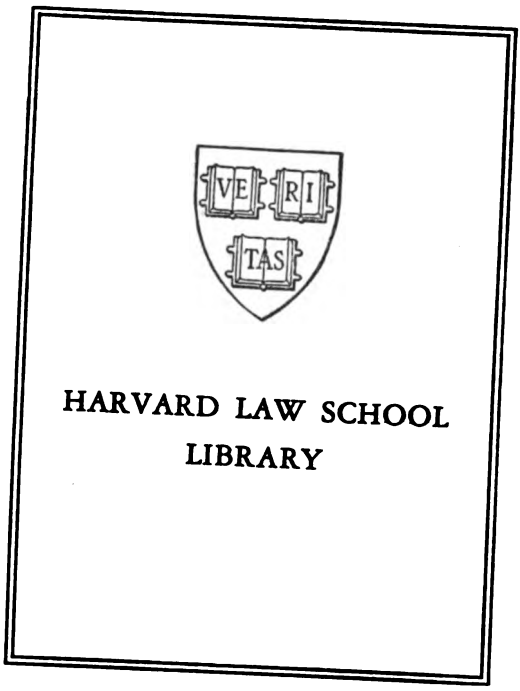
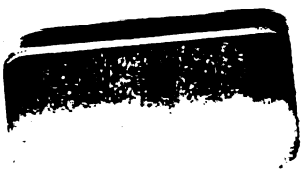
PRINCIPLES
OF
MAHOMEDAN LAW.

2ND EDITION.

D. F. MULLA.





Koran

Sunni (India, Turkey, Egypt)

Sources:
1. Koran
2. Hadith
3. Ijmaa (re consensus)
4. Kiyas (re deductions).

Shi'a (Persia, Oudh) — Partisans of M's family

- Asna-Asheriyas — Twelvers
- Ismailiyas — Concealed Imam
- Zaidiya

Akbari — Traditionalists
Usuli — Rationalists
Mutazala — ? alleged another sect

Shariya-ul-Islam is chief law book

Hanifite
- Abu Hanifa
- Abu Yusuf
- Mohammad-as-Shaibani

Maliki
- Malik bin Anas
- Morocco, Algeria

Shafeite
- Mohammad as-Shafei
- S. W. of India, Dutch India

Hanbali
- Ahmed ibn Hanbal
- Parts of Arabia

The Hedaya
Fatawa Alamgiri
Sirajiyyah
Sharifiyah
— are favourite law books

Abu Hanifa favoured kiyas
Malik favoured Hadith

Ismail was a descendant son of one of the twelve Imams of the Asheriyas

PRINCIPLES

OF

MAHOMEDAN LAW

BY

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SECOND EDITION.

Price, Rs. 3.

BOMBAY:

THACKER & COMPANY, ESPLANADE ROAD,

Booksellers and Publishers.

1907

BOMBAY:
PRINTED AT THE TIMES PRESS.

NOTE.

In the present edition the cases have been brought down to date. Some of the sections have been recast, and a few added, in the light of recent decisions.

D. F. M.

23, Church Gate Street,
February 1907.

PREFACE TO THE FIRST EDITION.

This work has been mainly designed for the use of students, as a guide to their study of MAHOMEDAN LAW. Hence, for a speedy and convenient grasp of its principles, I have cast them in a series of distinct propositions, systematically arranged in the order of consecutive sections, illustrated by decided cases applicable to each section. The language of judgments to be found in the recognised reports has, so far as practicable, been faithfully reproduced in the statement of each proposition, in order to impart to it the *imprimatur* of authoritative law ; and where such sources have failed, I have fallen back upon the translations of the HEDAYA and the FATWA ALUMGIRI, with such modifications as were necessary or proper for the requirements of modern law. The illustrative cases have likewise been imported, almost all, from the same Reports throughout the work, except in the Chapter on Inheritance. There is a citation of authority for every proposition I have set out ; and no important decisions have been missed, while enactments amending or repealing the ancient rules have been noted in their appropriate place.

The rules of succession in intestacy have been felt to be a crux to students, if not the hardest part in the whole range of MAHOMEDAN PERSONAL LAW for them to comprehend. To afford facilities in the sound understanding of the principles of Succession Law, a large number of illustrations have been grouped together, which, it is hoped, will add to the importance and value of the work as a concise and scientific exposition of the subject. The scheme of distribution among Sharers and Residuaries and Distant Kindred has been tabulated, and the

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principles upon which the rules of inheritance are based are expounded at pp. 41-44 as clearly as I have been able to do. In addition to the principles set out in the *Sirajiyyah*, I have ventured to formulate two fresh principles which have appeared to me to furnish a solution of some of the difficulties pointed out by writers on that subject.

This work is in the main modelled on the plan of Sir Roland Wilson's excellent DIGEST of ANGLO-MUHAMMADAN LAW, which I consider to be the best adapted for the object I have had in view. I have, however, on several occasions, ventured to differ from that authority in some cardinal doctrines.

D. F. M.

23, CHURCH GATE STREET,

July 1905.

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ADDENDA.

———:o:———

Sect. 7, p. 4.—Add following as notes to S. 7 :—

Custom.—There is no express recognition of custom in the above Act. Hence evidence will not be admitted under that Act to prove a *custom of succession* at variance with the Mahomedan law ; *Jammya* v. *Diwan* (1900) 23 All. 20 ; *Hakim Khan* v. *Gul Khan* (1882) 10 C. L. R. 603, 605.

Sect. 132, p. 90, f. n. (*a*).—Add :—See also *Banubi* v. *Narsingrao* (1906) 9 Bom. L. R. 97.

Sect. 134, p. 91, l. 11.—Add following to para. 2 of the section :—

A mere intention to set apart property for charitable purposes, unaccompanied by any declaration, either verbal or written, is not sufficient to create a *wakf*, although it may be followed by actual appropriation ; *Banubi* v. *Narsingrao* (1906) 9 Bom. L. R. 97.

Sect. 135, p. 91, l. 17.—Add following after the words " testator's death ":—

A bare statement in a will that the testator has *at a former time* given away or set apart a portion of his property to a charity does not amount to a testamentary devise. The reason is that there is wanting in such a case the requisite *declaration* which is a *sine qua non* of every *wakf* : *Banubi* v. *Narsingrao* (1906) 9 Bom. L. R 97.

Sect. 137, p. 92, l. 2.—Omit the word " until " and substitute " unless, besides there being a declaration of *wakf*,"

Sect 137, p. 92, l. 34.—Add :—The point was raised, but not decided, in a recent Bombay case : *Banubi* v. *Narsingrao* (1906) 9 Bom. L. R. 91.

Sect. 244, p. 143, f. n. (*v*).—Add :—*Mafazzal* v. *Basid* (1906) 34 Cal. 36.

Sect. 246, p. 144.—Add following as notes :—

As regards the guardianship of property, the paternal uncle has no legal right under the Mahomedan law to the guardianship of the property of a minor any more than the mother. Hence if the mother applies under the Guardians and Wards Act to be appointed guardian of the property of her minor son, and the uncle opposes the application, the Court should be guided by the principle whether it would be for the welfare of the minor to appoint the mother or the uncle as guardian of the minor's property : *Alim-ullah* v. *Abadi* (1906) 29 All. 10.

M. Ch. 1-14 : W. Pt. I
Rules for determining when, to whom & how a-M. Law is to be applied + relative authority of sources.

PRINCIPLES OF

MAHOMEDAN LAW.

CHAPTER I.

INTRODUCTION OF MAHOMEDA LAW INTO BRITISH INDIA.

Administration of Mahomedan law

1. The Mahomedan law is administered by the Courts of British India to Mahomedans not in all, but in certain matters only. The power of Courts to apply Mahomedan law to Mahomedans is derived from the British Legislature (*a*). This power is conferred upon the High Courts of Calcutta, Madras, and Bombay, by Statutes of Parliament, and upon other Courts by Acts of the Governor-General of India in Council and in one case by a Regulation of a local Council.

For the Statutes, see s. 6; for the Acts, see ss. 7-8, 10-13; for the Regulation, see s. 9.

The present work does not comprise the whole of pure Mahomedan law, but only such portions thereof as are applied by the Courts of British India to Mahomedans.

Extent of application

2. As regards British India, the rules of pure Mahomedan law may be divided into three parts—

(*i*) those which have been *expressly* directed by the Legislature to be applied to Mahomedans, such as the rules of Succession and Inheritance;

(*ii*) those which are applied to Mahomedans as a matter of *justice, equity and good conscience*, such as the rules of the Mahomedan Law of Pre-emption; *

+ n.b. in Madras Pre-e. is certain persons have prior right to buy property

(*iii*) those which are not applied at all, though the parties be Mahomedans, such as the Mahomedan Criminal Law, the Mahomedan Law of Evidence, and the Mahomedan Law of Contract. See P. 4 note A for exception

(*a*) *Sheik Kudratulla* v. *Mahini Mohan* (1869) 4 B. L. R. 134, 169; *Ibrahim* v. *Muni* (1870) 6 M. H. C. 26, 31; *Braja Kishor* v. *Kirti Chandra* (1871) 7 B. L. R. 19, 25.

The only portions of pure Mahomedan law that are administered by the Courts of British India to Mahomedans are those comprised in cls. (*i*) and (*ii*). In other respects, the Mahomedans in British India are governed by the General Law of British India.

Matters expressly enumerated

3. The rules of Mahomedan law that have been *expressly* directed to be applied to Mahomedans are to be applied except in so far as they have not been altered or abolished by legislative enactment.

Thus the rules of the Mahomedan Law of Inheritance are *expressly* directed to be applied to Mahomedans. One of these rules is that a Mahomedan renouncing the Mahomedan religion is to be excluded from inheritance. But this rule has now been abolished by the Freedom of Religion Act 21 of 1850. Hence this rule does not apply.

Matters not expressly enumerated

4. Such of the rules of Mahomedan law as have *not* been *expressly* directed to be applied to Mahomedans will be applied, as a matter of justice, equity and good conscience, if there is no other special provision for matters covered by those rules.

Thus the rules of the Mahomedan Law of Pre-emption are nowhere expressly directed to be applied to Mahomedans. Hence those rules are applied to Mahomedans on grounds of justice, equity and good conscience. But they are not applied to Mahomedans in Oudh and in the Panjab, for there are *special Acts* relating to pre-emption for Oudh and the Panjab, and those Acts apply to Mahomedans also. See Chapter XI below.

Again the rules of Mahomedan Criminal Law are nowhere expressly directed to be applied to Mahomedans. But there are *legislative enactments* relating to criminal law in India such as the Indian Penal Code and the Code of Criminal Procedure. Hence those rules could not be applied on grounds of justice, equity and good conscience. The result is that Mahomedans in British India are governed by the criminal law obtaining in British India.

Justice, equity and good conscience

5. The rules referred to in s. 2, cl. (*ii*), may not be applied, if they are in the opinion of the Court opposed to justice, equity and good conscience. But the rules referred to in cl. (*i*) of that section, that is, rules that have been expressly directed by the Legislature to be applied to Mahomedans, must be applied, though they may not in the opinion of the Courts conform with justice, equity and good conscience.

Thus the rules of the Mahomedan Law of Pre-emption come under s. 2, cl. *(ii)*, and they are not applied by the Courts of the Madras Presidency on the ground that

they are *opposed to* justice, equity and good conscience, inasmuch as the Law of Pre-emption places restriction upon liberty of transfer of property by requiring the owner to sell it in the first instant to his neighbour. The High Courts of Bombay and Allahabad, on the other hand, do apply the Mahomedan Law of Pre-emption to Mahomedans, with this remarkable result that the notion of "justice, equity and good conscience" held by those Courts differs from that held by the Madras High Court (*b*).

As regards rules which the Courts have been *expressly* directed to apply to Mahomedans, they must of course be applied regardless of considerations of justice, equity and good conscience. Thus the rules of the Mahomedan Law of Marriage have been expressly directed to be applied to Mahomedans in Bengal, N.-W. Provinces and Assam (s. 7). One of those rules is that a divorce pronounced by a husband is valid, though induced by compulsion of threats. Hence the Courts of British India will not be justified in refusing to recognize such a divorce, though it may be opposed to their notions of justice, equity and good conscience (*c*).

Mahomedan law in Presidency Towns

6. (*1*) As to the Presidency towns of Calcutta, Madras and Bombay, the rule is that, subject to any law made by the Governor-General in Council, the High Courts of those towns in the exercise of their ordinary original civil jurisdiction are to determine all questions relating to "succession and inheritance to lands, rents, and goods, and all matters of contract and dealing between party and party," in the case of Mahomedans, by the law and usages of Mahomedans, "and where only one of the parties shall be a Mahomedan, by the laws and usages of the defendant."

(*2*) In matters not otherwise specially provided for, the said Courts are to decide according to equity, justice good conscience.

(*3*) The law to be applied by the Presidency Small Cause Courts is the same as that administered for the time being by the High Courts in the exercise of their ordinary original civil jurisdiction (Presidency Small Cause Courts Act 15 of 1882, s. 16).

21 *Geo. III, c.* 70, *and* 37 *Geo. III, c.* 142.—This section reproduces the law contained in statutes 21 Geo. III, c. 70, s. 17, and 37 Geo. III, c. 142, s. 13. The former statute applied to the Supreme Court at Calcutta, and the latter to the Recorder's Courts at Madras and Bombay. Neither of these statutes is repealed, though the Courts to which they were applicable have been abolished. But they are alterable by Indian legislatures, for they are not included in the list of statutes

(*b*) *Ibrahim* v. *Muni* (1870) 6 M. H. C. 26: *Alabi* v. *Mussa* (1901) 24 Mad. 513 (doctrine of *Musha*).

(*c*) *Ibrahim* v. *Enayetur* (1868?) 4 B. L. R. A. C. 13.

which, under the Indian Councils Act of 1861, those legislatures are precluded from altering, and in fact they have been materially altered (*d*). For instance, the Mahomedan Law of Contract has been almost entirely superseded by the Contract Act of 1872 and other Acts. Similarly, it has been held that the rule of Mahomedan law prohibiting the taking of interest must be taken to have been superseded by the Usury Laws Repeal Act 28 of 1855, if the rule be at all regarded as a rule of law as distinguished from a mere moral precept (*e*).

In Bengal, N.-W. P., and Assam

7. As to Bengal, North-West Provinces, and Assam, except such portions of those territories as for the time being are not subject to the ordinary civil jurisdiction of the High Courts, it is enacted by Act XII of 1887, s. 37, that the Civil Courts of those Provinces shall decide all questions relating to "succession, inheritance, marriage, ... or any religious usage or institution," by the Mahomedan law in cases where the parties are Mahomedans, except in so far as such law has, by legislative enactment, been altered or abolished. In cases not provided for by the above clause, or by any other law for the time being in force, the Courts shall act according to justice, equity and good conscience.

In the Mufassal of Madras

8. As to the Mufassal of Madras, it is enacted by the Madras Civil Courts Act III of 1873, s. 16, that all questions regarding "succession, inheritance, marriage, ... or any religious usage or institution" shall be decided, in cases where the parties are Mahomedans, by the Mahomedan law, or by custom having the force of law, and in cases where no specific rule exists, the Courts shall act according to justice, equity and good conscience.

In the Mufassal of Bombay

9. As to the Mufassal of Bombay, it is enacted by Regulation IV of 1827, s. 26, that "the law to be observed in the trial of suits shall be Acts of Parliament and Regulations of Government applicable to the case; in the absence of such Acts and Regulations, the usage of the country in which the suit arose; if none such appears, the law of the defendant, and in the absence of specific law and usage, justice, equity and good conscience alone."

Note that not a single topic of Mahomedan law is *expressly* enumerated in this section. So much therefore of Mahomedan law as is administered to Mahomedans by Courts in the Mufassal of Bombay, is administered as a matter of justice, equity and good conscience.

(*d*) Ilbert, *Government of India*; *Mudhub Chunder* v. *Rajcoomar* (1874) 14 B. L. R. 76; *Nobin Chander* v. *Romesh Chunder* (1887) 14 Cal. 781.

(*e*) *Mia Khan* v. *Bibijan* (1870) 5 B. L. R. 500.

Usage.—In a recent case, the High Court of Bombay gave effect to a usage prevailing in this country of performing rites and ceremonies at the graves of deceased Mahomedans, and granted an injunction at the suit of the Mahomedan residents of Dharwar restraining a purchaser from the owner of a graveyard from obstructing them in performing religious ceremonies at the graveyard *(f)*.

Wilson says that M. law of gifts is confirmed : Transfer of Prop. Act.

10. As to the Panjab, it is enacted by the Panjab Laws Act IV of 1872, ss. 5 and 6, as follows :— *In the Panjab*

"In questions regarding succession, . . . betrothal, marriage, divorce, dower, . . . (adoption) guardianship, minority, bastardy, family relations, wills, legacies, gifts, partitions, or any religious usage, or institution, the rule of decision shall be—

see s. 6(b) act 90, so far as it affects marriage dower or divorce

(1) any custom applicable to the parties concerned, which is not contrary to justice, equity or good conscience, and has not been, by this or any other enactment, altered or abolished, and has not been declared to be void by any competent authority ;

(2) the Mahomedan law, in cases where the parties are Mahomedans, . . . except in so far as such law has been altered or abolished by legislative enactment, or is opposed to the provisions of the Act, or has been modified by any such custom as is above referred to."

"In cases not otherwise specially provided for, the Judges shall decide according to justice, equity and good conscience."

Custom.—"As regards Mahomedans, prostitution is not looked on by their religion or their laws with any more favourable eye than by the Christian religion and laws." Accordingly the Chief Court of the Panjab refused to recognize a custom of the Kanchas which aimed at the continuance of prostitution as a family business and the decision was upheld by the Privy Council on appeal (*g*).

11. The provisions of the Oudh Laws Act XVIII of 1876, s. 3, for the law to be administered in the case of Mahomedans are the same as in the Panjab. *In Oudh*

(*f*) *Ramrao* v. *Rustumkhan* (1901) 26 Bom. 198.

(*g*) *Ghasiti* v. *Umrao Jan* (1893) 21 Cal. 149, 20 I. A. 193.

In Central Provinces

12. As to the Central Provinces, it is enacted by the Central Provinces Laws Act XX of 1875, ss. 5 and 6, as follows :—

"In questions regarding inheritance, . . . betrothal, marriage, dower, . . . guardianship, minority, bastardy, family relations, wills, legacies, gifts, partitions, or any religious usage or institution, the rule of decision shall be the Mahomedan law in cases where the parties are Mahomedans, . . . except in so far as such law has been, by legislative enactment, altered or abolished, or is opposed to the provisions of this Act :

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

"In cases not provided for by [the above clause], or by any other law for the time being in force, the Court shall act according to justice, equity and good conscience."

In Lower Burma

13. The provisions of the ~~Lower~~ Burma Courts Act XI of 1889, s. 13, for the law to be administered in case of Mahomedans in ~~Lower~~ Burma are similar to those of the Madras Civil Courts Act.

See s. 6 above. There is no statutory provision for the application of Mahomedan law to Mahomedans in Upper Burma.

CHAPTER II.

Conversion to Mahomedanism.

Meaning "Mahomedan"

14. The expression "Mahomedan" in the Acts and Statutes referred to in ss. 6-13 includes not only a Mahomedan by *birth*, but also a Mahomedan by *religion*. Hence the Mahomedan law applies not only to persons who are born Mahomedans, but also to persons who have become converts to Mahomedanism, provided the conversion is *bonâ fide*, and not merely a colorable one (*h*).

Illustration.

A Christian, *A*, married to a Christian wife, *B*, lives and cohabits with a Native Christian woman, *C*. With a view to legalize the union between them, *A* and *C* both become Mahomedans; and marry in Mahomedan form *during the lifetime of B*. The marriage is not valid. The conversion cannot be said to be *bonâ fide*, as it has been actuated solely by the desire to enjoy the privileges of polygamy conferred by the Mahomedan law: *Skinner* v. *Orde* (1871) 14 M. I. A. 309. See also *in the matter of Ram Kumari* (1891) 18 Cal. 264.

Effect of change of religion

15. It is an open question whether conversion to Mahomedanism, made honestly after marriage with the assent of both spouses, and without any intent to commit a fraud upon the law, has the effect of altering rights incidental to the marriage.

Illustration.

A and *B*, both Mahomedans, espouse Christianity, and marry in Christian form. Some time after they both revert to Mahomedanism, and go through the form of marriage a second time according to Mahomedan law. After *A's* death, *B* sues *A's* relations to recover one-eighth of *A's* estate as his widow according to Mahomedan law. The defence is that *B* was *divorced* by *A according to Mahomedan form* some time before his death. Supposing the divorce is proved, is the divorce *valid* so as to exclude *B* from inheritance, regard being had to the fact that the marriage was primarily in Christian form, and the divorce was given in Mahomedan form? This question was left open by their Lordships of the Privy Council, as their Lordships held that the divorce was not proved: *Skinner* v. *Skinner* (1897) 25 Cal. 537, 546, 25 I. A. 34.

Khojas and Cutchhi Memons

16. Khojas and Cutchhi Memons are governed in matters of succession and inheritance, not by the Mahomedan but by the Hindu law (*i*).

(*h*) *Abraham* v. *Abraham* (1863) 9 M. I. A. 199, 243; *Jowala* v. *Dharum* (1866) 10 M. I. A. 511, 537-38; *Raj Bahadur* v. *Bishen* (1882) 4 All. 343.

(*i*) Case of the Khojas and the Memons (1847) Perry, O. C., 110; *Abdul Cadur* v. *Turner* (1884) 9 Bom. 158.

Khojas and Cutchhi Memons were originally Hindus. They became converts to Mahomedanism about 400 years ago, but retained the Hindu Law of Succession. Hence the Hindu Law of Succession is applied to them on the ground of custom. This custom is so well established among them that if a rule of succession opposed to the Hindu Law of Succession is alleged to exist amongst them, the burden of proof lies on the person setting up such rule *(j)*.

Sunni Boras of Gujrat

17. The Sunni Bora Mahomedans of Gujrat and the Molesalam Girasias of Broach are also governed by the Hindu Law in matters of succession and inheritance *(k)*.

These communities also were originally Hindus, and became subsequently converts to Mahomedanism.

(j) *Hirbai* v. *Gorbai* (1875) 12 B. H. C. 294, 305; *Rahimatbai* v. *Hirbai* (1877) 3 Bom. 34; *In re Haji Ismail* (1880) 6 Bom. 452; *Ashabai* v. *Haji Tyeb* (1882) 9 Bom. 115; *Mahomed Sulick* v. *Haji Ahmed* (1885) 10 Bom. 1; *In the goods of Mulbai* (1866) 2 B. H. C. 276.

(k) *Bai Baiji* v. *Bai Santok* (1894) 20 Bom. 53; *Fatesangji* v. *Harisangji*, *ibid.*, 181.

CHAPTER III.

MAHOMEDAN SECTS AND SUB-SECTS.

18. The Mahomedans are divided into two sects, namely, the Sunnis and the Shiahs. *Sunnis and Shiahs*

19. The Sunnis are divided into four sub-sects, namely, the Hanafis, the Malikis, the Shafeis and the Hanbalis. *Sunni sub-sects*

The Sunni Mahomedans of India belong principally to the Hanafi school.

Presumption as to Sunniism.—The great majority of the Mahomedans of this country being Sunnis, the presumption will be that the parties to a suit or proceeding are Sunnis unless it is shown that the parties belong to the Shiah sect (*l*).

20. The Shiahs are divided into three sub-sects, namely, the Asna-Aasharias, the Ismailias and the Zaidyas. *Shiah sub-sects*

The Khojas and the Borahs of Bombay belong to the Ismailia sect.

21. The Mahomedan law applicable to each sect is to prevail as to litigants of that sect (*m*). *Each sect governed by its law*

The Sunni law will therefore apply to Sunnis and the Shiah law to Shiahs, and the law peculiar to each sub-sect will apply to persons belonging to that sub-sect.

22. A Mahomedan, male or female, who has attained the age of puberty, may renounce the doctrines of the sect or sub-sect to which he or she belongs, and adopt the tenets of the other sect or any other sub-sect, and he or she shall thenceforth be subject to the law of the new sect or sub-sect (*n*). *Change of sect*

23. A Sunni woman contracting marriage with a Shiah does not thereby become subject to the Shiah law (*o*). *Marriage*

The same proposition would hold good of a Shiah woman marrying a Sunni.

(*l*) *Bafatun* v. *Bhatti Khanum* (1903) 30 Cal. 683, 686.
(*m*) *Deedar Hossein* v. *Zuhoor-oon-Nissa* (1841) 2 M. I. A. 441, 477.
(*n*) *Hayat-un-Nissa* v. *Muhammad* (1890) 12 All. 290, 17 I. A. 73 (change of sect); *Muhammad* v. *Gulam* (1864) 1 B. H. C. 236 (change from Shafeilsm to Hanafilsm).
(*o*) *Nasrat* v. *Hamidan* (1882) 4 All. 205.

CHAPTER IV.

Sources and Interpretation of Mahomedan Law.

Sources of Mahomedan law

24. There are four sources of Mahomedan law, namely, (1) the Koran ; (2) Hadis, that is, precepts, actions and sayings of the Prophet Mahomed, not written down during his lifetime, but preserved by tradition and handed down by authorised persons ; (3) Ijmaa, that is, decisions of the companions of Mahomed and his disciples ; and (4) Kiyas, being analogical deductions derived from a comparison of the first three sources when they did not apply to any particular case (*p*).

The *Kiyas* requires the exercise of reason, and it appears that though Abu Hanifa, the founder of the Hanafi sect of Sunnis, was so much inclined to the exercise of reason that he frequently preferred it in manifest cases to traditions of single authority, the founders of the other Sunni sects seldom resorted to Kiyas (*q*).

Interpretation of the Koran

25. The Courts, in administering Mahomedan law, should not as a rule attempt to put their own construction on the Koran in opposition to the express ruling of Mahomedan commentators of great antiquity and high authority.

Thus where a passage of the Koran (Sura ii, vv. 241-42) was interpreted in a particular way both in the Hedaya (a work on the Sunni law) and in the Imamia (a work on the Shiah law), it was held by their Lordships of the Privy Council that it was not open to a Judge to construe it in a different manner (*r*).

Precepts of the Prophet

26. Neither the ancient texts nor the precepts of the Prophet Mahomed should be taken literally so as to deduce from them *new* rules of law, especially when such proposed rules do not conduce to substantial justice.

The words of the section are taken from the judgment of their Lordships of the Privy Council in *Baqar Ali* v. *Anjuman* (*s*).

It is a rule of Mahomedan law that a gift in perpetuity is not valid unless the gift is one to *charity*. Is a gift by a Mahomedan to his own *children and their descendants* a gift to charity ? No—was the answer given by a majority of the Full Bench of the Calcutta High Court. Yes—was the answer given by Amir Ali, J., in a dissenting judgment, relying on the following precept of the Prophet Mahomed :

(*p*) *Morley*, Introd., ccxxvii.
(*q*) *Ib.*, p. ccxxxvii.
(*r*) *Aga Mahomed Jaffer* v. *Koolsom Beebee* (1897) 25 Cal. 9, 18.
(*s*) (1902) 25 All. 236, 254, 30 I. A. 94.

"A pious offering to one's *family* to provide against their getting into want is more pious than giving alms to the beggars. The most excellent form of *sadakah* (charity) is that which a man bestows upon his own family." On appeal to the Privy Council the decision of the majority was upheld. In commenting upon the judgment of Amir Ali, J., their Lordships observed that it was not safe in determining what is the rule of Mahomedan law on a particular subject to rely upon abstract precepts taken from the mouth of the Prophet without knowing the context in which those precepts were uttered. Their Lordships further observed that the rule of Mahomedan law on the subject was that which was laid down by the majority of the Full Bench, and that the new rule of law sought to be deduced from the precept of the Prophet by Amir Ali, J., was not one that would conduce to justice (*t*).

Ancient texts

27. New rules of law are not to be introduced because they seem to lawyers of the present day to follow logically from ancient texts however authoritative, when the ancient doctors of the law have not themselves drawn those conclusions (*u*).

General rule of interpretation of Hanafi law

28. The three great exponents of the Hanafi-Sunni law are Abu Hanifa, the founder of the Hanafi school, and his two disciples, Abu Yusuf and Imam Muhammad.

It is a general rule of interpretation of the Hanafi law that where there is a difference of opinion between Abu Hanifa and his two disciples, Abu Yusuf and Imam Muhammad, the opinion of the majority prevails (*v*). Where there is a difference of opinion between Abu Hanifa and Imam Muhammad, that opinion is to be accepted which coincides with the opinion of Abu Yusuf (*w*). When the two disciples differ from their master and from each other, the authority of Abu Yusuf is generally preferred (*x*).

(*t*) *Abul Fata* v. *Rasamaya* (1894) 22 Cal. 619, 632, 22 I. A. 76, 86.

(*u*) *Baqar Ali* v. *Anjuman* (1902) 25 All. 236, 254, 30 I. A. 94; *Agha Ali Khan* v. *Altaf Husan Khan* (1892) 14 All. 429, 448.

(*v*) *Agha Ali Khan* v. *Altaf Hasan Khan* (1892) 14 All. 429, 448; *Abdul Kadir* v. *Salima* (1886) 8 All. 166-167.

(*w*) (1886) 8 All p. 162. See also *Muhammad* v. *The Legal Remembrancer* (1893) 15 All. 321, 323.

(*x*) *Kulsom Bibee* v. *Golam Hossein* (1905) 10 C. W. N. 449, 488.

CHAPTER V.

SUCCESSION AND ADMINISTRATION.

[The two principal Acts in force in British India relating to the succession to and administration of the estate of deceased persons are the Indian Succession Act X of 1865, and the Probate and Administration Act V of 1881. The Succession Act applies to Europeans, Parsis, East Indians and to all Natives of India other than Hindus, Mahomedans and Budhists. The Probate and Administration Act applies to Hindus, Mahomedans and Budhists. Since the latter Act applies to Hindus as well as Mahomedans, it contains only *general* rules relating to administration and succession. The present chapter sets forth *special* rules of Mahomedan law relating to administration and succession except in a few cases where it has become necessary for special reasons to set forth some of the rules laid down in the Probate and Administration Act.]

Application of a Mahomedan's estate.

29. The property of a deceased Mahomedan is to be applied successively in payment of (1) his funeral expenses and death-bed charges, (2) expenses of obtaining probate or letters of administration, (3) wages due for service rendered to the deceased within three months next preceding his death by any labourer, artisan or domestic servant, (4) other debts of the deceased according to their respective priorities (if any), and (5) legacies not exceeding one-third of what remains after all the above payments have been made. The residue is to be distributed among the heirs of the deceased according to the law of the sect to which he belonged at the time of his death.

The order set forth above follows the provisions of the Probate and Administration Act, ss. 101-105. As regards item no. (5) it is to be noted that a Mahomedan cannot by *will* dispose of more than one-third of what remains of his property after payment of his funeral expenses and debts: Rumsey's *Al Sirajiyyah*, 12.

If the deceased was a Sunni at the time of his death, his property would be distributed among his heirs according to Sunni law, and if he was a Shiah, it would be distributed according to Shiah law. In other words, succession to the estate of a deceased Mahomedan is governed by the law of the sect to which he belonged at the time of his death, and not the law of the sect to which the persons claiming the estate as his heirs may belong (*xx*).

The person primarily entitled to administer the estate of a deceased Mahomedan (*i.e.*, to apply it in the manner set forth in the section) is the *executor* appointed under his will. If the deceased dies intestate, the person to whom letters of administration

(*xx*) *Hayat-un-Nissa* v. *Muhammad* (1890) 12 All. 290, 17 I. A. 73.

are granted is the person entitled to administer the estate of the deceased. Such a person is called *administrator*. The persons primarily entitled to letters of administration are the *heirs* of the deceased.

Vesting of estate in executor and administrator

30. The executor or administrator, as the case may be, of a deceased Mahomedan, is, under the provisions of the Probate and Administration Act, 1881, his legal representative for all purposes, and all the property o the deceased vests in him as such.

But since a Mahomedan cannot dispose of by will more than one-third of what remains of his property after payment of his funeral expenses and debts, and since the remaining two-thirds must go to his heirs as on intestacy unless the heirs consent to the legacies exceeding the bequeathable third, the executor is an active trustee to the extent only of the bequeathable third and a bare trustee for the heirs as to the rest of the testator's property (*y*).

The first para. is a reproduction of the provsions of s. 4 of the Probate and Administration Act. An executor under the Mahomedan law is called *wasi*, derived from *wasiyat*, which means a will. But though the Mahomedan law recognizes a *wasi*, it does not recognize an administrator, there being nothing analogous in that law to "letters of administration." A *wasi* or executor under the Mahomedan law is merely *manager* of the estate, and no part of the estate of the deceased *vests* in him as such. But the powers of a Mahomedan executor under the Probate and Administration Act are much larger, for under that Act the property of a deceased Mahomedan *vests* in his executor. Note further that the property of the deceased estate vests in the executor at the moment of the testator's death, and the vesting is not suspended till the grant of probate. A debtor of the deceased may therefore safely pay the debt to the executor even before probate (*z*). And as a further result of the *vesting* of the estate in a Mahomedan executor, he has the power to dispose of as he thinks fit the property for the time being veste in him, subject, however, to the provisions of the second paragraph of this section. A mere *manager*, such as a Mahomedan executor was before the passing of the Probate Act, has no such power.

Devolution of inheritance

31. Subject to the provisions of the foregoing section, the whole property of the deceased, where he has died intestate, or where he has left a will, so much of it as cannot be, or is not, disposed of by his will, devolves on his heirs in specific shares at the moment of his death, and the devolution is not suspended by reason merely of debts being due from the deceased.

(*y*) *Mirza Kurratulain* v. *Nawab Nuzhat-ul-Dowla* (1905) 33 Cal. 116, 32 I. A. 244.

(*z*) *Shaik Moosa* v. *Shaik Essa* (1884) 8 Bom. 241, 252.

The above rule follows from the decision of the Allahabad High Court in *Jafri Begam* v. *Amir Muhammed* (*a*), read with the preceding section. When a Mahomedan dies leaving a will, and there is an executor appointed under the will, the property of the deceased vests in the executor subject to the provisions of the second paragraph of s. 30. When a Mahommedan dies intestate, and there is a grant made of letters of administration of his property, the property vests in the administrator. But when there is no executor or administrator, the property of the deceased vests at the moment of his death in his *heirs*. It is to be noted that in the case of persons subject to the provisions of the Indian Succession Act—and Mahomedans are not subject to the provisions of that Act—the property of the deceased does not vest in his *heirs*. The reason why the property of a deceased *Mahomedan* vests in his *heirs* in the absence of an executor or administrator is that the Mahomedan law does not recognize any *representation* to the estate of the deceased (*b*); if it did, his property could vest only in his legal *representative*, that is, his executor or administrator, and it could not vest in his *heirs*.

The property, when it vests in the heirs, vests in *specific shares*, that is, it is only the share to which each heir is entitled that vest in him, and no more. The share of each heir *before* distribution is said to vest in him in *interest*. *After* distribution, the share vests in the heir in *possession*. When an heir comes into *possession* of his share, it is clear that he may alienate it by sale, mortgage, gift or otherwise. But he has not got the same powers of disposition when the share has not yet been vested in possession. Thus a valid *gift* cannot be made by an heir of his share which has not yet vested in him in possession except to a *co-heir*. And as regards disposition by way of *sale* or *mortgage*, the validity of the disposition depends on the conditions set forth in the next section.

Alienation of share before distribution

32. (*1*) Any heir may, even before distribution of the estate, transfer his own (*c*) share either by absolute sale or by mortgage, and give the transferee a good title thereto, notwithstanding any debts that might be due from the deceased, provided that the transferee acts in good faith and under circumstances which are not such as to raise a reasonable presumption that he had notice of the debts (*d*) [ills. (a) and (c)].

Even if the transferee has notice of the debts, the transfer is not absolutely void, but voidable merely at the option of the creditor, so as to entitle him to follow the estate in the hands of the transferee. But the creditor is not entitled to follow the estate in the transferee's hands, unless the assets in the hands of the heirs are insufficient to satisfy his claim (*e*) [ill. (d)].

(*a*) (1885) 7 All. 822, followed in *Muhammad Ameer* v. *Har Sahai* (1685) 7 All. 716.

(*b*) *Amir Dulhin* v. *Baij Nath* (1894) 21 Cal. 311, 315. The contrary opinion expressed by Markby, J., in *Assanuthum Nessa Bibee* v. *Lutchmeepat Singh* (1878) 4 Cal. 142, 158 is no longer law.

(*c*) *Bazayet Hossein* v. *Doolt Chund* (1878) 4 Cal. 402, 406, 5 I. A. 211.

(*d*) *Bazayet Hossein* v. *Doolt Chund* (1878) 4 Cal. 402, 5 I. A. 211; *Land Mortgage Bank* v. *Bolyadhart* (1880) 7 C. L. R. 460.

(*e*) *Rajkristo* v. *Koylash Chunder* (1881) 8 Cal. 24.

(2) Where the estate or any part thereof consists of immoveable property, and the transfer is made by an heir of his share in such property during the pendency of a suit brought by a creditor in which a decree is made for payment of the debt *out of the estate*, the transfer cannot affect the rights of the creditor, and he may execute the decree by attachment and sale of the share so transferred (*f*) [ill. (e)].

Explanation.—"Transferee" within the meaning of this section includes a purchaser at a sale in execution of a decree obtained against an heir by his creditor (*g*) [ill. (b)].

Illustrations.

(a) A Mahomedan, who owes a sum of money to *C*, dies leaving certain heirs. The heirs sell the whole of the porperty of the deceased to *P* before payment of the debt due to *C*. *C* then obtains a decree against the heirs for the amount of the debt, and in excution of the decree applies for an attachment of the property sold by the heirs to *P*, alleging that the heirs had no right to alienate the property of the deceased before payment of the debt due from the deceased. *C* is not entitled to attach the property in the hands of *P*, the latter being a *bona fide* purchaser for value without notice of *C's* claim : *Land Mortgage Bank* v. *Bidyadhari* (1880) 7 C. L. R. 460.

Note.—So long as the estate of a deceased Mahomedan is in the hands of his heirs, a creditor of the deceased who has obtained a decree against the heirs for his debts may follow it in the hands of the heirs, that is to say, he may attach the estate in the hands of the heirs in execution of the decree. But the case is different when the estate has been sold by the heirs, and it has passed into the purchaser's hands. In such a case if the purchaser bought *without notice* of the debts, the creditor cannot attach the property in the hands of the purchaser. It does not matter that the object of the heirs in selling the property was to defraud the creditor, for the question being one between the creditor and the *purchaser*, the test is whether the *purchaser* took with notice of the debts, and not whether the *heirs* intended to defraud the creditor (*h*).

(b) A Mahomedan, who owes a sum of money to *C*, dies leaving two sisters as his only heirs. *C* obtains a decree for the amount of his debt against the sisters as representing the estate of the deceased. Subsequently a creditor of the sisters obtains a decree against them, and the estate of the deceased in the hands of the sisters is sold in execution of that decree, and purchased by *P without notice of C's claim*. *C* then applies for attachment of the property of the deceased in the hands of *P*. He is not entitled to attach the property, for *P* is a purchaser *without notice* of *C's* claim : *Wahidunnissa* v. *Shubrattun* (1870) 6 B. L. R. 54, with facts slightly altered.

Note.—The only distinction between this and the preceding illustration is that in the latter case the sale by the heirs is *voluntary*, while in the present illustration the sale is *in execution of a decree* against the heirs. The point to be noted is that in both the cases *C* sought to attach the property after it had passed from the hands of

(*f*) *Barajet Hossein* v. *Dooli Chund* (1878) 4 Cal. 402, L. R. 5 I. A. 211.
(*g*) *Wahidunissa* v *Shubrattun* (1870) 6 B. L. R. 54.
(*h*) *Wahidunissa* v. *Shubruttun* (1870) 6 B. L. R. 54, 68.

the heirs into the hands of a *bonâ fide* purchaser for value without notice of *C's* claim, and in both the cases it was held that he was not entitled to do so.

(c) A Mahomedan, who owes a sum of money to *C*, dies leaving a son as his only heir. The son mortgages the whole of the estate of the deceased to *P* to secure repayment of advances made to him by *P without notice of C's claim*. Subsequently *C* obtains a decree for the amount of his debt against the son as representing the estate of the deceased, and in execution of the decree attaches the mortgaged property in the hands of the son (*not* in the hands of *P*, for a mortgage of itself does not pass possession of the mortgaged property to the mortgagee). During the pendency of the attachment, *P* sues the son on the mortgaged-bond, and obtains a decree for the realization of the mortgage-debt from the mortgaged property. The property mortgaged is sold in pursuance of the decree and purchased by *X*. Is *X* entitled to have the attachment set aside? Yes, for *X* derives his title under a sale in execution of the decree obtained by *P* who took the mortgage before the institution of *C's* suit without notice of *C's* claim: *Bazayet Hossein* v. *Dooli Chund* (1878) 4 Cal. 402, 5 I. A. 211, with facts slightly altered.

Note.—The only distinction between this and ill. (a) is that in the latter case the alienation by the heirs was by way of *sale*, while in the present illustration it is by way of *mortgage*. The test is whether *P*, the *mortgagee*, was a *bonâ fide* transferee for value without notice of *C's* claim, and not whether *X*, the purchaser from the mortgagee, purchased with notice of that claim.

(d) A Mahomedan, who is indebted to *C*, dies leaving a widow and other heirs. The widow sells to *P* certain land allotted to her on distribution of the estate of the deceased. *P* had notice at the time of purchase of *C's* claim. Subsequently *C* obtains a decree against the heirs for the amount of his debt, and seeks to attach the land sold by the widow to *P*. *C* is not entitled to attach the land in the hands of *P*, though *P* had notice of his claim, unless it is shown that the assets in the hands of the heirs are not sufficient to satisfy his claim: *Rajkristo* v. *Koylash Chunder* (1881) 8 Cal. 24, with facts altered and simplified.

Note.—The mere fact that *P* had notice of *C's* claim does not entitle *C* to follow the widow's share in the hands of *P*, unless *C* can show that there are not sufficient assets in the hands of the heirs for the payment of his debt.

(e) A Mahomedan, who owes a sum of money to *C*, dies leaving a son as his only heir. *C* institutes a suit against the son for an account of the estate of the deceased come to his hands and for payment of his debt out of the estate. *During the pendency* of the suit, the son sells to *P* certain land forming part of the property of the deceased. A decree is subsequently made in *C's* suit for the payment of his debt *out of the estate*. *C* applies in execution of the decree for attachment of the property in the hands of *P*. *C* is entitled to attach the property: *Bazayet Hossein* v. *Dooli Chund* (1875) 4 Cal. 402, 5 I. A 211, followed in *Yasin Khan* v. *Muhammad* (1897) 19 All. 504.

Note.—In ill. (a) the sale by the heirs was made *before* the institution of the creditor's suit; in the present case the sale is made *during the pendency* of the creditor's suit. But this circumstance of itself does not entitle the creditor to follow the property in the hands of the purchaser. To enable him to do so it is further necessary that he must have obtained a decree against the heir for payment of

his debt *out of the estate* of the deceased. In other words, the decree must be against the estate, and not a simple money decree (*i*). And as the rule laid down in cl. (2) of the present section is merely an application of the doctrine of *lis pendens* (see Transfer of Property Act, s. 52), it is submitted that it is also necessary that the estate out of which the debt is decreed to be paid must consist of *immoveable* property, that being the only kind of property to which the doctrine of *lis pendens* applies.

Liability of heirs for debts

33. The heirs of a deceased Mahomedan are liable, before distribution of the estate, to pay the debts of the deceased to the extent of the assets to which they may have succeeded, but they are not liable to pay debts exceeding such assets (*j*).

After the estate is distributed, each heir is liable for debts due from the deceased to the extent only of a share of the debts proportionate to his share of the estate (*k*).

Illustrations.

(a) A Mahomedan dies leaving assets of the value of Rs. 4,000 and debts amounting to Rs. 5,000. The liability of the heirs is confined to the amount of the assets, namely, Rs. 4,000, and the creditor is not entitled to any personal decree against the heirs for the balance of the debt.

(b) A Mahomedan, who is indebted to *C* in the sum of Rs. 3,200, dies leaving a widow, a son, and two daughters. The heirs divide the estate without paying the debt, the widow taking 1/8, the son taking 7/16, and each daughter 7/32. *C* then sues the widow and the son only for the *whole* of the debt due to him from the deceased. The widow is liable to pay only (1/8 × 3,200=) Rs. 400, and the son (7/16 × 3,200 =) Rs. 1,400 : *Pirthipal Singh* v. *Husaini Jan* (1882) 4 All. 361.

Distribution of estate

34. If the estate is not insolvent, the heirs may divide it at any time after the death of the deceased, and the distribution is not liable to be suspended until payment of the debts.

The Mahomedan law does not require that the distribution of the estate of a deceased Mahomedan should be suspended until the debts due from the deceased are paid. The heirs are at liberty to divide the estate even before payment of the debts, and each heir is then liable to the extent only of a share of the debts proportionate to his share of the estate, and no more (s. 33). It is not open to a creditor of the deceased to contend, when he sues only *some* of the heirs for the *whole* of his debt *after* distribution of the estate, that the estate ought not to have been distributed before payment of his debt, and that the heirs sued are liable to

(*i*) *Bhola Nath* v. *Maqbul-un-Nissa* (1903) 26 All. 28. It is stated in the judgment in this case that the decree in *Yasin Khan's* case cited in ill. (e) was a simple money-decree, and not a decree for payment of the creditor's debt *out of the estate*. If so, the decision in that case is obviously wrong.

(*j*) *Meer Aleem Ullah* v. *Atif Khan*, 1 S. D. A., Cal. 57.

(*k*) *Hamir Singh* v. *Zakia* (1875) 1 All. 57; *Pirthipal Singh* v. *Husaini Jan*. (1882) 4 All. 361.

pay the *whole* amount of the debts due to him by the deceased [see ill. (b) to s. 33]. It does not make any difference whether the debts due from the deceased are large or small (*l*). But if the estate is insolvent, the heirs cannot divide the estate, for nothing will then be left for them to inherit after payment of the debts (*m*).

Suit by creditor against executor or administrator

35. If the estate is represented by an executor or administrator, a suit by a creditor of the deceased ought to be instituted against the executor or administrator as the case may be.

Suit by creditor against heirs

36. In other cases, the creditor may, *after distribution* of the estate, sue any one or more of the heirs, and, *before distribution*, any heir or heirs in possession of any part of the estate (*n*), subject to the following provisions :—

(1) If the estate *is distributed*, and the suit is brought against some only of the heirs of the deceased, the creditor is not entitled to a decree for the whole amount of his debt, but only for an amount proportionate to the aggregate share of the defendants in the property (*o*).

(2) If the estate is not distributed, and the suit is brought against any heir or heirs in possession of any part of the estate, the creditor is entitled, according to the decisions of the Hight Courts of Calcutta and Bombay, and, it would seem, also the High Court of Madras, to a decree against the estate to the extent of so much thereof as is in the possession of the defendant (*p*) ; and where such a decree is obtained, it will bind the other heirs, though they were not parties to the suit (*q*), so as to pass a good title as against those heirs also to a purchaser of that portion of the estate at a sale in execution of a decree (*r*), unless the decree was obtained by consent (*s*), or unless it is proved that the debt was not due (*t*).

But according to the rulings of the Allahabad High Court, a decree, relative to his debts, passed in a contentious or non-contentious suit against only such heirs of

(*l*) *Jafri Begam* v. *Amir Muhammad Khan* (1885) 7 All. 822, 838, 839 ; *Pirthipat Singh* v. *Husaini Jan* (1882) 4 All. 361 ; *Hamir Singh* v. *Zakir* (1875) 1 All. 57, 59.

(*m*) *Bussunteram* v. *Kamaluddin* (1885) 11 Cal. 421, 428.

(*n*) *Ambashankar* v. *Sayad Ali* (1894) 19 Bom. 273 ; *Dulhin* v. *Baij Nath* (1894) 21 Cal. 311.

(*o*) *Hamir Singh* v. *Zakia* (1875) 1 All. 57 ; *Pirthipat Singh* v. *Husaini Jan* (1882) 4 All. 361.

(*p*) *Dulhin* v. *Baij Nath* (1894) 21 Cal. 311.

(*q*) *Muttyjan* v. *Ahmed Ally* (1) 1882 8 Cal. 370 ; *Khurshetibái* v. *Keso Vinayek* (1887) 12 Bom. 101 ; *Davalava* v. *Bhimaji* (1895) 20 Bom. 338 ; see also *Puthummuibi* v. *Vittil Ummachabi*, (1902) 26 Mad. 734, 738.

(*r*) *Muttyjan* v. *Ahmed Ally* (1882) 8 Cal. 370 and *Khurshetibái* v. *Keso Vinayek* (1887) 12 Bom. 101.

(*s*) *Assamathem* v. *Roy Lutchmeeput Singh* (1878) 4 Cal. 142, 155.

(*t*) *Khurshetibái* v. *Keso Vinayek* (1887) 12 Bom. 101, 103.

a deceased Mahomedan debtor as are in possession of the whole or part of his estate binds each defendant to the extent of his full share in the estate (*u*), but it does not bind the other heirs who, by reason of absence or any other cause are out of possession, so as to convey to the auction-purchaser in execution of such a decree the rights and interests of such heirs as were not parties to the decree; and they will be entitled to recover from the auction-purchaser possession of their share in the property sold, subject, however, to payment to the purchaser of their proportionate share of the debts for which the decree was made (*v*), unless the circumstances are such as do not call for the exercise of this equity in favor of the purchaser (*w*).

Illustrations.

CALCUTTA AND BOMBAY DECISIONS.

[(a) A Mahomedan dies leaving a widow, a daughter, and two sisters. After his death a suit is brought by a creditor of the deceased against the widow and the daughter who alone are in possession of the whole estate, and a decree is passed "against the assets of" the deceased. The decree and the sale in execution of the property left by the deceased are binding on the sisters though they were not parties to the suit: *Muttyjan* v. *Ahmed Ally* (1882) 8 Cal. 370.

(b) A Mahomedan woman, Khatiza, dies leaving a minor son and a daughter. After her death a suit is brought by a creditor of the deceased against "Khatiza, deceased, represented by her minor son represented by his guardian" (*x*), and a decree is made in that form. The deceased was entitled to a share in a *Khoti Vatan*, and "the right, title, and interest of Khatiza" in that share is sold in execution of the decree. The purchaser acquires a title unimpeachable by the daughter, though she was not a party to the suit, nor to the subsequent proceedings in execution: *Khurshetbibi* v. *Keso Vinayak* (1887) 12 Bom. 101 (*y*). [No reference was made in the judgment to the Calcutta case cited above, nor to the Allahabad cases cited below].

(c) A Mahomedan dies leaving a widow and other heirs. A suit is brought by a creditor of the deceased against the widow alone who is in possession of a part of the estate. The other heirs are not necessary parties, and the creditor is entitled to a decree not only against the share of the widow in the estate, but the full amount of assets which have come into her hands and which have not been applied in the

(*u*) *Dallu Mal* v. *Hari Das* (1901) 23 All. 263, 265.

(*v*) *Jafri Begam* v. *Amir Muhammad Khan* (1885) 7 All. 822; *Muhammad Awais* v. *Har Sahai* (1885) 7 All. 716; *Hamir Singh* v. *Zakia* (1875) 1 All. 57. See also *Muhammad Allahdad* v. *Muhammad Ismail* (1888) 10 All. 239.

(*w*) *Jafri Begam* v. *Amir Muhammad Khan* (1885) 7 All. 822: see the third question referred to the Full Bench in the above case, and the form of it as amended by the Full Bench (*ib*, p. 825).

(*x*) This form of suit, which was at one time common in the Mufussil of Bombay, has been recently disapproved by the Bombay High Court.

(*y*) Note that in this case "no part of the produce of the *Khoti* was in actual possession of either of the heirs of the deceased."

discharge of the liabilities to which the estate may be subject at her husband s death : *Amir Duthan* v. *Baij Nath* (1894) 21 Cal. 311.

(d) A Mahomedan dies leaving a widow, a minor son and two daughters. After his death a suit is brought by a mortgagee from the deceased against the son as represented by his guardian and mother, claiming possession of the land mortgaged to him as owner under a *gahan lahan* clause in the mortgage. The widow is in possession of the estate, and a decree *ex-parte* is made directing her to make over possession of the land to the mortgagee, and he is accordingly put in possession. The decree binds the daughters, though they were not parties to the suit and they are not entitled to redeem the mortgage as against the mortgagee or a purchaser from him : *Davalava* v. *Bhimaji* (1895) 20 Bom. 338.

ALLAHABAD DECISIONS.

(e) A creditor of a deceased Mahomedan obtains a decree upon a hypothecation bond "for recovery of his debt by enforcement of lien" against an heir of the deceased in possession of the estate. The whole estate is sold in execution of the decree, and it is purchased by the decree-holder. Subsequently another heir of the deceased, who was not a party to these proceedings, sues the decree-holder as purchaser for recovery of his share in the estate. He is entitled to possession of his share on payment of his proportionate share of the debts which were paid off from the proceeds of the sale : *Muhammad Awais* v. *Har Sahai* (1885) 7 All. 716, following *Jafri Begam* v. *Amir Muhammad* (1885) 7 All. 822.

(f) A creditor of a deceased Mahomedan obtains a money-decree against an heir of the deceased in possession of the estate, and attaches certain immoveable property forming part of the estate in execution of the decree. The value of the immoveable property exceeds the share of the defendant. The defendant is entitled to object to the attachment and sale of the rights and interests of the other heirs who were not parties to the suit, upon the ground that as regards them, he is in possession of the property as trustee : *Dallu Mal* v. *Hari Das* (1901) 23 All. 263. This follows from the decision set out in ill. (e).]

Conflict of decisions : Principle of Calcutta Rulings.—Though the view entertained by the High Courts of Calcutta and Bombay is the same, it proceeds upon different grounds altogether. According to the Calcutta Court, a creditor's suit is in the nature of an administration suit, and, as such, an heir in possession is bound to account for any assets that may have come into his hands, and to that extent is liable to pay the creditors, the residue, if any, being divided among the heirs. See the cases set out in ills. (a) and (c). We do not think it was intended by this decision that a creditor's suit should be regarded as an administration suit to all intents and purposes. Such a view may give rise to anomalous results, for it has never been disputed that a creditor of a deceased Mahomedan may sue an heir in possession of *any part* of the estate, and it is established law that an administration suit strictly so-called must comprise the *whole* estate of the deceased. Again, it is an elementary proposition that there cannot be more than one administration suit in respect of the same estate, and that the whole estate must be administered in one and the same suit; but it has never been suggested that the pendency or determination of a suit by a creditor deceased a Mahomedan against an heir in possession of

a part only of an estate is a bar to another suit by another creditor against the same heir (*z*), or against another heir in possession of some other part of the estate. We may, therefore, take it that the High Court of Calcutta would regard a suit by a creditor as an administration suit to the intent only that other heirs not parties to the suit might be bound by the decree to the extent of the estate in possession of the defendant-heir. This theory appears to have been dictated by two considerations, *viz.*, (1) the grave injustice that might result if the creditor were to be confined to the recovery of a fractional portion of his claim as held by the Allahabad High Court, and (2) the rule of Mahomedan law that an individual heir cannot be said with strict propriety to represent his co-heirs (*a*). The same Court has further endeavoured to strengthen its decisions by the analogy, though incomplete, of the case of an executor *de son tort* (*b*), who could be sued according to English law for an account of the specific assets that have come into his hands, though there may be no legal representative.

Principle of Bombay Rulings.—The principle underlying the decisions of the Bombay High Court is quite different. That Court follows the analogy of the Hindu law on the ground that "the Mahomedan law is, if possible, more strict in its recognition of the obligation to pay debts" than the Hindu law. According to that law it is established that "when, in a [creditor's] suit, the debt is due from the father, and after his death the property is brought to sale in execution of a decree against the widow or some of the heirs of the [deceased] and the whole property is sold, then the heirs not brought on the record cannot be permitted to raise the objection that they were not bound by the sale simply because they were not parties to the record" (*c*). It may be observed that the Calcutta rulings set out in the illustrations above are not referred to in either of the Bombay cases.

Madras Rulings.—The question now under consideration does not appear to have arisen in Madras. But in a recent case, the High Court, in determining the question whether a sale by an heir in sole *de facto* possession of the entire inheritance for payment of debts due from the deceased was binding upon the other heirs, relied upon the Bombay rulings set out in ills. (b) and (d), and held that if a *sale in execution of a decree* obtained by a creditor against an heir in possession of the estate was binding upon other heirs though they were not parties to the suit, there was no reason why a *voluntary* sale by such an heir for the purpose aforesaid should not bind other heirs though they were not parties to the sale (*d*). But it may be noted that no reference was made either in the argument of counsel or in the judgment to the Allahabad cases set out in ill. (e).

Principle of Allahabad Rulings.—The reasoning of the Allahabad High Court may thus be stated in the words of Mahomed J.: "To hold that a decree obtained by a creditor of the deceased against *some* of his heirs, will bind also those heirs who were no parties to the suit, amounts to giving a judgment *inter partes* or rather a judgment *in personam* the binding effect of a judgment *in rem*, which the law limits to cases provided for by s. 41 of the Evidence Act. But our law warrants no such course, and the reason seems to me to be obvious. Mahomedan

(*z*) *Mutiyjan* v. *Ahmed Ally* (1882) 8 Cal. 370, 373.
(*a*) *Amir Dulhin* v. *Baij Nath Singh* (1894) 21 Cal. 311, 316, 317.
(*b*) *Ib.* 317.
(*c*) *Daratava* v. *Bhimaji* (1895) 20 Bom. 338, 344, 345.
(*d*) *Pathummabi* v. *Vittil Ummachabi* (1902) 26 Mad. 734, 738-739.

heirs are independent owners of their specific shares, and if they take their shares subject to the charge of the debts of the deceased, their liability is in proportion to the extent of their shares. And once this is conceded, the maxim *res inter alios acta alteri nocere non debet* would apply without any such qualifications as might possibly be made in the case of Hindu co-heirs in a joint family" (*e*). The meaning of the maxim as applied to the question now under consideration is that a judgment in a suit between *A* and *B* is not binding upon *C* unless *C* is the privy either of *A* or *B*.

Alienation by heir for payment of debts

37. An heir in possession of any part of the estate may apply the same in payment of debts due from the deceased, and may for that purpose alienate the property in his possession so as to pass a good title to the alienee as against the other heirs.

It was so held by the High Court of Madras in a recent case (*f*). The ground of the decision was that if a sale in execution of a decree obtained by a creditor against an heir in possession of the estate is binding upon other heirs though they may not have been parties to the decree, it can make no difference whether the heir meets the demand by a *bonâ fide voluntary sale* or the property is brought to *sale in execution* of a decree obtained against him. In this respect the Court adopted the view held by the High Courts of Calcutta and Bombay (*g*) set out in s. 36.

But it is doubtful whether a *voluntary sale* by an heir in possession of the estate for payment of debts due from the deceased will be held binding on the other heirs by the High Court of Allahabad, for it has been laid down by that Court that a *sale in execution* of a creditor's decree obtained only against such heirs as are in possession of the estate is not binding upon other heirs (*h*). If a sale in execution of a decree made after full enquiry in open Court is not binding upon other heirs, it is probable that no greater effect will be given to a voluntary sale. But such a view would be opposed to the opinion expressed by the same Court in an earlier case (*i*), which is quite in accord with the rule laid down in the present section.

Recovery through Court of debts due to the deceased

38. No Court shall pass a decree against a debtor of a deceased Mahomedan for payment of his debt to a person claiming to be entitled to the effects of the deceased or to any part thereof, except on the production, by the person so claiming, of a probate or letters of administration evidencing the grant to him of administration to the estate of the deceased, or a certificate granted under the Succession Certificate Act, 1889, or under Bombay Regulation VIII of 1827, and having the debt specified therein.

Explanation.—The word "debt" in this section includes any debt except rent, revenue or profits payable in respect of land used for agricultural purposes.

(*e*) *Jafri Begam* v. *Amir Muhammad* (1885) 7 All. 822, 842, 843.
(*f*) *Pathummabi* v. *Vittil Ummachabi* (1902) 26 Mad. 734.
(*g*) *Davalava* v. *Bhimaji* (1895) 20 Bom. 336.
(*h*) *Jafri Begam* v. *Amir Muhammad* (1885) 7 All. 822.
(*i*) *Hasan Ali* v. *Mehdi Husain* (1877) 1 All. 533. This case is not referred to in *Jafri Begam's* case.

This section reproduces with slight verbal alterations the provisions of the Succession Certificate Act VII of 1889, s. 4, so far as they apply to Mahomedans. The Act extends to the whole of British India, but it is provided by s. 1, cl. 4, that a certificate shall not be granted under the Act with respect to any debt or security to which a right can be established by probate or letters of administration under the Indian Succession Act, 1865, or by probate of a will to which the Hindu Wills Act, 1870, applies, or by letters of administration with a copy of such a will annexed.

Probate.—In cases to which the Indian Succession Act, 1865, applies—and the Act does not apply to Mahomedans—it is provided by s. 187 that no right *as executor* can be established in any Court of Justice, unless probate shall have been granted of the will under which the right is claimed. These provisions are not reproduced in the Probate and Administration Act which applies to Mahomedans, and it has been held that the omission was intentional (*j*). The result is that an executor of a will of a deceased Mahomedan may establish his right in a Court of Justice without taking out probate of the will (*k*). In the case, however, of *debts due to the deceased*, it is necessary, before the executor can be entitled to a decree against a debtor of the deceased, that he should have obtained either a probate or a certificate under the Succession Certificate Act or Bombay Regulation Act VIII of 1827. These provisions are introduced by the Succession Certificate Act both to facilitate the collection of debts and to afford protection to parties paying debts to the representatives of deceased persons (*l*).

Letters of administration.—In cases to which the Indian Succession Act applies, it has been enacted by s. 190 that no right to any part of the property of a person who has died intestate can be established in any Court of Justice, unless letters of administration have first been granted by a Court of competent jurisdiction. That section has not been incorporated in the Probate and Administration Act and the heirs, therefore, of a deceased Mahomedan may sue to recover the estate of the deceased without a grant of letters of administration. But no decree will be made in a suit by the heirs to recover *debts* due to the deceased, unless they have obtained letters of administration or a certificate under the Succession Certificate Act or under Bombay Regulation VIII of 1827.

Recovery of debts through Court.—It must be observed that the provisions of the Succession Certificate Act set out above apply only in those cases where a debt due to the deceased is sought to be recovered *through a Court of Law*. A debtor of the deceased may pay his debt to the executor, though he may not have obtained a certificate or probate, and such payment will operate as a discharge to the debtor (see s. 22 above). Similarly the debtor may pay the debt to the heirs of the deceased, though they may not have obtained either a certificate or letters of administration. But payment of debt by a debtor to one of several heirs does not discharge the debt as to all (*m*), unless all the heirs join in the receipt. If all the heirs do not so join the debtor will be well advised not to pay the debt except to the person to whom a grant has been made either of a certificate or of letters of administration.

(*j*) *Shaik Moosa* v. *Shaik Essa* (1884) 8 Bom. 241, 255.

(*k*) It may be noted that when there are several executors or administrators, the powers of all may, in the absence of any direction to the contrary in the will or grant of letters of administration, be exercised by any one of them *who has proved the will or taken out administration*: see Probate and Administration Act, s. 92.

(*l*) Similar provisions occurred in Act XXVIII of 1880, which has been repealed by the Succession Certificate Act.

(*m*) *Pathummabi* v. *Vittil Ummachabi* (1902) 26 Mad. 734, 739. Compare *Sitaram* v. *Shridhar* (1903) 27 Bom. 292. See also *Ahinsa Bibi* v. *Abdul Kader* (1901) 25 Mad. 26, 39.

It may also be noted that where a debt is sought to be recovered by *legal proceedings*, it is not necessary that the plaintiff should have in readiness at the commencement of the proceedings the probate or letters of administration or the certificate referred to in the present section. But no *decree* will be passed unless the requisite documents are produced, and this is all that the section provides for.

Debt.– A suit to obtain a share of family property from other members of the family is not a suit to recover a debt strictly so called (*n*).

Bombay Regulation VIII of 1827.—This regulation is in force throughout the Presidency of Bombay, and provides for the grant of a certificate to the heir, executor, or "legal administrator" (*o*) of a deceased person, recognizing the applicant as heir, or executor, or administrator as the case may be. The certificate confers no right to the property, but only indicates the person who, for the time being, is in the legal management thereof (s. 7, cl. 2).

Enactments relating to administration

39. In matters not hereinbefore specifically enumerated, the administration of the estate of a deceased Mahomedan will be governed by the provisions of the following Acts to the extent to which they are severally applicable to the case of Mahomedans, namely :—

(1) Probate and Administration Act V of 1881 ;

(2) Succession Certificate Act VII of 1889 ;

(3) Administrator-General's Act II of 1874 ;

(4) Curator's Act XIX of 1841 ; and

(5) Bombay Regulation Act VIII of 1827.

Such of the provisions of the Administrator-General's Act as apply to Mahomedans come into operation when a Mahomedan dies leaving assets within the local limits of the ordinary original civil jurisdiction of the High Court of Calcutta, Madras, or Bombay. In such a case, the Court may, upon the application of any person interested in such assets, direct the Administrator-General to apply for letters of administration of the effects of the deceased, if the applicant satisfies the Court that such grant is necessary for the protection of the assets (s. 17).

The Curator's Act was passed for the protection of property of deceased persons against wrongful possession in cases of succession. It enables a person claiming a right by succession to the property of a deceased person to apply to the Court of the district where any part of the property is situate for relief by a summary suit either after actual dispossession, or when forcible means of seizing possession are apprehended, and provides for the appointment of a Curator to take charge of the property pending the determination of the suit, if danger is apprehended of misappropriation before the suit is disposed of (ss. 1 and 5).

(*n*) *Shaik Moosa* v. *Shaik Essa* (1884) 8 Bom. 241, 255.

(*o*) This expression has no reference to an "administrator" within the meaning of the Probate and Administration Act. It possibly refers to a guardian of a minor, or a person occupying a similar position; *Purshotam* v. *Runchhod* (1871) 8 B. H. C., A. C. 152.

Debts, funeral expenses a first charge
⅓ of rest may be disposed of by bequest.
Rest is inherited See 29.

CHAPTER VI.

INHERITANCE.

A.—GENERAL.

208 n. **40.** There is no distinction in the Mahomedan law of inheritance between moveable and immoveable property, or between ancestral and self-acquired property. *Heritable property*

Macnaghten, ch. I. 1.

41. The right of an heir-apparent or presumptive comes into existence for the first time on the death of the ancestor, and he is not entitled until then to any interest in the property to which he would succeed as an heir if he survived the ancestor (*p*). *Birth-right not recognized*

Illustration.

[*A*, who has a son *B*, makes a gift of his property to *C*. *B*, alleging that the gift was procured by undue influnce, sues *C during A's lifetime* on the strength of his right to succeed to *A's* property on *A's* death. The suit must be dismissed, for *B* has no cause of action against *C*. *B* has no cause of action, for he is not entitled to any interest in *A's* property *during A's lifetime : Hasan Ali* v. *Nazo* (1889) 11 All. 456, 458. But the gift would be liable to be set aside if the suit was brought *after A's* death, provided it was brought within the period of limitation *: Mirza Kurratulain* v. *Nawab Nuzhat-ud-Dowla* (1905) 33 Cal. 116, 32 I. A. 244.]

The right such as that claimed by *B* in the above illustration is unknown to, and not recognized by, the Mahomedan law (*q*). It is no more than a *spes successionis*, that is, an expectation or hope of succeeding to *A's* property if *B* survived *A*. As observed by the High Court of Allahabad, the Mamomedan law "does not recognize any. . . . . interest expectant on the death of another, and till that death occurs, which by force of that law gives birth to the right as heir in the person entitled to it according to the rule of succession, he possesses no right at all" (*r*).

42. The expectant right of an heir-apparent cannot pass by succession to his heir, nor can it pass by bequest to a legatee under his will (*s*). *Representation*

Illustration.

[*A* has two sons, *B* and *C*. *B* dies in the lifetime of *A*, leaving a son *D*. *A* then dies leaving *C*, his son, and *D*, his grandson. The whole of *A's* property will

(*p*) Macnaghten, ch. I, 9 : *Abdul Wahid* v. *Nuran Bibi* (1885) 11 Cal. 597, 12 I. A. 91 ; *Humeeda* v. *Budlun* (1872) 17 W. R. 525 ; *Hasan Ali* v. *Nazo* (1889) 11 All. 456 ; *Abdool* v. *Goolam* (1905) 30 Bom. 304.

(*q*) *Abdool* v. *Goolam* (1905) 30 Bom. 304.
(*r*) *Hasan Ali* v. *Nazo* (1889) 11 All. 456, 458.
(*s*) *Abdul Wahid* v. *Nuran Bibi* (1885) 11 Cal. 597, 607, 12 I. A. 91.

pass to *C* to the entire exclusion of *D*. It is not open to *D* to contend that he is entitled to *B's* share as representing *B*: *Moolla Cassim* v. *Moolla Abdul* (1905) 33 Cal. 173, 32 I. A. 177.]

In the case cited above their Lordships of the Privy Council observed: "It is a well known principle of Mahomedan law that if any of the children of a man die before the opening of the succession to his estate, leaving children behind, these grandchildren are entirely excluded from the inheritance by their uncles and their aunts."

If in the case put down above, *B* bequeathed any portion of his expectant share in *A's* property to *X*, the latter would take nothing under the will. "A mere possibility, such as the expectant right of an heir-apparent, cannot pass by succession, bequest or transfer, so long as the right has not actually come into existence by the death of the present owner" (*t*).

Transfer of spes successionis

43. The chance of an heir-apparent succeeding to an estate cannot be the subject of a valid transfer.

Illustrations.

[(a) *A* has a son, *B*, and a daughter, *C*. *C* executes a deed in favour of her brother (*B*) renouncing her right to inherit her father's (*A's*) property in consideration of Rs. 1,000 received by her from *B*. *A is alive and in possession of the property at the date of the deed.* *A* then dies, and *C* sues *B* for her share (one-third) of the property left by *A*. *B* sets up in defence the deed of renunciation by *C*. The deed is not a defence to the suit, and *C* is entitled to her share of the inheritance, for the transfer by her was a transfer merely of a *spes successionis*, and, as such, inoperative: see the opinions of the law officers in *Mt. Khanum Jan* v. *Jan Beebee* (1827) 4 S. D. A. 210; *Sumsuddin* v. *Abdul Hoosein* (1906) 8 Bom. L. R. 781.

(b) *A* has a son, *B*, and a daughter, *C*. It is agreed between *A* and *C* that *C* should renounce her right of inheritance to *A's* property on *A's* death, and that, in consideration of her doing so, *A* should set apart Rs. 9,000 to be paid to her on his death, and meanwhile pay interest to her every year on that sum at a fixed rate. *A* sets apart Rs. 9,000 pursuant to the agreement, and pays interest to *C* on the amount every year until his death. On *A's* death, *B* offers to pay to *C* Rs. 9,000 reserved for her, but she declines to accept the amount, and claims her share (one-third) of the property left by *A*. *C* is entitled to her share of the inheritance, for the transfer merely of a possibility of succession is not valid and binding: *Sumsuddin* v. *Abdul Hoosein* (1906) 8 Bom. L. R. 781. The decision to the contrary in *Kunhi* v. *Kunhi* (1896) 19 Mad. 176 is not sound law.]

The rule of Mahomedan law set forth in the first branch of this section is also the law under the Transfer of Property Act, 1882. S. 6 (a) of the Act enacts that "the chance of an heir-apparent succeeding to an estate, the chance of a relation obtaining a legacy on the death of a kinsman, or any other mere possibility of a like nature, cannot be transferred."

Vested remainder

44. The Mahomedan law does not recognize what is known to English law as "vested remainder".

(*t*) *Abdul Wahid* v. *Nuran Bibi* (1885) 11 Cal. 597, 12 I. A. 91.

Illustration.

[*A* sues *B*, his step-mother, to recover certain property of which *B* is in possession. The suit is compromised, and it is agreed that *B* should, during her lifetime, continue to hold possession as *malik* (proprietor) without power of alienation, and that after her death the property should pass to *A*. *A* dies in the lifetime of *B*, leaving a sister *C*. *Subsequently* *B* makes a gift o the property to *D*. *C* (*A's* heir) is not entitled on *B's* death to the property as against *D*: *Abdul Wahid* v. *Nuran Bibi* (1885) 11 Cal. 597, 12 I. A. 91; *Humeeda* v. *Budlun* (1872) 17 W 525; *Mohammad* v. *Umardaraz* (1906) 28 All 633.]

According to English law, *A* takes a vested interest which would pass to his heir on his death, known as "vested remainder." But such an interest is not recognized by the Mahomedan law. According to that law, the interest which is given by the compromise to *A* is the mere chance of an heir succeeding to the estate of *B* on *B's* death. Since *A* died during the lifetime of *B*, he took no interest in the property which he could pass to his heir *C*.

Vested inheritance

45. A "vested inheritance" is the share which vests in an heir at the moment of the ancestor's death. If the heir dies before distribution, the share of the inheritance which has vested in him will pass to his heirs at the time of his death.

Illustration.

A dies leaving a son, *B*, and a daughter, *C*. *B* dies before the estate of *A* is distributed, leaving a son, *D*. In this case, on the death of *A*, two-thirds of the inheritance vest in *B*, and one-third vests in *C*. If the estate of *A* is distributed after *B's* death, the two-thirds which vested in *B* will be allotted to his son, *D*.

See Macnaghten, ch. I., 96; Rumsey's Mahomedan Law of Inheritance, ch. IX; Rumsey's *Al Sirajiyyah*, 43-44.

Joint family

46. When the members of a Mahomedan family live in commensality, they do not form a "joint family" in the sense 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 (*u*).

Homicide

47. (1) Under the Sunni law, a person who has caused the death of another, whether intentionally or by mistake, negligence, or accident, is debarred from succeeding to the estate of that other.

(2) But homicide under the Shiah law is not a bar to succession unless the death was caused intentionally.

Rumsey's *Al Sirajiyyah*, 14.

(u) *Hakim Khan* v. *Gool Khan* (1882) 8 Cal. 826; *Suddurtonnessa* v. *Mazada Khatoon* (1878) 3 Cal. 694; *Abdool Adood* v. *Mahomed Makmil* (1884) 10 Cal. 562. See also *Abdool Kadar* v. *Bapubhai* (1898) 23 Bom. 188.

Impediments to inheritance—The Sirajiyyah sets out four grounds of exclusion from inheritance, namely, (1) homicide, (2) slavery, (3) difference of religion, and (4) difference of allegiance. Homicide, as an impediment to succession, is dealt with in the present section. The second impediment was removed by the enactment of Act V of 1843 abolishing slavery, and the third by the provisions of Act XXI of 1850 (*v*). The bar of difference of allegiance, as contemplated by the Mahomedan system of jurisprudence (*w*), has no place in Mahomedan law as administered in British India.

Of all the disqualifications above enumerated, the effect upon the person subject to them is absolute exclusion from the right of inheritance, and upon all others the same, as if the disqualified person were actually dead (*x*). But the person incapable of inheriting by reason of the above disqualifications does not exclude others from inheritance (*y*). Thus if *A* dies leaving a son *B*, a grandson *C* by *B*, and a brother *D*, and if *B* has caused the death of *A*, *B* is totally excluded from inheritance, but he does not exclude his son *C*. The inheritance will devolve as if *B* were dead, so that *C*, the grandson, will succeed to the whole estate, *D* being a more remote heir.

B.—Hanafi Law of Inheritance.

[The principal works of authority on the Hanafi Law of Inheritance are the Sirajiyyah, composed by Shaikh Sirajuddin, and the Sharifiyyah, which is a commentary on the Sirajiyyah written by Sayyad Sharif. The Sirajiyyah is referred to in this and subsequent chapters by the abbreviation *Sir*, and the references are to the pages of Mr. Rumsey's edition of the Translation of that work by Sir William Jones, as that edition is easily procurable.]

Classes of heirs

48. There are three classes of heirs, namely, (1) Sharers, (2) Residuaries, and (3) Distant Kindred :

(1) "Sharers" are those who are entitled to a prescribed share of the inheritance ;

(2) "Residuaries" are those who take no prescribed share but succeed to the "residue" after the claims of the Sharers are satisfied ;

(3) "Distant Kindred" are all those relations by blood who are neither Sharers nor Residuaries (*z*).

Sir. 12-13. The first step in the distribution of the estate of a deceased Mahomedan, after payment of his funeral expenses, debts and legacies, is to allot their

(*v*) Section 1 of the Act runs as follows: "So much of any law or usage now in force . . . as inflicts on any person forfeiture of rights or property, or may be held in any way to impair or affect any right of inheritance, by reason of his or her renouncing, or having been excluded from the communion of any religion. . . . shall cease to be enforced as law in the Courts of the East India Company and in the Courts established by Royal Charter within the said territories."

(*w*) Difference of allegiance referred to here is "difference of country, either actual, as between an alien enemy and an alien tributary, or qualified, as between a fugitive and a tributary, or between two fugitive enemies from two different states": Rumsey's *Al Sirajiyyah*, 14.

(*x*) Baillie's Mahomedan Law of Inheritance, p. 31.

(*y*) Rumsey's *Al Sirajiyyah*, 27-28.

(*z*) *Abdul Serang* v. *Putee Bibi* (1902) 29 Cal. 738.

respective shares *to such of the relations as belong to the class of sharers and are entitled to a share*. The next step is to divide the residue (if any) among *such of the residuaries as are entitled to the residue*. If there are no sharers, the residuaries will succeed to the whole inheritance. If there be neither sharers nor residuaries, the inheritance will be divided among *such of the distant kindred as are entitled to succeed thereto*. The distant kindred are not entitled to succeed so long as there is any heir belonging to the class of sharers or residuaries. But there is one case in which the distant kindred will inherit with a sharer, and that is where the sharer is the wife or husband of the deceased. Thus if a Mahomedan dies leaving a wife *and* distant kindred, the wife as sharer will take her share which is 1/4, and the remaining three-fourths will go to the distant kindred. And if a Mahomedan female dies leaving a husband *and* distant kindred, the husband as sharer will take his share 1/2, and the other half will go to the distant kindred. To take a simple case: *A* dies leaving a mother, a son, and a daughter's son. The mother as *sharer* will take her share 1/6, and the son as *residuary* will take the residue 5/6. The daughter's son, being one of the class of *distant kindred*, is not entitled to any share of the inheritance.

209 The question as to which of the relations belonging to the class of sharers, or residuaries, or distant kindred, are entitled to succeed to the inheritance depends on the circumstances of each case. Thus if the surviving relations be a father and a father's father, the father alone will succeed to the whole inheritance to the entire exclusion of the grandfather, though both of them belong to the class of sharers. And if the surviving relations be a son and a son's son, the son alone will inherit the estate, and the son's son will not be entitled to any share of the inheritance, though both belong to the class of residuaries. Similarly, if the surviving relations belong to the class of distant kindred, *e.g.*, a daughter's son, and a daughter's son's son, the former will succeed to the whole inheritance, it being one of the rules of succession that the nearer relation excludes the more remote.

49. In this part— *Definitions*

(*a*) "True grandfather" means a male ancestor between whom and the deceased no female intervenes.

Thus the father's father, father's father's father and his father how high soever, are all true grandfathers.

(*b*) "False grandfather" means a male ancestor between whom and the deceased a female intervenes.

Thus the mother's father, mother's mother's father, mother's father's father, father's mother's father, are all false grandfathers.

(*c*) "True grandmother" means a female ancestor between whom and the deceased no false grandfather intervenes.

Thus the father's mother, mother's mother, father's mother's mother, father's father's mother, mother's mother's mother, are all true grandmothers.

(*d*) "False grandmother" means a female ancestor between whom and the deceased a false grandfater intervenes.

Thus the mother's father's mother is a false grandmother. False grandfathers and false grandmothers belong to the class of distant kindred.

(*e*) "Son's son how low soever" includes son's son, son's son's son, and the son of a son how low soever.

(*f*) "Son's daughter how low soever" includes son's daughter, son's son's daughter, and the daughter of a son how low soever.

Sharers

50. After payment of funeral expenses, debts and legacies, the first step in the distribution of the estate of a deceased Mahomedan is to ascertain which of the surviving relations belong to the class of Sharers, and which again of these are entitled to a share of the inheritance, and, after this is done, to proceed to assign their respective shares to such of the Sharers as are, under the circumstances of the case, entitled to succeed to a share. The first column in the accompanying Table contains a list of Sharers; the second column specifies the circumstances which determine the right of Sharers to inherit as such, and the third column sets out the shares which the law has allotted to the several Sharers.

Illustrations.

[*Note.*—The italics in the following and other illustrations in this Chapter indicate the surviving relations. It will be observed that the sum total of the shares in all the following illustrations equals unity.

Father, Husband and Wife.

(a)	*Father*	1/6	(as *sharer* because there are daughters)
	Father's father		(excluded by father)
	Mother	1/6	(because there are daughters)
	Mother's mother		(excluded by mother)
	Two daughters	2/3	
	Son's daughter		(excluded by daughters)
(b)	*Husband*	1/2	
	Father	1/2	(as residuary)
(c)	*Four widows*	1/4	(each taking 1/16)
	Father	3/4	(as residuary)

X

Shar

14 1. FATHER

16 2. TRUE G
h. h. s.

211 3. HUSBAND

210 4. WIFE (wh
more not

214 215 5. MOTHER

217 218 6. TRUE GI
h. h. s.
more).

212 7. DAUGHTE

213 8. SON'S DAU

e. g.
(a) SON'S DA

(b) SON'S SO

Mother.

(d) *Mother* 1/3
Father ... ... 2/3 (as residuary)

(e) *Mother* ... ... 1/6 (because there are *two* sisters)
Two sisters ... ... (excluded by father)
Father ... ... 5/6 (as residuary)

Note—That though the sisters do not inherit at all they affect the share of the mother and prevent her from taking 1/3. This proceeds upon the principle that a person, though excluded from inheritance, may exclude others wholly or partially (Sir. 28). In the present case the exclusion is partial, the mother taking 1/6 instead of 1/3, which latter share she would have taken if the deceased had not left sisters.

(f) *Mother* 1/3
Sister ... ... (excluded by father)
Father ... ... 2/3 (as residuary)

(g) *Mother* ... ... 1/6 (because there is a brother & also a sister)
Brother (f., c., or u.) ... ... (excluded by father)
Sister (f., c., or u.) ... ... (excluded by father)
Father ... ... 5/6 (as residuary)

Note.—The mother takes 1/6, and not 1/3, whether there are two or more brothers, or two or more sisters, or *one brother and one sister* or two or more brothers and sisters. The brother and the sister, though they are excluded from inheritance by the father, prevent the mother from taking the larger share 1/3. See note to ill. (c).

(h) *Husband* 1/2
Mother ... ... 1/6 (=1/3 of 1/2)
Father ... ... 1/3 (as residuary)

Note.—But for the *husband and father* the mother in this case would have taken 1/3, as there are neither children nor brothers nor sisters. As the deceased has left a husband *and* father, the mother is entitled only to one-third of what remains after the husband's share is allotted to him. The husband's share is 1/2, and what remains is 1/2 and 1/3 of 1/2 is 1/6. The reason of the rule is clear, for if the mother took 1/3, the residue for the father would only be $1-(1/2+1/3)=1/6$ that is half the share of the mother, while as a general rule, the share of a male is twice as much as that of a female of parallel grade (Sir. 22). For the case where the deceased leaves a *widow and father*, see ill. (i) below.

(i) *Husband* 1/2
Mother 1/3
Father's father ... ... 1/6 (as residuary)

Note—The mother takes 1/3, for the father's father does not reduce her share from one-third of the whole to one-third of the remainder after deducting the husband's share.

(j) *Widow* 1/4
Mother ... ... 1/4 (=1/3 of 3/4)
Father ... ... 1/2 (as residuary)

Note—In this case, the mother would have taken 1/3 but for the *widow and father* for there are neither children nor brothers nor sisters. As the widow and father are among the surviving heirs the mother is entitled to one-third of the remainder after deducting the widow's share. The widow's share is 1/4, the remainder is 3/4, and the mother's share is 1/3 of 3/4, that is, 1/4. See ill. (h) above, and the note thereto.

(k) *Widow* 1/4
Mother 1/3
Father's father ... ... 5/12 (as residuary)

Note—The mother takes 1/3, for the father's father does not reduce her share from one-third of the whole to one-third of the remainder after deducting the widow's share.

True grandfather and true grandmother.

(l) *Father's mother* ... ... (being a true *pat.* grandmother, is excluded by father)
Mother's mother ... ... 1/6 (being a true *mat.* grandmother, is not excluded by father)
Father ... ... 5/6 (as residuary)

(m) *Father's mother* ... ...
Mother's mother ... ... } 1/6 (each taking 1/12)
Father's father ... ... 5/6 (as residuary)

Note.—The father's mother is not excluded by the father's father, for the latter is not an *intermediate*, but an equal, true grandfather.

(n) *Father's father's mother* ... ... (excluded by father's father)
Father's father ... ... takes the whole as residuary.

Note.—The father's father's mother is excluded by the father's father for he is an intermediate true grandfather, the father's father's mother being related to the deceased *through* him.

(o) *Father's mother's mother* 1/6
Father's father ... ... 5/6 (as residuary).

Note.—The father's mother's mother (who is a true *pat.* grandmother) is not excluded by the father's father (who is a true grandfather), for though he is nearer in degree, he is *not* in relation to her, an *intermediate* true grandfather, as the father's mother's mother is *not related to the deceased through him*, but through the father.

(p) *Father's mother* 1/6
Mother's mother's mother.... ... ... (excluded by father's mother, who is a nearer true grandmother)
Father's father ... ... 5/6 (as residuary)

(q) *Father's mother* ... ... (excluded by father)
Mother's mother's mother... (excluded by father's mother who is a nearer true grandmother)
Father ... ... takes the whole as residuary.

Note.—The father's mother, though she is excluded by the father, excludes the mother's mother's mother. This proceeds upon the rule that one who is excluded may himself exclude others wholly or partially. See note to ill. (c): in that case the exclusion of the mother by the sisters was partial for she *did* take a share, namely, 1/6. In the present case, however the exclusion of the mother's mother's mother is entire. It need hardly be stated that if the deceased had not left the father's mother, the mother's mother's mother would have taken 1/6, for being a true *maternal* grandmother, she is not excluded by the father.

Daughters and Sons' daughters h. l. s.

(r) *Father* ... ... 1/6 (as sharer)
Mother 1/6
3 *sons' daughters*, of whom one is by one son and the other two by another son. 2/3 (each taking 2/9)

Note.—The sons' daughters take *per capita* and not *per stirpes*. The two-thirds is not therefore divided into two parts, one for the son's daughter by one son, and the other for the other two by another son, but it is divided into as many parts as there are sons' daughters irrespective of the number of sons through whom they are related to the deceased. The reason is that the Mahomedan law does not recognize any right of representation (see s. 42) and the sons' daughters do not inherit as representing their respective fathers, but in their own right as grand-daughters of the deceased. The same principle applies to the case of sons' sons, brothers' sons, uncles' sons, etc. See Table of Residuaries.

(s) *Father* ... ... 1/6 (as sharer)
Mother 1/6
Daughter 1/2
4 *sons' daughters* ... ... 1/6 (each taking 1/24)

Note.—There being only one daughter, the sons' daughters are not entirely excluded from inheritance but they take 1/6, which, together with the daughter's 1/2, makes up 2/3, the full portion of daughters.

(t) *Father* ... ... 1/6 (as sharer)
Mother 1/6
2 *sons' daughters*... ... ... 2/3
Son's son's daughter ... ... (excluded by sons' daughters)

(u) *Father* ... ... 1/6 (as sharer)
Mother 1/6
Son's daughter 1/2
Son's son's daughter 1/6

Note.—The rule of succession as between daughters and sons' daughters applies, in the absence of daughters, as between higher sons' daughters and lower sons' daughter (Sir. 18). There being only one son's daughter in the present illustration, the son's son's daughter is not entirely excluded from inheritance, but she inherits 1/6, which, together with the son's daughter's 1/2, makes up 2/3, the full share of sons' daughters in the absence of daughters.

(v) *Mother* 1/6
2 *full sisters* ... ... 2/3 (each taking 1/3)
C. sister ... ... (excluded by full sisters)
U. sisters (*or* u. brother) 1/6

(w)	2 *full sisters* (*or* c. sisters)	2/3 (each taking 1/3)
	2 *u. sisters* (*or* u. brothers)	1/3 (each taking 1/6)
(x)	*Full sister*	1/2
	2 *c. sisters*	1/6 (each taking 1/12)
	U. brothers	1/6
	U. sisters	1/6

Note.—There being only one full sister, the consanguine sisters are not excluded from inheritance, but they inherit 1/6 which, together with the sister's 1/2, makes up 2/3, the collective share of full sisters in the inheritance (Sir. 21).]

Sir. 14-23. The principal points involved in the Table of Sharers are explained in their proper place in the notes appended to the illustrations. The illustrations must be carefully studied, as it is very difficult to understand the rules of succession without them. The principles underlying the rules of succession are set out in the notes on s. 52 below. It will be observed that the illustrations are so framed that the sum total of the shares does not exceed unity. For cases in which the total of the shares exceeds unity, see the next section.

The sharers are twelve in number. Of these there are six that inherit under certain circumstances as residuaries, namely, the father, the true grandfather, the daughter, the son's daughter, the full sister, and the consanguine sister. See the list of Residuaries given in s. 52 below, and the notes on that section.

"*Increase*"

51. If it be found on assigning their respective shares to the Sharers that the total of the shares exceeds unity, the share of each Sharer is proportionately diminished by reducing the fractional shares to a common denominator, and *increasing* the denominator so as to make it equal to the sum of the numerators.

Illustrations.

(a)	*Husband*	1/2 = 3/6	reduced to	3/7
	2 full sisters	2/3 = 4/6	„	4/7
		7/6		1

Note.—The sum total of 1/2 and 2/3 exceeds unity. The fractions are therefore reduced to a common denominator, which, in this case, is 6. The sum of the numerators is 7, and the process consists in substituting 7 for 6 as the denominator of the fractions 3/6 and 4/6. By so doing the total of the shares equals unity. The doctrine of "increase" is so-called because it is by *increasing* the denominator from 6 to 7 that the sum total of the shares is made to equal unity.

(b)	*Husband*	1/2 = 3/6	reduced to	3/7
	Full sister	1/2 = 3/6	„	3/7
	C. sister	1/6 = 1/6	„	1/7
		7/6		1

(c)	*2 full sisters*	2/3=4/6	reduced to	4/7
	2 u. brothers (or u. sisters)	1/3=2/6	„	2/7
	Mother	1/6=1/6	„	1/7
		7/6		1
(d)	*Husband*	1/2=3/6	reduced to	3/8
	2 full sisters	2/3=4/6	„	4/8
	Mother	1/6=1/6	„	1/8
		8/6		1
(e)	*Husband*	1/2=3/6	reduced to	3/8
	Full sister	1/2=3/6	„	3/8
	2 u. sisters	1/3=2/6	„	2/8
		8/6		1
(f)	*Husband*	1/2=3/6	reduced to	3/9
	2 Full sisters	2/3=4/6	„	4/9
	2. u. sisters	1/3=2/6	„	2/9
		9/6		1
(g)	*Husband*	1/2=3/6	reduced to	3/9
	Full sister	1/2=3/6	„	3/9
	2 u. sisters	1/3=2/6	„	2/9
	Mother	1/6=1/6	„	1/9
		9/6		1
(h)	*Husband*	1/2=3/6	reduced to	3/10
	2 Full sisters	2/3=4/6	„	4/10
	2 u. sisters	1/3=2/6	„	2/10
	Mother	1/6=1/6	„	1/10
		10/6		1
(i)	*Widow*	1/4=3/12	reduced to	3/13
	2 c. sisters	2/3=8/12	„	8/13
	Mother	1/6=2/12	„	2/13
		13/12		1
(j)	*Husband*	1/4=3/12	reduced to	3/13
	Mother	1/6=2/12	„	2/13
	2 daughters	2/3=8/12	„	8/13
		13/12		1
(k)	*Husband*	1/4=3/12	reduced to	3/13
	Mother	1/6=2/12	„	2/13
	Daughter	1/2=6/12	„	6/13
	Son's daughter	1/6=2/12	„	2/13
		13/12		1

(l)	*Widow*...	1/4=3/12	reduced to	3/13
	Mother...	1/2=4/12	„	4/13
	Full sister	1/2=6/12	„	6/13
		13/12		1
(m)	*Widow*...	1/4=3/12	reduced to	3/15
	2 *full sisters*	2/3=8/12	„	8/15
	2 *u. sisters*	1/3=4/12	„	4/15
		15/12		1
(n)	*Widow*	1/4=3/12	reduced to	3/15
	2 *full sisters*	2/3=8/12	„	8/15
	U. sister	1/6=2/12	„	2/15
	Mother...	1/6=2/12	„	2/15
		15/12		1
(o)	*Husband*	1/4=3/12	reduced to	3/15
	Father...	1/6=2/12	„	2/15
	Mother...	1/6=2/12	„	2/15
	3 *daughters*	2/3=8/12	„	8/15
		15/12		1
(p)	*Widow*...	1/4=3/12	reduced to	3/17
	2 *full sisters*	2/3=8/12	„	8/17
	2 *u. sisters*	1/3=4/12	„	4/17
	Mother	1/6=2/12	„	2/17
		17/12		1
(q)	*Wife*	1/8=3/24	reduced to	3/27
	2 *daughters*	2/3=16/24	„	16/27
	Father...	1/6=4/24	„	4/27
	Mother	1/6=4/24	„	4/27
		27/24		1

Sir. 29-30. For cases in which the total of the shares is less than unity see s. 53 below.

Residuaries

52. If there are no Sharers, or if there are Sharers, but there is a residue left after satisfying their claims, the whole inheritance or the residue, as the case may be, will devolve upon Residuaries in the order set forth in the annexed table.

Illustrations.

[*Note*—The residue remaining after satisfying the sharers' claims is indicated in the following illustrations thus ( ).

I.—*DESCENDANTS:*

1. **SON.**

Daughter takes

2. **SON'S SON h. l. s.**
Son's Daughter
she takes as a r
double the sha

Note—When the son's d
with the *lower* son's

II.—*ASCENDANTS:*

3. **FATHER.**

4. **TRUE GRANDFAT**

III.—*DESCENDANTS OF FATHER:*

5. **FULL BROTHER.**

Full Sister—tak

6. **FULL SISTER**—In
(1) a daughter
daughter or da

7. **CONSANGUINE B**

Consanguine S

8. **CONSANGUINE SI**
if any, if there
and a son's da

9. **FULL BROTHER'S**

10. **CONSANGUINE BI**

IV.—*DESCENDANTS OF TRUE GR.*

11. **FULL PATERNAL**

12. **CONSANGUINE P.**

13 **FULL PATERNAL**

14. **CONSANGUINE P.**
MALE DESCENDA
uncle and thei

No. 1. Sons and daughters.

(a) *Son* 2/3
Daughter ... ... 1/3 } (as residuaries)

Note.—The daughter cannot inherit as a sharer when there is a son. But if the heirs be a daughter and a son's son, the daughter as a *sharer* will take 1/2, and the son's son as a residuary will take the residue 1/2.

(b) 2 *sons* ... ... 4/7 (as residuaries, each son taking 2/7)
3 *daughters* ... 3/7 (as residuaries, each daughter taking 1/7)

(c) *Widow*... ... ... 1/8 (as sharer)
Son ... ... 2/3 of (7/8)=7/12 } (as residuaries)
Daughter ... 1/3 of (7/8)=7/24 }

Note.—The residue after payment of the widow's share is 7/8.

(d) *Husband* ... ... 1/4 (as sharer)
Mother ... ... 1/6 (as sharer)
Son ... ... 2/3 of (7/12)=7/18 } (as residuaries
Daughter ... 1/3 of (7/12)=7/36 }

Note.—The residue in the above case is 1—(1/4 of 1/6)=7/12. If there were two sons and three daughters, each son would have taken 2/7 of 7/12=1/6, and each daughter 1/7 of 7/12=1/12.

No. 2. Sons' sons h. l. s. and sons' daughters h. l. s.

(e) *Son's son* ... ... 2/3 } (as residuaries)
Son's daughter ... ... 1/3 }

Note.—The son's daughter h. l. s. cannot inherit as a sharer, but she can inherit as a residuary only, when there is an equal son's son h. l. s. Thus the son's daughter cannot succeed except as a residuary, when there is a son's son. Similarly son's son's daughter cannot inherit except as a residuary when there is a son's son's son.

(f) 2 *daughters* ... ... 2/3 (as sharers)
Son's son ... ... 1/3 (as residuary)
Son's son's son ... ... (excluded by son's son)
Son's son's daughter ... ... (excluded both by daughters and son's son. See Tab. of Sh., No. 8)

(g) 2 *daughters* ... ... 2/3 (as sharers)
Son's son ... ... 2/3 (of 1/3)=2/9 } (as residuaries)
Son's daughter ... ... 1/3 (of 1/3)=1/9 }

(h) *Daughter* ... ... 1/2 (as sharer)
Son's son ... ... 2/3 (of 1/2)=1/3 } (as residuaries)
Son's daughter ... ... 1/3 (of 1/2)=1/6 }

Note.—There being only one daughter, the son's daughter would have taken 1/6 as *sharer* (see Tab. of Sh. No. 8), if the deceased had not left a son's son. But as the son's son is one of the heirs, the son's daughter can only inherit as a *residuary* with the son's son.

(i) *Son's daughter* ... ... 1/2 (as sharer)
Son's son's son ... ... 1/2 (as residuary)

Note.—In this case the son's daughter is not precluded from inheriting as a *sharer*, for there is none of those relations that precludes her from succeeding as a sharer (see Tab. of Sh. No. 8, 2nd column). And it will be seen on referring to the Table of Residuaries that the only case in which the son's daughter inherits as a residuary with the son's son's son (who is a *lower* son's son), is where she is precluded from succeeding as a sharer (see ill. (k) below).

(j) *Daughter* ... ... 1/2 (as sharer)
Son's daughter... ... ... 1/6 (as sharer. See Tab. of Sh., No. 8)
Son's son's sons... ... ... 2/3 of (1/3)=2/9 } (as residuaries)
Son's son's daughter ... ... 1/3 of (1/3)=1/9 }

Note.—There being only one daughter, the son's daughter is entitled to 1/6 as a sharer. Since she is not precluded from inheriting as a sharer, she does not become a residuary with the son's son's son (who is a *lower* son's son).

(k) 2 *daughters* ... ... 2/3 (as sharers)
Son's daughter ... ... 1/3 of (1/3) = 1/9 } (as residuaries)
Son's son's son... ... ... 2/3 of (1/3) = 2/9 }

Note.—There being two daughters, the son's daughter cannot inherit as a sharer. She therefore inherits as a residuary with the son's son's son (who is a *lower* son's son).

(l) 2 *Son's daughters* ... ... 2/3 (as sharers)
Son's son's son... ... ... 2/3 of (1/3) = 2/9 } (as residuaries)
Son's son's daughter ... ... 1/3 of (1/3) = 1/9 }

Note.—The son's daughters in this case do not inherit as residuaries with the son's son's son, for they are not precluded from inheriting as sharers.

(m) 2 *daughters* ... ... 2/3 (as sharers)
Son's son's son... ... ... 2/4 of (1/3) = 1/6 }
Son's daughter ... ... 1/4 of (1/3)= 1/12 } (as residuaries)
Son's son's daughter ... ... 1/4 of (1/3)= 1/12 }

Note.—There being two daughters, the son's daughter cannot inherit as a sharer. She therefore inherits as a residuary with the son's son's son (who is a *lower* son's son). The son's son's daughter is entitled to inherit as a residuary with the son's son's son who is an equal son's son in relation to her. Both these female relations inherit therefore as residuaries with the son's son's son, each taking 1/12. This illustration presents two peculiar features. The one is that the son's son's daughter, though remoter in degree, shares with the son's daughter. The other is that the son's daughter succeeds as a residuary with a *lower* son's son. If this were not so, the son's son's daughter would inherit to the exclusion of the son's daughter, a result directly opposed to the principle that the nearest of blood must take first (Sir. 18-19).

No. 3. Father.

(n) *Father* ... ... 1/6 (as sharer)
Son (*or* son's son h. l. s.) ... ... 5/6 (as residuary)

Note.—Here the father inherits as a sharer.

(o) *Mother* ... ... 1/3 (as sharer)
Father ... ... 2/3 (as residuary)

Note.—Here the father inherits as a residuary, as there is no child or child of a son h. l. s. See Tab. of Sh., No. 1.

(p) *Daughter* ... ... (as sharer)=1/2
Father ... ... 1/6 (as sharer)+1/3 (as residuary)=1/2

Note.—Here the father inherits both as a sharer and residuary. He inherits as a sharer, for there is a daughter; and he inherits the residue 1/3 as a residuary, for there are neither sons nor son's sons h.l.s. The father may inherit *both* as a sharer and residuary. He inherits simply as a sharer when there is a son or son's son h. l. s. (see ill. (n) above). He inherits simply as a residuary when there are neither children nor children of sons h. l. s. (see ill. (o) above). He is both a sharer and residuary when there are only daughters or son's daughters h. l. s., but no sons or son's sons h. l. s. as in the present illustration. The same remarks apply to the true grandfather h. h. s. In fact, the father and the true grandfather are the only relations that may inherit in both capacities simultaneously.

No. 4. True grandfather h. h. s.

Note.—Substitute "true grandfather" for "father" in ills. (n), (o) and (p). The true grandfather will succeed in the same capacity and will take the same share as the father in those illustrations.

Nos. 5 and 7. Brothers and sisters.

(q) *Husband* ... ... 1/2 (as sharer)
Mother ... ... 1/6 (as sharer)
Brother ... ... 2/3 of (1/3)=2/9 } (as residuaries)
Sister ... ... 1/3 of (1/3)=1/9 }

Note.—The sister cannot inherit as a sharer when there is a brother, but she takes the residue with him.

No. 6. Full sisters with daughters and sons' daughters.

(r) *Daughter* (*or* son's daughter h.l.s.) 1/2 (as sharer)
Full sister ... ... 1/2 (as residuary No. 6)
Brother's son ... ... excluded by full sister who is a nearer residuary.

Note.—The full sister inherits in three different capacities: (1) as a sharer under the circumstances set out in the Table of Sharers; (2) as a residuary with full brother, when there is a brother; and, failing to inherit in either of these two capacities, (3) as a residuary with daughters, or son's daughters h. l. s., or one daughter and sons' daughters h. l. s., provided there is no nearer residuary. Thus in the present illustration, the sister cannot inherit as a sharer, because there is a daughter (or son's daughter h. l. s.). And as there is no brother, he cannot inherit in the second of the three capacities enumerated above. She therefore takes the residue 1/2 as a residuary with the daughter (or son's daughter), for there is no residuary nearer in degree. If this were not so, the brother's son, who is a more remote relation, would succeed in preference to her.

(s)	2 *Daughters* (*or* son's daughters h. l. s.)	2/3 (as sharers)		
	Full sister	1/3 (as residuary No. 6)		
(t)	*Daughter*	1/2 (as sharer)		
	Son's daughter	1/6 (as sharer)		
	Full sister	1/3 (as residuary No. 6)		
(u)	*Daughter*	1/2 (as sharer)		
	Son's daughter	1/6 (as sharer)		
	Mother	1/6 (as sharer)		
	Full sister	1/6 (as residuary No. 6)		
(v)	*Daughter*	1/2 (as sharer)		
	Son's daughter	1/6 (as sharer)		
	Husband	1/4 (as sharer)		
	Full sister	1/12 (as residuary No. 6)		
(w)	*Daughter*	1/2 (as sharer)=6/12	reduced to	6/13
	Son's daughter	1/6 (as sharer)=2/12	„	2/13
	Husband	1/4 (as sharer)=3/12	„	3/13
	Mother	1/6 (as sharer)=2/12	„	2/13
	Full sister	0		
		13/12		1

Note.—Here the only capacity in which the full sister could inherit is that of a residuary with the daughter and son's daughter. But a residuary succeeds to the residue (if any) after the claims of the sharers are satisfied, and in the present case there is no residue. The sum total of the shares exceeds unity, and the case is one of "Increase."

No. 8. Consanguine sisters with daughters and sons' daughters h. l. s.

Note.—Consanguine sisters inherit as residuaries with daughters and son's daughters in the absence of full sisters. Substitute "consanguine sister" for "full sister" in ills. (r) to (w), and the shares of the several heirs will remain the same, the consanguine sister taking the place of the full sister. Substitute also in the note to ill. (r) "consanguine brother" for "full brother."

Other Residuaries.

(x)	*Full sister*	1/2 (as sharer)
	C. sister	1/6 (as sharer)
	Mother	1/6 (as sharer)
	Brother's son	1/6 (as residuary)
(y)	*Widow*	1/4 (as sharer)
	Mother	1/3 (as sharer)
	Pat. uncle	5/12 (as residuary)]

Sir. 18-21, and 23-26. Some of the important points involved in the Table of Residuaries are explained in the notes appended to the illustrations.

Classification of Residuaries.—All residuaries are related to the deceased ***through a male.*** The uterine brother and sister are related to the deceased through a

female, that is, mother, and they do not therefore find place in the List of Residuaries. The Sirajiyyah divides residuaries into three classes: (1) residuaries *in their own right*: these are all males comprised in the List of Residuaries; (2) residuaries *in the right of another*: these are the four female residuaries, namely, the daughter as a residuary in the right of the son, the son's daughter h. l. s. as a residuary in the right of the son's son h. l. s., the full sister in the right of the full brother, and the consanguine sister in the right of the consanguine brother; and (3) residuaries *with* others, namely, the full sister and consanguine sister, when they inherit as residuaries with daughters and son's daughter h. l. s. Having regard, however, to the order of succession, residuaries may be divided into four classes, the first class comprising descendants of the deceased, the second class his ascendants, the third the descendants of the deceased's father, and the fourth the descendants of the deceased's true grandfather h. h. s. This classification has been adopted in the Table of Residuaries. The division of Distant Kindred into four classes proceeds upon the same basis.

Residuaries that are primarily sharers.—It will be noted on referring to the Tables of Sharers and Residuaries that there are six sharers who inherit under certain circumstances as residuaries. These are the father and true grandfather h. h. s., the daughter and son's daughter h. l. s., and the full sister and consanguine sister. Of these only the father and true grandfather inherit in certain events both as sharers and residuaries (see ill. (p) above, and the note thereto). In fact they are the only relations that can inherit at the same time in a double capacity. The other four, who are all females, inherit either as sharers or residuaries. The circumstances under which they inherit as sharers are set out in the Table of Sharers. They succeed as residuaries, and can succeed in that capacity alone, when they are combined with male relations of parallel grade. Thus the daughter inherits as a sharer, when there is no son. But when there is a son, she inherits as a residuary, and can inherit in that capacity alone: not that when there is a son she is excluded from inheritance, but that in that event she succeeds as a residuary, the presence of the son merely altering the character of her heirship. Similarly, the son's daughter h. l. s. inherits as a residuary when there is an *equal* son's son. And in like manner the full sister and consanguine sister succeed as residuaries when they co-exist with the full brother and consanguine brother respectively. The curious reader may ask why it is that the said four female relations are precluded from inheriting as sharers when they exist with males of parallel grade? The answer appears to be this—that if they were allowed to inherit as sharers under those circumstances, it might be that no residue would remain for the corresponding males (all of whom are residuaries alone), that is to say, though the females would have a share of the inheritance, the corresponding males, though of equal grade, might have no share of the inheritance at all. To take an example: *A* dies leaving a husband, a father, a mother, a daughter, and a son. The husband will take 1/4, the father 1/6, and the mother 1/6. If the daughter were allowed to inherit as a sharer, her share would be 1/2, and the total of all the shares being 13/12, no residue would remain for the son. It is, it seems, to maintain a residue for the males that the said females are precluded from inheriting as sharers under the circumstances specified above.

The principle which regulates the succession of full and consanguine sisters as residuaries with daughters and son's daughters h. l. s. is explained in the notes appended to ill. (r).

Female residuaries.—There are two more points to be noted in connection with female residuaries, which are stated below :

(1) The female residuaries are four in number, of whom two are descendants of the deceased, namely, the daughter and son's daughter h. l. s., and the other two are descendants of the deceased's father, namely, the full sister and consanguine sister. *No other female can inherit as a residuary.*

(2) All the four females inherit as residuaries with corresponding males of *parallel* grade. But none of these except the son's daughter h. l. s. can succeed as a residuary with a male *lower* in degree than herself. Thus the daughter cannot succeed as a residuary with the son's son, nor the sister with the brother's son ; but the son's daughter may inherit as a residuary not only with the son's son but with the son's son's son or other lower son's son, see ill. (m) and the note thereto.

Principles of Succession among sharers and residuaries.—It will have been seen from the Tables of Sharers and Residuaries that certain relations entirely exclude others from inheritance. This proceeds upon certain principles, of which the following two are set out in the Sirajiyyah :

(1) "*Whoever is related to the deceased through any person shall not inherit while that person is living.*"—(Sir. 27.) Thus the father excludes brothers and sisters. And since uterine brothers and sisters are related to the deceased through the mother, it must follow that they should be excluded by the mother. A reference, however, to the Table of Sharers will show that these relations are not excluded by the mother. The reason is that the mother, when she stands alone, is not entitled to the whole inheritance in one and the *same capacity* as the father would be if he stood alone, but partly as a sharer and partly by "Return" (Sir. 27 : Sharifiyyah, 49). Thus if the father be the sole surviving heir, he will succeed to the whole inheritance as a *residuary*. But if the mother be the sole heir, she will take 1/3 as *sharer*, and the remaining 2/3 by *Return* (see s. 53 below). For this reason the mother does not exclude the uterine brother and sister from inheriting with her.

(2) "*The nearer in degree excludes the more remote.*"—(Sir. 27). The exclusion of the true grandfather by the father, of the true grandmother by the mother, of the son's son by the son, etc., rests upon this principle. These cases may also be referred to the first principle set out above.

It will have been seen that the daughter, though she is nearer in degree, does not exclude the brother's son or his son. Thus if the surviving relations be a daughter and a brother's son, the daughter takes 1/2, and the brother's son takes the residue. The reason is that the daughter in this case inherits as a *sharer*, and the brother's son as a *residuary*, and the principle laid down above applies only as between relations *belonging to the same class of heirs*. To this, however, there is an exception in the case of sons and son's sons h. l. s., who, though residuaries, exclude certain sharers from inheritance (see Tab. of Sh., Nos. 8-12). For, if the sons and their male descendants did not exclude those sharers, it might happen in certain cases that no residue would be left for them, while, as will be seen presently, the son, and, in his absence, the son's son h. l. s., are never liable to exclusion, and are always entitled to some share or other. The above principle may, therefore, be read thus : "*Within the limits of each class of heirs* the nearear in degree excludes the more remote."

Again, it will have been seen that the father, though nearer in degree, does not exclude the mother's mother or her mother; nor does the mother exclude the father's father or his father. The reason is that the above principle is to be read with further limitations, which we shall proceed to enumerate. Those limitations are nowhere stated in the Sirajiyyah nor in any other work of authority, but they appear to have been tacitly recognized in the rules governing succession among Sharers and Residuaries.

There are six heirs that are *always* entitled to some participation in the inheritance, and are in no case liable to exclusion, namely, (1) son, (2) daughter, (3) father, (4) mother, (5) husband, and (6) wife (Sir. 27). These are the most favoured heirs, and we shall call them, for brevity's sake, Primary Heirs. Next to these, there are four, namely, (1) son's son h. l. s., (2) son's daughter h. l. s., (3) true grandfather h. h. s. and (4) true grandmother h. h. s. These four are the substitutes of the primary heirs, and each of them is entitled to some portion of the inheritance in the absence of the corresponding primary heir. The substitutes of primary heirs are liable to be excluded by the corresponding primary heirs, and by them alone, but by no others. Thus the son's son h. l. s., is the son's substitute, and he is always entitled to some portion of the inheritance in the absence of the son. The son's daughter h.l.s., is the daughter's substitute, and she is always entitled to some portion of the inheritance in the absence of the *son and daughter*. The true grandfather is always entitled to some share or other in the absence of the father, and he is liable to be excluded by the father or nearer true grandfather, but by no other heir. This explains why the mother does not exclude the father's father or his father. Similarly the true grandmother is always entitled to participate in the inheritance in the absence of the mother, and she is liable to be excluded by the mother or nearer true grandmother, but by no other heir. And this explains why the father does not exclude the mother's mother or her mother. This as well as the preceding case may be explained with reference to the first principle set out in the Sirajiyyah, for the true grandfather h. h. s. is not related to the deceased through the mother, nor is the true grandmother h. h. s. related to the deceased through the father. From this point of view, the second principle is to be read subject to the first, that is, the nearer relation excludes the more remote *provided always the latter is related to the deceased through the former;* but neither of the two principles set out in the Sirajiyyah explains the exclusion of uterine brothers, or of full, consanguine and uterine sisters by the son's child h. l. s., or by the true grandfather h. h. s. (*a*). These apparently are cases of the exclusion of relations nearer in degree by more remote heirs. The explanation is to be sought for in the principle that the substitutes of primary heirs are always entitled to some portion of the inheritance in the absence of the corresponding primary heirs, and this involves as a necessary consequence that relations that are excluded by the primary heirs must be excluded by their substitutes. Hence it is that uterine brothers, and full, consanguine and uterine sisters, who are excluded by the son, daughter and father, are also liable to exclusion by the son's son h. l. s., son's daughter h. l. s., and the true grandfather h. h. s. (*b*). The principles governing succession may therefore be stated thus: Whoever is related to the deceased through any person shall not inherit

(*a*) See Tab. of Sh., Nos. 9-12.

(*b*) It may here be stated that though, according to the opinion of the Abu Hanifa, the true grandfather excludes brothers and sisters whether full or consanguine, he does not exclude them, according to the view of Abu Yusuf and Muhammad, but is put to his election as between certain shares (Sir. 40-42). But the latter view is not generally adopted, and it is unnecessary to set it out here.

while that person is alive. Primary heirs are always entitled to some participation in the inheritance and are not liable to be excluded by any other heirs. The substitutes of the primary heirs are always entitled to some share or other in the inheritance in the absence of corresponding primary heirs, and they are excluded by them alone, but by no other heirs : and, as a necessary consequence, all relations that are excluded by primary heirs are also excluded by substitutes of those heirs. Subject to this the nearer in degree, within the limits of each class of heirs, excludes the more remote.

Of the residue.—The son, being a residuary, is entitled to the *residue* left after satisfying the claims of sharers. At the same time it has been seen above that a son is *always* entitled to some share of the inheritance. To enable the son to participate in the inheritance in all cases, it is necessary that some residue must always be left when the son is one of the surviving heirs, and in fact this is so ; for the shares are so arranged and the rules of succession are so framed that when the son is one of the heirs, some residue invariably remains. And since, in the absence of the son, the son's son h. l. s. is entitled to some participation in the inheritance, it will be found that in all cases where he is one of the surviving heirs some residue is always left, and the same is the case when the father, or, in his absence, the true grandfather h. h. s., is one of the heirs, for the father is always entitled to some portion of the inheritance, and in his absence the true grandfather h. h. s. No case of "Increase" can therefore take place when these residuaries are amongst the surviving heirs.

Return

53. If there is a residue left after satisfying the claims of Sharers, but there is no Residuary, the residue reverts to the Sharers in proportion to their shares. This right of reverter is technically called "Return."

Exception.—Neither the husband nor wife is entitled to the "Return," so long as there is any other Sharer, or any relation belonging to the class of Distant Kindred.

Illustrations.

[(a) A Mahomedan dies leaving a widow as his sole heir. The widow will take 1/4 as sharer, and the remaining 3/4 by "Return": ***Mahomed Arshad*** v. ***Sajida Banoo*** (*c*) ; ***Bafatun*** v. ***Bilaiti Khanum*** (*d*).

(b) ***Husband*** 1/2
Mother ... ... 1/2 (1/3 as sharer and 1/6 by Return)

Note.—The husband is not entitled to the "Return," as there is another sharer, namely, the mother. The surplus 1/6 will therefore go to the mother by Return.

(c) ***Husband*** 1/4
Daughter ... ... 3/4 (1/2 as sharer and 1/4 by Return)

(d) ***Wife*** 1/4
Sister (f. or c.) ... ... 3/4 (1/2 as sharer and 1/4 by Return)

(*c*) (1878) 3 Cal. 702. | (*d*) (1903) 30 Cal. 683.

(e) *Wife* 1/8
Son's daughter ... ... 7/8 (1/2 as sharer and 3/8 by Return)

(f) *Mother* ... ... 1/6 increased to 1/4
Son's daughter ... ... 1/2=3/6 „ 3/4
4/6 1

Note.—In this and in illustrations (g) to (k) it will be observed that neither the husband nor wife is among the surviving heirs. The rule in such a case is to reduce the fractional shares to a common denominator, and to decrease the denominator of those shares so as to make it equal to the sum of the numerators. Thus in the present illustration, the original shares, when reduced to a common denominator, are 1/6 and 3/6. The total of the numerators is 1+3=4, and the ultimate shares will therefore be 1/4 and 3/4 respectively.

(g) *Father's mother* ... ...
Mother's mother ... ... } 1/6 increased to 1/5 (each taking 1/10)
2 *daughters* ... ... 2/3=4/6 „ 4/5
5/6 1

(h) *Mother* ... ... 1/6 increased to 1/5
Daughter ... ... 1/2=3/6 „ 3/5
Son's daughter ... ... 1/6 „ 1/5
5/6 1

(i) *Father's mother* ... ...
Mother's mother ... ... } 1/6 increased to 1/5
Full sister ... ... 1/2=3/6 „ 3/5
C. sister ... ... 1/6 „ 1/5
5/6 1

(j) *Full sister* ... ... 1/2=3/6 increased to 3/5
C. sister ... ... 1/6 „ 1/5
U. sister ... ... 1/6 „ 1/5
5/6 1

(k) *Mother* ... ... 1/6 increased to 1/5
Full sister ... ... 1/2=3/6 „ 3/5
U. brother ... ... 1/6 „ 1/5
5/6 1

(l) *Husband* ... ... 1/4 =4/16
Mother ... ... 1/6 increased to 1/4 of (3/4)=3/16
Daughter ... ... 1/2=3/6 „ 3/4 of (3/4)=9/16
11/12 1

Note.—In this and in ills. (m) to (r), it will be observed that either the husband or wife is one of the surviving heirs. Since neither the husband nor wife is entitled to the Return when there are other sharers, his or her share will remain the

same, and the shares of the other sharers will be increased by reducing them to a common denominator, and then decreasing the denominator of the original fractional shares so as to make it equal to the sum of the numerators, and multiplying the new fractional shares thus obtained by the residue after deducting the husband's or wife's share. Thus in the present illustration the shares of the mother and daughter, when reduced to a common denominator, are 1/6 and 3/6 respectively. The total of the numerators is 1+3=4, and the new fractional shares will thus be 1/4 and 3/4 respectively. The residue after deducting the husband's share is 3/4 and the ultimate shares of the mother and daughter will therefore be 1/4 of 3/4=3/16, and 3/4 of 3/4=9/16, respectively.

(m)	*Wife*	1/8		4/32
	Mother	1/6	increased to 1/4 of (7/8)=	7/32
	Daughter	1/2=3/6	„ 3/4 of (7/8)=	21/32
		19/24		1
(n)	*Wife*	1/8		5/40
	Mother	1/6	increased to 1/5 of (7/8)=	7/40
	2 son's daughters ...	2/3=4/6	„ 4/5 of (7/8)=	28/40
		23/24		1
(o)	*Husband*	1/2		2/4
	U. brother	1/6	increased to 1/2 of (1/2)=	1/4
	U. sister	1/6	„ 1/2 of (1/2)=	1/4
		5/6		1
(p)	*Wife*	1/4		2/8
	U. brother	1/6	increased to 1/2 of (3/4)=	3/8
	U. sister	1/6	„ 1/2 of (3/4)=	3/8
		7/12		1
(q)	*Wife*	1/4		4/16
	Full sister	1/2=3/6	increased to 3/4 of (3/4)=	9/16
	C. sister	1/6	„ 1/4 of (3/4)=	3/16
		11/12		1
(r)	*Wife*	1/4		1/4
	U. brother	1/6	increased to 1/3 of (3/4)=	1/4
	U. sister	1/6	„ 1/3 of (3/4)=	1/4
	Mother	1/6	„ 1/3 of (3/4)=	1/4
		9/12		1
(s)	*Husband*...	1/2		
	Daughter's son	1/2		

Note—The daughter's son belongs to the class of distant kindred. The husband is not therefore entitled to the surplus by Return, and the same will go to the daughter's son as a distant kinswoman.

(t)	*Wife*	1/4
	Brother's daughter	3/4

Note—The brother's daughter belongs to the class of distant kindred. The surplus will therefore go to her, as the wife is not entitled to the Return *(dd)*.]

Sir. 37-40.

Residuaries for special cause.—A residuary for special cause is a person who inherits from a freedman, by reason of the manumission of the latter (*e*). According to Mahomedan law proper, if a manumitted slave dies without leaving any residuary heir by relation, the manumittor is entitled to succeed to the residue, in preference to the right of the sharers to take the residue by Return (Sir. 25-26). But residuaries for special cause have no place in Mahomedan law as administered by the Courts of British India since the abolition of slavery in 1843.

Husband and wife.—The rule of law as stated in the exception as regards the right of the husband and wife to the Return is different from that set out in the Sirajiyyah. According to the latter authority, neither the husband nor wife is entitled to the return *in any case*, not even if there be no other heir, and the surplus goes to the Public Treasury (Sir. 37). "But although that was the original rule, and equitable practice has prevailed in modern times of returning to the husband or to the wife in default of other sharers by blood and distant kindred," and this practice has been adopted by our Courts. See the cases cited in ill. (a), above.

"*Return*" *distinguished from* "*Increase*".—The Return is the converse of Increase. The case of Return takes place when the total of the shares is *less* than unity; the case of Increase, when the total is greater than unity. In the former case the shares undergo a rateable increase; in the latter, a rateable decrease.

Father and true grandfather.—When there is only one sharer, he succeeds to the whole inheritance, to his legal share as sharer, and to the surplus by Return. When the father is the sole surviving heir, he succeeds to the whole inheritance as a *residuary*, for he cannot inherit as a sharer when there is no child or child of a son h.l.s. (see Tab. of Sh., No. 1). The same remarks apply to the case of the true grandfather when he is the sole surviving heir.

239 **54.** On failure of Sharers and Residuaries, the inheritance is divided amongst Distant Kindred. *Distant Kindred*

Sir. 13. It will have been seen from the preceding section that a husband or wife, though a sharer, does not exclude distant kindred from inheritance, when he or she is the sole surviving heir. See ills. (s) and (t), s. 53.

240 **55.** Distant Kindred are divided into four classes, namely, (1) descendants of the deceased other than sharers and residuaries; (2) ascendants of the deceased other than sharers and residuaries; (3) descendants of the deceased's parents other than sharers and residuaries; and (4) descendants of ascendants how high soever. The descendants of the deceased succeed in priority to the ascendants, the *Four classes*

(*dd*) See *Koonari* v. *Dalim* (1882) 11 Cal. 14. | (*e*) Rumsey's Mah Law of Inheritance, 164.

ascendants of the deceased in priority to the descendants of parents, and the descendants of parents in preference to the descendants of ascendants.

The following is a list of Distant Kindred arranged in the order of the classes in which they succeed :

List of Distant Kindred.

I. Descendants :

1. Daughters' children and their descendants.
2. Children of sons' daughters h. l. s., and their descendants.

II. Ascendants :

1. False grandfathers h. h. s.
2. False grandmothers h. h. s.

III. Descendants of parents :

1. Full brothers' daughters and their descendants.
2. Con. brothers' daughters and their descendants.
3. Uterine brothers' children and their descendants.
4. Daughters of full brothers' sons h. l. s., and their descendants.
5. Daughters of con. brothers' sons h. l. s., and their descendants.
6. Sisters' (f., c., or ut.) children and their descendants.

IV. Descendants of immediate grandparents (true or false) :

1. Full pat. uncles' daughters and their descendants.
2. Con. pat. uncles' daughters and their descendants.
3. Uterine pat. uncles and their children and their descendants.
4. Daughters of full pat. uncles' sons h. l. s., and their decendants.
5. Daughters of con. pat. uncles' sons h. l. s., and their descendants.
6. Pat. aunts (f., c., or ut.) and their children and their descendants.
7. Mat. uncles and aunts and their children and their descendants.

and

Descendants of remoter ancestors h. h. s. (true or false).

Sir. 44-46. The Sirajiyyah does not enumerate all relations belonging to the class of distant kindred, but mentions only some of them. Hence it was thought at one time that "distant kindred" were restricted to the specific relations mentioned in the Sirajiyyah. But this view has long since been rejected as erroneous, and it was recently held by the High Court of Calcutta that the son of the grand-daughter of the brother of the grandfather of the deceased, though not specifically mentioned in the Sirajiyyah, belongs to the class of distant kindred (*f*). That this should be so is clear from the definition of distant kindred, who are defined as *all* those relations

(*f*) *Abdul Serang* v. *Putee Bibi* (1902) 29 Cal. 738.

by blood that are neither sharers nor residuaries. The list of distant kindred given above follows from the definition of distant kindred, read in conjunction with a passage from the Sirajiyyah, which, after enumerating certain relations belonging to the class of distant kindred, proceeds to say : "these *and* all who are related to the deceased through them, are among the distant kindred" (p. 46).

241 **56.** The succession of Distant Kindred of the first class is governed by the following rules: *First class of distant kindred*

Rule (1). The nearer in degree excludes the more remote.

Sir. 47. Thus a daughter's son or a daughter's daughter is preferred to a son's daughter's daughter. The daughter's son and the daughter's daughter are the nearest distant kindred.

242 *Rule (2).* Among claimants in the same degree of relationship, the children of sharers and residuaries are preferred to those of distant kindred.

Sir. 47. Thus a son's daughter's son, being a child of a sharer (son's daughter), succeeds in preference to a daughter's daughter's son, who is the child of a distant kinswoman (daughter's daughter).

243 *Rule (3).* Among claimants in the same degree of relationship, the share of the male claimant is double that of the female claimant, provided there is no difference of sex in the intermediate ancestors.

Sir. 47-48. Thus if the claimants be a daughter's son and a daughter's daughter, the former will take 2/3, and the latter 1/3, for the sex of the intermediate ancestors (*i.e.*, daughters) is the same. Similarly, if a person leaves a daughter's son's son and a daughter's son's daughter, the former will take 2/3 and the latter 1/3. And according to Abu Yusuf, the rule is the same, even when the ancestors *differ* in their sexes. Thus if the claimants be a daughter's *daughter's* son and a daughter's *son's* daughter, the sex of the intermediate ancestors is not the same, it being female in one case and male in the other. Even in such a case, according to Abu Yusuf, the daughter's daughter's son, being a male, will take twice as much as the daughter's son's daughter, for, according to this disciple of Abu Hanifa, regard is to be had, in applying the rule of the double share to the male, to the sexes of the *claimants*, and *not* to the sexes of the *intermediate ancestors* through whom they respectively claim. According to Abu Muhummed, however, regard should be had, in applying that rule, to the sexes of the ancestors, and not to the sexes of the claimants (Sir. 48). As the opinion of Abu Muhummed is followed by the Hanafi Sunnis in India in preference to that of Abu Yusuf, it becomes necessary to consider the same.

Imam Muhammed

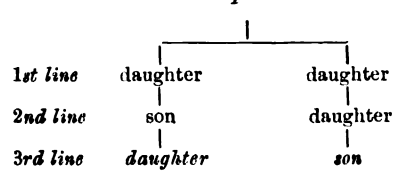
Rule (4). Where the intermediate ancestors differ in their sexes, the inheritance, according to Abu Muhummed,

is to be distributed according to the following rules (*g*) :—

(a) The simplest case is where there are only two claimants, one claiming through one line of ancestors and the other claiming through another line. In such a case, the rule is to stop at the first line of descent in which the sexes of the intermediate ancestors differ, and to assign to the male ancestor a portion double that of the female ancestor. The share of the male ancestor will descend to the claimant who claims through him, and the share of the female ancestor will descend to the claimant who claims through her, irrespective of the sexes of the claimants.

Illustration.

A Mahomedan dies leaving a daughter's son's daughter and a daughter's daughter's son, as shown in the following table :



In this case, the ancestors first differ in their sexes in the second line of descent, and it is at this point that the rule of a double portion to the male is to be applied. This is done by assigning 2/3 to the daughter's son, and 1/3 to the daughter's daughter. The 2/3 of the daughter's son will go to her daughter, and the 1/3 of the daughter's daughter will go to her son. Thus we have

daughter's son's daughter ... 2/3
daughter's daughter's son ... 1/3

According to Abu Yusuf, the shares would be 1/3 and 2/3 respectively.

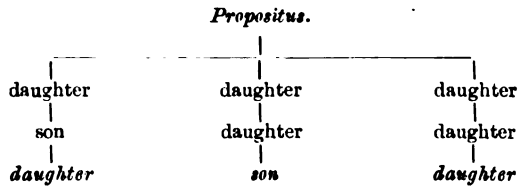
(b) The next case is when there are three or more claimants, each claiming through a different line of ancestors. Here again, the rule is to stop at the first line in which the sexes of the intermediate ancestors differ, and to assign to each male ancestor a portion double that of each female ancestor. But in this case, the individual share of each ancestor does not descend to his or her posterity as in the preceding case, but the collective share of all the male ancestors is to be divided among all the descendants claiming through them, and the collective

(*g*) Sir. 48-50.

share of the female ancestors is to be divided among their descendants, according to the rule, as between claimants in the same group, of a double portion to the male.

Illustrations.

(a) A Mahomedan dies leaving a daughter's son's daughter, a daughter's daughter's son, and a daughter's daughter's daughter, as shown in the following table :



In this case, the ancestors differ in their sexes in the second line of descent. In that line we have one male and two females. The rule of the double share to the male is to be applied, first, in this line of descent, so that we have

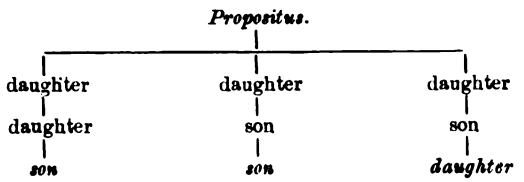
daughter's son 1/2
daughter's daughter ...1/4
daughter's daughter ...1/4 } 1/2 (collective share of female ancestors).

The daughter's son stands alone, and therefore his share descends to his daughter. The two female ancestors, namely, the daughters' daughters, form a group, and their collective share is 1/2, which will be divided between their descendants, that is, the daughter's daughter's son and daughter's daughter's daughter, in the proportion again of two to one, the former taking $2/3 \times 1/2 = 1/3$, and the latter $1/3 \times 1/2 = 1/6$. Thus we have

daughter's son's daughter ...1/2=3/6
daughter's daughter's son ...1/3=2/6
daughter's daughter's daughter.1/6=1/6

According to Abu Yusuf, the shares would be 1/4, 1/2, and 1/4 respectively.

(b) A Mahomedan dies leaving a daughter's daughter's son, a daughter's son's son, and a daughter's son's daughter, as shown in the following table :



In the preceding illustration, we had one male and two females in the first line in which the sexes differed. In the present case, we have one female and two males in that line.

First, ascertain the first line in which the sexes differ. Here again that line is the second line of descent.

Next, consider the relations in that line as so many children of the deceased, and determine their shares upon that footing. The shares therefore will be :

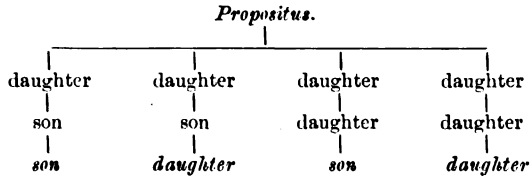
daughter's daughter, 1/5, and each daughter's son, 2/5, the two together taking 4/5. Assign the 1/5 of daughter's daughter to her son.

Lastly, divide the 4/5 of the two male ancestors between their descendants as if they were children of one ancestor, assigning a double portion to the male descendant. Thus the daughters son's son takes 2/3×4/5=8/15, and the daughter's son's daughter 1/3×4/5=4/15. Thus we have

daughter's daughter's son	1/5=3/15
daughter's son's son...	8/15
daughter's son's daughter	4/15

According to Abu Yusuf, the shares would be 2/5, 2/5, and 1/5 respectively.

(c) A Mahomedan dies leaving a daughter's son's son, a daughter's son's daughter, a daughter's daughter's son, and a daughter's daughter's daughter, as shown in the following table :



Here the ancestors first differ in their sexes in the second line, and in that line we have two males and two females. The collective share of the two males is 4/6, and that of the two females is 2/6. The 4/6 of the daughters' sons will be divided between the daughter's son's son and the daughter's son's daughter, the former taking 2/3×4/6=8/18, and the latter 1/3×4/6=4/18. The 2/6 of the daughter's daughter will be divided between the daughter's daughter's son and the daughter's daughter's daughter, so that the former will take 2/3×2/6=4/18, and the latter 1/3×2/6=2/18. Thus we have

daughter's son's son	8/18
daughter's son's daughter	4/18
daughter's daughter's son	4/18
daughter's daughter's daughter	2/18

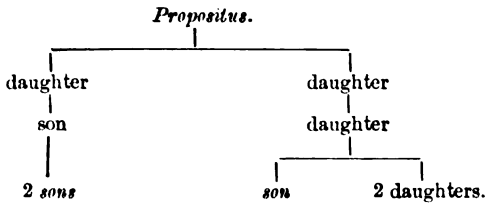
According to Abu Yusuf, the shares would be 2/6, 1/6, 2/6, and 1/6 respectively

[When a person dies leaving descendants in the *fourth* and remoter generations, "the course indicated in the [above rule] as to the first line in which the sexes differ, is to be followed equally in any lower line; but the descendants of any individual or group once separated must be kept separate throughout; in other words, they must not be united in a group with those of any other individual or group" (*h*).]

(c) The last case is when there are two or more claimants claiming through the same intermediate ancestor. In such a case, there is this further rule to be applied, namely, to count for each such ancestor, if male as many males as there are claimants claiming through him, and if female as many females as there are claimants claiming through her irrespective of the sexes of the claimants.

(*h*) Rumsey's Mahomedan Law of Inheritance, pp. 68-69.

Illustrations.



Here the ancestors first differ in their sexes in the second line, and in that line we have one male and one female. The daughter's son will count as two males, by reason of his having two descendants among the claimants, and the daughter's daughter will count as three females by reason of her having three descendants. Thus we have

daughter's son	4/7
daughter's daughter	3/7

The 4/7 of the daughter's son will go to his two sons. The 3/7 of the daughter's daughter will go to her descendants, the son taking 2/4 × 3/7 = 6/28, and each daughter taking 1/4 × 3/7 = 3/28. Thus we have

daughter's son's sons...	4/7 = 16/28 (each 8/28)
daughter's daughter's son	6/28
daughter's daughter's daughters	6/28 (each 3/28)

According to Abu Yusuf, the shares would be as follows :

each daughter's son's son	2/8
daughter's daughter's son...	2/8
each daughter's daughter's daughter	1/8

[When the deceased leaves descendants in the *fourth* and remoter generations, the process indicated in the above rule is to be applied as often as there may be occasion to group the sexes.]

246-248 **57.** In default of Distant Kindred of the first class, the inheritance devolves upon Distant Kindred of the second class in the order enumerated below : *Second class of distant kindred*

1. Mother's father.
2. { Father's mother's father, 2/3.
   { Mother's mother's father, 1/3.
3. { Mother's father's father, 2/3.
   { Mother's father's mother, 1/3.
4. Other false ancestors in the fourth and remoter degree.

The order enumerated above follows from the rules for the succession of distant kindred of the second class, which are nearly the same as those set forth in the preceding section in respect to the first class (Sir. 51-52). There is no difference in respect of this class of distant kindred between the system of Abu Muhummed and that of Abu Yusuf.

The mother's father is the only false ancestor in the second degree, and, being the nearest, excludes all other false ancestors. See s. 56, rule (1).

In the third degree, there are four false ancestors, namely, (1) father's mother's father, (2) mother's mother's father, (3) mother's father's father, and (4) mother's father's mother. Of these, the first two, being related to the deceased through sharers,—the father's mother and mother's mother are sharers,—exclude the other two who are related through the mother's father, a distant kinsman. See s. 56, rule (2). The father's mother's father, being related to the deceased through a male (*i.e.*, father), takes double the portion of the mother's mother's father, who is related through a female (*i.e.*, mother), though both these ancestors are of the same sex; the rule being that when the sexes of the ancestors differ, 2/3 go to the father's side, and 1/3 to the mother's side. Either of these ancestors, standing alone, succeeds to the whole inheritance.

In default of mother's father, father's mother's father, and mother's mother's father, the mother's father's father and the mother's father's mother will succeed to the inheritance, the former taking 2/3, and the latter 1/3, according to the third rule set forth in the preceding section. Either of them, standing alone, succeeds to the whole inheritance.

It is not necessary to pursue the subject of the succession of false ancestors any further, as it can rarely happen that a person should die leaving ancestors in the fourth or higher degree.

Third class of distant kindred

58. The succession of Distant Kindred of the third class is governed, according to Abu Muhummed, by the following rules :—

(1) Among claimants in the same degree of relationship, the descendants of full brothers are preferred to those of consanguine brothers or sisters.

The descendants of uterine brothers and sisters are not liable to be excluded from inheritance by descendants either of full or consanguine brothers or sisters.

Sir. 54. Since a *full brother* excludes consanguine brothers and sisters, his descendants likewise exclude descendants of consanguine brothers and sisters.

But neither a consanguine brother nor a consanguine sister is excluded by a *full sister*; therefore, the descendants of consanguine brothers and sisters are not excluded by descendants of full sisters. Thus if there be a full sister's daughter's daughter and a consanguine brother's daughter's son, the former does not exclude the latter; and the full sister's 1/2 as sharer will go to her descendants, and the consanguine brother's 1/2 as residuary will go to his descendants (*i*).

And since neither brothers nor sisters, full or consanguine, exclude uterine brothers or sisters, the descendants of the former do not exclude those of the latter.

(2) The descendants of maternal relations divide equally among them the primary share of these relations, without any regard to difference of sex.

(*i*) See Rumsey's Mahomedan Law of Inheritance, p. 67.

Illustrations.

(a) A Mahomedan dies leaving 2 sons and 3 daughters of a uterine brother, and 3 sons and 4 daughters of a uterine sister. Here the total number of claimants being 12, each claimant will take 1/12.

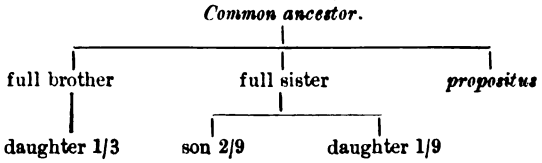
(b) A Mahomedan dies leaving relations enumerated in the above illustration, and also a daughter of a full brother. Here the primary share of the uterine brother and sister both together is 1/3 (see Tab. of Sh., No. 9), and this will be divided equally among their descendants, each taking 1/12 of 1/3=1/36. The primary share of the full brother as a residuary is 2/3, and this will go to his daughter.

(c) A Mahomedan dies leaving 2 sons and 3 daughters of a uterine brother, and a daughter of a full brother. Here the primary share of the uterine brother is 1/6 (see Tab. of Sh., No. 9), and this will be divided among his five descendants in equal shares, each taking 1/5 of 1/6=1/30. The primary share of the full brother as a residuary is 5/6, and this will go to his daughter.

(3) In other respects, the rules regulating succession of distant kindred of this class are similar to those for the succession of the first class.

Illustrations.

(a) A Mahomedan dies leaving a daughter of a full brother, a son and a daughter of a full sister, a daughter of a consanguine brother, a son and a daughter of a consanguine sister, a daughter of a uterine brother, and a son and a daughter of a uterine sister (see Sir. 54). In this case, the children of the consanguine brother and sister will be excluded from inheritance by the daughter of the full brother [see rule (1) above]. The property will therefore be divided among the children of the full and uterine brothers and sisters. The primary share of the uterine brother and sister as sharers is 1/3, and this will be divided equally among their three descendants, each taking 1/3. The primary share of the full brother and sister as residuaries is 2/3, and this will be divided among their descendants according to s. 56, rule (4), as shown in the following table:



Here the first line in which the sexes of the ancestors differ is the first line of descent. The full sister, having two descendants, will count as two females. Therefore the full brother's share is 1/2 of 2/3=1/3, and this will descend to his daughter. The full sister's share is 1/2 of 2/3=1/3, and this will be divided between her son and daughter so that the son will take 2/3 of 1/3=2/9, and the daughter will take 1/3 of 1/3=1/9.

(b) A Mahomedan dies leaving a full brother's son's daughter and a sister's daughter's son. The former will succeed, being the child of a residuary (brother's son), in preference to the latter who is a child of a distant kinswoman (sister's daughter). See s. 56, rule (2).

Fourth class of distant kindred

59. For the purposes of succession, the Distant Kindred of the fourth class may be divided into the two following groups:

I. Children of immediate grandparents, true or false, namely,

(a) full, consanguine and uterine sisters of the father ;

(b) full, consanguine and uterine sisters of the mother ;

(c) uterine brothers of the father ; and

(d) full, consanguine and uterine brothers of the mother.

This group comprises all paternal and maternal uncles and aunts, excepting full and consanguine paternal uncles who belong to the class of residuaries (see Tab. of Res., Nos. 11-12). Note that all the distant kindred in this group are equal in degree.

II. Remoter descendants of grandparents, and descendants of remoter ancestors, true or false.

Group I (uncles and aunts)

60. The succession of relations comprised in group I is governed by the following rules :

(1) Among claimants on the same side, those of the whole blood are preferred to those of the half blood, and consanguine relations are preferred to uterine relations, without distinction of sex.

The "same side" means either the father's side or the mother's side. Thus in the case of claimants on the *father's* side, the father's full sister is preferred to the father's consanguine or uterine sister, and the father's consanguine sister is preferred to the father's uterine sister. The order of priority is the same in the case of claimants on the *mother's* side.

It is important to note that the above rule applies to the case only of claimants related to the deceased on the *same* side. Hence the father's full sister, though of the whole blood, does not exclude the mother's consanguine sister, the former being related through the *father*, and the latter through the *mother*. See ill. (a) to the next rule.

It is also important to note that the above rule applies *irrespective of the sexes of the claimants ;* hence the father's *full* or *consanguine* sister is preferred to the father's *uterine* brother, though the latter is a male. Similarly the mother's *full* or *consanguine* sister is preferred to the mother's *uterine* brother.

According to the rule now under consideration, the mother's *consanguine* sister is preferred to the mother's *uterine* sister, though the former is the child of a distant

kinsman (mother's father), and the latter the child of a sharer (mother's mother). The reason is that the rule that the children of sharers or residuaries are preferred to the children of distant kindred does not apply to this group.

(2) If there are claimants on the paternal side, together with claimants on the maternal side, the former will take collectively 2/3, and the latter 1/3, and each side will then divide its own collective share, subject to the above rule, each male taking a double share.

Illustrations.

(a)	*Father's f. sister*			2/3
	Mother's c. sister			1/3
(b)	*Father's u. sister*			2/3
	Mother's f. brother			1/3
(c)	*Father's u. brother*	2/3		2/3×2/3=4/9
	Father's u. sister			1/3×2/3=2/9
	Mother's f. brother	1/3		2/3×1/3=2/9
	Mother's f. sister			1/3×1/3=1/9

Sir. 55-56.

Group II

61. The succession of relations comprised in group II is to be determined by applying the followiug rules in order :—

(1) The nearer in degree excludes the more remote.

(2) Among claimants on the same side, those of the whole blood are preferred to those of the half blood, and consanguine relations are preferred to uterine relations, without distinction of sex.

See s. 60, rule (1).

(3) Among claimants on the same side, the children of residuaries are preferred to the children of distant kindred.

The distant kindred comprised in group II are either children of residuaries or of distant kindred.

(4) If there are claimants on the paternal side together with claimants on the maternal side, the former will take collectively 2/3, and the latter 1/3, and each side will then divide its own collective share according to the rule of the double share to the male.

See s. 60, rule (2).

(5) Where the sexes of the intermediate ancestors differ, the principle of sex-grouping is to be applied, accord-

ing to the system of Muhummad, in the same manner as in the case of distant kindred of the first class.

See s. 56, rule (4). Sir. 56-58.

Successor by contract

62. In default of Sharers, Residuaries and Distant Kindred, the inheritance devolves upon the "Successor by Contract," that is, a person who derives his right of succession under a contract with the deceased, in consideration of an undertaking given by him to pay any fine or ransom to which the deceased may become liable.

Sir. 13; Hedaya, p. 517; Tagore Law Lectures, 1873, p. 92. It would seem, according to the Sirajiyyah, that the deceased must be a person of unknown descent.

Acknowledged kinsman

63. Next in succession is the "Acknowledged Kinsman," that is, a person of unknown descent in whose favour the deceased has made an acknowledgment of kinship, not through himself, but through another.

Such an acknowledgment confers upon the "Acknowledged Kinsman" the right of succession to the property of the deceased, subject to bequests to the extent of the bequeathable third, but it does not invest the acknowledgee with all the rights of an actual kinsman.

Sir. 13. The kinship acknowledged must be kinship *through another*, that is, through the deceased's father or his grandfather. Thus a person may acknowledge another to be his brother, for that is kinship through the *father* (*j*). But he may not acknowledge another to be his son, for that is kinship through *himself*. The acknowledgment by the deceased of a person as his son or daughter stands upon a different footing altogether, and it is dealt with in the chapter on "Parentage."

Universal legatee

64. The next successor is the "Universal Legatee," that is, a person to whom the deceased has left the whole of his property by will.

Sir. 13. It is to be noted that the prohibition against bequeathing more than a third exists only for the benefit of the heirs. Hence a bequest of the whole will take effect if the deceased has left no known heir (*k*).

Escheat

65. On failure of all the heirs and successors above enumerated, the property of a deceased Mahomedan escheats to the Crown.

(*j*) Tagore Law Lectures, 1873, pp. 92-93.

(*k*) Baillie's Mahomedan Law of Inheritance, p. 19.

Sir. 13. The rule of pure Mahomedan law in this respect is different, for, according to that rule, the property does not devolve upon the Government by way of inheritance as *ultimus hæres*, but falls to the *bait-ul-mal* (public treasury) *for the benefit of Musalmans.*

Miscellaneous.

Step-children

66. Step-children do not inherit from step-parents, nor do step-parents inherit from step-children.

See Macnaghten, Precedents of Inheritance, no. xxi.

Bastard

67. An illegitimate child is considered to be the child of its mother only, and as such it inherits from its mother and her relations, and they inherit from such child (*l*).

Illustration.

[A Mahomedan female of the Sunni sect dies leaving a husband and an illegitimate son of her sister. The husband will take 1/2, and the sister's son, though illegitimate, will take the other 1/2 as a distant kinsman, being related to the deceased through his *mother*: *Bafatun* v. *Bilaiti Khanum* (1903) 30 Cal. 683.]

An illegitimate child does not inherit from its putative father or his relations, nor do they inherit from such child.

Missing persons

68. When the question is whether a Mahomedan 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 on the person who affirms it.

Under the Hanafi law, a missing person is to be regarded as alive till the lapse of ninety years from the date of his birth. But it has been held by a Full Bench of the Allahabad High Court, that this rule is only a rule of *evidence*, and not one of *succession*, and it must therefore be taken as superseded by the provisions of the Indian Evidence Act (*m*). The present section reproduces, with some verbal alterations, the provisions of s. 108 of the Evidence Act.

C.—Shiah Law of Inheritance.

[The following twenty sections contain the principal points of distinction between the Shiah and the Sunni Law of Inheritance. The most authoritative text-book of the Shiah law is Sharaya-ul-Islam (*n*), the whole of which has been translated into French by M. Querry under the title *Droit Musalman*. The Second Part of Baillie's Digest of Mahomedan Law, with the exception of the last Book, is composed, as the author tells us in the Introduction (p. xxvi), of translations from Sharaya-ul-Islam.]

(*l*) Tagore Law Lectures, 1873, p. 123.
(*m*) *Mazhar Ali* v. *Budh Singh* (1884) 7 All. 297; see also *Moolla Casim* v. *Moolla Abdul*, (1905) 33 Cal. 176, 32 I. A. 177.
(*n*) *Aga Ali Khan* v. *Altaf Hasan Khan* (1892) 14 All. 429, 450.

Division of heirs

69. The Shiahs divide heirs into two groups, namely, (1) heirs by marriage, and (2) heirs by consanguinity.

Heirs by marriage

70. The heirs by marriage are the husband and wife, and their shares are a fourth for the husband and an eighth for the wife, if there is a child or "child of a *child* how low soever" (not merely "child of a *son* how low so ever" as in Hanafi law), and half for the husband and a fourth for the wife, if there is no child or child of a child how low soever.

Baillie, Part II., 273. According to the above rule, the existence of a *daughter's* son or a *daughter's* daughter will have the effect of reducing the share of the husband or wife, though not according to Hanafi law.

Heirs by consanguinity

71. Heirs by consanguinity are divided, according to the order of their succession, into the following three classes, namely :—

I. (*i*) Parents :

(*ii*) Children and other lineal descendants h. l. s.

II. (*i*) Grandparents h. h. s. (true as well as false) ;

(*ii*) Brothers and sisters and their descendants h. l. s.

III. Paternal and maternal uncles and aunts of the deceased, and of his parents and grandparents h. h. s., and their descendants h. l. s.

Baillie, Part II., 276, 280, 285.

Order of succession

72. Of these three classes, each excludes the next lower, but one division of a class does not exclude the other.

Illustrations.

[(a) A Shiah Mahomedan dies leaving a daughter's son, a father's mother, and a full brother.

By Hanafi law the father's mother as a sharer will take 1/6, and the full brother as a residuary will take 5/6 ; the daughter's son, being a distant kinsman, will be entirely excluded from inheritance.

By Shiah law the daughter's son, being an heir of the first class, will succeed to the whole inheritance in preference to the father's mother and the full brother, both of whom belong to the second class of heirs.

(b) A Shiah Mahomedan dies leaving a brother's daughter and a full paternal uncle.

By Hanafi law the full paternal uncle, being a residuary, will take the whole property to the exclusion of the brother's daughter who is a distant kinswoman.

By Shiah law the brother's daughter, being an heir of the second class, will succeed in preference to the full paternal uncle who belongs to the third class of heirs.

(c) A Shiah Mahomedan dies leaving a brother and a grandfather. Neither of these relations excludes the other, for they both belong to the same class of heirs, that is, the second class.]

Illustrations (a) and (b) exemplify the fundamental distinction between the Shiah and the Sunni Law of Inheritance. Under the Sunni law, the relations known as "distant kindred" are postponed to sharers and residuaries. "Distant kindred," it will be remembered, are all cognates, for they are connected with the deceased through females. On the other hand, "residuaries" are all agnates, for they are connected with the deceased through males. The Sunnis prefer the agnates to cognates, but the Shiahs prefer the nearest kinsmen without reference to the sex through which they are connected with the deceased. In other words, the distinction between agnates and cognates which obtains in Sunni law, has no place in Shiah law. All heirs by consanguinity, under the Shiah law, are either sharers or residuaries. But the "residuaries" of Shiah law comprise also some of the relations known as "distant kindred" in the Sunni law.

In working out examples, the first step is to assign to the husband or wife (if any) his or her share according to the rule set forth in s. 70. The next step is to ascertain the class to which the surviving relations belong, and if there be any sharers among them, to assign their respective shares to them. If there is a residue after the claims of the sharers are satisfied, and there are residuaries (note the special meaning of this term), the residue is to be divided among them according to the rules set forth below.

General Rule

73. In each division of the first and the second class, and in the third class where there are no divisions, the nearer excludes the more remote.

Illustration.

A Shiah Mahomedan dies leaving a grandfather, a great grandfather, a brother, and a brother's son. The grandfather will exclude the great grandfather, and the brother will exclude the brother's son; but the brother does not exclude the grandfather, because they belong to the same class, *viz.*, class II, though to *different divisions* of that class.

Parents

74. (1) The father succeeds, as a sharer, if the deceased has left any lineal descendant: as a residuary, if there be no such descendant.

(2) The mother takes one-sixth, if there be a lineal descendant, or, if there are two or more brothers, or one brother and two or more sisters, or four or more sisters, either full or consanguine; otherwise, she takes one-third.

Baillie, Part II., 271-273. As to the father's rights under the Hanafi law, see notes on ill (p), p. 32 *ante*. As to the mother's rights under the Hanafi law, see Tab. of Sh., No. 5.

Children

75. When there are children of both sexes, the portion of each male is double that of a female.

Baillie, Part II., 276.

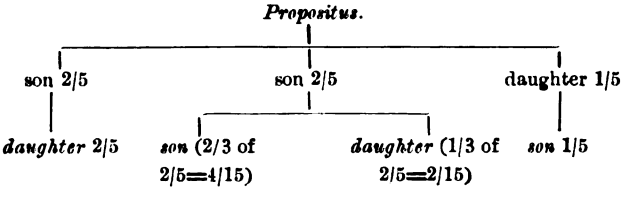
Grand-children

76. The children of each son take among them the share which their father would have taken, and the children of each daughter take among them the share which their mother would have taken, according to the rule, in each branch of descendants, of a double portion to the male.

The same rule applies to great grandchildren, and remoter lineal descendants.

Illustration.

A Shiah Mahomedan dies leaving relations indicated in italics in the lowest line of the following table :—



Here each son, had he survived the *propositus*, would have taken 2/5. The daughter, had she survived the *propositus*, would have taken 1/5. The shares of the grandchildren will be as shown in the table. As to the children of the second son, it will be observed that the son takes a portion double that of the daughter.

Baillie, Part II., 278-279.

Brothers and sisters

77. Full brothers or sisters exclude consanguine brothers or sisters, but neither brothers nor sisters, full or consanguine, exclude uterine brothers or sisters.

The share of a full brother is double that of a full sister, and the share of a consanguine brother is double that of a consanguine sister.

The share of one uterine brother or sister is one-sixth: the collective share of two or more uterine brothers is one-third, to be divided equally among them.

Baillie, Part II., 280-281. The rules in the second and third clauses are the same as in Hanafi law.

Nephews and nieces

78. The children of each brother, full or consanguine, divide among them the share which their father would have taken according to the rule of the double share to the male,

and the children of each sister divide among them the share which their mother would have taken, according to the same rule; but the children of uterine brothers and sisters divide equally among them, without distinction of sex, the one-third or the one-sixth, as the case may be.

Baillie, Part II., 284.

Grandparents

79. (1) If there are no brothers or sisters, or descendants of brothers or sisters, the maternal grandparents take one-third in equal portions, and the paternal grandparents take two-thirds according to the rule of the double share to the male.

(2) If there is a maternal grandfather or maternal grandmother, together with uterine brothers or sisters, the grandfather counts as a brother and the grandmother as a sister, and the mother's third is divided among them all equally.

If there is a paternal grandfather or paternal grandmother, together with full or consanguine brothers or sisters, the grandfather counts as a full or consanguine brother, and the grandmother as a full or consanguine sister, and the father's two-thirds will be divided among them according to the rule of the double portion to the male.

The same principle applies when grandparents are combined with descendants of brothers or sisters.

Illustration.

Father's father	2/3	... ...	2/3 of 2/3=4/9
Father's mother		... ...	1/3 of 2/3=2/9
Mother's father	1/3	... ...	1/2 of 1/3=1/6
Mother's mother		... ...	1/2 of 1/3=1/6

Baillie, Part II., 281.

Uncles and aunts

80. The following rules govern the succession of uncles and aunts:

(1) Among claimants on the same side, and in the same degree of relationship, those of the whole blood are preferred to those of the half blood.

Exception.—The son of a full paternal uncle is preferred to a consanguine paternal uncle, though the latter is nearer in degree.

As to the meaning of the expression "same side," see notes on s. 60, rule (1).

(2) If there are claimants on the paternal side, together with claimants on the maternal side, the former will take collectively two-thirds, and the latter one-third.

Illustration.

A Mahomedan dies leaving a consanguine paternal uncle and a full maternal aunt. The former, in virtue of his claiming through the father, will take two-thirds; the latter, in virtue of her claiming through the mother, will take one-third.

(3) Maternal aunts share equally with maternal uncles of the same kind, and uterine paternal aunts share equally with uterine paternal uncles. But full and consanguine uncles and aunts share according to the rule of the double portion to the male.

(4) Among uncles and aunts on the same side, the distribution is governed by the same principle as among brothers and sisters of the deceased.

Baillie, Part II., 285, 286.

Children of uncles and aunts

81. The children of uncles and aunts take the share of their respective parents in like manner as children of brothers and sisters.

Baillie, Part II., 287. *Aga Sherali* v. *Bai Kulsam* (1904) 6 Bom. L. R. 846.

Doctrine of "Return"

82. If there is a residue left after satisfying the claims of Sharers, but there is no Residuary *in the class to which the Sharers belong*, the residue reverts to the Sharers in the proportion of their respective shares.

Illustration.

Mother	...	1/6 increased to	1/4
Daughter	1/2=3/6	,,	3/4
Brother	0		

Note that by Hanafi law, the brother would have taken the residue 1/3. But by Shiah law he takes nothing, for he belongs to the second class of heirs, and no member of the second class can inherit so long as there is any member of the first class. In fact, the rule set forth in the present section follows as a necessary consequence from the order of succession in which heirs by consanguinity inherit.

No return to a wife

83. A wife is not in any case entitled to the "Return," but the surplus will escheat to the Crown.

Baillie, Part II., 262.

Mother when not entitled to "Return"

84. When the deceased has left a mother, a father, and one daughter, and also two or more brothers, or one brother and two or more sisters, or four or more

sisters, either full or consanguine, the surplus will "return" to the father and the daughter, but not to the mother.

Illustration.

Father	1/6 increased to	1/4 × (5/6) = 5/24
Daughter ...	1/2 = 3/6 „	3/4 × (5/6) = 15/24
Mother	1/6 „	= 4/24
2 *full brothers*... ...	(excluded, being heirs of the second class.)	

The rule set forth in the present section follows from the statement of law in Baillie, Part II., p. 272. This is the only case in which the mother is excluded from the "return."

Doctrine of "Increase"

85. The doctrine of "Increase" has no place in Shiah law; for the only case in which under that law the sum total of the sharers could exceed unity is where a daughter or daughters are among the surviving relations, and the rule in that case is to deduct from the share of the daughter or daughters the fraction in excess of unity.

Illustration.

Husband	1/4 = 3/12		= 3/12
Daughter	1/2 = 6/12	reduced to	6/12 − 1/12 = 5/12
Father	1/6 = 2/12		= 2/12
Mother	1/6 = 2/12		= 2/12
	13/12		1

Note.—Here the excess over unity is 1/12, and this will be deducted from the daughter's original share, so that her ultimate share will be 5/12. This will restore the total of the shares to unity.

Baillie, Part II., 263. Having regard to the rules of succession among Shiahs, no case of "Increase" is possible amongst heirs of the second or the third class.

Miscellaneous.

Eldest son

86. The eldest son, if of sound mind, is exclusively entitled to the wearing apparel of the father, and to his Koran, sword and ring, provided the deceased has left other property besides the said articles.

Baillie, Part II., 279.

Childless widow

87. A childless widow is not entitled to a share in her husband's lands, but only to a share in his moveable property and in the value of buildings or other structures forming part of his estate.

Baillie, Part II., 295. *Mir Ali* v. *Sajuda Begum* (*o*); *Umardaraz Ali Khan* v. *Wilayat Ali Khan* (*p*).

The expression "lands" in this section does not refer to *agricultural* land only, but also to land forming the site of buildings: *Aga Mahomed Jaffer* v. *Koolsom Beebee* (*q*).

Illegitimate child

88. An illegitimate child does not inherit at all, not even from his mother or her relations, nor do they inherit from him.

Baillie, Part II., 305; *Sahebzadee Begum* v. *Himmut Bahadoor* (*r*).

(*o*) (1897) 21 Mad. 27.
(*p*) (1896) 19 All. 169.
(*q*) (1897) 25 Cal. 9.
(*r*) (1869) 12 W. R. 512, s. c. on review (1870) 14 W. R. 125.

There was no mention of Inheritance: Hedaya. This was separately treated in the Sirajiyah (date uncertain), a commentary thereon called the Sharifiyah d 1400 A.D. a translation of the former with an abstract of latter was done by Sir W. Jones at instance of Lord Cornwallis. His translation of Sirajiyah was twice reprinted by the late Admiral Ramsay. 1869 & 1890 Wilson P. 60

In 1825 Sir Wm Macnaughten published "Principles & Precedents of M. L." a collection of responsa from M. L. Officers, preceded by a general statement of the principles of each Branch of the law as understood by M.

In 1850 Baillie produced a restatement of this
in his M. Law of Sale.
1853 he produced the portion relating to the land law
of India 1865 His digest of M.L. Authority Vol I. is chiefly
extracts from F. a. CHAPTER VII.
1874 he produced Vol II. chiefly a translation of Sharya-ul-Islam

WILLS.

[The leading authority on the subject of Wills is the *Hedaya* (Guide), which was translated from the original Arabic into Persian by four moolvees or Mahomedan lawyers, and from Persian into English by Charles Hamilton, by order of Warren Hastings, when Governor-General of India. The *Hedaya* was composed by Sheikh Burhan-ud-Deen Ali, who flourished in the twelfth century. The author of the *Hedaya* belonged to the Hanafi School, and it is the doctrines of that school that he has principally recorded in that work. *The Fatawa Alamgiri*, a work of minor authority, was compiled in the seventeenth century by command of the Emperor Aurungzebe Alumgeer. It is "a collection of the most authoritative *futwas* or expositions of law, on all points that had been decided up to the time of its preparation." The law there expounded is again the law of the Hanafi sect, as the Mahomedan sovereigns of India all belonged to that sect. The First Part of Baillie's Digest of Mahomedan Law is founded chiefly on that work. Both the *Hedaya* and *Fatawa Alamgiri* deal with almost all topics of Mahomedan law, except that the Law of Inheritance is not dealt with in the *Hedaya*. The *Hedaya* is referred to in this and subsequent chapters by the abbreviation *Hed.*, and the references are given to the pages of Mr. Grady's Edition of "Hamilton's Hedaya." The leading work on Shiah law is *Sharaya-ul-Islam*, for which see the preliminary note on p. 59 *ante*.] 1791

89. Subject to the limitations hereinafter set forth, every Mahomedan of sound mind and not a minor may dispose of his property by will. *Persons capable of making wills*

Hed. 673; Baillie, 617. The age of majority as regards matters other than marriage, dower, divorce and adoption, is now regulated by the Indian Majority Act IX of 1875. Sec. 3 of the Act declares that a person shall be deemed to have attained majority when he shall have completed the age of eighteen years. In the case, however, of a minor of whose person or property a guardian has been appointed, or of whose property the superintendence has been assumed by a Court of Wards, the Act provides that the age of majority shall be deemed to have been attained on the minor completing the age of twenty-one years.

Minority under the Mahomedan law terminates on completion of the fifteenth year, and therefore, before the passing of Act IX of 1875, a Mahomedan, who had attained the age of fifteen years, was qualified to make a valid disposition of his property (Ameer Ali, Vol. I., 10). But this rule of Mahomedan law, so far as regards matters other than marriage, dower and divorce (adoption not being recognized by that law), must be taken to be superseded by the provisions of the Majority Act, for the Act extends to the whole of British India (s. 1), and applies to every person domiciled in British India (s. 3). Hence minority in the case of Mahomedans, for purposes of wills, gifts, wakfs, etc., terminates not on the completion of the fifteenth year, but on completion of the eighteenth year *(s)*.

(s) Compare *Madhub Chunder* v. *Rajcoomar Doss* (1874) 14 B. L. R. 76.

Shiah law: suicide.—A will made by a person after he has taken poison, or done any other act towards the commission of suicide, is not valid under the Shiah law: Baillie, Part II., 232. In *Mazhar Husen* v. *Bodha Bibi (t)*, the deceased first made his will, and *then* took poison, and it was held that the will was valid, though he had contemplated suicide at the time of making the will.

Form of will immaterial

90. A will may be made either verbally or in writing.

"By the Mahomedan law no writing is required to make a will valid, and no particular form, even of verbal declaration, is necessary as long as the intention of the testator is sufficiently ascertained" *(u)*. In a recent case before the Privy Council, a letter written by a testator shortly before his death, and containing directions as to the disposition of his property, was held to constitute a valid will *(v)*. The mere fact that a document is called *tamlik-nama* (assignment), will not prevent it from operating as a will, if it contains dispositions which are to take effect *after* the executant's death. Thus where a *tamlik-nama* purported to give *S*, in consideration of her devotion and affection to the executant, the executant's property, and provided that the executant should during her life enjoy the income of the property, and that at her death *S* and her heirs should become the owners of the property, it was held that the document operated as a will (*w*).

But where a Mahomedan executed a document which stated *inter alia* "I have no son, and I have adopted my nephew to succeed to my property and title," it was held by the Privy Council that the document did not operate as a will, as there was a complete absence of intention *to give*, in words. Their Lordships said: "He says he has no son, and he adopts somebody who may succeed. His son may succeed—*any other person* may succeed—if it is in the nature of a *testamentary* gift." The document, it was held, was not in the nature of a *testamentary* gift; nor did it operate as a gift *inter vivos*, for there was no delivery of possession to the nephew during the lifetime of the deceased. The effect of the document was merely to declare the nephew in *general* terms to have the right to the entire property belonging to the deceased after his death, and such a declaration has no effect in Mahomedan law (*x*).

A Mahomedan will, though in writing, does not require to be signed (*y*); nor, though it is signed, does it require attestation (*z*). The reason is that a Mahomedan will does not require to be in writing at all.

Bequests to heirs

91. A bequest to an heir is not valid, unless the other heirs consent to the bequest after the death of the testator (*a*).

Explanation.—In determining whether a person is an heir or not, regard is to be had not to the time of the execution of the will, but to the time of the testator's death.

(*t*) (1898) 21 All. 91.
(*u*) *Mahomed Altaf* v. *Ahmed Buksh* (1878) 25 W. R. 121.
(*v*) *Mazhar Husen* v. *Bodha Bibi* (1898) 21 All. 91.
(*w*) *Saiad Kasum* v. *Shaista Bibi* (1875) 7 N. W. P. 313.
(*x*) *Jeewunt Singjee* v. *Jet Singjee* (1844) 3 M. I. A. 245, 258.
(*y*) *Amtu Bibi* v. *Alauddin* (1906) 28 All. 715.
(*z*) *In re Abu Sattar* (1905) 7 Bom. L. R. 558.
(*a*) *Shek Muhammad* v. *Shek Imamuddin* (1865) 2 B. H. C. 50.

Illustrations.

[(a) A Mahomedan dies leaving him surviving a son, a father, and a paternal grandfather. Here the grandfather is not an "heir," and a bequest to him would be valid without the assent of the son and the father.

(b) *A*, by his will, bequeaths certain property to his father's father. Besides the grandfather, the testator had a son and a father living at the time of the will. The father dies in the lifetime of *A*. The bequest to the grandfather cannot take effect, unless the son assents to it, for the father being dead, the grandfather is an "heir" at the time of *A's* death.

(c) *A*, by his will, bequeaths certain property to his brother. The only relatives of the testator living at the time of the will are a daughter and the brother. After the date of the will, a son is born to *A*. The son, the daughter, and the brother all survive the testator. The bequest to the brother is valid, for though the brother was an expectant "heir" *at the date of the will*, he could not succeed as an "heir" *at the death of the testator*, for he would be excluded from inheritance by the son. [If the daughter and the brother had been the sole surviving relatives, the brother would have been entitled to succeed as a "residuary" and the bequest to him could not then have taken effect, unless the daughter assented to it]; *Baillie*, 615; *Hed.* 672.

(d) *A* bequeaths certain property to one of his sons as his executor upon trust to expend such portion thereof as he may think proper "for the testator's welfare hereafter, by charity and pilgrimage," and to retain the surplus for his sole and absolute use. The other sons do not consent to the legacy. The bequest is void, for it is "in reality an attempt to give, under color of a religious bequest," a legacy to one of the heirs. *Khajooroonissa* v. *Rowshan Jehan* (1876) 2 Cal. 184, 3 I. A. 291. [If the bequest had been exclusively for religious purposes, and if those purposes had been sufficiently defined, it would have been valid to the extent of the bequeathable third.]

(e) A Mahomedan leaves him surviving a son and a daughter. To the son he bequeaths three-fourths of his property, and to the daughter one-fourth. The daughter may not consent to the disposition, and she is entitled to claim a third of the property as her share of the inheritance: see *Fatima Bibee* v. *Ariff Ismailjee* (1881) 9 C.L.R. 66.]

Hed. 621; Baillie, 615, as to Explanation. Under the Mahomedan law a bequest to an heir is not valid without the consent of the other heirs (*b*). The policy of that law is to prevent a testator from interfering by will with the course of devolution of property according to law among his heirs, although he may give a specified portion, as much as a third, to a stranger (*c*). The reason is that a bequest in favor of an heir would be an injury to other heirs, inasmuch as it would reduce their legitimate share, and "would consequently induce a breach of the ties of kindred" (Hed. 671). But this cannot happen if the other heirs, "having arrived at the age of majority," consent to the bequest. The consent necessary to give effect to the bequest must be given *after* the death of the testator, for no heir is entitled to any interest in the property of the deceased *in his lifetime*. It is to be noted, however, that the consent of the heirs to a testamentary disposition exceeding the bequeathable third makes that disposition valid

(*b*) *Bafatun* v. *Bilatti Khanum* (1903) 30 Cal. 683.

(*c*) *Khajooroonissa* v. *Rowshan Jehan* (1876) 2 Cal. 184, 196, 3 I. A. 291, 307.

merely as a will, but it does not validate every term contained in the will, if any of the terms is repugnant to Mahomedan law. Thus a bequest of a life-interest is repugnant to Mahomedan law, and it will not be validated by the consent of the heirs to the will. Such a bequest will operate as an absolute gift of the property to the legatee: see s. 126 below (*d*). See s. 126, ill (a).

Ill. (e) presents the case of a bequest of the whole of the testator's property to *all* the surviving heirs. The shares according to law would be 2/3 for the son, and 1/3 for the daughter. The daughter may object to the bequests, and claim her share, for the bequest to her is only of a fourth.

A bequeaths the rents of a house to one of his sons for life, and, after his death, to a charitable society for the benefit of the poor. The other sons do not consent to the legacy. The bequest to the son being void for want of assent of the other sons, the subsequent bequest also will not take effect (*e*).

Shiah law.—Under the Shiah law, the consent of the other heirs is not necessary to validate a bequest to an heir, provided the bequest does not exceed the legal third (Baillie, Part II., 244).

Extent of testamentary power

92. A Mahomedan cannot by will dispose of more than a third of the surplus of his estate after payment of funeral expenses and debts. Bequests in excess of the legal third cannot take effect, unless the heirs consent thereto after the death of the testator (*f*).

Hed. 671. It will be seen from this and the preceding section that the powers of a Mahomedan to dispose of his property by will are limited in two ways: first, as regards *the persons* to whom bequests could be made; and secondly, as regards *the extent to which* he could bequeath his property. The only case in which testamentary dispositions are binding upon the heirs is where the bequest does not exceed the legal third, and is made to a person who is not an heir. But a bequest in excess of the legal third may be validated by the consent of the heir; similarly, a bequest to an heir may be rendered valid by the consent of the other heirs. The reason is that the limits of testamentary power exist solely for the benefit of the heirs, and the heirs may, if they like, forego the benefit by giving their consent. For the same reason, if the testator has no heir, he may bequeath the whole of his property to a stranger (see s. 53 above, and Baillie, 614).

As to the consent of heirs necessary to validate a legacy exceeding the legal third, it is to be remembered that the consent once given cannot be rescinded (Hed. 671). The consent need not be express: it may be signified by conduct showing a fixed and unequivocal intention. *A* bequeaths the whole of his property, which consists of three houses, to a stranger. The will is attested by his two sons who are his only heirs. After *A*'s death, the legatee enters into possession, and recovers the rent with the knowledge of the sons, but without any objection from them. Those facts are sufficient to constitute consent on the part of the sons, and the bequest will take effect as against the sons and persons claiming through them (*g*).

(*d*) *Abdul Karim* v. *Abdul Qayum* (1906) 28 All. 342.
(*e*) *Fatima Bibee* v. *Ariff Ismailjee* (1881) 9 C. L. R. 66, with facts slightly altered.
(*f*) *Cherachom* v. *Valia* (1865) 2 M. H. C. 350.
(*g*) *Daulatram* v. *Abdul Kayum* (1902) 26 Bom. 497. See also *Sharifa Bibi* v. *Gulam Mahomed* (1892) 16 Mad. 43.

Bequests for pious purposes, like other bequests, can only be made to the extent of the bequeathable third.

A commission to an executor, by way of remuneration, is "a gratuitous *bequest*, and . . . certainly *not* in any sense a *debt*." It is therefore subject to the rules contained in this and the preceding section *(h)*.

Shiah law.—Under the Shiah law, the consent necessary to validate a bequest exceeding the legal third *may* be given in the lifetime of the testator: Baillie, Part II., 233.

Abatement of legacies

93. If the bequests exceed the legal third, and the heirs refuse their consent, the bequests abate in equal proportions.

Hed. 676; Baillie, 626, 627.

Bequests to unborn persons

94. A bequest to a person not yet in existence at the testator's death is void; but a bequest may be made to a child in the womb, provided it is born within six months from the date of the bequest.

The legatee, according to Mahomedan law, must be a person *competent* to receive the legacy (Baillie, 614); he must therefore be a person in existence at the death of the testator *(i)*.

As to bequest to a child in the womb, see Hed. 674.

In what case a legacy lapses

95. If the legatee does not survive the testator, the legacy cannot take effect, but it will lapse and form part of the residue of the testator's property.

See Hed. 679. Compare the Indian Succession Act, s. 92, which, however, does not apply to Mahomedans.

Shiah law.—Under the Shiah law, the legacy would, in such a case, pass to the heirs of the legatee, unless it is revoked by the testator; but if the legatee should die without leaving any heir, the legacy would pass to the heirs of the testator (Baillie, Part II., 247).

Subject of legacy

96. It is not necessary for the validity of a bequest, that the thing bequeathed should be in existence at the time of the execution of the will; it is sufficient if it exists at the time of the testator's death.

Baillie, 614. The subject of a *gift* must be in existence at the time of the gift; see s. 112 below.

(h) Aga Mahomed Jaffer v. *Koolsom Beebee* (1897) 25 Cal. 9, 18.

(i) Abdul Gulur v. *Turner* (1884) 9 Bom. 158.

Revocation of bequests

97. A bequest may be revoked either expressly or by implication.

Hed. 674 ; Baillie, 618. Revocation is express, when the testator revokes the bequest in express terms, either oral or written. It is implied, when he does an act from which revocation may be inferred.

It is doubtful whether if a testator deny that he ever made a bequest, the denial operates as a revocation ; but the better opinion seems to be that it does not : Hed. 675; Baillie, 619.

Implied revocation

98. A bequest may be revoked by an act which occasions an addition to the subject of the bequest, or an extinction of the proprietary right of the testator.

Illustrations.

(a) A bequest of a piece of land is revoked, if the testator subsequently builds a house upon it.

(b) A bequest of a piece of copper is revoked, if the testator subsequently converts it into a vessel.

(c) A bequest of a house is revoked, if the testator sells it, or makes a gift of it to another.

Hed. 674, 675 ; Baillie 618. The illustrations are taken from the Hedaya.

Revocation by subsequent will

99. A bequest to one person is revoked by a bequest in a subsequent will of the same property to another. But a subsequent bequest, though it be of the same property, to another person, in the same will, does not operate as a revocation of the previous bequest, and the property will be divided between the two legatees in equal shares.

Hed. 675; Baillie 620.

Executor need not be a Moslem

100. It is not necessary that the executor of the will of a Mahomedan should be a Mahomedan.

A Mahomedan may appoint a Christian, a Hindu, or any non-Moslem as his executor : *Moohummud Ameenoodeen* v. *Moohummud Kubeeroodeen (j)* ; *Henry Imlach* v. *Zuhooroonnisa (k)*.

Powers of executors

101. The powers and duties of the executors of a Mahomedan will are now determined by the provisions of the Probate and Administration Act, in cases in which that Act applies.

(j) (1845) 4 S. D. A. 55.

(k) (1828) 4 S. D. A. 303.

Per Sargent, C.J., in *Shaik Moosa* v. *Shaik Essa (l)*. The Probate and Administration Act, 1881, applies amongst others to Mahomedans. Before the passing of that Act, the powers and duties of Mahomedan executors were determined by the Mahomedan law; since the passing of that Act, however, they are determined by the provisions of that enactment. The provisions of the Probate and Administration Act are now extended almost to the whole of British India, and it is therefore thought unnecessary to set out the rules of Mahomedan law on the subject. It is important to note that when there are several executors, the powers of all may, in the absence of any direction to the contrary in the will, be exercised by any one of them who has proved the will (Probate Act, s. 92). But where there is only one executor, he may exercise all the powers of an executor without proving the will *(m)*.

(l) (1884) 8 Bom. 241, 256.

(m) Ib.

CHAPTER VIII.

Death-bed Gifts and Acknowledgments.

Gift made during death-illness

102. Gifts made by a Mahomedan during *marz-ul-maut* or death-illness, cannot take effect beyond a third of the surplus of his estate after payment of funeral expenses and debts, unless the heirs give their consent, after the death of the donor, to the excess taking effect; nor can such gifts take effect if made in favour of an heir, unless the other heirs consent thereto after the donor's death (*n*).

Explanation.—A *marz-ul-maut* is a malady which induces an apprehension of death in the person suffering from it, and which eventually results in his death.

Hed. 684, 685; Baillie, 542, 544.

Summary of decisions (*o*).—It is an essential condition of *marz-ul-maut* that the person suffering from the *marz* (malady) must be under an apprehension of *maut* (death). "The most valid definition of death-illness is, that it is one which it is *highly probable* will issue fatally" (Baillie, 543). But it must be noted that mere apprehension of death is not sufficient to constitute *marz-ul-maut*: it is further necessary that the *marz* should have ended fatally. Hence it follows that if a gift be made by a person during *marz-ul-maut* of the whole of his property, it will take effect to the extent of the whole, *if he subsequently recovers from the illness*. Where the malady is of long continuance, as, for instance, consumption or albuminuria (*p*), and there is no immediate apprehension of death, the malady could not be said to be *marz-ul-maut*; but it may become *marz-ul-maut*, if it subsequently reaches such a stage as to render death highly probable, and death does in fact ensue. According to the Hedaya, a malady is said to be of "long continuance," if it has lasted a year, so that a disease that has lasted for a period of one year does not constitute a death-illness; for "the patient has become familiarized to his disease, which is not then accounted as sickness" (Hed. 685). But "this limit of one year does not constitute a hard-and-fast rule, and it may mean a period of *about* one year" (*q*).

When valid

103. A gift made during *marz-ul-maut* is subject to all the conditions necessary for the validity of a gift including delivery of possession by the donor to the donee.

(*n*) *Wazir Jan.* v. *Sayyid Altaf Ali* (1887) 9 All. 357.

(*o*) *Fatima Bibee* v. *Ahmad Baksh* (1903) 31 Cal. 319; *Hassarat Bibi* v. *Goolam Jaffar* (1898) 3 C. W. N. 57; *Muhammad Gulshere Khan* v. *Mariam Begam* (1881) 3 All. 731; *Labbi Beebee* v. *Bibban Beebee* (1874) 6 N. W. P. 159; *Sarabai* v. *Rabiabai* (1906) 30 Bom. 537.

(*p*) In Fatima Bibee's case, cited above, the deceased had suffered from albuminuria for more than a year before his death, and there was no immediate apprehension of death at the time when the deceased made the gift in question in that case.

(*q*) *Fatima Bibee's* case, p. 326; see *supra*.

Baillie, 542. As to the conditions necessary for the validity of gifts, see the chapter on Gifts, below. See also the cases cited in foot-note (*o*), p. 74 *ante*. A death-bed gift is essentially a gift, though the limits of the donor's power to dispose of his property by such a gift are the same as the limits of his testamentary power. It is therefore subject to all the conditions of a gift, among which is included the delivery of possession to the donee before the death of the donor.

Death-bed acknowledgment of debt

104. An acknowledgment of a debt may be made as well during death-illness as "in health."

When the only proof of a debt is an acknowledgment made during death-illness, the payment of the debt is to be postponed until after the liquidation of debts acknowledged by the deceased while he was "in health," or debts proved by other evidence. But an acknowledgment of a debt made during death-illness in favor of an heir does not constitute any proof of the debt, and no effect will be given to it, unless the other heirs admit that the debt is due.

Hed. 436, 437, 438, 684, 685; Baillie, 683, 684. This section is to be read with s. 29. The provisions of the present section will govern the "priorities" of debts referred to in that section.

CHAPTER IX.

GIFTS.

Gift

105. A *hiba* or gift is "a transfer of property, made immediately, and without any exchange."

This is the definition of *hiba* as given in the Hedaya, p. 482. The term "exchange" *(ewaz)* is synonymous with "consideration." A *hiba* is a transfer without *ewaz* or consideration. A *hiba-bil-ewaz* is a gift for consideration: see s. 126 below.

Capacity for making gifts

106. Every Mahomedan of sound mind and not a minor may dispose of his property by gift.

See Hedaya, p. 524. As to minority, see notes to s. 89 *ante*.

Insolvent donor

107. A gift made with intent to defeat or delay his creditors by a donor in insolvent circumstances is voidable at the option of the creditors.

A gift by a person who is not in insolvent circumstances at the time of the gift could not be avoided by *future* creditors.

Amir Ali, Vol. I, pp. 16-19. The rule of law enacted in s. 53 of the Transfer of Property Act does not affect the above rule of Mahomedan law, see s. 2, cl. (d) of that Act. See also *Azim-un-Nissa* v. *Clement Dale* (*r*).

Writing not necessary

108. A gift may be made either verbally or in writing.

See *Kamar-un-Nissa Bibi* v. *Hussaini Bibi* (*s*), where a verbal gift was upheld by the Privy Council. See also Baillie, 509.

It is to be noted that the provisions of the Transfer of Property Act which relate to gifts (ss. 122-128) do not apply to Mahomedans (s. 129). It is not therefore necessary under the Mahomedan law that a gift of immoveable property should be made by a registered instrument as required by s. 123 of that Act. Where is an instrument it must be registered

Extent of donor's power

109. A gift, as distinguished from a will, may be made of the whole of the donor's property, and it may be made even to an heir.

"The policy of the Mahomedan law appears to be to prevent a *testator* interfering by will with the course of the devolution of property according to law among his *heirs*, although he may give a specified portion, as much as a third, to a stranger. But

(*r*) (1871) 6 M. H. C. 455, 466.

(*s*) (1880) 3 All. 267.

it also appears that a holder of property may, to a certain extent, defeat the policy of the law *by giving in his lifetime the whole or any part of his property* to one of his sons, provided he complies with certain forms" (*t*).

It need hardly be stated that a Mahomedan may dispose of the whole of his property by gift in favor of a stranger, to the entire exclusion of his heirs.

Subject of gift

110. Actionable claims and incorporeal property may form the subject of gift equally with corporeal property (*u*).

Illustration.

[A gift may be made of debts, negotiable instruments, or of Government promissory notes (*v*); of *malikana* (*w*) or of zemindari rights (*x*); or of property let on lease (*y*) or under attachment (*z*).]

" *Hiba* in its literal sense signifies the donation of a *thing from which the donee may derive a benefit*" ; *Hed.* 482. " Gift, as it is defined in law, is the conferring of a *right of property* in something specific, without an exchange." *Baillie*, 507.

The cases cited in the above illustration would not have arisen at all, had it not been for the wrong notion which prevailed at one time that *khas* or actual possession was necessary in *all cases* to constitute a valid gift. Conformably to that notion, it was contended in those cases that corporeal property alone could form the subject of gifts, for it is only that kind of property that is susceptible of *khas* or actual possession. But that notion has long since been rejected as erroneous, and it has been held that when the subject of a gift is not susceptible of actual possession, as in the case of *choses in action* and incorporeal rights, the gift may be completed by doing any act which has the effect of transferring the ownership from the donor to the donee (see s. 114 below). Debts, negotiable instruments, and Government promissory notes are all *choses in action*, or, to use the phraseology of the Transfer to Property Act, actionable claims.

Gift of equity of redemption

111. A gift may be made by a mortgagor of his equity of redemption. But it has been held by the High Court of Bombay that a gift of an equity of redemption is not valid if the mortgagee is in possession of the property at the time of the gift (*a*).

The Bombay High Court does not hold that an equity of redemption could not from the subject of a gift in any case. What it does hold is that a gift of an equity

(*t*) *Khajooroonissa* v. *Rowshan Jehan* (1876) 2 Cal. 184, 197; 3 I. A. 291, 307. See also the observations of their Lordships of the Privy Council in *Nawab Umjad Ally Khan* v. *Mohumdee Begum* (1867) 11 M. I. A. 517, 546, *Chaudhri Mehdi Hasan* v. *Muhammad Hasan* (1905) 28 All. 439.

(*u*) Amir Ali, Vol. I, 27. See the cases cited in the illustration.

(*v*) *Mullick Abdul Gaffoor* v. *Muleka* (1884) 10 Cal. 1112, 1125.

(*w*) *Ib.*, p. 1125. A *malikana* right is the right to receive from the Government a sum of money, which represents the *malik's* (owner's) share of the profits of the revenue-paying estate, when from his declining to pay the revenue assessed by the Government, or from any other cause, his estate is taken into *khas* or actual possession of Government, or transferred to some other person, who is willing to pay the rate assessed.

(*x*) *Ib.*, p. 1126.

(*y*) *Ib.*, p. 1124.

(*z*) *Anwari Begam* v. *Nizam-ud-Din Shah* (1898) 21 All. 165, 167.

(*a*) *Ismai* v. *Ramji* (1899) 23 Bom. 682; *Mohinudin* v. *Manchershah* (1882) 6 Bom. 650.

of redemption is not valid if the property at the time of gift is *in the possession of the mortgagee*. The ground of the Bombay decisions is that delivery of possession by the donor to the donee is a condition essential to the validity of a gift; and the mortgagor cannot deliver possession to the donee, if the mortgagee is in possession. It is quite true that delivery of possession by the donee is a condition necessary for the validity of a gift, but it is equally well established that when the subject of a gift is not in its nature capable of actual possession, the gift may be perfected by appropriate acts on the part of the donor which may have the effect of transferring the ownership; see s. 114 below. When the mortgagee is *not* in possession of the property mortgaged to him, a gift of the equity of redemption is not valid unless the mortgagor delivers possession of the property to the donee; for the mortgagee not being in possession, the mortgagor *could* deliver possession of the mortgaged property to the donee. But when the mortgagee *is* in possession, the mortgagor *could not* deliver possession to the donee, and, it is submitted, that the gift may in that event be completed by some other appropriate method. If this be so, the Bombay decisions cannot be correct. In fact, the authority of these decisions has already been questioned by the High Court of Allahabad (*b*).

Future property

112. A gift of property not actually in existence at at the time of gift, is void.

Illustrations.

(a) *A* makes a gift to *B* of "the fruit that may be produced by his palm-trees." The gift is void. *Baillie*, 508.

(b) A Mahomedan executes a deed in favor of his wife, purporting to give to the wife and her heirs in perpetuity Rs. 4,000 every year out of his share of the income of certain jaghir villages. The gift is void, for it is in effect a gift of a portion of the *future* revenues of the villages: *Amtul Nissa* v. *Mir Nurudin* (1896) 22 Bom. 489. *Baillie*, 508.

Property held adversely to donor

113. A gift of property in the possession of a person who claims it adversely to the donor is not valid, unless the donor subsequently acquires possession, and puts the donee in possession of the property.

Illustrations.

(*a*) *A* executes a deed of gift in favor of his nephew, conferring upon him the proprietary right to certain lands of which he is not in possession, but to recover which he had brought an action, then pending against *Z*. *A* dies during the pendency of the suit. The gift is void, for it has not been completed by delivery of possession to the nephew. *Macnaghten*, 201.

(b) *A* executes a deed of gift in favor of *B*, conferring upon him the proprietary right to certain lands, then in the possession of *Z*, and claimed by *Z* adversely to *A*. *A* dies without acquiring possession of the lands. After *A*'s death, *B* sues *Z* to recover

(*b*) *Rahim Bakhsh* v. *Muhammad Hasan* (1888) 11 All. 1, 10; *Anwari Begum* v. *Nizam-ud-din* (1898) 21 All. 165, 170, 171. See also *Amir Ali*, Vol. I, 29-30.

possession from him. The suit will not lie, for the gift has not been completed by delivery of possession to *B*: *Mevraly* v. *Tajudin* (1888) 13 Bom. 156; *Rahim Bakhsh* v. *Muhammad Hasan* (1888) 11 All. 1.]

This rule is virtually a corollary of the proposition that delivery of possession to the donee is necessary to complete a gift. As such, its proper place would be somewhere after s. 114. But the rule is set forth here, as it is more closely allied to the subject-matter of ss. 110-112, which enumerate the different kinds of property that may form the subject of a gift.

In ill. (a), the nephew could not claim to continue the suit as *donee*, for the gift is not complete.

As to ill. (b), the suit would not lie even if *B* were authorized by *A* to sue *Z* to recover possession. The reason is that the gift being inchoate, *B* has got *no right to sue*. We are unable to concur in the view taken by a learned writer, that the gift could be completed by *B* by instituting a suit against *Z* and recovering possession in *A's* lifetime; for such a suit cannot lie at all, not even if it was brought by *B* with *A's* authority and on his behalf (*c*). The mistake has arisen from a misapprehension of a passage in the judgment of the Privy Council in *Mahomed Buksh* v. *Hosseini Bibi* (*d*). The said passage runs as follows:—

"In this case it appears to their Lordships that the lady did all she could do to perfect the contemplated gift, and that nothing more was required from her. The gift was attended with the utmost publicity, *the hibanama itself authorises the donees to take possession, and it appears that in fact they did take possession.* Their Lordships hold, under these circumstances, that there can be no objection to the gift on the ground that Shahzadi had not possession, and that she herself did not give possession at the time."

The above passage must be read in the light of the facts of the case. The facts do not show that the subject of the gift was in the hands of a person claiming adversely to the donor, or that the donees recovered possession by a suit or other legal proceedings. It was a case of a gift of an undivided share by an heir of a deceased Mahomedan to her co-heirs, and the co-heirs, it seems, took possession of the whole of the inheritance including the share of the donor without any litigation.

114. It is essential to the validity of a gift that there should be— *Gift when complete*

(1) a declaration of gift by the donor,

(2) an acceptance of the gift by the donee, and

(3) delivery of possession by the donor to the donee, if the subject of the gift is capable of physical possession. But if the subject of the gift is not capable of physical possession as in the case of actionable claims and incorporeal pro-

(*c*) See Sir R. K. Wilson's Digest of Anglo-Muhammadan Law, s. 306.

(*d*) (1888) 15 Cal. 684, 702; 15 I. A. 81.

perty, the gift may be completed by any act on the part of the donor which has the effect of transferring the ownership of the subject of the gift from the donor to the donee.

Explanation.—Registration of a deed of gift does not operate as a transfer of possession.

Illustrations.

[(a) A gift of Government promissory notes may be completed by endorsement and delivery to the donee: ***Nawab Umjad Ally Khan*** v. ***Muhumdee Begum*** (1867) 11 M. I. A. 517, 544.

(b) A gift of zamindari rights, held under Government, may be completed by mutation of names in the books of the Collector: ***Sajjad Ahmad Khan*** v. ***Kadri Begam*** (1895) 18 All. 1.

(c) *A* hands over to his wife a receipt passed to him by a Bank in respect of money deposited by him with the Bank, and says, "after taking a bath I will go to the Bank and transfer the papers to your name." The receipt contains in the margin the words "not transferable." *A* dies before the transfer is effected. The gift is void: ***Aga Mahomed Jaffer*** v. ***Koolsom Beebee*** (1897) 25 Cal. 9, 17. [The receipt being "not transferable," the donor's right to receive the money from the Bank cannot be transferred by a mere delivery of the receipt.]

(d) *A* executes a deed of gift of a house belonging to him in favour of *B*. No sort of possession is delivered to *B*, but the deed is duly registered. The gift is not valid, for registration does not cure the want of delivery by the donor: ***Mogulsha*** v. ***Mahamed Saheb*** (1887) 11 Bom. 517, followed in ***Ismal*** v. ***Ramji*** (1889) 23 Bom. 682.]

Hed. 482; ***Baillie***, 513. See s. 110, above.

As regards delivery of possession, a distinction ought to be drawn between cases where from the nature of the subject of the gift actual possession could not be given to the donee, and cases where such possession could be given to the donee (*e*). "There is no doubt that the principle of Mahomedan law is that possession is necessary to make a good gift, but the question is, possession of what? If the donor does not transfer to the donee, ***so far as he can***, all the possession which he can transfer, the gift is not a good one. As we have said above, there is, in our judgement, nothing in the Mahomedan law to prevent the gift of a ***right*** to property. The donor must, ***so far as it is possible for him***, transfer to the donee that which he gives, namely, such right as he himself has; but this does not imply that where a ***right*** to property forms the subject of a gift, the gift will be invalid unless the donor transfers, what he himself does not possess, namely, the ***corpus*** of the property. He must evidence the reality of the gift by divesting himself, ***so far as he can***, of the whole of what he gives" (*f*). Thus in ***Mahomed Buksh*** v. ***Hosseini Bibi*** (*g*), their Lordships of the Privy Council, in upholding a gift of an ***undivided share*** in the estate of a deceased Mahomedan by an heir of the deceased to her co-heirs, observed: "In this case it appears to their Lordships that ***the lady did***

(*e*) ***Mullick Abdool Guffoor*** v. ***Muleka*** (1884) 10 Cal. 1112.

(*f*) (1) ***Anwari Begam*** v. ***Nizam-ud-Din Shah*** (1898) 21 All. 165.

(*g*) (1888) 15 Cal. 684, L. R. 15 I. A. 81.

all she could to perfect the contemplated gift, and that nothing more was required from her." In fact, in considering the question of delivery of possession, regard must be had to the nature of the property which forms the subject of the gift. If the gift be of a share of inheritance not yet divided off, as in the Privy Council case cited above, it is impossible for the donor to deliver *actual* possession of the share, and the gift may then be completed by any act on the part of the donor which may have the effect of transferring the ownership. And this, it was held by their Lordships, was done by the donor in the above case.

Gift of immoveable property

115. (1) A gift of immoveable property of which the donor is in actual possession is not complete, unless the donor physically departs from the premises with all his goods and chattels, and the donee formally enters into possession (*h*).

(2) A gift of immoveable property which is in the occupation of tenants may be completed by a request by the donor to the tenants to attorn to the donee (*i*).

(3) A gift of immoveable property in which the donor and the donee are *both* residing at the time of the gift may be completed by declaration and acceptance without formal delivery and possession such as are required in sub-section (1) where the donor *alone* is residing in the premises (*j*).

Illustration of sub-section (3).

[A Mahomedan lady, who had brought up her nephew as her son, executed a deed of gift in favour of the nephew of a house in which they were both residing at the time of the gift. The donor did not physically depart from the house either at the time of the gift or at any subsequent period, but continued to live in the house with her nephew. The property was transferred in the name of the nephew, and the rents were recovered in his name. After the nephew's death, the donor sued for a declaration that the gift was imperfect on the ground that there was no formal delivery of possession. But the suit was dismissed, and it was held that the gift was complete, though there was no formal delivery of possession: *Humera Bibi* v. *Najm-un-nissa* (1905) 28 All. 147.]

Sub-sections (1) and (2) are particular applications of the rule laid down in s. 114. The case referred to in sub-section (1) is that of the donor being in possession of immoveable property. In such a case formal delivery of possession as indicated in that sub-section must be given by the donor to the donee. Sub-section (2) refers to the case in which the donor is not in actual physical possession of the property. The request by the donor to the tenants to attorn to the donee is an act within the meaning of s. 114 which has the effect of transferring the ownership of the property to the donee.

(h) Macnaghten, Prec. XXII, p. 231, 4th Ed; *Bava Saib* v. *Mahomed* (1896) 19 Mad. 344.

(i) *Shaik Ibhram* v. *Shaik Suleman* (1884) 9 Bom. 146, 150; *Bibi Khaver* v. *Bibi Rukhia* (1905) 29 Bom. 468, 477; *Khajoorunissa* v. *Roushan Jehan* (1876) 2 Cal. 184, 197, 3 I. A. 291, 308.

(j) *Shaik Ibhram* v. *Shaik Suleman* (1884) 9 Bom. 146; *Humera Bibi* v. *Najm-un-nissa* (1905) 28 All. 147; *Bibi Khaver* v. *Bibi Rukhia* (1905) 29 Bom. 468. But see *Bava Saib* v. *Mahomed* (1896) 19 Mad. 343.

In the case cited in the illustration, the Allahabad High Court observed, following the Bombay case of *Shaik Ibhraim* v. *Shaik Suleman* (*k*), that "if the parties are present on the premises, it is sufficient that an intention on the part of the donor to transfer the possession is unequivocally manifested." Moreover, the relation in which the donor stands to the donee must be looked to. "The donor was aunt of the donee, and the donee had been brought up and treated by her as her son. The intention of both the donor and the donee was that the donor should continue to reside with the donee, and under the circumstances it would have been a mere empty formality for the donor to have left the house and removed therefrom all her goods and chattels for the purpose of completing the gift and then immediately to have returned to it." In a recent Bombay case the donor was the mother of one of the donees and grandmother of the other donees. The donor and the donees all resided together in the house which was the subject of the gift. The donor left the house before the deed of gift was executed, and remained away for some days with a view to effecting a delivery of possession, and then returned to the house and resided with the donees as before. It was contended that the donor having returned to the house, coupled with the fact that she had not removed her goods and effects when she left the house with the object of delivering possession, rendered the gift invalid. But it was held, following the Bombay case above referred to, that neither of these circumstances rendered the gift invalid, and that it was not necessary, having regard to the relation existing between the parties and to the fact that the donor and donees were residing together, that the donor should have left the premises to complete the gift (*l*).

Where donee is in possession

116. Where the subject of the gift is already in the possession of the donee, the gift may be completed by declaration and acceptance, without formal delivery and possession.

Illustrations.

(a) A gift of a property in the possession of a bailee, a trustee, a tenant, a lessee, a pledgee, or a mortgagee, may be completed without formal transfer of possession: *Hed.* 464; *Baillie*, 514.

(b) *A* makes a gift of a house to a servant in his employ for the collection of rents. There is no evidence of any "overt act showing transfer of possession of the property." The gift is void, for a servant or an agent for the collection of rents cannot be said to be in "possession" of the property of which he collects the rents: *Valayat Hossein* v. *Maniram* (1879) 5 C. L. R. 91.

Hed. 484; *Baillie* 514.

"Mushaa" defined

117. "*Mushaa*" is an undivided share in property whether moveable or immoveable.

It is not to be supposed that the term *mushaa* is restricted in its meaning to an undivided share in a property *capable* of partition.

Gift of mushaa

118. (1) A valid gift may be made of an undivided share (*mushaa*) in property which is not capable of partition.

(*k*) (1884) 9 Bom. 146.

(*l*) *Bibi Khairer* v. *Bibi Rukhia* (1905) 29 Bom. 488

(2) A gift of an undivided share (*mushaa*) in property which is capable of partition is invalid (*fasid*), but not void (*batil*): the gift being merely invalid, it may be perfected and rendered valid by subsequent partition and delivery to the donee of the donor's share.

Exception.—But where a property which is capable of partition is held by several co-sharers, any one of them may make a valid gift of his undivided share (*mushaa*) to any one or more of the other co-sharers.

Illustrations

[*of sub-section* (1)—(a) *A*, who is the owner of a house, makes a gift to *B* of the house and of her right to use a staircase held by her jointly with the owner of an adjoining house. The gift of *A's* undivided share in the staircase is valid, for it is a gift of *mushaa* in property *not* capable of partition: *Kasim Husain* v. *Sharif-un-Nissa* (1883) 5 All. 285.

of sub-section (2)—(b) *A* makes a gift of her share in certain lands to *B*. The share is not divided off at the time of gift, but it is *subsequently* separated, and possession thereof is delivered to *B*. The gift is valid: *Muhammad Mumtaz Ahmad* v. *Zubaida Jan* (1889) 11 All. 460, 16 I. A. 205; *Mahomed* v. *Cooverbai*, 6 Bom. L. R. 1043.

of Exception—(c) A Mahomedan female dies leaving a mother, a son, and a daughter as her only heirs. The mother may make a valid gift of her share, *before* division, either to the son or the daughter, or jointly to the son and daughter: *Mahomed Buksh* v. *Hosseini Bibi* (1888) 15 Cal. 684, 701, 15 I. A. 81.

(d) *A*, *B*, and *C* are co-sharers in a certain zamindari. Each share is separately assessed by the Government, having a separate number in the Collector's books, and the proprietor of each share is entitled to collect a definite share of rents from the ryots. *A* makes a gift of his share to *Z without* a partition of the zamindari. The gift is valid, for it is not a gift strictly of a *mushaa*, the share being *definite* and marked off from the rest of the property: *Ameeroonnissa* v. *Abadoonissa* (1875) 15 B. L. R. 67, 2 I. A. 87.]

Hed. 483; *Baillie*, 515-517. In *Muhammad Mumtaz* v. *Zubaida Jan*, upon which the second illustration is based, their Lordships of the Privy Council observed: "The doctrine relating to the invalidity of gifts of *mushaa* is wholly unadapted to a progressive state of society, and ought to be confined within the strictest rules."

The term *mushaa* is derived from *shuyuu*, which signifies confusion. An undivided share is called *mushaa*, because of the confusion that might likely arise in the enjoyment of the property, if a gift were made of an undivided share in the property by one co-sharer to a *stranger*. No such confusion can arise, if the gift be by one co-sharer to another *co-sharer*. Hence the rule of the Hanafi law that when a property held by several co-sharers is *capable* of partition, the gift of an undivided share in that property in favour of a stranger does not take effect until the share is divided off from the rest of the property, and possession thereof is delivered to the donee. "Seisin in cases of gift is expressly ordained, and consequently a complete seisin is a necessary condition": *Hed.* 483.

Madras Presidency

119. The Mahomedan law of gifts is administered in the Madras Presidency as a matter of *justice, equity and good conscience*, and the High Court of Madras has accordingly refused to adopt the doctrine of *mushaa* on the ground that it is "wholly unadapted to a progressive state of society," and therefore opposed to justice, equity and good conscience (*m*).

Shiah law.—Under the Shiah law, a gift of a *mushaa* in property capable of partition is equally valid with a gift of *mushaa* in property not capable of partition: Baillie, Part II., 204. See s. 5 *ante*. The rules set forth in this section do not apply to a transfer of an undivided share when such transfer is made for a *consideration*. Such a transfer is not a gift (*n*).

Gift to two donees

120. A gift of property which is capable of partition to two persons jointly is invalid, but it may be rendered valid by subsequent possession, on the part of each donee, of a specific portion of the property.

Illustration.

[*A* makes a gift of a house to *B* and *C* without making any division of the property at the time of the gift. Subsequently *B* and *C* divide the property, and each takes possession of a specific portion. The gift becomes valid by subsequent division and possession.]

Hed. 485; *Baillie*, 516. The principle of the present section does not apply to a *sadaka* or a pious gift. Hence if a gift be made of property capable of division to two poor men jointly, the gift will take effect at once.

Shiah law.—Under the Shiah law a gift of property to two or more donees is valid, though no division may be made either at the time of gift or subsequently: *Baillie*, Part II., 205.

Gift to unborn persons

121. A gift to a person not yet in existence is void; but a gift may be made to a child in the womb, provided it is born within six months from the date of the gift.

See notes to s. 94 above.

Gift to minors

122. A gift to a minor or to a lunatic may be completed by delivery of possession to his guardian.

Hed. 484. "When [the donee] is a minor, or insane, the right to take possession for him belongs to his guardian, who is first his father, then his father's executor, then his grandfather," &c. *Baillie*, 530. A *mother* has no right to the guardianship of the *property* of her minor children, unless she is appointed guardian by the Court.

(*m*) *Alali Koya* v. *Mussa Koya* (1901) 24 Mad. 513.

(*n*) *Ashulbai* v. *Abdulla* (1906) 8 Bom. L. R. 652.

123. No change of possession is necessary for the validity of a gift by a father to his minor child, or by a guardian to his ward, or by a person standing in *loco parentis* to another (*o*). *Gift by father to minor child*

Hed. 484 ; *Baillie*, 529.

"Where there is on the part of a 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 (*p*).

A gift by a *mother* to her infant child *does* require a transfer of possession from the mother to the father, if the father is alive, for the father is the primary natural guardian of his infant child. And if the father is dead, the possession must be delivered to the father's executor or the grandfather, unless the mother is appointed guardian by the Court, in which case no change of possession is necessary, for it is then a gift by a guardian to a ward.

A gift by an aunt to her nephew, whom she had brought up as her son, is a gift by a person standing in *loco parentis* to another.

124. A gift by a husband to his wife of a house in which they are both residing at the time is not invalid, merely because the husband continues to receive the rent and to live in the house after the making of the gift (*q*). *Gift by husband to wife*

"The relation of husband and wife, and his legal right to reside with her and to manage her property, rebut the inference which in the case of parties standing in a different relation would arise from a continued residence in the house after the making of the *hiba*, and in the husband generally receiving the rent of . . . . . that house" (*r*). Contrast *Bava Sahib* v. *Mahomed* (1896) 19 Mad. 343.

125. A gift cannot be made to take effect at any future period whether definite or indefinite. *Gifts in futuro*

Illustrations.

[(a) *A* executes a deed of gift in favour of *B*, containing the words "so long as I live, I shall enjoy and possess the properties, and I shall not sell or make gift to any one, but after my death, you will be the owner." The gift is void, for it is not accompanied by delivery of possession, and it is not to operate *until after* the death of *A* : *Yusuf Ali* v. *Collector of Tipperah* (1882) 9 Cal. 138 ; *Chekkene Kutti* v. *Ahmed* (1886) 10 Mad. 196.

(b) A gift to *A*'s brother, if *A* died without leaving sons, is void, for it is postponed to take effect at an indefinite future period : *Abdoola* v. *Mahomed* (1905) 7 Bom. L. R. 306.]

The rule set forth in this section is a corollary of the proposition that a gift is not valid unless it is accompanied by possession : see s. 114 above.

(*o*) *Humera Bibi* v. *Najm-un-nissa* (1905) 28 All. 147, 154 ; *Bibi Khaver* v. *Bibi Rukhia* (1905) 29 Bom. 468, 479.

(*p*) *Ameeroonnissa* v. *Abadoonnissa* (1875) 15 B. L. R. 67, 78, 2 I. A. 87.

(*q*) *Amina Bibi* v. *Khatija Bibi* (1864) 1 B. H. C. 157 ; *Azim-un-Nissa* v. *Dale* (1868) 6 M. H. C. 455 ; *Emnabai* v. *Hajrabai* (1888) 13 Bom. 352.

(*r*) *Per* Sausse, C. J., in *Amina Bibi* v. *Khatija Bibi* (1864) 1 B. H. C. 157, at p. 162.

Gifts with conditions

126. When a gift is made subject to a condition which derogates from the completeness of the grant, the condition is void, and the gift will take effect as if no condition were attached to it.

But it has been held by the Privy Council, that if a gift of property is made subject to a condition that the donee shall pay the produce or income of the property to the donor during his lifetime, both the gift and the condition are valid (*s*).

Illustrations.

[(a) A gift of a house is made to *A* for life, and after his death to his brother. The condition that *A* shall have the house *for life* is void, and he takes an absolute interest, as if no condition was attached to the gift : *Hed.* 489. [Under the Hanafi law a grantee of a life-estate takes an absolute estate : *Nizamuddin* v. *Abdul Gafur* (1888) 13 Bom. 264, 275 ; s. c. on appeal, 17 Bom. 1, 5 ; *Abdoola* v. *Mahomed* (1905) 7 Bom. L. R. 306. The same rule applies to testamentary gifts. Thus, a *bequest* to *A* for life operates as an absolute bequest of the property to *A* : *Abdul Karim* v. *Abdul Qayum* (1906) 28 All. 342.]

(b) *A* makes a gift of Government promissory notes to *B*, on condition that *B* should return a *fourth part of the notes* to *A* after a month. The condition is void, and *B* takes an absolute interest in the notes : see *Baillie*, 588 ; *Hed.*, 488. [Here the condition relates to the return of a part of the *corpus*.]

(c) A father makes a gift of Government promissory notes to his son, on condition that the son should pay the *interest* to the father during his lifetime. Both the gift and the condition are valid : *Nawab Umjad Ally* v. *Mohumdee Begum* (1867) 11 M. I. A. 517. [*Quære* whether the condition would be good, if it were not confined to the payment of interest *till* the donor's death ?]

(d) *A* makes a gift of his mansion to *B* on condition that he shall not sell it, or that he shall sell it to a particular individual. The conditions are void, and *B* takes an absolute estate in the mansion : *Baillie*, 538.]

Hed. 488, 489 ; *Baillie*, 537, 540. As to ill. (c), it may perhaps be asked,—does not the condition for the payment of interest to the donor derogate from the completeness of the gift ? The answer is that it does, in that the donee is deprived of the *income* during the donor's lifetime ; that it does not, in that the donee's dominion over the *corpus* is not affected by the condition. This latter would seem to be the ground of the Privy Council decision. If so, a condition which does not deprive the donee of dominion over the *corpus*, and leaves that dominion complete and entire, is not a condition which derogates from the completeness of a grant within the meaning of the present section. In this view the section may be read as follows :

"When a gift is made subject to a condition which derogates from the completeness of the grant *so as to deprive the donee of dominion or any share of dominion over the corpus of the property* given to the donee, the condition is void, and the gift will take effect as if no condition were attached to it."

(*s*) See the case cited in ill. (*c*).

The limitation in italics is suggested by the words of their Lordships of the Privy Council in the case now under review. At p. 547 of the report, their Lordships say: "It remains to be considered whether a real transfer of property by a donor in his lifetime under the Mahomedan law, reserving not the dominion over the *corpus* of the property, nor any share of dominion over the *corpus*, but simply stipulating for and obtaining a right to the recurring produce during his lifetime, is an incomplete gift by the Mahomedan law." Their Lordships held that it was not.

Note that the effect of the conditions in ills. (a), (b) and (d), is to restrict the donee's dominion over the *corpus* of the property; but the condition in ill. (c) has not that effect.

Shiah law.—Under the Shiah law, when a gift is made subject to a condition, both the gift and the condition are valid (Ameer Ali, Vol. I., 77, 78, 85).

Revocation of gifts

127. A gift may be revoked, even after delivery of possession, except in the following cases :—

(1) when the gift is made by a husband to his wife, or by a wife to her husband ;

(2) when the donee is related to the donor within the prohibited degrees ;

(3) when the donee is dead ;

(4) when the thing given has passed out of the donee's possession by sale, gift or otherwise ;

(5) when the thing given is lost or destroyed ;

(6) when the thing given has increased in value, whatever be the cause of the increase ;

(7) when the thing given is so changed that it cannot be identified, as when wheat is converted into flour by grinding ;

(8) when the donor has received something in exchange for the gift ;

(9) when the gift is a *sadaka* made with the object of acquiring merit in the sight of God, *e.g.*, alms to the poor.

Explanation I.—A gift can be revoked by the donor alone, and not by his heirs after his death.

Explanation II.—A gift once completed can only be revoked by proceedings in a Court of law for cancelling the gift.

Hed. 485 ; Baillie, 524-528.

Shiah law.—The Shiah law differs from the Hanafi law in the following particulars:—

(a) a gift to any blood relation, whether within the prohibited degrees or not, is irrevocable ;

(b) a gift by a husband to his wife, or by a wife to her husband, is, according to the better opinion, revocable (Baillie, Part II, 205).

Hiba-bil-ewaz

128. A *hiba-bil-ewaz* is a sale in all respects, and delivery of possession is not necessary to validate the transaction.

Illustrations.

[(a) A Mahomedan husband executes a deed in favour of his wife, purporting to give to the wife certain lands belonging to him in lieu of dower due to her. The wife is not put into possession of the lands. The transaction is a *hiba-bil-ewaz*, and it is valid without delivery of possession: *Muhammad Esuph* v. *Pattamsa Ammal* (1889) 23 Mad. 70.

(b) *A* executes a deed purporting to give a house to *B* in consideration of *B* having "with cordial affection and love rendered service to me, maintained and treated me with kindness and indulgence, and shown all sorts of favour to me." Possession of the house is not delivered to *B*. The gift is void, for it is not a *hiba-bil-ewaz*, but a *hiba* pure and simple, and delivery of possession is therefore necessary to validate the gift: *Rahim Bakhsh* v. *Muhammad Hasan* (1888) 11 All. 1. See also *Jafar Ali* v. *Ahmed* (1868) 5 B. H. C. A. C. 37.]

Baillie, 532, 533. *Hiba-bil-ewaz* means literally a gift for an exchange. The rule of Mahomedan law, which requires that a gift must be accompanied by possession to render it valid, does not apply to a transaction which is supported by valuable consideration (*t*). In the case of such a transaction actual payment of the consideration and the *bonâfide* intention of the donor to divest himself *in præsenti* of the property and to confer it upon the donee must both be clearly proved (*u*).

In the case of a *hiba-bil-ewaz*, that is, a gift coupled with consideration, actual payment of the consideration must be proved, and the *bonâ-fide* intention of the donor to divorce himself *in præsenti* of the property and to confer it upon the donee must also be proved (*v*).

Hiba-ba-shart-ul-ewaz

129. A *hiba-ba-shart-ul-ewaz* or a *gift made on condition of an exchange* is a gift in its inception, and continues to be so with all the legal incidents of a gift until the performance of the condition by the donee, when it becomes a sale.

Baillie, 534; Ameer Ali, Vol. I., 102.

(*t*) *Mahammaduntssa* v. *Bachelor* (1905) 29 Bom. 428.
(*u*) *Chaudhri* v. *Muhammad* (1906)28 All. 439, 33 I A. 68.
(*v*) *Chaudhri Mehdi Hasan* v. *Muhammad Hassan* (1906) 28 All. 439, 33 I A. 68.

130. A transfer merely of a right to enjoy the *usufruct* of a thing is called *Ariat*, and it is invalid according to Mahomedan law (*w*). *Ariat*

Thus where a Mahomedan made a transfer of his property in favour of his wife, but the transfer was not made under a written document, and after the transfer he presented a petition to the revenue authorities for the mutation of names, stating that he had transferred his rights and interests to his wife, and made her his *locum tenens*, but that she had *no power to transfer the property in any way*, and that she would continue to hold and possess the same *for her life*, it was held that this was not a gift, but merely an *ariat* and invalid according to Mahomedan law. In the case put above there was no deed of gift or any other evidence to show that the intention was to make a gift of the property to the wife. The Court observed : " If there had been such a deed, we should have to consider the nature of the transfer made under it, and whether the transferor attached any condition to it which would be void under the Mahomedan law " [s. 126].

131. Private trusts are subject to all the conditions necessary for the validity of a gift including delivery of possession to the trustee (*x*). *Private trusts*

Possession is quite as necessary in the case of a trust as in the case of a gift, for the only difference between a trust and a gift is that in the case of a trust the gift is made through a third party (trustee), and in the case of a gift it is made direct to the donee. The mere execution and registration of an instrument of trust are not sufficient to validate a trust.

As to the law of *wakf* or public trusts, see s. 137 below.

(*w*) *Mumtaz-un-Nissa* v. *Tufail* (1905) 28 All. 264.

(*x*) *Moosabhai v. Yacoobbhai* (1904) 29 Bom. 267.

wakf = detention

CHAPTER X.

WAKFS.

"Wakf" defined

132. A *wakf* is a dedication in perpetuity of specified property to charitable or religious uses or to objects of public utility.

Explanation.—A *wakf* may be made of immoveable property, but not of moveable property, except where the moveable is accessory to immoveable property as where land is appropriated together with cattle attached to it (*y*). As to whether a *wakf* can be created of coin or shares in a company, it has been held by the High Court of Calcutta that a *wakf* cannot be created of such property (*z*). On the other hand, it has been held by the High Court of Allahabad, that a *wakf* may be created of such property (*a*).

Illustrations.

[(a) Property is dedicated to the purpose of providing an *imam* for a mosque, and a professor for a *madresa* (college). This is a valid *wakf*: Baillie, 565, 566.

(b) A dedication for the purpose of maintaining a private tomb (as distinguished from the tomb of a saint), or for reading the Koran at the tomb, or for the performance of ceremonies in honor of the deceased at the tomb, is not valid, for "these observances can lead to no *public* advantage": *Kaleeloola* v. *Nuseerudeen* (1894) 18 Mad. 201. [The soundness of this decision has been questioned by Mr. Justice Ameer Ali in his work on Mahomedan Law, Vol. I, p. 389. The above case, so far as it decides that a dedication for maintaining a private tomb is not valid, was followed by the High Court of Bombay in *Zooleka Bibi* v. *Syed Zynul Abedin* (1904) 6 Bom. L. R. 1058.]

(c) An appropriation for the performance of ceremonies known as *fateha* and *kadam sharif* is lawful: *Phul Chand* v. *Akbar Yar Khan* (1896) 19 All. 211.

(d) A Mahomedan conveys a house belonging to him to trustees upon trust out of the income thereof to feed the poor for the period of a year, and after the expiration of the year, to reconvey the house to him. This is not a valid *wakf*, for the appropriation is not permanent, but for a limited period only: Baillie, 557.]

Hed. 231, 234; Baillie, p. 549 (as to the definition of *wakf*), p. 557 (as to perpetuity being a necessary condition of *wakf*), pp. 561-563 (as to the subjects of *wakf*), pp. 565-567 (as to the objects of *wakf*).

The term *wakf* literally means *detention*. In the language of law it signifies the extinction of the appropriator's ownership in the thing dedicated and the *detention* of the thing in the implied ownership of God, in such a manner that its profits may revert to or be applied for the benefit of mankind (Baillie, 550). In the following sections we have used sometimes the word "endowment" and sometimes "appropriation" as the English equivalent of *wakf*.

(*y*) Hed. 234, 235.
(*z*) *Fatima Bibee* v. *Ariff* (1881) 9 C. L. R. 66; *Kulsom Bibee* v. *Golam Hoosein* (1905) 10 Cal. W. N. 443.
(*a*) *Abu Sayid* v. *Bakar Ali* (1901) 24 All. 190.

133. Every Mahomedan of sound mind and not a minor may dedicate his property by way of *wakf*. *Persons capable of making wakfs*

Baillie, 552. See as to majority, notes to s. 89 *ante*.

134. A *wakf* may be made either verbally or in writing. *Form of wakf immaterial*

It is not necessary to constitute a *wakf* that the term "*wakf*" should be used in the grant (*b*); and, conversely, the mere use of the word "*wakf*" is not sufficient to constitute a *wakf* (*c*). What is essential for the creation of a *wakf* is that the words of transfer should be direct, express and explicit (*d*).

Note that the provisions of the Indian Trusts Act II of 1882 do not apply to *wakfs* see s. 1 of that Act.

135. A *wakf* may be created by act *inter vivos* or by will. *Wakf may be testamentary or inter vivos*

A testamentary *wakf* is a dedication which is to come into effect after the testator's death (*e*). Though it was held at one time that a Shiah cannot create a *wakf* by will, it has been recently held by the Privy Council that a Shiah can create a valid *wakf* by will (*f*).

A testamentary *wakf* is not invalid merely because it contains a clause cancelling the *wakf* if any child should be born to the testator in his lifetime or because it reserves to the testator power to cancel or modify any of the clauses of the will. The reason is that a testator has the power in law to revoke or modify his will at any time he likes, and clauses such as the above do simply express what is otherwise implied (*g*).

136. A Mahomedan may dedicate the whole or any part of his property by way of *wakf*; but a *wakf* made by will or during *marz-ul-maut* cannot take effect to a larger amount than the bequeathable third, without the consent of the heirs. *Limits of power to dedicate property by way of wakf*

Hed. 233; Baillie 550. A testamentary *wakf* is but a *bequest* to charity, and is therefore governed by the provisions of s. 92 *ante*.

137. A wakf *inter vivos* is completed, according to Abu Yusuf, by a mere declaration of endowment by the *Completion of wakf*

(*b*) *Jewun Dass* v. *Shah Kubeer-ood-Deen* (1840) 2 M. I. A. 390.
(*c*) *Abdul Ganne* v. *Hussen Miya* (1873) 10 B. H. C. 7; *Abdul Gafur* v. *Nizamudin* (1892) 17 Bom. 1, 19 I. A. 170; *Abdul Fata Mahomed* v. *Rasamaya* (1894) 22 Cal. 619, 22 I. A. 76; *Muhammad Munawer* v. *Razia Bibi* (1905) 27 All. 320, 324, 32 I. A. 86.
(*d*) *Sahiq-un-nissa* v. *Mati Ahmad* (1903) 25 All. 418.
(*e*) *Abdul Karim* v. *Shokannissa* (1906) 33 Cal. 853.
(*f*) *Bakar Ali Khan* v. *Anjuman Ara Begam* (1902) 25 All. 236, 30 I. A. 94.
(*g*) *Mohammad Ahsan* v. *Umardaraz* (1906) All. W. N. 146.

owner ; but according to Abu Muhummad, a *wakf* is not complete, until a *Mutawali* is appointed by the owner, and possession of the property is delivered to him.

Hed. 233 ; Baillie, 550. In *Muhammad Aziz-ud-Din* v. *The Legal Remembrancer* (*h*), a Sunni Mahomedan executed a deed purporting to be a *wakfnama*, and appointed his sons the first *mutawalis* of the property. The deed was registered, but possession of the property was not delivered to the sons. The settlor continued in possession till his death, and it was found that he never spent any portion of the income under the terms of the deed. Upon these facts, it was held by the High Court of Allahabad that the *wakf* was incomplete, and that the property passed to the settlor's sons as his heirs on his death. On behalf of the Legal Remembrancer it was contended that the *wakf* became complete on the execution of the deed, and the opinion of Abu Yusuf was cited in support of that contention. But the Court preferred to follow the opinion of Abu Muhummad, and held that the settlor having retained exclusive proprietary possession, and never having employed any portion of the income for the purposes mentioned in the deed, the *wakf* was inoperative and invalid. But what if the settlor *had* employed the income of the property for the purposes specified in the deed, in other words, what if he had acted upon the deed ? In such a case, it is conceived, that the settlor's declaration, combined with his conduct, would have been sufficient to establish a *wakf*. There is much in the judgment of the Allahabad Court to support this view. Thus at p. 322, the learned Judges say : "The learned Judge below seems not to have considered the effect of the appropriator's conduct in never giving possession *and in making no change whatever with regard to the property dealt with*." And at p. 323, the learned Judges observe : "We find, therefore, that in respect of this *wakf, the income of which was never employed for the declared purpose*, the appropriator having retained exclusive proprietary possession, ... there was never a valid and operative *wakf*, but an inchoate endowment only." Compare s. 147.

The question whether delivery of possession to a *mutawali* is essential to the validity of a *wakf* was considered in an earlier case (*i*), where the learned Judges observe : "After obtaining all the information we are able to collect through the means of our Moulvies and a reference to authorities, we are of opinion that the opinion of Abu Yusuf . . . . . must be considered as the law now prevailing and sanctioned by the more recent authorities." This case does not appear to have been referred to in the Allahabad case cited above.

Revocation of wakf

138. A wakf *inter vivos* once completed cannot be revoked. But a *wakf* made by will may be revoked by the owner at any time before his death.

Fatma Bibi v. *Advocate-General* (1881) 6 Bom. 42. Hed. 232, 233 ; Baillie, 550, 591. A testamentary *wakf* being but a *bequest* to charity, may be revoked like any other bequest : see s. 97 *ante*.

Wakf of mushaa

139. A *mushaa* or an undivided share in a property may, according to the more approved view, form the sub-

(*h*) (1893) 15 All. 321.

(*i*) *Doe d. Jaun Beebee* v. *Abdoollah* (1838), Fulton's Rep. 345.

ject of a *wakf*, whether the property be capable of partition or not.

Exception.—The *wakf* of a *mushaa* for a mosque or a tomb is not valid.

Hed. 233; Baillie, 564. The approved opinion above referred to is that of Abu Yusuf. According to Abu Muhummad, the *wakf* of a *mushaa* in property *capable* of partition is not valid, for he holds that delivery of possession by the endower to a *mutawali* is a condition necessary to the validity of a *wakf*; see s. 137 above. See as to *mushaa*, s. 118 above.

140. It is essential to the validity of a *wakf* that the appropriation should not be made to depend on a contingency. *Contingent wakf not valid*

Illustration.

A Mahomedan wife conveys her property to her husband upon trust to maintain herself and her children out of the income, and to hand over the property to the children on their attaining majority, and in the event of her death without leaving children, to devote the income to certain religious uses. This is not a valid *wakf*, for it is contingent on the death of the settlor without leaving issue: *Pathukutti* v. *Avathalakutti* (1888) 13 Mad. 66.

Baillie, 556.

141. When property is dedicated to religious or charitable uses, the ownership is deemed to be transferred from the dedicator to the Almighty, and the property cannot therefore be alienated by him or by any other person, nor can it pass to his heirs on his death. *Wakf property is inalienable and inheritable*

Hed. 231, 232; Baillie, 550, 551.

142. As *wakf* property is inalienable and inheritable, the person interested in impeaching the validity of a *wakf* are generally the creditors of the settlor and his heirs. *Persons interested in impeaching the validity of wakf*

Family Settlements by way of Wakf.

143. It is not necessary to the validity of a *wakf* that it should come into effect at once (*Hedaya*, 237). *Operation of wakf may be postponed*

Illustration.

A Mahomedan wife conveys her house to her husband on trust to pay the income of the house to her during her lifetime, and from and after her death to devote the whole of it to certain charitable purposes. This is a valid *wakf*, though the charitable trust is not to come into effect till after the founder's death: see *Fatmabibi* v. *Advocate-General of Bombay* (1881) 6 Bom. 42, 51, 52; *Mohammad Ahsan* v. *Umardaraz* (1906) All. W. N. 146.

Family settlements in perpetuity

144. It is not necessary to the validity of a wakf that it should be confined exclusively to religious or charitable purposes. A *wakf* may *include* provisions for the benefit of the founder, or of his descendants or other relatives, including persons not yet in existence (*j*), and effect will be given to these provisions, subject to the conditions set forth in the next following section, though the interest which the beneficiaries successively take, may constitute a perpetuity (*k*).

But a mere settlement for the benefit of the settlor's family in perpetuity, not accompanied by any endowment to religious or charitable uses, is void, and it will not be rendered valid by the mere use of the word "*wakf*" in the settlement.

Illustrations.

[(a) A Mahomedan conveys his property to his son upon trust to support out of the income thereof such of his "descendants and kindred" as might be "in great want and need of support," and to devote the surplus of the income to certain charitable purposes. This is a valid *wakf*: *Deoki Prasad* v. *Inait-ullah* (1892) 14 All. 375. [But the *wakf* would not be valid if it was not confined to the *poor* relatives only of the settlor: see the next section.]

(b) *A* executes a deed purporting to settle in *wakf* certain immoveable properties on his wife, his daughters, and their descendants "from generation to generation." The deed is not valid as a *wakf*, for there is no dedication whatever of any part of the property to religious or charitable uses: *Abdul Gafur* v. *Nizamudin* (1892) 17 Bom. 1, 19 I. A. 170. [The use of the word "*wakf*" in the deed is "only a veil to cover arrangements for the aggrandisement of the family and to make the property inalienable": *Mahomed Ahsanulla* v. *Amarchand Kundu* (1889) 17 Cal. 498, 511, 17 I. A. 28.]

Note—The document cannot be supported as a *family settlement*, for it creates a perpetuity which is opposed to the spirit of the Mahomedan law (*l*). The only case in which the Mahomedan law allows a perpetual family settlement is when it forms part of a *wakf*, provided that there is a *substantial* dedication of the property to religious or charitable uses *at some period of time or other*; the reason being that in that case, the gift to charity comes to the rescue of the family settlement which, without it, would be void.]

It is conceived that documents purporting to be family settlements are governed by the rules of the Mahomedan Law of Gifts. Applying these rules to the facts of ill. (b) it will be seen at once that no descendant of the settlor who was not in existence at the time of gift can take under the deed, for a gift to persons not yet in existence is

(*j*) *Mahomed Ahsanulla* v. *Amarchand Kundu* (1889) 17 Cal. 498, 509, 17 I. A. 28.
(*k*) *Fatmabibi* v. *Advocate-General* (1881) 6 Bom. 42, 51; *Kulsom Bibee* v. *Golam Hossein* (1905) 10 C. W. N. 449, 462.
(*l*) *Abdul Ganne* v. *Hussen Miya* (1873) 10 B.H.C. 7, 11; *Nizamudin* v. *Abdul Gafur* (1888) 13 Bom. 264, 275; s. c. on appeal, 17 Bom. 1, 4.

void (s. 121 *ante*). In the case cited in ill. (b), the only persons who were in existence at the time when the so-called *wakf* was made, were the settlor's wife and his two daughters. These alone could therefore take under the deed, provided the settlor had relinquished possession of the property, and possession had been taken in the settlor's lifetime by each of the three donees of her share (ss. 114-120 *ante*). It was not so, however, in the case under consideration, nor could it have been so, for the settlor's object was to give ***only a life interest*** to the wife and the daughters.

In *Abul Fata Mahomed* v. *Rasamaya* (*m*), it was contended before their Lordships of the Privy Council that the creation of a *family* endowment was of itself a "religious and meritorious act" according to Mahomedan law, and that it therefore came within the definition of *wakf*. But this contention was overruled, and it is now established that a settlement in favour of the settlor's children and his descendants is not valid, unless there is a substantial dedication of the property to religious or charitable purposes (see the next section).

It has already been stated above that *wakf* property is inalienable (s. 141 above). At the same time it is to be remembered that *wakf* property alone is inalienable, and that all other property is alienable. It therefore frequently happens that Mahomedans desirous of keeping their property in their family settle the property on their children and their descendants in perpetuity, and use the term "*wakf*" in the settlement, believing that the mere use of that term is sufficient to make the property inalienable. But these attempts are ineffectual, for it has been held that the mere use of the term "*wakf*" is not sufficient to impress on the property the character of *wakf* so as to make it inalienable. To hold otherwise would be to "enable every person by a mere verbal fiction to create a perpetuity of any description" (*n*), and it would be to "make *words* of more regard than *things*, and *form* more than *substance*" (*o*). See s. 134 above.

Family settlements by way of wakf, when void

145. When a *wakf* comprises family trusts as well as religious or charitable trusts, the provisions in favour of the founder's family can take effect only if "there is a substantial dedication of the property to [religious or] charitable uses at some period of time or other." But if the primary object of the *wakf* be the "aggrandisement of the settlor's family," and the dedication to religious or charitable uses be "illusory" or "colourable," the provisions for the settlor's family are void, and no effect will be given to them (*p*).

Explanation I.—"A gift [to charitable or religious uses] may be illusory whether from its small amount or from its uncertainty and remoteness" (*q*).

(*m*) (1894) 22 Cal. 619, 22 I. A. 76.
(*n*) *Abdul Ganne* v. *Hussen Miya* (1873) 10 B. H. C. 7, 14.
(*o*) *Abul Fata Mahomed* v. *Rasamaya* (1892) 22 Cal. 619, 634, 22 I. A. 76.
(*p*) *Mahomed Ahsanulla* v. *Amarchand Kundu* (1889) 17 Cal. 498, 17 I. A. 28; *Abdul Gafur* v. *Nizamuddin* (1892) 17 Bom. 1, 19 170; *Abul Fata Mahomed* v. *Rasamaya* (1894) 22 Cal. 619 22 I. A. 76; *Mujh-un-nissa* v. *Abdur Rahim* (1900) 23 All. 233; *Bikani Miya* v. *Shuk Lal* (1892) 20 Cal. 116; *Fazlur Rahim* v. *Mahomed Obedul Azim* (1903) 30 Cal. 666.
(*q*) *Abul Fata Mahomed* v. *Rasamaya* (1894) 22 Cal. 619, 634.

Explanation II.—A gift to charity is not illusory merely because the object of the gift is of such a precarious character that the trust may fail for want of object. If the trust fails for want of object, the Court will, on being invited so to do, apply it *cy-près*, that is to say, to other objects as nearly as may be of a similar character.

Illustrations.

(a) Two Mahomedan brothers execute a deed purporting to make a *wakf* of all their immoveable properties for the benefit of their children and their descendants "from generation to generation," and on total failure of all their descendants, for the benefit of widows, orphans, beggars and the poor. The provisions for the settlor's children and their descendants are void, for the gift to the poor is illusory by reason of its remoteness: *Abul Fata Mahomed* v. *Rasamaya* (1894) 22 Cal. 619, 22 I. A. 76.

Note.—Here the gift to charity is *too remote*, for the poor are to take nothing, "until the total extinction of the blood of the settlors, whether lineal or collateral." The document professes to create a *wakf*, but, in reality, the settlors' relations are the only objects of their bounty. "The poor have been put into the settlement merely to give it a colour of piety, and so to legalize arrangements meant to serve for the aggrandisement of a family."

(b) A Mahomedan conveys certain lands to a *mutawalli* with directions out of the profits of the lands to defray the expenses of a mosque, to give alms to mendicants and to utilise the surplus towards the expenses of the marriages, burials and circumcisions of the members of the family of the *mutawali*. This is a valid *wakf*: *Muzhurool Huq* v. *Puhraj Ditarey* (1870) 13 W. R. 235.

(c) A Mahomedan executes a document purporting to be a deed of *wakf* by which it is provided that Rs. 75 arising out of the income of certain property should be distributed annually among the poor, that Rs. 100 should be paid every year to each of his four sons, that on the death of any of his sons, his share should be paid to his "successive descendants," that the surplus income should be accumulated and added to the endowed property, and that on total failure of all the descendants of the settlor, the whole of the income should be distributed among "the poor, the indigent and the beggars residing in the town of Dacca." The provisions in favour of the settlor's family are void: *Bikani Mia* v. *Shuk Lal* (1892) 20 Cal. 116.

Note.—In this case there is not only an *ultimate* gift to charity, but also a *concurrent* gift to charity. The ultimate gift to charity could not support the family provisions, for it is *too remote* as shown in ill. (a). Nor could the concurrent gift of Rs. 75 per annum validate the family trusts, for the amount of gift is *too small* compared with the provision of Rs. 400 for the settlor's family. In fact, the gift to charity is illusory, and the object is manifestly to benefit the family, and to increase the family property as shown by the direction to *accumulate* the surplus income.

(d) A deed purporting to be a *wakfnama* contains provisions similar to those in the last illustration, with the difference that instead of the amount of the concurrent gift to charity being specified in the deed, it is left entirely to the discretion of the

mutawali. Here, again, the family trusts are void, for the gift is illusory by reason of its *uncertainty* : *Mujib-un-nissa* v. *Abdur Rahim* (1900) 23 All. 233.

(c) A deed purporting to be a *wakfnama* contains provisions similar to those in ill. (c), with this difference that instead of the amount of the concurrent gift to charity being specified, there is a direction to the *mutawali* to "continue to perform the stated religious works according to custom." No evidence of custom is given to show what amount would be necessary for the performance of the "religious work." The average annual income of the property is Rs. 13,000, while the character of the "religious works" is not such as would absorb more than a devout and wealthy Mahomedan gentleman might find it becoming to spend in that way. The provisions in favour of the settlor's family are void, as the charitable outlays contemplated by the settlor are of *small* amount compared with the property : *Mahomed Ahsanulla* v. *Amarchand Kunda* (1889) 17 Cal. 498, 17 I. A. 28.

Note.—In the above case their Lordships of the Privy Council observed : "If indeed it were shown that the *customary* uses were of such magnitude as to *exhaust* the income or to absorb the *bulk* of it, such a circumstance would have its weight in ascertaining the intention of the grantor." Accordingly, where a Mahomedan had dedicated certain property, of which the average annual income was Rs. 850, to the performance of *fateha* and *kadam sharif* ceremonies, and it was found that according to the custom prevailing in the country the amount required for the ceremonies was Rs. 500 per annum, it was held by the High Court of Allahabad that the dedication to religious purposes was *substantial*, and that the *wakf* was therefore valid : *Phul Chand* v. *Akbar Yar Khan* (1896) 19 All. 211.

(f) *Illustration of Explanation II.—A*, who owns four houses in Calcutta, one a large house used by him for his residence of the value of Rs. 1,10,000, and the other three all small houses of the aggregate value of Rs. 40,000 and yielding a monthly rent of Rs. 300, conveys them all by a *wakfnama* to one of his sons as *mutawali* upon trusts to collect the rents, and after payment of rates and taxes to divide the residue into three parts (1) one-third to be used in repairing and maintaining the trusts premises, (2) one-third to be devoted towards defraying the expenses of a mosque, and (3) one-third towards the feeding of learned men coming from Mecca, Medina, Baghdad, Samarkand, Bokhara and other places noted for learning, who were all to be housed in the large house. The deed gives to the *mutawali* and his successors, who were also to be members of the family, the right of residence in the large house, and to the settlor a right of residence in the same house so long as he should live. It is further provided by the deed that after the settlor's death his wife Fatima and his children by her should be at liberty to reside in the large house, but if, by reason of their presence, sufficient accommodation was not obtainable for learned men, they (*i.e.*, Fatima and her children) should leave the house, with liberty to return when there was room for both. *A* dies leaving Fatima and several children by her, one of them being the *mutawali*, and also leaving another widow Kulsom Bibee. After *A's* death a suit is brought by Kulsom Bibee against the other heirs of *A* to set aside the *wakfnama* on the ground that the dedication of the large house to the public as represented by learned men from Mecca and other places was colorable, *for hardly any learned men would be coming to Calcutta from those places*, and that the real object was to secure to the settlor, so long as he lived, and to his wife Fatima and his children by her and to such other descendants as might be *mutawalis* after his death, the enjoyment of the family

dwelling house to maintain the dignity of the family. Is the *wakf* invalid? No; it is a perfectly valid *wakf*. "There is an undoubted trust for accommodation of learned men of the whole of [the large house], subject to the right of residence referred to. The only permanent right [of residence in the large house] is that of the *mutawali*, which is of an usual character. The right of the settlor [to reside in the house] disappears with his death, and of his family with theirs. Moreover, their right is made subject to this that they cannot stay in the house if it is required for learned men from Bokhara, Samarkand and elsewhere. It is not difficult to imagine what may happen. There may be, as suggested, a lack of [learned men], in which case the family will not be put to the trouble of moving, or there may be such persons and a breach of trust in refusing them admittance. I cannot, however, assume this and such considerations are really foreign to the case. If the trust fails for want of object, the Court will, on being invited so to do, doubtless apply it *cy-près*. If there is a breach of trust, the Court will, at the instance of those interested, enforce it and remove the trustee": *Kulsom Bibee* v. *Golam Hossein* (1905) 10 C. W. N. 449, 462, 485.]

The mere fact that there is an ultimate gift for the poor, or even a concurrent gift for them, will not support a perpetual family settlement, unless the gift to charity is substantial, and not merely illusory (*r*). "If a man were to settle a crore of rupees, and provide ten for the poor, that would be at once recognized as illusory. It is equally illusory to make a provision for the poor under which they are not entitled to receive a rupee till after the total extinction of a family; possibly not for hundreds of years; possibly not until the property had vanished away under the wasting agencies of litigation or malfeasance or misfortune; certainly not as long as there exists on the earth one of those objects whom the donors really cared to maintain in a high position" (*s*). The test in all these cases is whether the property is in substance dedicated to charitable purposes, or whether it is dedicated substantially to the maintenance and aggrandizement of the family estates for family purposes. In a recent Privy Council case on the subject, where the question was whether a document purporting to be a *wakfnama* was a valid deed of *wakf*, their Lordships observed: "It will be so, if the effect of the deed is to give the property in substance to charitable uses. It will not be so, if the effect is to give the property in substance to the [settlor's] family" (*t*). The same principles were reiterated in *Muhammad Munavar* v. *Razia Bibi*, the latest Privy Council case on the subject (*u*).

Effect of failure of family trusts upon religious charitable trusts

146. It has been held by the High Court of Calcutta that when a *wakf* contains provisions for the benefit of the settlor's family, and there is also a concurrent gift to charity, the failure of the family trusts by reason of the gift to charity being illusory, does not involve the failure of the gift to charity.

Illustration.

[A Mahomedan executes a deed purporting to be a *wakfnama* providing for the payment of Rs. 75 per annum out of the income of the property to the poor, and

(*r*) The decision to the contrary in *Amrutlal* v. *Shaik Hussein* (1887) 11 Bom 49 is no longer law: see *Abul Fata Mahomed* v. *Rasamaya* (1894) 22 Cal. 619, at p. 633.

(*s*) *Abul Fata Mahomed* v. *Rasamaya* (1892) 22 Cal 619, 6. 4, 22 I. A. 76.

(*t*) *Mujib-un-nissa* v. *Abdur Rahim* (1900) 23 All 243, 242.

(*u*) (1905) 27 All. 320, 32 I. A. 86.

Rs. 400 per annum to his children and their descendants "from generation to generation." Here the gift to charity is illusory by reason of its smallness. The family trusts therefore fail, but the gift to charity is valid. *Bikani Miya* v. *Shuk Lal* (1892) 20 Cal. 116, 194, 225. See also *Mahomed Ahsanulla* v. *Amarchand Kundu* (1889) 17 Cal. 498, 511, 17 I. A. 28.]

The present section relates to the question of the validity of a *concurrent* gift to charity, when the family settlement fails by reason of the gift being illusory. It does not make any mention of the effect upon the *ultimate* gift to charity, under similar circumstances. It is submitted that since the decisions set out in the preceding section, the failure of intermediate family trusts must be taken to involve the failure of the *ultimate* charitable or religious trusts. Thus in ill. (a) to the preceding section, the whole settlement, it is submitted, is void, including the ultimate gift to charity. No doubt, the judgment of West, J., in *Fatmabibi* v. *Advocate-General* (*v*) points to a different conclusion, but it must be remembered that the judgment in that case proceeded upon the theory, no longer tenable, that if the condition of an ultimate dedication to a pious and unlawful purpose be specified, the *wakf* is *not* made invalid by an intermediate settlement on the founder's children and their descendants." That this is no longer law will be seen from the decision of the Privy Council set out in ill. (a) to the preceding section.

Evidence of intention

147. (1) If a *wakf inter vivos* is formally constituted and establishes by its terms a substantial charitable trust, evidence is not admissible to show that there was no intention to give effect to the trusts and that the trusts were not in fact given effect to (*w*). But such evidence is admissible, if the *wakf* was not created by any document, (*x*) or, if it was created by a document, any question arises as to ambiguity in the language employed in the document (*y*).

Evidence showing the manner in which a document purporting to create a *wakf* is related to existing facts, *e.g.*, the value and state of the *wakf* properties and their rental, is always relevant, for the object of such evidence is to show that if there appears a substantial endowment on paper, that is not so when the document is read in the light of the value and state of the *wakf* properties (*z*).

(2) But where a *wakf* is created by a will (so that it could not come into operation until after the death of the settlor) evidence is admissible to show that the settlor so dealt with the *wakf* property subsequent to the execution

(r) (1881) 6 Bom. 42.
(w) *Kulsom Bibee* v. *Golam Hossein* (1905) 10 C. W. N. 449, 484.
(x) *Rutty Ram* v. *Amjad Khan* (1906) All. W. N. 159; *Zooleka Bibi* v. *Syed Zynul Abedin* (1904) 6 Bom. L. R. 1058, 1067.
(y) *Kulsom Bibee* v. *Golam Hossein* (1905) 10 C. W. N. 449, 484.
(z) *Kulsom Bibee* v. *Golam Hossein* (1905) 10 C. W. N. 449, 484-85.

of the will as to indicate an intention to rescind the disposition in favour of charity (*a*).

If a *wakf*, executed with the necessary formalities and otherwise validly constituted, establishes by its terms a substantial trust in favour of the public, it is not open to those who seek to set aside the *wakf* to say that though the document by its terms evidences an intention to create a *wakf*, the settlor never intended to carry it out and in fact never did so. Hence evidence given to show that it was never intended to give effect to the trusts and that in fact they were never given effect to, is irrelevant. The intention of the settlor must be gathered from the document itself (*b*) except in the two cases mentioned in clause (1). See notes to s. 137.

Of Mutawalis or Managers of endowed property.

Who may be mutawali

148. A dedicator may appoint himself (*c*) or any other person, even a female (*d*) or a non-Moslem (*e*), to be *mutawali* of *wakf* property, provided the person so appointed is of sound mind and not a minor (*f*).

But where the *wakf* involves the performance of religious duties, such as the duties of a *sajjada-nashin* (spiritual preceptor), a *muezzin* (crier), or a *khatib* (Koran-reader), neither a female (*g*) nor a non-Moslem (*h*) is competent to perform those duties, though they may perform such of the duties attached to the *wakf* as are of a secular nature.

Appointment of new mutawalis

149. Whenever any person appointed a *mutawali* dies or refuses to act in the trust, or is removed by the Court, and there is no provision in the deed of *wakf* regarding succession to the office (*i*), a new *mutawali* may be appointed by—

(*a*) the founder of the *wakf*, if he be alive ; or

(*b*) his executor, if any ; and if there be no executor, by

(*c*) the Court ; provided that the Court should not appoint a stranger, so long as there is any member of the founder's family in existence qualified to hold the office.

Baillie, 593.

(*a*) *Abdul Karim* v. *Shofunnissa* (1906) 33 Cal. 854.
(*b*) *Kulsom Bibee* v. *Golam Hossein* (1905) 10 C. W. N. 449, 484.
(*c*) *Advocate-General* v. *Fatima* (1872) 9 B. H. C. 19.
(*d*) *Wahid Ali* v. *Ashruff Hossain* (1882) 8 Cal. 732.
(*e*) Ameer Ali, Vol I, 348.
(*f*) See *Piran* v. *Abdool Karim* (1891) 19 Cal. 203, 219-20.
(*g*) *Hussain Beebee* v. *Hussain Sheriff* (1868) 4 M. H. C. 23; *Ibrambibi* v. *Hussain Sheriff* (1880) 3 Mad. 95.
(*h*) Ameer Ali, Vol I, 348.
(*i*) *Advocate-General* v. *Fatima* (1872) 9 B. H. C. 19.

150. A *mutawali* cannot transfer his office to another in his lifetime. *Office of mutawali not transferable inter vivos*

Baillie, 594. It was so held by the High Court of Calcutta in *Wahid Ali* v. *Ashruff Hossain* (1882) 8 Cal. 732. But the rule is qualified in the Fatwa Alumgiri by the clause "unless the appointment of himself were in the nature of a *general* trust." This clause, as pointed out by Mr. Justice Ameer Ali, was not brought to the notice of the Court in the Calcutta case. It would appear from certain passages quoted by that learned writer that the powers of a *mutawali* are *general*, when the founder has transferred all his powers to the *mutawali* in *general* terms, as when he says, "you shall be *in my place* with reference to this *wakf*," in which event the *mutawali* may transfer the office to another person in his lifetime.

151. In the absence of any provision in the deed of *wakf* or of any evidence of usage regarding the devolution of the office of *mutawali*, the *mutawali* for the time being may nominate his successor on his death-bed; but such appointment cannot be made, if the founder is alive, or if he has left an executor competent to make the appointment (*j*). *Mutawali may appoint successor on his death-bed*

A *mutawali* may appoint as his successor in office a stranger, that is, one who is not a member of the family of the deceased founder of the *wakf* (*k*).

152. A *mutawali* has no power, without the permission of the Court, to mortgage, sell or exchange, the *wakf* property or any part thereof. *Mutawali cannot mortgage or sell*

Baillie, 595, 596; Ameer Ali, 370, 371. A debt contracted by the *mutawali*, without the sanction of the Court, is his *personal* debt, even though it may have been contracted for necessary purposes, such as for repairs of the property or for payment of taxes.

153. A *mutawali* should not lease *wakf* property, if it be agricultural, for a term exceeding three years, and if non-agricultural, for a term exceeding one year, nor without reserving the best rent that can be resonably obtained. But a lease for a longer term may be granted with the permission of the Court, even though the founder may have expressly directed not to grant such a lease (Baillie, 596, 597). *Power of mutawali to grant leases*

(*j*) Baillie, 594; *Piran* v. *Abdool Karim* (1891) 19 Cal. 263; *Zooleka Bibi* v. *Syed Zynul Abedin* (1904) 6 Bom. L. R. 1058.

(*k*) *Sheikh Amir Ali* v. *Syed Wazir* (1905) 9 C. W. N. 876.

Allowance of officers and servants

154. The *mutawali* has no power to increase the allowance of officers and servants attached to the endowment, but the Court may in a proper case increase such allowance.

Ameer Ali, Vol. I, 369.

Remuneration of mutawali

155. If no provision is made by the founder for the remuneration of the *mutawali*, the Court may fix a sum not exceeding one-tenth of the income of the *wakf property* (*l*). And if the amount fixed by the founder is too small, the Court may increase the allowance, provided it does not exceed the limit of one-tenth (*m*).

Removal of mutawali

156. A *mutawali* may be removed by the *Court* on proof of misfeasance or breach of trust, or if it be found that he is otherwise unfit to hold the office, though the founder may have expressly provided that the *mutawali* should not be removed in any case. But the *founder* has no power to remove a *mutawali*, unless he has expressly reserved such power in the deed of *wakf*.

Baillie, 597, 598; *Hidait-oon-nissa* v. *Syud Afzool Hossein* (1870) 2 N. W. P. 420 Even the founder, when he holds the office of *mutawali*, may be removed by the Court on any of the grounds specified above.

Personal decree against mutawali

157. (1) Neither the whole corpus, nor any specific portion of the corpus of *wakf* property, can be attached and sold in execution of a personal decree against the *mutawali*, merely because there is a margin of profit coming to him after performance of the duties attached to his office. But the surplus profit that may remain in the hands of the *mutawali* for his own benefit may [probably] be attached (*n*)

(2) The office of *mutawali* also cannot be attached in execution of a personal decree against him (*o*).

In *Bishen Chand* v. *Nadir Hoosein* (1887) 15 Cal. 329, 15 I. A. 1, it was contended on behalf of the decree-holder that as some surplus always remained in the hands of the trustee after the performance of the trusts, he (the decree-holder) was entitled to attach so much of the *corpus* of the property as was represented by the surplus *income*. But it was held by their Lordships of the Privy Council, confirming the decision of the Calcutta High Court, that "the *corpus* of the estate cannot be sold, nor can any specific portion of the corpus of the estate be taken out of the hands of the

(*l*) *Mohiuddin* v. *Sayiduddin* (1893) 20 Cal. 810, 821.
(*m*) Ameer Ali, Vol. I, 369.
(*n*) *Bishen Chand* v. *Nadir Hossein* (1887) 15 Cal. 329, 15 I. A. 1.
(*o*) *Sarkum* v. *Rahaman Buksh* (1896) 24 Cal. 83, 91.

trustee because there may be a margin of profit coming to him after the performance of all the religious duties."

Miscellaneous.

Public mosques

158. Every Mahomedan is entitled to enter a mosque dedicated to God, whatever may be the sect or school to which he belongs, and to perform his devotions according to the ritual of his own sect or school. But it is not certain whether a mosque appropriated exclusively by the dedicator to any particular sect or school can be used by the followers of another sect or school.

Ata-Ullah v. *Azim-Ullah* (1889) 12 All. 494; *Jangu* v. *Ahmad-Ullah* (1889) 13 All. 419; *Fazl Karim* v. *Maula Baksh* (1891) 18 Cal. 448, 18 I. A. 59.

In the first of these cases, it was held by the High Court of Allahabad, that a mosque dedicated to God is for the use of all Mahomedans, and cannot lawfully be appropriated to the use of any particular sect. This ruling was referred to by their Lordships of the Privy Council in *Fazl Karrim's* case, but they declined to express any opinion upon it, stating that the facts of the case before them did not properly raise that question. The point cannot therefore be said to be quite settled. But when a mosque is not appropriated to any one sect, there seems to be no doubt that it can be used by any Mahomedan for the purposes of worship without distinction of sect. Thus a Shafei may join in a congregational worship, though the majority of worshippers in the congregation may be Hanafis; and he cannot be prevented from taking part in the service, because, according to the Shafei practice, he pronounces the word *amin* (amen) in a loud voice, and the Hanafi practice is to mutter the word softly.

Sajjad-i nashin

159. The office of *Sajjad-i-nashin* is a religious office, and the property acquired by a *Sajjad-i-nashin* is ordinarily his private property which descends to his heirs on his death (*p*).

Notes.—The office of a *mutawali* is a secular office; that of a *Sajjad-i-nashin* is a spiritual office, and he has certain spiritual functions to perform. A person may hold the office both of a *mutawali* and a *Sajjad-i-nashin* at the same time. A *Sajjad-i-nashin* may, like a *mutawali* (s. 151), appoint his own successor. As to the distinction between the two offices, see the undermentioned cases (*q*).

(*p*) *Zooleka Bibi* v. *Syed Zynul Abedin* (1904) 6 Bom. L. R. 1058.
(*q*) *Piran* v. *Abdool Karim* (1891) 19 Cal. 203; *Secretary of State* v. *Mohiuddin* (1900) 27 Cal. 674.

17 of 64 Mussal Trustees Act. 6 of 90. Charitable Endowments Act, § 539 of Civil P C. allows those interested in endowment to sue trustees. 20 of 63

CHAPTER XI.

PRE-EMPTION.

Pre-emption

160. The right of *shaffa* or pre-emption is a right which the owner of certain immoveable property possesses to acquire by purchase certain other immoveable property which has been sold to another person.

Hed. 547 ; Baillie, 471 ; *Gobind Dayal* v. *Inayatullah* (1885) 7 All. 775, 799.

Law of pre-emption not applied in Madras Presidency

161. The Mahomedan law of Pre-emption is applied by the Courts of British India to Mahomedans as a matter of "justice, equity and good conscience," except in the Madras Presidency where the right of pre-emption is not recognized at all on the ground that it places a restriction upon liberty of transfer of property, and is therefore opposed to "justice, equity and good conscience" (*r*).

See notes to s. 5 above.

Special Acts

162. The law of Pre-emption in the Punjab is regulated by the Punjab Laws Act, 1872, as amended by Act XII of 1878, and in Oudh by the Oudh Laws Act, 1876. These Acts apply both to Mahomedans and to non-Mahomedans, with the result that the special rules of the Mahomedan law of pre-emption do not apply even to Mahomedans in those places.

Pre-emption among Hindus

163. The right of pre-emption is recognized by custom among Hindus who are either natives of, or are domiciled (*s*) in Behar (*t*) and Gujarat (*u*), and it is governed by the rules of the Mahomedan law of Pre-emption except in so far as such rules are modified by custom (*v*).

The explanation lies in the fact that under the Mahomedan law, non-Mahomedans are as much entitled to exercise the right of pre-emption as Mahomedans (Baillie, 473). Accordingly during the Mahomedan rule in India claims for pre-emption were entertained by the courts of the country whether they were preferred by or

(*r*) *Ibrahim* v. *Muni Mir Udin* (1870) 6 M. H. C. 26.
(*s*) *Parsashth Nath* v. *Dhanat* (1905) 32 Cal. 988.
(*t*) *Fakir Rawot* v. *Emambaksh* (1863) B. L. R. Sup. Vol. 35.
(*u*) *Gordhandas* v. *Prankor* (1869) 6 B. H. C. A. C. 263.
(*v*) *Chakauri* v. *Sundari* (1906) 28 All. 590 ; *Jat Kuar* v. *Heera Lal* (1874) 7 N.W.P. 1.

local custom does not bind owners of land not natives of not domiciled : the locality

against Hindus. In this wise, the Mahomedan law of pre-emption came to be the customary law of Behar and Gujarat. But the law of pre-emption as applied to Hindus in those places was the Hanafi law, the Mahomedan sovereigns of India being all Sunnis of the Hanafi sect, and the same law is now applied to them in cases of pre-emption. But it is a necessary condition of the application of the Mahomedan law of pre-emption to Hindus in Behar and Gujarat that they should be either natives of or domiciled in those places. It is not enough that the party is a Hindu and owns immoveable property in those places. Thus in a recent Calcutta case the right of pre-emption was denied to a Hindu who was a co-sharer of certain immoveable property in Behar, but who was neither a native of, nor domiciled in, that place (*w*).

Who may claim pre-emption

164. The following three classes of persons, and no others, are entitled to claim pre-emption, namely :—

(1) co-sharers ;

(2) "participators in the appendages" (*x*); and

(3) owners of adjoining immoveable property, but not *tenants* (*y*), nor persons in possession of such property without any *lawful* title (*z*).

The first class excludes the second, and the second excludes the third. But when there are two or more pre-emptors belonging to the same class, they are entitled to equal shares of the property in respect of which the right is claimed.

Exception.—"The right of pre-emption on the ground of vicinage does not extend to estates of large magnitude [such as villages and zamindaris], but is confined to houses, gardens, and small parcels of land" (*a*).

Illustrations.

(a) *A*, who owns a piece of land, grants a building lease of the land to *B*. *B* builds a house on the land, and sells it to *C*. *A* is not entitled to pre-emption of the house, though the land on which it is built belongs to him, for he is neither a co-sharer nor a participator in the appendages of the house, nor an owner of *adjoining* property : *Pershadi Lal* v. *Irshad Ali* (1807) 2 N. W. P. 100.

(b) *A* owns a house which he sells to *B*. *M* owns a house towards the north of *A's* house, and is entitled to a right of way through that house. *N* owns a house towards the south of *A's* house, separated from *A's* house by a party wall, and having a right of support from that wall. Both *M* and *N* claim pre-emption of the house sold

(*w*) *Parsashth Nath* v. *Dhanai* (1905) 32 Cal. 988.
(*x*) *Karim* v. *Priyo Lal* (1905) 2 All. 127.
(*y*) *Goonun Sing* v. *Tripool Sing* (1867) 8 W. R. 437.
(*z*) *Beharee Ram* v. *Shoobhudra* (1868) 9 W. R. 455.
(*a*) *Mahomed Hossein* v. *Mohsin Ali* (1870) 6 B. L. R. 41, 50 ; *Abdul Rahim* v. *Kharag Singh* (1892) 15 All. 104.

to *B*. Here *M* is a participator in the appendages, while *N* is merely a neighbour, for the right of collateral support is not an appendage of property. *M* is therefore entitled to pre-emption in preference to *N*: see *Ranchoddas* v. *Jugaldas* (1899) 24 Bom. 414; *Karim* v. *Priyo Lal* (1905) 28 All. 127.

Note.—In the above illustration, the house owned by *M* is a dominant heritage, and the pre-empted house is a servient heritage, for *M* has a right of way through it. But *M* would none the less be a "participator in the appendages," if the pre-empted property was the dominant heritage, and his property was the servient heritage: *Chand Khan* v. *Naimat Khan* (1869) 3 B. L. R., A. C. 296. And *M* would yet be a "participator," even if his house and the pre-empted house were dominant tenements having a right of easement as against a third property: *Mahatab Sing* v. *Ramtahal* (1868) 6 B. L. R., at p. 43.

(*c*) *A*, *B* and *C* are co-sharers in a house, *A's* share being one-half, *B's* share one-third, and *C's* share one-sixth. *A* sells his share to *M*. *B* and *C* are each entitled to pre-emption of one-fourth, without reference to the extent of their shares in the property: Baillie, 494; see also *Maharaj Singh* v. *Bheechuk Lal* (1865) 3 W. R. 71.]

Hed. 548-550; Baillie, 476-480, 494, 495. The right of pre-emption cannot be resisted on the ground that the pre-emptor was not in possession at the date of the suit. It is *ownership* and not *possession*, that gives rise to the right (*b*).

When pre-emption is claimed by two or more persons on the ground of participation in a right of way, all the pre-emptors have equal rights although one of them may be a contiguous neighbour (*c*).

The reason why the right of pre-emption cannot be claimed when the contiguous estates are of large magnitude is that the law of pre-emption "was intended to prevent vexation to holders of *small* plots of land who might be annoyed by the introduction of a stranger among them."

Shiah law—By the Shiah law the only persons who are entitled to the right of pre-emption are co-sharers: Baillie, 175-177; *Qurban* v. *Chote* (1899) 22 All. 102. But there is no right of pre-emption even among co-sharers, if their number exceeds two: *Abbas Ali* v. *Maya Ram* (1889) 12 All. 229.

Sale alone gives rise to pre-emption

165. The right of pre-emption arises only out of a valid (*d*), complete (*e*) and *bonâ fide* (*f*) sale. It does not arise out of gift, *sadaka* (pious gift), *wakf*, inheritance, bequest (*g*), or lease even though in perpetuity (*y*). Nor does it arise out of a mortgage even though it may be by way of conditional sale (*i*); but the right will accrue, if the mortgage is foreclosed (*j*).

(*b*) *Sakina Bibi* v. *Amiran* (1888) 10 All. 472.
(*c*) *Karim Bakhsh* v. *Khuda Bakhsh* (1894) 16 All. 247.
(*d*) Hed. 560; Baillie, 472.
(*e*) Hed. 550; Baillie, 472.
(*f*) *Parsashth Nath* v. *Dhanai* (1905) 32 Cal. 989.
(*g*) Baillie, 471.
(*h*) *Dewanutulla* v. *Kazem Molla* (1887) 15 Cal. 184.
(*i*) *Gurdial* v. *Teknarayan* (1865) B. L. R. Sup. Vol. 166.
(*j*) *Batul Begum* v. *Mansur Ali* (1901) 24 All. 17.

Explanation I.—A transfer of immoveable property by a husband to his wife in consideration of a sum of money due to her as dower is a sale (*k*).

Explanation II.—It has been held by the High Court of Allahabad, that although the rules of the Mahomedan Law of Sale have been superseded by the provisions of the Transfer of Property Act, 1882, the question whether a sale is valid and complete so as to give rise to a right of pre-emption is to be determined by applying the Mahomedan law, and if there is a complete sale under that law, although not under the said Act, the right of pre-emption will arise (*l*).

Illustration.

A agrees to sell his house to *B* for Rs. 300. *B* pays the purchase-money, and obtains possession of the house. The sale is complete under the Mahomedan law so as to give rise to a right of pre-emption, though a sale of immovable property of the value of one hundred rupees and upwards can only be made under the Transfer of Property Act by a registered instrument: *Janki* v. *Girjadat* (1885) 7 All. 482.

Ground of pre-emption to continue up to decree

166. The right in which pre-emption is claimed—whether it be co-ownership, or participation in appendages, or vicinage—must exist not only at the time of the sale, but at the date of the suit for pre-emption (*m*), and it must continue up to the time the decree is made (*n*). But it is not necessary that the right should be subsisting at the time of the execution of the decree (*o*).

Thus if a plaintiff, who claims pre-emption as owner of a contiguous property, sells the property to another person, *though it be after the date of the suit*, he will not be entitled to a *decree*, for he does not then belong to any of the three classes of persons to whom alone the right of pre-emption is given by law: see s. 164, above. But once a *decree* is made, the plaintiff does not forfeit the right of being put into possession of the pre-empted property in execution of the decree, although he may have alienated his property *before execution*. It need hardly be mentioned that a plaintiff does not forfeit his right of pre-emption merely because he had on a previous occasion mortgaged his own property on which his right of pre-emption is based (*p*).

Doubt as to whether the buyer should be a Mahomedan

167. It is not necessary, according to the Allahabad decisions, that the buyer should be a Mahomedan (*q*): according to an earlier ruling of the Calcutta High Court it is necessary that the buyer should be a Mahomedan (*r*),

(*k*) *Fida Ali* v. *Muzaffar Ali* (1882) 5 All. 65.
(*l*) *Najm-un-nissa* v. *Ajaib Ali* (1900) 22 All. 343.
(*m*) *Janki Prasad* v. *Ishar Das* (1899) 21 All. 374.
(*n*) *Ram Gopal* v. *Puari Lal* (1899) 21 All. 441.
(*o*) *Ram Sahai* v. *Gaya* (1884) 7 All. 107.
(*p*) *Ujagar Lal* v. *Jia Lal* (1896) 18 All. 382.
(*q*) *Govind Dayal* v. *Inayatulla* (1885) 7 All. 775; *Abbas Ali* v. *Maya Ram* (1889) 12 All. 229.
(*r*) *Kudratulla* v. *Mahini Mohan* (1869) 4 B. L. R. 134.

although in a recent case the same Court allowed a claim for pre-emption though the buyer was a Hindu (*s*). But both the High Courts are agreed that the seller and the pre-emptor should both be Mahomedans (*t*).

The vendor should be a Mahomedan. Hence no right of pre-emption can be claimed by a Mahomedan when the vendor is a Hindu or a European, though the vendee may be a Mahomedan.

The pre-emptor also should be a Mahomedan, the reason being that if he is a Mahomedan, and subsequently wants to sell the pre-empted property, he is bound to offer it to his Mahomedan neighbours or partners before he can sell it to a stranger. But a non-Mahomedan is not subject to any such obligation, and he can sell to anyone he likes. The law of pre-emption contemplates both a right and an obligation, and if a non-Mahomedan were allowed to pre-empt, it would be allowing him the right without the corresponding obligation. This is the principle underlying the decision of Allahabad High Court in *Qurban's* case (*u*), where it was held that a Shiah Mahomedan could not maintain a claim for pre-emption based on the ground of *vicinage* when the vendor is a Sunni. The decision was based on the ground that by the Shiah law a *neighbour*, as such, has no right of pre-emption, and that if he were allowed to pre-empt, he might sell his house to anyone he liked, and his Sunni neighbours could not successfully assert any right of pre-emption against him.

The vendee also, according to an earlier Calcutta decision, should be a Mahomedan. Hence a Mahomedan cannot obtain pre-emption of property sold by a Mahomedan to a *Hindu*. According to that Court, the right of pre-emption is not a right that attaches to the land, but it is merely a personal right. If it were a right attaching to the *land*, it might be claimed even against a Hindu or any other non-Mahomedan purchaser. "We cannot, . . . in justice, equity and good conscience decide that a Hindu purchaser in a district in which the custom of pre-emption does not prevail as amongst Hindus, is bound by the Mahomedan law, which is not his law, to give up what he has purchased" to a Mahomedan pre-emptor." But in a recent case where the vendor and pre-emptor were Mahomedans, and the purchaser was a Hindu, the High Court of Calcutta allowed the plaintiff's claim for pre-emption. The point, however, dealt with in this section was not expressly raised.

On the other hand, it has been held by the Allahabad High Court that it is not necessary that the vendee should be a Mahomedan, and that pre-emption can therefore be claimed even against a *Hindu* purchaser. According to that Court, a Mahomedan owner of property is under an obligation imposed by the Mahomedan law to offer the property to his Mahomedan neighbours or partners before he can sell it to a stranger, and this is an incident of his property, which attaches to it whether the vendee be a Mahomedan or a non-Mahomedan.

Pre-emption in case of sale to a Shafee

168. When the sale is made to one of several *shafees* (persons entitled to pre-empt), the other *shafees* are not

(*s*) *Jog Deb* v. *Mahomed* (1905) 32 Cal. 982.
(*t*) *Dwarka Das* v. *Husain Bakhsh* (1878) 1 All. 564 (Hindu vendor); *Poorno Singh* v. *Hurrychurn* (1872) 10 B. L. R. 117 (European vendor); *Qurban* v. *Chote* (1899) 22 All. 102 (Shiah pre-emptor against Sunni vendor and Sunni vendee).
(*u*) (1899) 22 All. 102.

Vendee cannot plead his own contingent right v. a right of pre-emption

entitled, according to the decisions of the Calcutta High Court, to claim pre-emption against him. But when the sale is made to a *shafee* and a stranger, and the property sold is conveyed to both the purchasers as a whole for one entire consideration, other *shafees* belonging to the same class as the *shafee*-purchaser are entitled to claim pre-emption, to the same extent as if the sale were made to a stranger.

The same rule was followed by the High Court of Allahabad up to the year 1896, but in recent cases it has been held by that Court that even when the sale is made to a *shafee* alone, other *shafees* belonging to the same class as the *shafee*-purchaser *are* entitled to claim pre-emption of their share against him.

Illustrations.

CALCUTTA DECISIONS.

[(a) *A*, *B* and *C* are co-sharers in certain lands. *A* sells his share to *B*. *C* has no right to claim pre-emption as to the whole or any part of the share sold: ***Lalla Nowbut Lall*** v. ***Lalla Jewan Lall*** (1878) 4 Cal. 831.

(b) *A*, *B* and *C* are co-sharers in certain lands. *A* sells his share at Rs. 1,000 to *B* and *S*. It is declared in the sale-deed that two-thirds of the share is to be for *B*, and one-third for *S*. *C* is entitled to claim pre-emption of the whole share sold by *A*, and not only of the one-third declared to be for *S*: ***Saligram*** v. ***Raghubardyal*** (1887) 15 Cal. 224. [Though the shares are here defined, the amount of purchase-money contributed by each vendee is not. If the price paid by each had been specified, *C* (it seems) would only be entitled to claim pre-emption of the one-third sold to *S* by offering to pay the price paid by him.]

ALLAHABAD DECISIONS.

(c) *A*, *B*, *C* and *D* own each a house situate in a private lane common to all the four houses. *A* sells his house to *B*. Here *B*, *C* and *D* are "participators in the appendages" of the house sold, the appendage being the right of way, and *C* and *D* are each entitled to claim pre-emption of a third of the house even though the sale is made to a ***shafee*** alone without any stranger being associated with him: ***Amir Hasan*** v. ***Rahim Bakhsh*** (1897) 19 All. 466; ***Abdullah*** v. ***Amanat-ullah*** (1899) 21 All. 292.]

The decisions referred to in the section are set out in the illustrations. The ground of the Calcutta decisions may thus be stated in the words of Garth, C. J.: "The object of the rule [of pre-emption] . . . is to prevent the inconvenience which may result to families and communities from the introduction of a disagreeable stranger as a coparcener or near neighbour. But it is obvious that no such annoyance can result from a sale by one coparcener to another." The recent Allahabad decisions proceed upon the broad ground that the rule laid down in the Hedaya that "when there is a plurality of persons entitled to the privilege of *shaffa*, the right of all is equal" is as much applicable when the purchaser is a person having the right of pre-emption as when he is a stranger.

In case of sale on credit pre-emptor may at his option delay claiming possession or not. He cannot have possession & credit like the buyer. Pre-emptor forfeits his right by forcing

Necessary form to be observed

169. A person who would otherwise be entitled to the right of pre-emption cannot claim the right, unless

(1) he has declared his intention to assert the right immediately on receiving information of the sale (*talab-i-mowasibat*); and unless

(2) he has without any unnecessary delay affirmed the intention, referring expressly to the previous *talab-i-mowasibat* (*v*), and made a formal demand—

(a) either in the presence of the buyer or the seller, or on the premises in dispute, and

(b) in the presence of witnesses *specifically* called upon to bear witness (*w*) to the demand being made (*talab-i-ishhad*).

Explanation I.—The *talab-i-mowasibat* must be made after the sale is completed. If it is made during the pendency of negotiations between the seller and the buyer, it is of no effect.

Ameer Ali, 2nd Ed. Vol. I, page 606.

Explanation II.—It is not necessary that the *talab-i-mowasibat* or *talab-i-ishhad* should be made by the pre-emptor in person. It is sufficient if it is made by a manager or duly authorised agent of the pre-emptor (*x*); and when the pre-emptor is at a distance, it may be made by means of a letter (*y*).

Explanation III.—If the *talab-i-ishhad* is performed in the presence of the buyer, it is not necessary that the buyer should then be actually in possession of the property in respect of which pre-emption is claimed (*z*).

Explanation IV.—No particular formula is necessary either for the performance of *talab-i-mowasibat* or *talab-i-ishhad* so long as the claim is unequivocally asserted (*a*).

Hed. 550, 551; Baillie, 481-487. It is stated in the Hedaya (p. 550) that "the right of *shaffa* is but a feeble right, as it is the disseising of another of his property merely in order to prevent apprehended inconveniences" (see notes to s. 168, above).

(*v*) *Rujjub Ali* v. *Chundi Churn* (1890) 17 Cal. 54; *Mubarak Hussain* v. *Kaniz Bano* (1904) 27 All. 160.

(*w*) *Ganga Prasad* v. *Ajudhia* (1905) 28 All. 24.

(*x*) *Abadi Begam* v. *Imam Begam* (1877) 1 All. 521; *Ali Muhammad* v. *Muhammad* (1896) 18 All. 369. See also *Harihar* v. *Sheo Prasad* (1884) 7 All. 41, where it was held that the pre-emptor is bound by the acts and omissions of his agent.

(*y*) *Syed Wajid* v. *Lalla Hanuman* (1869) 4 B. L. R., A. C. 19.

(*z*) (*g*) *Ali Muhammad* v. *Muhammad* (1896) 18 All. 369.

(*a*) *Jog Deb* v. *Mahomed* (1905) 32 Cal. 982.

Benami transactions never allowed

talab i Khusumand in the regular suit.
a lawlike

Hence the formalities must be strictly complied with, and there must be a clear proof of the observance of those formalities (*b*). The *talab-i-mowasibat* (immediate demand) should be made as soon as the fact of the sale is known to the claimant. A delay of twelve hours was held in an Allahabad case to be too long (*c*). And it was held in a Calcutta case that where the pre-emptor, on hearing of the sale, "entered his house, opened his chest, took out Rs. 47-4" (evidently to tender the amount to the buyer), and then performed the *talab-i-mowasibat*, he was not entitled to claim pre-emption, for the delay was quite unnecessary (*d*); see next section. It is not necessary to the validity of *talab-i-mowasibat*, that it should be performed in the presence of witnesses. But it is of the essence of *talab-i-ishhad* (literally, invoking witnesses), that it should be performed before witnesses (*e*). It is also absolutely necessary that at the time of making the 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 *talab-i-mowasibat* was also performed in the presence of witnesses, and that the witnesses to the *talab-i-ishhad* are the same (*f*). The requirements of a *talab-i-ishhad* would be complied with, if the pre-emptor were to state in the presence of the vendor or the vendee, or on the land sold, *and* in the presence of witnesses: "I *have* claimed pre-emption; I *still* claim it; *bear witness* therefore to the fact" (*g*).

As an illustration of *Explanation IV* it may be stated that if there are several purchasers, it is not necessary that the names of *all* the purchasers should be enumerated at the time either of the first or the second demand. Thus where a pre-emptor claimed the right of pre-emption against five purchasers, and the form used was "whereas Jagdeb Singh *and others* have purchased the property and I claim the right of pre-emption," and this was proclaimed in the presence of two only of the purchasers and at the empty doors of the other three, it was held that the demand was properly made, and that there was nothing equivocal in the formulation of the claim (*h*).

Tender of price not essential

170. It is not necessary to the validity of a claim of pre-emption that the pre-emptor should tender the price at the time of the *talab-i-ishhad*; it is sufficient that he should then declare his readiness and willingness to pay the price stated in the deed of sale, or, if he has reasonable grounds to believe that the price named in the sale-deed is fictitious, such sum as the Court determines to have been actually paid by the buyer (*i*).

Extinction of right on death of pre-emptor

171. The right of pre-emption is extinguished on the death of the pre-emptor, and if a suit has been instituted by the pre-emptor to enforce the right, the suit will abate on his death.

Baillie, 499, 530; *Muhammed Husain* v. *Niamat-un-Nissa* (1897) 20 All. 88. See Code of Civil Procedure, s. 361.

(*b*) *Jadu Sing* v. *Rajkumar* (1870) 4 B. L. R., A. C. 171.
(*c*) *Ali Muhammad* v. *Taj Muhammad* (1878) 1 All. 284.
(*d*) *Jarfan Khan* v. *Jabbar Meah* (1884) 10 Cal. 388.
(*e*) *Jadu Sing* v. *Rajkumar* (1870) 4 B. L. R., A. C. 171.
(*f*) *Mubarak Husain* v. *Kaniz Bano* (1904) 27 All. 161.
(*g*) Macnaghten, p. 183.
(*h*) *Joy Deb* v. *Mahomed* (1905) 32 Cal. 982.
(*i*) *Heera Lall* v. *Moorut Lall* (1869) 11 W. R. 275; *Lajja Prasad* v. *Debi Prasad* (1880) 3 All. 26; *Karim Bakhsh* v. *Khuda Bakhsh* (1894) 16 All. 247, 248.

Right lost by acquiescence

172. The right of pre-emption is lost if the pre-emptor enters into a compromise with the buyer, or if he otherwise acquiesces in the sale (*j*). But a mere offer by a pre-emptor to purchase from the buyer at the sale-price, made with the object of avoiding litigation, does not amount to acquiescence (*k*).

Right not lost by refusal of offer before sale

173. As the right of pre-emption accrues *after* the completion of a sale, it is not lost by a refusal to purchase when the offer is made to the pre-emptor *before* the completion of the sale (*l*).

Suit for pre-emption

174. Every suit for pre-emption must include the whole of the property subject to pre-emption conveyed by one transfer (*m*). But a person entitled to the 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 (*n*).

The principle of denying the right of pre-emption except as to the whole of the property sold, is that by splitting up the bargain the pre-emptor would be at liberty to take the best portion of the property and leave the worst part of it with the vendee (*o*). "The right of pre-emption was never intended to confer such a capricious choice upon the pre-emptor" (*p*).

Limitation.—A suit to enforce a right of pre-emption must be instituted within one year from the time when the purchaser takes physical possession of the property, or, where the subject of the sale does not admit of physical possession, when the instrument of sale is registered (Limitation Act, 1877, sch. II, art. 10). If the subject of sale does not admit of physical possession, the suit will be governed not by art. 10, but by art. 120 (*q*). When the person entitled to pre-emption is a minor, the right may be claimed on his behalf by his guardian, and the suit must be instituted within the aforesaid period. The right of pre-emption is extinguished after the expiration of the period of limitation, and it cannot be claimed by the minor on attaining majority (Hed. 564), notwithstanding (it seems) the provisions of s. 7 of the Limitation Act. The same rule would seem to apply in the case of persons suffering from any other legal disability, such as lunacy or idiocy.

Form of decree.—See Code of Civil Procedure, s. 214. The rights of ownership vest in the pre-emptor when the payment of the pre-emption price is paid in accordance with the terms of the decree, and he is therefore entitled to the mesne profits from the

(*j*) *Habib-un-nissa* v. *Barkat Ali* (1886) 8 All. 275.
(*k*) *Muhamad Nasir-ud-din* v. *Abdul Hasan* (1894) 16 All. 360; *Muhammad Yunus* v. *Muhammad Yusuf* (1897) 19 All. 334.
(*l*) *Abadi Begam* v. *Imam Begam* (1877) 1 All. 521.
(*m*) *Durga Prasad* v. *Munsi* (1884) 6 All. 423.
(*n*) *Amir Hasan* v. *Rahim Bakhsh* (1897) 19 All. 466.
(*o*) *Sheobharos* v. *Jiach Rai* (1886) 8 All. 482.
(*p*) *Durga Prasad* v. *Munsi* (1884) 6 All. 423, at p. 426.
(*q*) *Bulul Begam* v. *Mansur Ali* (1901) 24 All. 17; *Kaunsilla* v. *Gopal* (1906) All. W. N. 73.

date of payment, though he may not have obtained possession till some time after: *Deokinandan* v. *Sri Ram* (1889) 12 All. 234. See also *Wazir Khan* v. *Kale Khan* (1893) 16 All. 126.

Legal device for evading pre-emption

175. When it is apprehended that a claim for pre-emption may be advanced by a neighbour, the vendor may sell the whole of his property excluding a portion, however small, immediately bordering on the neighbour's property, and thus defeat the neighbour's right of pre-emption.

Hed. 563; Baillie, 505.

Sect-law as governing pre-emption

176. (1) If both the vendor and pre-emptor are Sunnis, the right of pre-emption is to be determined according to the Sunni law, and if both the parties are Shiahs (*r*), the right of pre-emption is governed by the Shiah law (*s*).

(2) If the vendor and pre-emptor do not both belong to the same sect, the right of pre-emption is to be determined according to the law of the sect to which the pre-emptor belongs. Thus if the vendor is a Sunni and the pre-emptor a Shiah, the right of pre-emption is to be determined according to the Shiah law (*t*), and if the vendor is a Shiah and the pre-emptor a Sunni, the right of pre-emption is to be determined according to the Sunni law (*u*).

(3) The personal law of the buyer is immaterial in these cases (*v*).

The following are the two main points of distinction between the Sunni and the Shiah law of pre-emption :—

(1) According to the Shiah law no right of pre-emption exists in the case of property owned by *more than two* co-sharers (*w*).

(2) The Shiah law does not recognize the right of pre-emption on the ground of *vicinage* (*x*).

(*r*) See *Govind Dayal* v. *Inayatullah* (1885) 7 All. 775.
(*s*) *Abbas Ali* v. *Maya Ram* (1888) 12 All. 229.
(*t*) *Qurban* v. *Chote* (1899) 22 All. 102.
(*u*) *Jog Deb* v. *Mahomed* (1905) 32 Cal. 982.
(*v*) *Govind Dayal* v. *Inayatullah* (1885) 7 All. 775; *Jog Deb* v. *Mahomed* (1905) 32 Cal. 982. But see *Kudratulla* v. *Mahini Mohun* (1869) 4 B. L. R. 1-4.
(*w*) *Abbas Ali* v. *Maya Ram* (1889) 12 All. 229.
(*x*) *Qurban* v. *Chote* (1899) 22 All. 102.

The marriages are not bad (void) but found ::
invalid. The latter may be validated
I invalid marriages + consummated issue within two
years is legit.

CHAPTER XII.

MARRIAGE, DOWER, DIVORCE AND PARENTAGE.

A.—MARRIAGE.

Nikah s 17

"Marriage" defined

177. Marriage is a contract, which has for its object the procreation and the legalising of children.

nikah = carnal union

Hed. 25; Baillie, 4. Marriage under the Mahomedan law being merely a contract, it is necessary that there should be "freedom of contract." Hence a marriage brought about under coercion or fraud may be set aside at the instance of the party whose consent was so caused (Baillie, 4).

Who may contract a marriage

91 **178.** Every Mahomedan of sound mind, who has attained puberty, may enter into a contract of marriage.

Puberty is presumed, in the absence of evidence, on completion of the age of fifteen years.

Baillie, 4; Hed. 529. The decision in *Abdool Oahab* v. *Elias Banoo* (1867) 8 W. R. 301, following probably Macnaghten's opinion (p. 62), that puberty is presumed on completion of the *sixteenth* year, is obviously erroneous.

Note that the provisions of the Indian Majority Act, 1875, do not apply to matters relating to marriage, dower, and divorce. See notes to s. 89 above.

must v. 92

Proposal and acceptance

14,15 **179.** Whether or not there may have been a proposal and acceptance to marry at some *future* period (which constitute what is known in other systems of law as a *promise* to marry), it is essential to the validity of a *contract* of marriage that there should be a proposal and acceptance made at the same meeting with the object of establishing *immediate* marital relation between the parties. And it appears that until such relation is established, the parties are at liberty to withdraw from any *promise* they may have made to marry, and that no suit will lie for damages for breach of such a promise.

Hed. 25, 26; Baillie, 10.

Witnesses

10 of 1' **180.** A marriage contracted without witnesses is invalid, but not void. ∴ two males or one male + two females must be same adult Muslims

Baillie, 155. As to the legal effect of an invalid marriage, see s. 189 below.

Invalid. v. 27-30 bot of next page.

Capacity to marry

31 **181.** It is necessary to the validity of a marriage that the woman must not be the wife of another man, and that

v. 92. The rule that minority can be terminated by showing puberty is a rule of evidence rather than substantive law but the Evidence Act does not make this conclusive

the man must not be the husband of four wives, that being the full number of wives permitted by Mahomedan law.

Hed. 31; Baillie, 27, 31. An agreement between a Mahomedan husband and wife at the time of marriage that the wife should be at liberty to divorce herself from the husband, if he married another wife, is valid (*y*).

182. A marriage with a widow or a divorced woman before the expiration of the period of *iddat*, which it is incumbent upon her to observe on the death of her husband or on divorce, is void. *Marriage during iddat*

Explanation.—The *iddat* of a woman arising on divorce is three courses, if she is subject to menstruation; if not, it terminates at the expiration of three months from the date of divorce. The *iddat* of a woman arising on widowhood is four months and ten days. But if the woman be pregnant, the period of *iddat* does not terminate until after delivery.

Hed. 128, 129; Baillie, 37, 350-355.

183. (1) A Mahomedan may contract a valid marriage with a woman who believes in a revealed religion (that is, Christianity and Judaism), but not with an idolatress [or perhaps a fire-worshipper]. But a marriage with an idolatress [or a marriage with a fire-worshipper, if such marriage is not lawful from the first] is not void, but merely invalid. *Difference of religion*

(2) The marriage of a Mahomedan female with a non-Mahomedan, whether he be a Christian, a Jew, an idolater, or a fire-worshipper, is invalid, but not void.

Hed. 30; Baillie, 40. When either party to a marriage is a Christian, the marriage must be solemnized in accordance with the provisions of the Indian Christian Marriage Act XV of 1872; otherwise the marriage is void (s. 4). If the marriage is solemnized in accordance with those provisions, it will be *valid*, though it be the marriage of a Mahomedan *female* with a Christian. But if the marriage is not so solemnized, it will not be valid, though it be the marriage of a Mahomedan *male* with a Christian woman.

As to the legal effect of an invalid marriage, see s. 189 below.

184. A man is prohibited from marrying (1) his mother or his grandmother, how high soever; (2) his daughter or grand-daughter, how low soever; his sister *Prohibited degrees of consanguinity*

(*y*) *Poonoo Bibee* v. *Fyez Bukish* (1874) 15 B. L. R. App. 5; *Badarannissa* v. *Majattala* (1871) 7 B. L. R. 442.

whether full, consanguine or uterine; (4) his niece or great-niece, how low soever; and (5) his aunt or great-aunt, how high soever, whether paternal or maternal.

Hed. 27; Baillie, 23.

Prohibited degrees of affinity

185. A man is prohibited from marrying (1) his wife's mother or grandmother, how high soever; (2) his wife's daughter or grand-daughter, how low soever; (3) the wife of his father or paternal grandfather, how high soever; and (4) the wife of his son, or of his son's son or daughter's son, how low soever.

Hed. 28; Baillie, 24-29.

Prohibition on the ground of fosterage

186. Fosterage is as much a bar to a lawful marriage as consanguinity, except in the case of certain foster-relations, such as a sister's foster-mother, or a foster-sister's mother, or a foster-son's sister, or a foster-brother's sister, with any of whom a lawful marriage may be contracted.

Hed. 68, 69; Baillie, 194.

Additional prohibitions

187. It is not lawful for a man to have two wives at the same time who are so related to each other that, if one of them had been a male, they could not have lawfully intermarried.

Hed. 28, 29; Baillie, 31, 153. Thus a man is prohibited from marrying his wife's sister during his wife's lifetime. The children of such a marriage are illegitimate and cannot inherit; *Aizunnissa* v. *Karimunnissa* (1895) 23 Cal. 130. But if the wife be divorced or dead, he may marry her sister.

Effect of a valid marriage

188. A valid marriage confers upon the wife the right of dower, maintenance and residence in her husband's house, and imposes on her the obligation to be faithful and obedient to her husband, and to admit him to sexual intercourse. It creates between the parties reciprocal rights of inheritance, but it does not confer on the husband any interest in the wife's property.

Baillie, 13; *A.* v. *B.* (1896) 21 Bom. 77, 84.

Effect of an invalid marriage

189. (1) An invalid marriage (as distinguished from a *valid* marriage) may be terminated by a mere repudiation on either side. It does not confer any rights on either party to inherit from the other, nor does it entitle the woman to dower, unless the marriage has been consummated.

(2) An invalid marriage (as distinguished from an *illegal* marriage) has this effect that children born during the continuance of the contract are regarded as legitimate.

Baillie, 156, 157. As to which marriages are invalid, see ss. 180 and 183 above.

Marriage of Minors.

Marriage of minors

190. A boy or a girl who has not attained puberty (hereinafter called a minor), is not competent to enter into a contract of marriage, but he or she may be contracted in marriage by his or her guardian.

See notes to s. 178 above.

Guardians for marriage

191. The right to dispose of a minor in marriage belongs successively to the (1) father, (2) paternal grandfather how high soever, and (3) brothers and other male relations on the father's side in the order of inheritance enumerated in the Table of Residuaries. In default of paternal relations, the right devolves upon the mother, maternal uncle or aunt, and other maternal relations within the prohibited degrees. And in default of maternal kindred, it devolves upon the Government.

Hed. 36, 39. It is doubtful whether the right to dispose of a minor in marriage is lost by the apostasy of the guardian from the Mahomedan faith. Under the Mahomedan law proper, an apostate has no right to contract a minor in marriage (Hed. 392). On the other hand, it is enacted by Act XXI of 1850, that no law or usage shall inflict on any person, who renounces his religion, any "forfeiture of *rights* or property," and it was accordingly held by the High Court of Calcutta in *Muchoo* v. *Arzoon* (*z*), that a Hindu father is not deprived of his right to the custody of his children by reason of his conversion to Christianity. In a subsequent case, however, decided by the same Court, but without any reference to *Muchoo's* case, it was held that a Mahomedan, who had become a convert to Judaism, was disqualified by reason of his apostasy from disposing of his daughter in marriage (*a*). In a recent Bombay case, it was held, following *Muchoo's* case, that a Hindu convert to Mahomedanism was not disqualified from giving his son in adoption to a Hindu (*b*). It is submitted that the right to contract a minor in marriage is a "right" within the meaning of the above Act, and that the decision in *Muchoo's* case, followed in the Bombay case, is the correct one.

Marriage brought about by father and grandfather

192. When a minor has been disposed of in marriage by the father or father's father, the contract of marriage is

(*z*) (1866) 5 W. R. 235.
(*a*) *In the matter of Marin Bibi* (1874) 13 B. L. R. 160.
(*b*) *Shamsing* v. *Santabai* (1901) 25 Bom. 551.

valid and binding, and it cannot be annulled by the minor on attaining puberty.

Hed. 37; Baillie, 50.

Marriage brought about by other guardians

193. When a marriage is contracted for a minor by any guardian other than the father or father's father, the minor has the option of repudiating the marriage on attaining puberty. This is technically called the "option of puberty."

The right of repudiating the marriage is lost, in the case of a female, if she has remained silent after attaining puberty. But in the case of a male, the right continues until he has ratified the marriage either expressly or impliedly as by payment of dower or cohabitation.

Hed. 38; Baillie, 51.

Effect of repudiation

194. When the "option of repudiation" is exercised, the marriage is dissolved from the moment of repudiation. But the marriage is valid until repudiation, and in the event of the death of either party before repudiation, the other is entitled to all the rights of inheritance.

Baillie, 50. It is, no doubt, stated in the Hedaya (p. 37) that "in dissolving the marriage, decree of the Kazee is a necessary condition in all cases of option exerted after maturity." "But the Radd-ul-muhtar" (Vol. II, p. 502) "explains it by saying that a judicial declaration is . . . . needed [only] to provide judicial evidence in order to prevent disputes," and it has accordingly been held by the High Court of Calcutta that a judicial order is not essential to effect the cancellation of a marriage contracted by a guardian on behalf of a minor (*c*). It is, therefore, clear that a girl, who has been disposed of in marriage during her minority, and who repudiates the marriage on attaining puberty and marries another person, cannot be convicted of bigamy, though the repudiation may not have been confirmed by a judicial order (*d*).

Shiah law.—Under the Shiah law, when a minor is not given in marriage by the father or the father's father, the marriage is invalid until it is ratified by the minor by positive assent on his attaining puberty, and if the minor dies without ratifying the marriage, the other party to the marriage is not entitled to inherit to the deceased (*e*).

Marriage of lunatics

195. The provisions of sections 190 to 194, relating to the marriage of minors, apply *mutatis mutandis* to the marriage of lunatics.

Baillie, 50-54.

(*c*) *Badal Aurat* v. *Queen-Empress* (1891) 19 Cal. 79.
(*d*) *Ib.*
(*e*) *Mulka Jehan* v. *Mahomed* (1871) Sup. Vol. I. A. 192.

nashizah : rebellious wife

Maintenance of Wives. 49-55

Husband's duty to maintain his wife

196. The husband is bound to maintain his wife (unless she is too young for matrimonial intercourse) (*f*), so long as she is faithful to him and obeys his reasonable orders; but he is not bound to maintain a wife who refuses herself to him (*g*), or is otherwise disobedient (*h*), unless the refusal or disobedience is justified by non-payment of "prompt" dower (*i*).

Order for maintenance

197. If the husband neglects or refuses to maintain his wife without any lawful cause, the wife may sue him for maintenance in a civil Court, but she will not be entitled to a decree for *past* maintenance, unless the claim is based on a specific agreement (*j*). Or, she may apply for an order of maintenance under the provisions of the Code of Criminal Procedure, 1898, section 488, in which case the Court may order the husband to make a monthly allowance for her maintenance not exceeding fifty rupees.

Maintenance during iddat

198. The wife is entitled to maintenance during the *iddat* consequent upon divorce (*k*); but the widow is not entitled to maintenance during the *iddat* consequent upon her husband's death (*l*).

As to the period of *iddat*, see s. 182 above. When an order is made for the maintenance of a wife under s. 488 of the Criminal Procedure Code, it will cease to operate, in the case of a divorce, on the expiration of the period of *iddat*, but not earlier (*m*).

Restitution of Conjugal Rights.

Suit for restitution of conjugal rights

50-C **199.** (*1*) Where a wife shall have without lawful cause ceased to cohabit with her husband, the husband may sue the wife in a civil Court for the restitution of his conjugal rights (*n*).

77 (*2*) Cruelty, when it is of such a character as to render it unsafe for the wife to return to her husband's dominion, is a valid defence to such a suit. "It may be, too, that gross failure by the husband of the performance

(*f*) Baillie, 427.
(*g*) Baillie, 438. See s. 205 below.
(*h*) *A. v. B.* (1896) 21 Bom. 77, at p. 82.
(*i*) Baillie, 438.
(*j*) *Abdool Futteh v. Zabunnessa* (1881) 6 Cal. 631.
(*k*) Hed. 145; Baillie, 450.
(*l*) *Aga Mahomed Jaffer v. Koolsom Beebee* (1897) 25 Cal. 9.
(*m*) In *re Abdul Ali* (1883) 7 Bom. 180; *In the matter of Din Muhammad* (1882) 5 All. 226; *Shah Abu v. Ulfat Bibi* (1896) 19 All. 50.
(*n*) *Moonshee Buzloor Ruheem v. Shumsoonnissa Begam* (1867) 11 M. I. A. 551.

s. 77. says Mohd. ought to chastise his wife is doubtful.

of the obligations which the marriage contract imposes on him (s. 188) for the benefit of the wife, might, if properly proved, afford good grounds for refusing to him the assistance of the Court" (*o*).

(*3*) An agreement entered into before marriage by which it is provided that the *wife should be at liberty to live with her parents after marriage* is void, and does not afford an answer to a suit for restitution of conjugal rights (*p*). Similarly an agreement entered into after marriage between a husband and wife who were for some time prior to the date of the agreement living separate from each other, providing that they should resume cohabitation, but that if the wife should be unable to agree with the husband, *she should be free to leave him*, is void, and does not constitute a defence to the husband's suit for restitution of conjugal rights (*q*).

(*4*) Non-payment of prompt dower is a defence to a suit for restitution of conjugal rights, but in this sense only that the Court will not pass an absolute decree for restitution but one conditional upon payment of the dower (*r*). But if the marriage is consummated, non-payment of prompt dower is no defence at all to such a suit (*s*).

Before leaving this subject, it may be noted that a suit for jactitation of marriage will lie in a Civil Court in British India. "There can be no doubt that unless a man is entitled by means of the Civil Courts to put to silence a woman, who falsely claims to be his wife, the man and others may suffer considerable hardship, and his heirs may be harassed by false claims after his death." "The Court trying such a suit will of course take care, before granting a plaintiff a decree, to see that it is strictly proved that the defendant did seriously allege that the disputed marriage had taken place, and that the plaintiff did not acquiesce in the claim or allegation of the defendant as to the disputed marriage, and, further, that in fact no marriage had taken place between the parties" (*t*).

B.—DOWER.

"*Dower*" *defined*

200. *Mahr* or Dower is a sum of money or other property which the wife is entitled to receive from the husband in consideration of the marriage.

See Baillie, 91, and per Mahmud, J., in *Abdul Kadir* v. *Salima* (1886), 8 All. 149, at p. 157.

(*o*) *Moonshee Buzloor Ruheem* v. *Shumsoonnissa Begum* (1867) 11 M. I. A. 551; *Meherally* v. *Sakerkhanoobai* (1905) 7 Bom. L. R. 602, 608.

(*p*) *Abdul* v. *Hussenbi* (1904) 6 Bom. L. R. 728.

(*q*) *Meherally* v. *Sakerkhanoobai* (1905) 7 Bom. L. R. 602.

(*r*) *Abdul* v. *Hussenbi* (1904) 6 Bom. L. R. 728; *Meherally* v. *Sakerkhanoobai* (1905) 7 Bom. L. R. 602, 611.

(*s*) *Bai Hansa* v. *Abdulla* (1905) 30 Bom. 122.

(*t*) *Mir Azmat Ali* v. *Mahmud-ul-nissa*, (1897) 20 All. 96.

Marriage under the Mahomedan law is a civil contract (s. 177 *ante*), and it is likened to a contract of sale. A sale is a transfer of property for a price. In the contract of marriage, the "wife" is the property, and the "dower" is the price; see the Allahabad case cited above.

Under the Mahomedan law, a husband may divorce his wife at any time he likes without assigning any reason. The object of dower is to serve as a check upon the capricious exercise by the husband of his power to dissolve the marriage at will. To attain this end, it is usual to split the amount of dower into two parts, one payable on demand, and the other payable on the dissolution of the marriage by death or *divorce*. See s. 204.

Amount of dower

201. The husband may settle any amount he likes by way of dower upon his wife, though it may be far beyond his means to pay, and though nothing may be left to his heirs after payment of the stipulated amount; but the amount should not in any case be less than ten *dirms*.

Hed. 44; Baillie 92; *Sugra Bibi* v. *Masuma Bibi* (1877), 2 All. 573. A *dirm* is "a silver coin generally in value about two pence sterling"; Johnson's Persian, Arabic, and English Dictionary. It is equivalent in weight to forty-eight barleycorns (*jau*) according to the following table: 1 *dirm* = 6 *dangs*; 1 *dang* = 2 *carrats*; 1 *carrat* = 2 *taswigs*; and 1 *taswig* = 2 *jaus*.

Shiah law—Under the Shiah law, there is no fixed legal minimum for dower. (Baillie, Part II, 67, 68.)

Dower may be fixed after marriage

202. The amount of dower may be fixed either before or at the time of marriage, or even subsequent to the marriage (*u*).

"Proper" dower

203. If there is no express stipulation as to the amount of dower, the wife is entitled to "proper" dower (*mayr-in-misl*), even though the marriage may have been contracted on the express condition that she should not claim any dower. In determining what is "proper" dower, regard is to be had to the amount or value of dower that may have been settled upon other female members of the wife's father's family, such as her paternal sisters or aunts.

Hed. 45, 53; Baillie, 91, 95.

Shiah law.—The "proper dower" under the Shiah law should not exceed 500 *dirms* (Baillie, Part II, 71).

Dower "prompt" and "deferred"

204. The amount of dower is usually split up into two parts, one called "prompt," which is payable on

(*u*) *Kamar-un-Nissa* v. *Hussaini Bibi* (1890) 3 All. 266.

demand, and the other, called "deferred," which is payable on the dissolution of the marriage by death or divorce.

When it is not specified whether the dower is to be "prompt" or "deferred," the rule is to regard the whole as "prompt."

In support of the second proposition set out above, see the Privy Council decision in ***Mirza Bedar Bukht*** v. ***Mirza Khurram Bukht*** (1879) 19 W. R. 315, and the Full Bench decisions in ***Abdul Kadir*** v. ***Salima*** (1886) 8 All. 149, at p. 158, and ***Masthan Sahib*** v. ***Assan Bibi*** (1899) 23 Mad. 371. On the other hand, it has been held in two Allahabad cases, both decided in 1877, that when, at the time of marriage, it is not specified whether the dower is "prompt" or "deferred," payment of a ***portion*** only of the dower must be considered "prompt," and the amount thereof is to be determined with reference to the position of the wife and the aggregate amount of the dower, what is customary being at the same time taken into consideration (*v*). Accordingly, in one of those cases, the Court determined that one-fifth only of a dower of Rs. 5,000 should be considered "prompt," the wife having been a prostitute, and, in the other, it held (following Baillie, p. 126) that a third of a dower of Rs. 51,000 was reasonable as "prompt" dower. Similarly it has been held in a Bombay case, decided in 1865, that no specific amount of dower having been declared "prompt," one-third of the whole might be considered "prompt" (*w*). The Bombay case was decided several years before the Privy Council case cited above, and the latter case does not appear to have been brought to the notice of the Court in the two Allahabad cases referred to above. The point, however, may now be taken as settled by the decision of the Privy Council in ***Mirza Bedar's*** case.

Non-payment of "prompt" dower

205. Though the wife is bound, as a necessary consequence of the marriage, to render conjugal rights to her husband, she may refuse herself to her husband, if the "prompt" dower is not paid when demanded; but once the marriage is consummated, she has no right to refuse herself to her husband, though the "prompt" dower may not be paid.

See section 199 *ante*, and the cases there cited.

Dower as debt

206. The widow's claim for dower is only a debt chargeable against the husband's estate, and it must, like other debts, be paid before legacies and before distribution of the inheritance.

See the cases cited in the next section. See also ***Bhola Nath*** v. ***Maqbul-un-nissa*** (1903) 26 All. 28. A dower-debt has no priority over other debts (Macnaghten, p. 274).

(*v*) *Eidan* v. *Mazhar Husain* (1877) 1 All. 483; *Tanki-un-Nissa* v. *Ghulam Kambar* (1877) 1 All. 506.

(*w*) *Fatma Bibi* v. *Sadruddin* (1865) 2 B. H. C. 291.

Widow's right of retention

207. The widow's claim for dower does not entitle her to a lien on any specific property of her deceased husband. But when she *is in possession* of the property of her deceased husband, having obtained such possession lawfully and without force or fraud, and her dower or any part of it is due and unpaid, she is entitled as against the other co-heirs of her husband to *retain that possession* until her dower is paid (*x*). The right of retention is extinguished on payment of the dower-debt, but the widow is then bound to account to the other heirs for the profits received by her from the property (*y*).

Explanation.—Possession is not lawful within the meaning of this section, unless it has been delivered by the husband or by the other heirs after his death, or unless it has been obtained by the widow under an agreement with her husband, or with the consent or acquiescence of the other heirs ; but it will be presumed to be lawful, unless the contrary is shown (*z*).

Illustration.

A dies leaving a widow and a sister. Some time after *A*'s death, the widow applies to the Collector to have certain lands forming the entire estate of *A* registered in her name, alleging that she has been in possession of the lands by right of inheritance ***and also on account of her dower.*** The application is opposed by the sister, but the lands are registered by the Collector in the widow's name. After ***ten*** years, the sister sues the widow to recover her share (three-fourths) in the estate of *A*. The widow contends that she is entitled to continued possession and enjoyment of the estate until payment of her dower. The widow is entitled to retain the possession until her dower is satisfied, and the sister's suit must be dismissed ; ***Bebee Bachun*** v. ***Sheikh Hamid*** (1871) 14 M. I. A. 377. [Here the widow was in possession at the date of the suit, and the Privy Council held that the possession was ***lawful***, though the sister ***had opposed*** the application of the widow to have the property transferred in her name. The reason would appear to be that the sister took no steps whatever for a period of ***ten years*** to interfere with the widow's possession, and this would amount to ***acquiescence*** on the part of the sister : *ib.*, pp. 383, 388, 389.]

The language of the first portion of this section is taken almost ***verbatim*** from the head-note of ***Amani Begam's*** case reported in 16 All. 225, which sets out the effect of the decision in the Privy Council case cited in the above illustration. In that case their Lordships said : "The appellant (widow) having obtained actual and lawful possession of the estates under a claim to hold them as heir and for her dower, their Lordships are of opinion that she is entitled to retain that possession until her dower is satisfied. . . . . It is not necessary to say whether this right of the widow in

(*x*) *Bebee Bachun* v. *Sheikh Hamid* (1871) 14 M. I. A. 377.
(*y*) *Ib.*, p. 384.
(*z*) *Amanat-un-Nissa* v. *Bashir-un-nissa* (1894) 17 All. 77 ; *Muhammad Karim ullah Khan* v. *Amani Begam* (1895) 17 All. 93.

possession is a lien in the strict sense of the term, although no doubt the right is so stated in a judgment of the High Court in a case of ***Ahmed Hoossein*** v. ***Mussumat Khodeja*** (10 W. R. 369). Whatever the right may be called, it appears to be founded on the power of the widow, as a creditor for her dower, to hold the property of her husband, of which she has lawfully, and without force or fraud, obtained possession, until her debt is satisfied with the liability to account to those entitled to the property, subject to the claim for the profits received."

Nature of the above right

208. (*1*) The right of the widow to retain possession of her husband's property until satisfaction of the dower-debt, does not carry with it the right of selling or mortgaging the property (*a*).

(*2*) The right of retention is entirely a personal one, and it cannot therefore be transferred by sale, gift, or otherwise (*b*). And the right being a personal one, it becomes extinct on the widow's death, and it cannot therefore pass to her heirs on her death (*c*). But the right to recover the dower (as distinguished from the right of retention), is a right to property, and it will pass to her heirs on her death.

(*3*) The widow's right of retention is not a right of lien such as is obtained by a mortgage. Hence a mortgagee from her husband is entitled to sell the mortgaged property, though she may be in possession of that property under a claim for her dower, and she is not entitled to retain possession of such property as against a purchaser from the mortgagee (*d*).

(*4*) The mere fact that the widow is in possession of her husband's property under a claim for her dower, does not preclude her from maintaining a suit to recover the amount of the dower (*e*).

Limitation

209. (1) The period of limitation for a suit to recover "prompt" or "exigible" dower is three years from the date when the dower is demanded and refused, or, where during the continuance of the marriage no such demand has been made, when the marriage is dissolved by death or divorce.

(*a*) *Chuki Bibi* v. *Shams-un-nissa* (1894) 17 All. 19.
(*b*) *Ali Muhammad* v. *Azizullah* (1883) 6 All. 50.
(*c*) *Hadi Ali* v. *Akbar Ali* (1898) 20 All. 262.
(*d*) *Ameer Ammal* v. *Sankaranarayanan* (1900) 25 Mad. 658.
(*e*) *Ghulam Ali* v. *Sagir-ul-Nissa* (1901) 23 All. 432.

(2) The period of limitation for a suit to recover "deferred" dower is three years from the date when the marriage is dissolved by death or divorce.

Limitation Act XV of 1877, Sch. II, arts. 103, 104.

C.—DIVORCE.

Different forms of divorce

210. The contract of marriage under the Mahomedan law may be dissolved in three ways: (1) by the husband at his will, and without the intervention of a Court of law; (2) by mutual consent of the husband and wife, also without the intervention of a Court; or (3) by a judicial decree at the suit of the husband or wife. But the wife cannot divorce herself from her husband except by obtaining a judicial decree in that behalf.

When the divorce proceeds from the husband, it is called *talak* (ss. 211-216); and when it is effected by mutual consent of the husband and wife, it is sometimes called *khula* (s. 217) and sometimes *mubarat* (s. 218).

A divorce may be effected by writing as well as by word of mouth. As an illustration of a divorce by writing, see *Sarabai* v. *Rabiabai* (*f*).

Divorce by talak

211. Any Mahomedan of sound mind who has attained puberty, may "divorce his wife without any misbehaviour on her part or without assigning any cause."

Macnaghten, p. 59; Hed., 75; Baillie, 208. It is essential to the validity of a *talak* that the husband should have attained puberty.

Form of talak immaterial

212. No special expressions are necessary to constitute a valid *talak*; but it is necessary that the words used must clearly indicate the intention of the husband to dissolve the marriage (*g*).

It has been held by the High Court of Calcutta that the words of *talak* must be addressed *to the wife* (*h*).

On the other hand, it has been by held the High Court of Bombay that it is not necessary for the validity of a *talak* that the declaration of *talak* should be actually made to the wife (*i*).

(*f*) (1905) 30 Bom. 537.

(*g*) *Ibrahim* v. *Syed Bibi* (1888) 12 Mad. 63. See also *Hamid Ali* v. *Imtiazan* (1878) 2 All. 71, where the words "Thou art my cousin, the daughter of my uncle, if thou goest to thy father's house without my consent," were held sufficient to constitute a divorce.

(*h*) *Furzund* v. *Janu Bibee* (1878) 4 Cal. 588.

(*i*) *Sarabai* v. *Rabiabai*, (1905) 30 Bom. 537.

Thus where a Mahomedan belonging to the Hanafi sect went to a Kazi with two witnesses, and after pronouncing the divorce of his wife in her absence had a *talaknama* written out by the Kazi which was duly signed and attested by witnesses, it was held that the fact that the declaration of *talak* was not actually made to the wife, but in her absence to the Kazi and the witnesses, did not vitiate the divorce; "such a writing," it was said, "even though not communicated to the wife, effects an irrevocable divorce *as from the date of the document*" (*ii.*)

Divorce by talak how effected

213. The divorce by *talak*, when the marriage is consummated, may be effected in any of the three following ways :—

(1) by a *single* declaration of *talak*, followed by abstinence from sexual intercourse for the period of *iddat* (called *talak ahsan*); or,

(2) by a declaration of *talak* repeated *three times*, once during each successive *tahr* (period between menstruation), and accompanied by abstinence from sexual intercourse until the third pronouncement (called *talak hasan*); or,

(3) by a declaration of *talak* repeated *three times* at shorter intervals or even in immediate succession (*j*) (called *talak-ul-bidaat*). But the triple repetition is but one of the forms by which the irrevocability which is the essential feature of *talak-ul-bidaat* is indicated, and a *talak-ul-bidaat* is none the less valid though it may be pronounced by a *single* declaration, provided it clearly indicates an intention *irrevocably* to dissolve the marriage (*k*).

When the marriage is not consummated, the divorce may be accomplished by a single declaration of *talak*.

Hed. 72, 73, 83; Baillie, 206. As to *iddat*, see s. 160, above.

The Hanafis divide *talak* into *talak-us-sunnat*, that is, *talak* according to the rules laid down in the *sunnat* or traditions, and *talak-ul-bidaat*, that is, heretical or irregular *talak*. The *talak-us-sunnat* is again sub-divided into *ahsan*, that is, most proper, and *hasan*, that is, proper. The *talak-ul-bidaat* or irregular divorce is good in law, though bad in theology. In the case of *talak ahsan* and *talak hasan*, the husband has an opportunity of reconsidering his decision, for the *talak* in both these cases does not become absolute until a certain period has elapsed (s. 214), and the husband has the option to revoke it before then. But the *talak-ul-bidaat* becomes irrevocable immediately it is pronounced (s. 214). The essential feature of a *talak-ul-bidaat* is its irrevocability. One of the tests of irrevocability is the repetition *three*

(*ii*) *Sarabai* v. *Rabiabai* (1905) 30 Bom. 537.
(*j*) See *In re* Abdul Ali (1883) 7 Bom. 180.
(*k*) *Sarabai* v. *Rabiabai* (1905) 30 Bom. 537.

times of the formula of divorce. But the *triple repetition* is not a necessary condition of *talak-ul-bidaat*, for the intention to render a *talak* irrevocable may be expressed in other ways also. Thus if a man says: "I have divorced you by a *talak-i-bain* (*irrevocable divorce*)", the *talak* is *talak-i-bidaat*, and it will take effect immediately it is pronounced, though it may be pronounced but once. Here the use of the expression "*bain* (irrevocable)" manifests of itself the intention to effect an irrevocable divorce. It may here be said that a *talak* by writing belongs to the class of *talak-ul-bidaat*, for in the absence of words showing a different intention, the writing must be presumed to take effect from the time of its execution. (See sec. 214A).

It is not essential to the validity of a *talak ahsan* or *talak-ul-bidaat*, that it should be pronounced during the period of *tahr* (Hed. 74). But when the *talak-ul-bidaat* is pronounced during the period of *menstruation*, the *talak* loses its character of irrevocability, and it may be revoked at the option of the husband at any time before the expiration of the period of *idaat*, being the period within which a *talak* may be *revoked*: see next section.

The latter portion of cl. (1) and the first part of cl. (3) are taken almost *verbatim* from Sir R. K. Wilson's Digest of Anglo-Mahomedan Law.

Shiah law.—The Shiah lawyers do not recognize the validity of *talak-ul-bidaat* (*o*). *Talak* under the Shiah law must be pronounced in the presence of two competent witnesses (Baillie, Part II, 113).

Divorce by talak when irrevocable

214. (1) The *talak* called *ahsan* becomes complete and irrevocable on the expiration of the period of *iddat*.

(2) The *talak* called *hasan* becomes complete and irrevocable after the third pronouncement, and it is not suspended until completion of the *iddat*.

(3) The *talak-ul-bidaat* becomes complete and irrevocable immediately the repudiation is made, if such repudiation was made during the *tahr* of the wife and the husband had no intercourse with her during that period; in other cases, it becomes complete on the expiration of the period of *iddat*.

Until a *talak* becomes complete, the husband has the option to revoke it, which may be done either expressly, or in an implied manner such as resuming sexual intercourse.

Hed., 72, 73; Baillie, 206, 207, 285-289. In all the three forms of *talak* the wife is bound to observe the *iddat*, though in the second case, and under certain circumstances in the third case, the divorce may become irrevocable *before* completion of the *iddat*. As to *iddat*, see s. 182 above. See also s. 224, cls. 1, 3, 5 and 6.

Talak by writing

214A. In the absence of words showing a different intention, a *talak* by writing operates as an irrevocable

(*o*) Baillie, Part II, 118.

divorce (*talak-i-bain*), and takes effect immediately on the execution of the document (*talaknama*) (*m*).

In a recent Bombay case (*n*), a Mahomedan appeared before the Kazi of Bombay and executed a *talaknama*, which ran as follows: "As on account of some disagreement between us there has arisen some ill-feeling, I, the declarant, appear personally before the Kazi of my free will, and divorce Sarabai, my wife by Nika, by one *bain-talak* (irrevocable divorce) and renounce her from the state of being my wife". The Court observed: "The authorities show that a *bain-talak*, such as this, reduced to manifest and customary writing, takes effect immediately on the mere writing. The divorce being absolute [and irrevocable], it is effected as soon as the words are written 'even without the wife receiving the writing'." Note that the *talak* in the above case, being *talak-i-bain* or "irrevocable" *talak*, belongs to the category of *talak-ul-bidaat*, the *talak-ul-bidaat* being the only kind of *talak* which becomes *irrevocable* immediately it is pronounced. The other two kinds of *talak*, namely, *talak-ahsan* and *talak-hasan* are *always revocable and the option to revoke continues for a certain period.*

Talak by delegated authority

215. An agreement entered into before marriage, by which it is provided that the wife should be at liberty to divorce herself from her husband under certain specified conditions, is valid, if the conditions are of a reasonable nature, and are not opposed to the policy of the Mahomedan law. When such an agreement is made, the wife may, on the happening of the contingencies, repudiate herself in the exercise of the power, and a divorce will then take effect to the same extent as if the *talak* had been pronounced by the husband (*o*).

Illustration.

A enters into an agreement before his marriage with *B*, by which it is provided that *A* should pay *B* Rs. 400 as her dower on demand, that he should not beat or ill-treat her, that he should allow *B* to be taken to her father's house four times a year, and that if he committed a breach of any of the conditions, *B* should have the power of divorcing herself from *A*. Some time after the marriage, *B* divorces herself from *A*, alleging cruelty and non-payment of dower. *A* then sues *B* for restitution of conjugal rights. Here the conditions are all of a reasonable nature, and they are not opposed to the policy of the Mahomedan law. The divorce is therefore valid, and *A* is not entitled to restitution of conjugal rights: *Hamidoolla* v. *Faizunnissa* (1882) 8 Cal. 327.

Note.—The agreement in the above case was supported on the doctrine of *tafweez*, which is an essential part of the Mahomedan Law of Divorce. Under that law the husband may *in person* repudiate his wife, or he may *delegate* the power of repudiating her to a third party or even to *the wife* (Baillie, 236): such a delegation of power is called *tafweez*. "When a man has said to his wife, 'Repudiate thyself,' she can repudiate herself at the meeting, and he cannot divest her of the power" (Baillie, 252).

(*m*) Baillie, 233; Moulvi Mahomed Yusuf, Vol. III, 95; *Sarabai* v. *Rabiabai* (1905) 30 Bom. 537.

(*n*) *Sarabai* v. *Rabiabai* (1905) 30 Bom. 537.

(*o*) *Hamidoolla* v. *Faizunnissa* (1882) 8 Cal. 327.

"When a man has said to his wife, 'Choose thyself a month or a year,' she may exercise the option (of repudiation) *at any time* within the given period" (Baillie, 240). The agreement in the case cited above may be regarded as a case of repudiation by the wife under an authority from the husband, in other words, as a *talak* by *tafweez*. Such a divorce, though it is *in form* a divorce of the husband *by the wife*, operates *in law* as a *talak* of the wife *by the husband*.

216. A *talak* pronounced under compulsion is valid. Similarly a *talak* pronounced by a husband in a state of intoxication is valid, unless the thing which intoxicated him was administered to him without his knowledge or against his will. *Talak under compulsion*

Hed. 75, 76; Baillie, 208, 209; *Ibrahim* v. *Enayetur* (1869) 4 B. L. R. A. C. 13 (as to *talak* under compulsion). The reason of the rule is that a husband acting under compulsion has the choice of two evils, one, the threat held out to him, and the other, divorce; and if he makes a *choice* of divorce, divorce will take effect. As to the efficacy of divorce pronounced in a state of voluntary intoxication, it is stated in the Hedaya, that "the suspension of reason being occasioned by an offence, *the reason of the speaker is supposed still to remain*, whence it is that his sentence of divorce takes effect, in order to deter him from drinking fermented liquors, which are prohibited."

Shiah law.—Under the Shiah law a *talak* pronounced under compulsion or in a state of intoxication is not valid (Baillie, Part II, 108).

217. (1) A divorce by *khula* is a divorce with the consent, and at the instance, of the wife, in which she gives or agrees to give a consideration to the husband for the release from the marriage tie. In such a case the terms of the bargain are matter of arrangement between the husband and the wife, and the wife may, as the consideration, release her dower and other rights, or make any other agreement for the benefit of the husband. *Khula divorce*

(2) The divorce by *khula* is complete and irrevocable from the moment the husband repudiates the wife.

(3) The non-payment by the wife of the consideration for a *khula* divorce does not invalidate the divorce, but the husband may sue the wife to recover the amount payable by her under the agreement.

Moonshee Buzul-ul-Raheem v. *Luteefut-oon-Nissa* (1861) 8 M. I. A. 379, 395. Hed. 112-116; Baillie, 303 *et seq.*

Khula means *to lay down*. "In law, it is the laying down by a husband of his right and authority over his wife."

A *khula* divorce is virtually a divorce *purchased* by the wife from the husband for a price, and it is in this respect that *khula* differs from *mubarat*: see next section.

Mubarat divorce

218. A divorce by *mubarat* or mutual release operates as a complete discharge of all marital rights on either side. It is effected by mutual consent, and it differs from *khula* in that no consideration passes from the wife to the husband. But, like *khula*, it becomes complete and irrevocable from the moment of repudiation.

Hed. 116; Baillie, 304.

Wife's Suit for Divorce.

When wife may claim judicial divorce

219. The wife cannot divorce herself from her husband except in the cases stated in sections 217 and 218. But she may *sue* for divorce on the ground of her husband's impotency (s. 220), or on the ground of *laan* (imprecation) (s. 221).

Suits by *husbands* for divorce are rare, as a husband may divorce his wife without judicial assistance, though the wife cannot.

Impotency of husband

220. No decree will be made in a suit for divorce on the ground of the husband's impotence, unless it is proved (1) that the impotency existed at the time of the marriage, (2) that the wife had no knowledge of it at the time of the marriage, and (3) that the marriage has not been consummated.

If the above facts are established, the Court will adjourn the further hearing of the suit for a year in order to ascertain whether the infirmity is inherent or whether it is merely supervenient or accidental.

If the defect is not removed within the aforesaid period, the Court will make a decree dissolving the marriage on the application of the plaintiff. The divorce becomes irrevocable when the decree is made.

Hed. 126-128; Baillie, 346-349. There is a difference of opinion as to whether the year should be a lunar year or a solar year, and in Baillie's Digest of Mahomedan Law it is stated that the year is to commence from the "time of litigation." But in *A.* v. *B.* (1896) 21 Bom. 77, the further hearing appears to have been adjourned for a year from the *date of the order* (see p. 83 of the report).

Vadake Vitil v. *Odakel* (1881) 3 Mad. 347 is a case in which the impotency alleged was not proved.

221. If a husband charge his wife with adultery, the wife may claim divorce *by a suit*: but "laan" does not *ipso facto* operate as a divorce. *"Laan" or imprecation*

Hed. 23; Baillie, 333-336. As to the second branch of the proposition, see ***Jaun Beebee*** v. ***Beparee*** (1865) 3 W. R. 93.

222. A wife is not entitled to claim divorce on any other ground, not even if the husband fails to perform the obligations which the marriage contract imposes on him for the benefit of the wife. *No other ground of divorce recognized*

As to the obligations arising on marriage see s. 188 above. As to the obligation of *maintaining* the wife, it is expressly stated in the Fatwa Alamgiri that "a man is not to be separated from his wife for inability to maintain her": Baillie, 443. As to the obligation of *conjugal fidelity* on the part of the husband, and *payment of prompt dower* to the wife, and treating her with *kindness*, it is nowhere stated in the Hedaya or Fatwa Alamgiri that conjugal infidelity, or non-payment of prompt dower, or cruelty to the wife, is a ground of *divorce*. As to how far failure to perform the above obligations is a valid defence to a suit for *restitution of conjugal rights*, see s. 199 above.

223. The rule of "English law which makes the husband in divorce proceedings liable *prima facie* to the wife's costs, except when she is possessed of sufficient separate property, does not apply to divorce proceedings between Mahomedans." *Wife's costs in a suit for divorce*

It was so laid down by the High Court of Bombay in *A.* v. *B.* (1896) 21 Bom. 77. That was a suit by a Mahomedan wife against her husband for divorce on the ground of his impotency. The English rule is founded upon the doctrine of the Common Law, according to which the husband becomes entitled upon marriage to the whole of the wife's personal property and to the income of her real property. Such being the case, it is but just that the husband should pay the wife's costs pending the hearing to enable her to conduct her case against him. Under the Mahomedan law, however, the husband does not by marriage acquire any interest in the property of the wife. Hence it was held in the above case that the practice of the English Divorce Court should not be applied to proceedings for divorce between *Mahomedans*.

As to *Parsis*, it is provided by the Parsi Marriage and Divorce Act, 1865, s. 33, that in a suit for divorce or judicial separation, if the wife should not have an independent income sufficient for her support and the *necessary* expenses of the suit, the Court might order the husband to pay her monthly or weekly during the suit a sum not exceeding one-fifth of the husband's net income.

The question whether the rule of English law as to wife's costs applies to divorce proceedings between *Christians in British India* presents some difficulty. Those proceedings are now regulated by the Indian Divorce Act IV of 1869. Section 7 of the Act provides that the Courts under that Act should act and give relief on principles and rules *as nearly as may be* conformable to those on which the Divorce Court in England

acts and gives relief. The said rule as to costs is one of the rules on which the English Divorce Court acts in proceedings for divorce. Hence it has been held by the High Court of Bombay that the rule applies to *divorce proceedings between Christians under the Indian Divorce Act* (*p*). But then we have the provisions of the Indian Succession Act X of 1865, which applies amongst others to *Christians*. Section 4 of that Act provides that "no person shall by marriage acquire any interest in the property of the person whom he or she marries." Hence a Christian husband, married in British India after the date of the said Act, does not acquire any interest in the property of his wife. Thus far the provisions of the Succession Act supersede the doctrine of the Common Law on which the rule of the English Divorce Court as to the wife's costs is founded. Why should then a Christian husband in British India be required to pay his wife's costs pending the hearing of a suit for divorce under the Indian Divorce Act? The High Court of Calcutta has held that a Christian husband is not, under the circumstances, liable to pay the wife's costs (*q*). As to this contention, however, Farran, J., said in the Bombay case above referred to: "It does not appear to me that these provisions (that is, of s. 4 of the Succession Act) affect the rule as to costs which ought to be applied to the case." It is submitted that the decision of the Calcutta High Court is the correct one, for s. 7 of the Divorce Act does not provide that the Courts under that Act should act on *all* the rules on which the English Divorce Court acts and gives relief, but that they should act and give relief on principles and rules *as nearly as may be* conformable to those rules and principles.

Rights and Obligations of Parties on Divorce.

224. The following rights and obligations arise on the dissolution of a contract of marriage by divorce, whatever may be the form of the divorce, and whether it is effected by a judicial decree, or without it:—

(1) The wife is bound to observe the *iddat* during the period specified in s. 182, but not if the marriage was not consummated (*r*).

(2) If the wife observes the *iddat*, the husband is bound to maintain the wife during the whole period of *iddat* (s. 198).

(3) The wife cannot marry another husband until after completion of her *iddat* (s. 182). And if the husband has four wives, including the divorced one, he cannot marry a fifth one until after completion of the *iddat* of the divorced wife (*s*).

(4) The wife becomes entitled to the "deferred" dower (s. 204). And if the "prompt" dower has not been paid, it becomes payable immediately on divorce. But if

(*p*) *Mayhew* v. *Mayhew* (1894) 19 Bom. 293.
(*q*) *Proby* v. *Proby* (1879) 5 Cal. 857.
(*r*) Baillie, 351.
(*s*) Hed. 32; Baillie, 34.

the marriage has not been consummated, the wife is not entitled on divorce to the whole of the unpaid dower, but only to half the aggregate amount of the "prompt" and "deferred" dower (*t*).

(5) In the event of the death of either party before the expiration of the period of *iddat*, the other is entitled to inherit to him or her in the capacity of wife or husband, as the case may be, if the divorce *had not yet become irrevocable* at the time of the death of the deceased; the reason being that the divorce not having become irrevocable, the husband might have revoked it, if death had not supervened.

If the divorce is pronounced in death-illness (*marz-ul-maut*), and the husband dies before completion of the wife's *iddat*, the wife is entitled to inherit from him, even though the divorce *had become irrevocable* prior to his death, unless the divorce was effected with her consent; the reason of the rule being that a sort of inchoate right of inheritance arises on death-illness, and the husband cannot defeat that right while on death-bed. But the husband has no right under similar circumstances to inherit from the wife, if the wife dies before completion of her *iddat*, the reason being that the divorce proceeded from him and not from the wife.

But where an *irrevocable* divorce has been pronounced by the husband in "health" and during the *tahr* of the wife, the wife has no claim to inherit to the husband, though the husband's death may take place before the completion of the period of *iddat* (*u*).

Neither the husband is entitled to inherit to the wife, nor the wife to the husband, in the event of the death of either of them *after* the expiration of the period of *iddat* (*v*).

(6) In the case of a divorce completed by a triple repudiation, it is not lawful for the parties to re-marry unless the woman shall have been married to another person, and divorced by him after consummation of the marriage (*w*).

The first para. of cl. (5) refers to the case where the divorce has not yet become irrevocable and the husband dies before completion of the period of *iddat*. The second

(*t*) Hed. 44, 45; Baillie, 96, 97.
(*u*) *Sarabai* v. *Rabiabai* (1905) 30 Bom. 537.
(*v*) Hed. 99, 100, 103; Baillie, 277, 278.
(*w*) Hed. 108; Baillie, 290; *Akhtaroon-Nissa* v. *Shurutoolla* (1867) 7 W. R. 268.

para. refers to cases where the divorce is pronounced in death-illness. The third para. refers to cases where the divorce pronounced is *irrevocable*, that is to say, in the case of *talak-ul-bidaat* which if made during the *tahr* of the wife becomes complete and irrevocable immediately the repudiation is made. See s. 214 above.

Apostasy

225. Apostasy from the Mahomedan religion of either party to a marriage operates as a complete and immediate dissolution of the marriage.

The marriage is in such a case dissolved without a divorce : Hedaya, 66.

D.—Parentage.

Special rules

226. The subject of parentage in Mahomedan law derives its importance from the special rules relating to legitimacy and filiation by acknowledgment.

An illegitimate child, we have seen, can inherit from its *mother alone* and her relations (s. 67). But a legitimate child is entitled to inherit also from its *father* and his relations. And it has been seen, in s. 189 *ante*, that the issue even of an *invalid* marriage (as distinguished from a *void* marriage) is also regarded as legitimate. In *Abdul Razak* v. *Aga Mahomed Jaffer* (*x*), the question arose as to the legitimacy of a son born to a Mahomedan by a Burmese woman. The marriage of a Mahomedan with a Burmese woman is only invalid, and not void (s. 183 *ante*), and the issues of such a marriage are *legitimate* (s. 189 *ante*). The latter point, however, does not appear to have been specifically argued before their Lordships of the Privy Council, and it seems to have been assumed even in the judgment of their Lordships that if the marriage was *invalid*, the claimant could not be considered legitimate. This view, it is submitted, is in direct opposition to the rule of Mahomedan law, according to which the issue of an *invalid* marriage are equally legitimate with the issue of a *lawful* marriage. But the point not having been brought to the notice of their Lordships, the judgment cannot be taken as denying that principle.

Legitimacy.

Presumption as to legitimacy : birth during marriage

227. A child born of a married woman *six months after* the date of the marriage is presumed to be the legitimate child of the husband, but not a child born within less than six months after the marriage (Baillie, 393).

The rule of the Indian Evidence Act, however, is that the birth of a child *at any time during the continuance* of a marriage is conclusive proof of its legitimacy, unless it can be shown that the parties to the marriage had no access to

(*x*) (1893) 21 Cal. 666, 21 I. A. 56.

each other at any time when the child could have been begotten (s. 112 of the Evidence Act).

It is submitted that the rule of the Evidence Act supersedes the rule of the Mahomedan law.

Illustration.

[*A* marries *B* on 1st January 1905. *B* gives birth to a child on 1st March 1905. *A* dies two days after the birth of the child. Can the child inherit from *A*? It will be entitled to inherit if it can be regarded as the legitimate child of *A*. Under the Mahomedan law, the child cannot be regarded as legitimate, it having been born within less than six months after the marriage. Under the Evidence Act, it is legitimate, it having been born during the continuance of the marriage. It is doubtful by which of these two rules the question of legitimacy is to be determined: ***Muhammad Allahdad*** v. ***Muhammad Ismail*** (1888) 10 All. 289, at p. 339.]

The Mahomedan law requires as a condition of legitimacy that ***conception*** should commence after marriage; an ante-nuptial child, therefore, is not legitimate under that law (*z*). Under the Evidence Act, however, it is enough to establish legitimacy that the ***birth*** took place during the continuance of marriage, although the ***conception*** may have commenced ***before*** marriage. In other words, conception, and not birth, is the starting point of legitimacy according to the rule of Mahomedan law. If a child is born within less than ***six*** months after marriage, it is regarded under that law as illegitimate, on the ground that it must have in that event been conceived before marriage. Mr. Field, in his work on the Law of Evidence, says (p. 552): "It may be supposed that the provisions of this section [*i.e.*, s. 112 of the Evidence Act] will supersede certain rather absurd rules of the Mahomedan law by which a child born ***six*** months after marriage, or within two years after divorce or the death of the husband, is presumed to be his legitimate offspring." On the other hand, Sir R. K. Wilson, in his Digest of Anglo-Muhammudan Law, says (p. 184) that the rule of the Evidence Act is really a rule of substantive marriage law rather than of evidence, and as such has no application to Mahomedans so far as it conflicts with the Mahomedan rule set out above. Assuming, however, the rule of the Evidence Act to be one of substantive marriage law, we are unable to see why it should not be applied to Mahomedans. It is true that the Mahomedan law of marriage, parentage, legitimacy, inheritance, etc., is to be applied to Mahomedans, but that law is to be applied ***except in so far as it has been altered or abolished by legislative enactment*** (see Chapter I *ante*). It is submitted, that the rule of the Evidence Act, s. 112, ***alters*** the rule of Mahomedan law set out in the present section. Whether the rule of the Evidence Act be a rule of substantive law or of evidence, the fact stands that the rule finds its place in an enactment which applies to ***all*** classes of persons in British India. There is, therefore, no valid reason why it should not be applied to Mahomedans. The reason of the rule is quite immaterial in determining that question. If it is founded on grounds of public policy, it cannot surely be against public policy to extend it to Mahomedans, regard being had especially to the fact that "the Mahomedan Law raises a strong presumption in favour of legitimacy."

(*z*) *Ashrufood Dowlah* v. *Hyder Hossein Khan* (1866) 11 M. I. A. 94.

Presumption as to legitimacy: birth after dissolution of marriage

228. A child born of a married woman within two years after divorce or the death of the husband, is presumed to be the legitimate child of the husband, but not a child born more than two years after the dissolution of the marriage by death or divorce (Baillie, 393-395).

But this rule of Mahomedan law, it is submitted, must now be taken to be superseded by the provisions of the Indian Evidence Act, s. 114.

In fact, it was held by the High Court of Calcutta prior to the passing of the Evidence Act, that "notwithstanding Mahomedan law, a Court of Justice cannot pronounce a child to be the legitimate offspring of a particular individual when such a conclusion would be contrary to the course of nature and impossible" (*a*). Hence it was held in that case that notwithstanding Mahomedan law, a child born *nineteen* months after the divorce of its mother by her former husband was not the legitimate offspring of that husband. That case was decided in 1871, that is, a year before the passing of the Evidence Act. The decision, it seems, would be the same under s. 114 of that Act. That section provides that "the Court may presume the existence of any fact which it thinks likely to have happened, *regard being had to the common course of natural events*," etc. Having regard to this rule, a Court would be justified in presuming that a child born of a woman nineteen months after her divorce by her husband is not the legitimate child of the husband.

Acknowledgment of paternity.

Legitimation by acknowledgment

229. Legitimacy is not a condition precedent to the right of inheritance from the mother (s. 67); but it is a necessary condition of the right of inheritance from the father, and it depends upon the existence of a lawful marriage between the parents of the claimant at the time of his conception or birth. When legitimacy cannot be established by *direct* proof of such a marriage, "acknowledgment" is recognised by the Mahomedan law as a means whereby the marriage and legitimate descent may be established as a matter of substantive law for the purposes of inheritance (*b*).

Acknowledgment has the effect of legitimation only in those cases 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. It is to be noted that the doctrine of acknowledgment is an integral portion of the Mahomedan family law, in other words, it is a part of *substantive* law; hence the conditions under which it will take effect must be determined with reference to Mahomedan jurisprudence, rather than to the Evidence Act (*c*).

(*a*) *Ashruff Ali* v. *Meer Ashad Ali* (1871) 16 W. R. 260.

(*b*) *Muhammad Allahdad* v. *Muhammad Ismail* (1888) 10 All. 289, 330; *Musst. Bibee Fazlatunnessa* v. *Musst. Bibee Kamarunnessa* (1905) 9 C. W. N. 352.

(*c*) *Ib.*

Acknowledgment may be express or implied

§ 230. The acknowledgment by a Mahomedan of another as his legitimate child may be made either by express declaration or it may be presumed from treatment tantamount to acknowledgment of legitimacy (*d*). But mere continued cohabitation with a woman does not suffice to raise such a legal presumption of a marriage with her as to legitimatize the offspring; the cohabitation must be a cohabitation *as man and wife* (as distinguished from "a mere casual concubinage") (*e*), and the treatment must be such as to amount to acknowledgment of legitimacy (*f*).

Illustrations.

[(a) A child is born to a Mahomedan of a woman who had resided in his female apartments for a period of 7 years *prior* to the birth of the child. It is proved that the cohabitation was a *continual* one (and not merely "casual"), and that it was between a man and woman cohabiting together *as man and wife*, and having that repute *before the conception* commenced. It is also proved that the child was born under his roof and continued to be maintained in his house without any steps being taken on his part or of any one else to repudiate its title to legitimacy as his offspring. These facts are sufficient to raise the presumption of marriage and acknowledgment: *Khajah Hidayut* v. *Rai Jan* (1844) 3 M. I. A. 295.

Note.—In *Mahomed Bauker* v. *Shurfoon Nissa* (1860) 8 M. I. A. 136, there was abundant evidence of continued cohabitation between the father and the mother of the claimant; *but* as there was no proof in that case of treatment tantamount to acknowledgment, as in the above illustration, the claimant was adjudged to be illegitimate.

(b) A child is born to a Mahomedan of a woman who had been in his service for some time before the birth of the child. It is alleged that the man entered into a *mutaa* marriage (*g*) with the woman, but the date of the marriage is not found. The evidence shows that pregnancy commenced *before* the woman had the acknowledged status of a *mutaa* wife. It does not appear when the intercourse began which led to the birth, nor what the nature of it was, whether casual or of a more permanent character. It is proved that there was no *express* acknowlegment, and it appears from the evidence that the treatment of the child was equivocal, he being sometimes treated as a son and at others not. These facts are not sufficient to raise a presumption of acknowledgment: *Ashrufood Dowlah* v. *Hyder Hossein* (1866) 11 M. I. A. 94.]

It is to be noted that a mere recognition of the *paternity* of a child is insufficient to confer upon the child the status of *legitimacy*. What is essential is that there should be an acknowledgment of the paternity of the child by the acknowledger as his *legitimate child*. There must be, in other words, a real acknowledgment "intended to have the serious effect of conferring the status of *legitimacy*" (*h*).

(*d*) *Saiyad Wahidla* v. *Miran Saheb* (1864) 2 B. H. C. 285.

(*e*) *Mahomed Bauker* v. *Shurfoon Nissa* (1860) 8 M. I. A. 136, 159.

(*f*) *Khajah Hidayut* v. *Rai Jan Khanum* (1844) 3 M. I. A. 295; *Ashrufood Dowlah* v. *Hyder Hossein Khan* (1866) 11 M. I. A. 94; *Mahammad Azmat* v. *Lalli Begum* (1881) 8 Cal. 422. 9 I. A. 8; *Sadakat Hossein* v. *Mahomed Yusuf* (1883) 10 Cal. 661, 11, I. A. 31; *Abdul Razak* v. *Aga Mahomed Jaffer* (1893) 21 Cal. 666, 21 I. A. 56; *Masit-un-nissa* v. *Pathani* (1904) 26 All. 295; *Musst. Bibee Fazlatunnessa* v. *Musst. Bibee Kamarunnessa* (1905) 9 C. W. N. 352.

(*g*) A *mutaa* marriage is a sort of temporary marriage recognised by the Akhbar-i-Shiahs. Such a marriage terminates on the expiration of the fixed period, and it may be dissolved earlier by mutual consent.

(*h*) *Abdul Razak* v. *Aga Mahomed* (1893) 21 Cal. 666, 21 I. A. 56.

Effect of acknowledgment

231. The acknowledgment by a Mahomedan of the paternity of a child as his legitimate offspring is not merely *primâ facie* evidence of the fact of legitimacy (*i*), but affords a conclusive presumption thereof, and gives such child the right of inheritance to him as a legitimate son or daughter as the case may be (*j*).

Such an acknowledgment also gives to the mother of the acknowledgee the right of inheritance to the acknowledger, the law presuming from the acknowledgment of legitimacy of the child a lawful *union* between the parents. (*k*).

Note.—The acknowledged child may be either a *son* or a *daughter (l)*.

Conditions of a valid acknowledgment

232. In order that an "acknowledgment" may have the consequences mentioned in s. 231, it is necessary that the following conditions should concur :—

(1) the acknowledger must be old enough to be the father of the acknowledgee ;

(2) the acknowledgee must not be known to be the child of some other person ;

(3) the acknowledgee must confirm the acknowledgment, if he is old enough to understand the nature of the transaction ; but such confirmation is not necessary when the acknowledgee is an infant ;

(4) the doctrine of acknowledgment being founded upon the presumed legitimacy of the acknowledgee which the acknowledgment has the effect of *confirming* (*m*), it follows that the acknowledgee must not be an offspring of adultery, incest or fornication. Hence a child begotten upon a woman who was at

(*i*) In the matter of *Bibee Najibunnissa* (1869) 4 B. L. R., A. C. 55.

(*j*) *Muhammad Azmat* v. *Lalla Begam* (1881) 8 Cal. 422, 9 I. A. 8; *Sadakat Hossein* v. *Mahomed Yusuf* (1885) 10 Cal. 663, 11 I. A. 31.

(*k*) *Khajah Hidayat* v. *Rai Jan* (1844) 3 M. I. A. 295, 318; *Wise* v. *Sanduloonissa* (1869) 11 M. I. A. 177, 193; *Nowab Malka Jehan* v. *Muhammad* (1873) Sup. Vol. I. A. 192; *Khajooroonissa* v. *Rowshan Jehan* (1876) 2 Cal. 184, 199; 3 I. A. 291; *Mahatala* v. *Ahmed Haleemoozooman* (1881) 10 C. L. R. 293.

(*l*) *Oomda Beebee* v. *Syud Shah Jonab* (1866) 5 W. R. 132.

(*m*) Cp. *Ashrufood Dowlah* v. *Hyder Hossein Khan* (1866) 11 M. I. A. 94, where their Lordships of the Privy Council, after observing that the issue as to acknowledgment was properly framed, said (p 104): "It uses the word 'acknowledgment' in its legal sense, under the Mahomedan law of acknowledgment of *antecedent right established by the acknowledgment* on the acknowledged."

the time the wife of another man (*n*), or the sister of the acknowledger's wife (*o*), or a prostitute (*p*), cannot be legitimated by any acknowledgment.

Hed. 439; Baillie, 405.

Fourth Condition.—In *Sadakat Hossein* v. *Mahomed Yusuf* (1883) 10 Cal. 663, L. R. 11 I. A. 31, their Lordships of the Privy Council left it an open question as to whether the offspring of an ***adulterous*** intercourse can be legitimated by any acknowledgment. Referring to this case, Mahmood, J., observed in ***Muhammad Allahdad*** v. ***Muhammad Ismail*** (1883) 10 All. 289, at p. 337: "There is no warrant in the principles of the Mahomedan law to justify the view that a child proved to be the offspring of fornication, adultery or incest, could be made legitimate by any ackowledgment by the father. The rule is limited to cases of ***uncertainty*** of legitimate descent, and proceeds entirely upon an assumption of legitimacy and the establishment of such legitimacy by the force of such acknowledgment." This dictum has been followed by the High Courts of Allahabad and Calcutta in the case referred to in ***Condition*** (4) above.

Acknowledgment of legitimacy irrevocable

233. Once an acknowledgment of paternity is made, it cannot be revoked either by the acknowledger or persons claiming through him (*q*).

Adoption not recognized

234. The Mahomedan law does not recognize Adoption as a mode of filiation (*r*).

(*n*) *Liaqat Ali* v. *Karim-un-Nissa* (1893) 15 All. 396.
(*o*) *Aizunnissa* v. *Karim-un-Nissa* (1895) 23 Cal. 1·0.
(*p*) *Dhan Bibi* v. *Lalon Bibi* (1900) 27 Cal. 801.
(*q*) *Ashrufood Dowlah* v. *Hyder Hossein* (1866) 11 M. I. A. 94; *Muhammad Allahdad* v. *Muhammad Ismail* (1888) 10 All. 289, 317.
(*r*) *Muhammad Allahdad* v. *Muhammad Ismail* (1888) 10 All. 289, 340.

CHAPTER XIII.

GUARDIANSHIP. ss. 90-139

Age of majority

235. For the purposes of this Chapter, "minor" means a person who shall not have completed the age of eighteen years.

See Indian Majority Act, IX of 1875, s. 3, and the Guardians and Wards Act, VIII of 1890, s. 4, cl. (1).

Power of the Court to make order as to guardianship

236. When the Court is satisfied that it is for the welfare of a minor that an order should be made (1) appointing a guardian of his person or property, or both, or (2) declaring a person to be such guardian, the Court may make an order accordingly.

Guardian and Wards Act, s. 7.

ss. 98 = sec 8. 9. 6. act.
ss. 99 = sec (10. 6) 9. 4 6 act.

Matters to be considered by the Court in appointing guardian

237. (1) In appointing or declaring the guardian of a minor, the Court shall, subject to the provisions of this section, be guided by what, *consistently with the law to which the minor is subject*, appears in the circumstances to be for the welfare of the minor.

(2) In considering what will be for the welfare of the minor, the Court shall have regard to the age and sex of the minor, the character and capacity of the proposed guardian and his nearness of kin to the minor, the wishes, if any, of a deceased parent, and any existing or previous relations of the proposed guardian with the minor or his property.

(3) If the minor is old enough to form an intelligent preference, the Court may consider that preference.

Guardians and Wards Act, s. 17. The italicized words show that if a minor of whose person or property or both a guardian is to be *appointed* or *declared* by the Court is a Mahomedan, the Court is to have regard to the rules of Mahomedan law, *subject, however, to the provisions of sub-sections* (2) & (3). See notes to s. 241 below, as to the exact significance of the words last italicized. We now proceed to enumerate the principles of Mahomedan law relating to (1) the guardianship of the person of a minor, and (2) the guardianship of his property.

Guardians of the Person of a Minor.

Right of mother to custody of infant children

238. The mother is entitled to the custody of her male child until he has completed the age of seven years, and of her female child until she has attained puberty, and the right is not lost though she may have been divorced by her husband (*s*).

Hed. 138; Baillie, 431. It has been held by the High Court of Calcutta that the *mother* is entitled to the custody of her daughter who has not attained puberty in preference even to the *husband of the daughter: Nur Kadir* v. *Zuleikha Bibi* (1885) 11 Cal. 649; *Korban* v. *King-Emperor* (1904) 32 Cal. 444.

Shiah law.—Under the Shiah Law, the mother is entitled to the custody of her male child until he is weaned, and of her female child until she has completed the age of seven years: Baillie, Part II, 95.

Right of female relatives in default of mother

239. Failing mother, the right of custody of a boy under the age of seven years, and of a girl that has not attained puberty, devolves upon the following female relatives in the order enumerated below:—

(1) mother's mother, how high so ever;
(2) father's ~~father~~ mother, how high so ever;
(3) full sister;
(4) uterine sister;
(5) [consanguine sister];
(6) full sister's daughter;
(7) uterine sister's daughter;
(8) [consanguine sister's daughter];
(9) maternal aunts, in like order as sisters; and
(10) paternal aunts, also in like order as sisters.

Hed. 138; Baillie, 432. Neither the *consanguine* sister nor her daughter is expressly mentioned either in the Hedaya or Fatwa Alamgiri; the omission seems to be accidental, for *paternal* aunts are expressly mentioned.

Right of male paternal relatives

240. In default of all the female relatives mentioned above, the right of custody passes to (1) the father, (2) father's father how high so ever, (3) full brother, (4) consanguine brother, (5) full brother's son, (6) consanguine

(*s*) *Emperor* v. *Ayshabai* (1904) 6 Bom. L. R. 536.

brother's son, (7) full paternal uncle, (8) consanguine paternal uncle, and other paternal male relatives in the order enumerated in the Table of Residuaries (s. 52).

No male is entitled to the custody of a female child unless he stands within the prohibited degrees of relationship to her.

Hed. 138, 139; Baillie, 433.

Right of custody, how lost

241. Neither a mother nor any other female relative mentioned in s. 239 is entitled to the custody of an infant, if she marries a person not related to the infant within the prohibited degrees; but the right is restored on the dissolution of the marriage by death or divorce. Nor is she entitled to *retain* custody of an infant, if she removes the infant to a distant place so as to render it impracticable for the father to look after the child.

Hed. 138, 139; Baillie, 432, 435. The reason of the first branch of the rule is that the infant may not be treated with kindness, if the woman marries a person *who is not a near relative* of the infant. In *Bhoocha* v. *Elahi Bux* (1885) 11 Cal. 574, the question arose as to whether the grandmother of a minor female, or her paternal uncle, was entitled to the custody of the minor. The minor had not attained puberty, and she was married to a boy twelve or fourteen years of age. The mother of the minor had married a person not related to the minor within the prohibited degrees. No claim was made on behalf of the husband. It was held that the grandmother was entitled to the custody in preference to the paternal uncle (see s. 239). The Court felt itself bound by the provisions of Mahomedan law, though it was clearly of opinion that under the circumstances the uncle of the girl was a far preferable guardian to the grandmother. This case was decided in 1885, that is, five years before the passing of the Guardians and Wards Act. Under that Act, however, the primary consideration for the Court is the *welfare* of the minor (s. 237 *ante*), and the provisions of the law to which the minor is subject are subordinated to that consideration.

A prostitute is not a fit and proper person to be appointed guardian of an infant: *Abasi* v. *Dunne* (1878) 1 All. 598. This, however, is not a special rule of Mahomedan law, but a part of the general law of British India. See Guardians and Wards Act, s. 17, cl. 2, set out in s. 237 above.

It seems that apostasy is not a ground of disqualification: Hed. 139; Baillie, 431. See also Act XXI of 1850, and the notes to s. 191.

Custody of boy over seven and of adult female.

242. The father is entitled to the custody of a boy when he has completed the age of seven years, and of a girl when she has attained puberty. Failing father, the

right of custody devolves upon the paternal relatives mentioned in s. 240.

Hed., 139; Baillie, 434; *Idu* v. *Amiran* (1886) 8 All. 322. The father is entitled to the custody of a boy *under* seven years of age and of a girl that has *not* attained puberty, only if there be no mother or any of the female relatives mentioned in s. 217 and competent to act. See s. 240.

Custody of illegitimate children

243. The custody of illegitimate children belongs to the mother and her relations.

Macnaghten, 298, 4.

Guardians of the property of a minor.

Guardians of property

244. The following persons are entitled to be guardians of the property of a minor :—

(1) the father ;

(2) the executor appointed by the father's will ;

(3) the father's father ;

(4) the executor appointed by the will of the father's father ;

If there be none of these, the Court has the power to appoint a guardian, but it should select by preference a male agnate of the deceased father.

Macnaghten, 304. For a list of male agnates, see the Table of Residuaries, s. 52.

The only relations by blood that are entitled as such to the guardianship of the *property* of a minor are (1) the father, and (2) the father's father. No other relative can claim to be such guardian *as of right*, not even the mother (*t*). Hence a mother has no power to bind the estate of her minor children by mortgage, sale or otherwise (*u*), unless the transaction be manifestly for the benefit of the minor (*v*). Nor is a mortgage executed together by a mother, brother and sister of a minor, binding on the minor, none of them being a guardian of the minor's property (*w*). Similarly it has been held that a mortgage executed by the uncle of a minor is not binding on the minor (*x*).

As to the powers of a husband to deal with the property of his *minor* wife, see *Hayath* v. *Syahsa Meya* (1903) 27 Mad. 10.

(*t*) *Pathummabi* v. *Vittil Ummachabi* (1902) 26 Mad 74; *Moyna Bibi* v. *Banku Behari* (1902) 29 Cal. 47; *Baba* v. *Shivaji* (1895) 20 Bom. 199; *Sita Ram* v. *Amir Begam* (1886) 8 All. 324, 338.

(*u*) *Ib.*

(*v*) *Mahdan* v. *Ram Narain* (1903) 26 All. 22.

(*w*) *Bhutnath* v. *Ahmed Hosein* (1885) 11 Cal. 417. A brother is not a guardian of her sister's property: *Bukshan* v. *Maldai* (1869) 3 B. L. R. A. C. 423. See also *Husein Begam* v. *Zia-ul-Nisa Begam* (1882) 6 Bom. 467.

(*x*) *Nizam-ud-din* v. *Anandi Prasad* (1896) 18 All. 373.

Powers of guardian to sell or mortgage

245. A guardian of the property of a minor may sell the moveable property of the minor, but he cannot sell any part of his immoveable property, unless the sale is absolutely necessary or is for the benefit of the minor.

Baillie, 676; Macnaghten, 64, 305, 306; *Hurbai* v. *Hiraji* 20 Bom. 116, 121. See also *Kali Dutt* v. *Abdul Ali* (1888) 16 Cal. 627.

If a person is appointed or declared a guardian of the property of a Mahomedan minor under the Guardians and Wards Act, "he shall not, *without the previous permission of the Court* (a) mortgage or charge, or transfer by sale, gift, exchange, or otherwise, any part of the immoveable property of his ward, or (b) lease any part of that property for a term exceeding five years, or for any term extending more than one year beyond the date on which the ward will cease to be a minor" (s. 29). And it is provided by s. 30 of the Act that a disposal of immoveable property by a guardian in contravention of the foregoing provisions is *voidable* at the instance of any other person affected thereby.

Guardians and Wards Act.

Applicability of the Guardians and Wards Act

246. All applications for the appointment or declaration of a guardian of a person or property or both of a Mahomedan minor must now be made under the Guardians and Wards Act, 1890, and the duties, rights, and liabilities of guardians appointed or declared under that Act, are governed by the provisions of that Act.

See addenda

CHAPTER XIV.

MAINTENANCE OF RELATIVES.

Maintenance of children

247. A father is bound to maintain his daughters until they are married, but he is not obliged to maintain his adult sons unless they are disabled by infirmity or disease. The mere fact that the children are in the custody of their mother during their infancy (s. 238) does not relieve the father from the obligation of maintaining them (*y*).

If the father is poor, and incapable of earning anything by his own labour, the mother, if she has got property of her own, is bound to maintain her unmarried daughters and such of her adult sons as are disabled.

Hed. 148; Baillie, 455-458. As to maintenance of wives, see s. 196 *et seq.*

Maintenance of parents

248. Children in easy circumstances are bound to maintain their own parents, although the latter may be able to earn something for themselves.

This section is a reproduction of the first marginal note on p. 461 of Baillie's Digest. See also Hedaya, p. 148.

Maintenance of other relations

249. Persons in easy circumstances may be compelled to maintain their poor relations within the prohibited degrees in proportion to the shares which they would inherit on the death of the relative to be maintained by them.

Baillie, 463.

Statutory obligation of father to maintain his children

250. If the father neglects or refuses to maintain his legitimate or illegitimate children who are unable to maintain themselves, he may be compelled, under the provisions of the Code of Criminal Procedure, to make a monthly allowance not exceeding fifty rupees for their maintenance.

See Criminal Procedure Code, s. 488. If the children are illegitimate, the refusal of the mother to surrender them to the father is no ground for refusing maintenance. *Kariyadan* v. *Kayat Beeran* (1885) 19 Mad. 461.

(*y*) *Emperor* v. *Ayahabai* (1904) 6 Bom. L. R. 836.

W. 140 Minors etc are to be unaffected by majority act not M. L.

easy circumstances, however, are liable to pay Zakat poor rate & are not able to receive from it

W. 141. With exception of wife no person can be maintained at expense of any one else if he or she can do it out of his or her own property

W. 142. Mainten. of minor sons as far as necess. is obligatory He may be put out to reasonable work to help - any surplus ought to be handed to him on his majority

W. ~~144~~ 151. A son not = E. C. is not bound to make an allowance for his parents but if earning enough should take his mother or father in if necessary. Same for grandson

152 no poor person chargeable for collaterals

153. If sole heir - relative is poor burden depends on next heir expectant.

Devolution of liability

156 oblig. to maintain relatives is not affected in Brit. I. by apostasy

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