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MUHAMMADAN LAW

THE PERSONAL LAW OF MUSLIMS

BY

FAIZ BADRUDDIN TYABJI, M.A.

OF THE MIDDLE TEMPLE, BARRISTER-AT-LAW

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TO MY FATHER

And if the world did know
The heart he had
'T' would deem the praise it yields him, scantly dealt

Dante

SAY : IF I ERR, VERILY I SHALL ERR ONLY AGAINST MY OWN SOUL : BUT IF I AM RIGHTLY GUIDED, IT WILL BE BY THAT WHICH MY LORD HATH MADE CLEAR TO ME. VERILY HE IT IS THAT HEARETH : HE IT IS THAT IS NIGH.

Koran XXXIV. 50.

PREFACE

IT is now twenty-one years since the last edition of this work was submitted to the legal public. I have endeavoured to bring the present edition abreast of the decisions and other materials that are now available. When the work was first published, every reported case was intended to be mentioned in it. That plan has become unsuitable after the multiplication of Courts and reports. But it is hoped that every judgment appearing in the authorized series, and all other reported decisions containing anything new or likely to be useful, are cited. Reference is also occasionally made to unreported cases. I have to thank Principal Fyzee of the Bombay Law College for selecting in the first instance the cases that ought to be mentioned. He has also helped me throughout in a variety of ways, though he was not able to spare as much time as he intended to devote in connection with the preparation and printing of the work.

During these twenty-one years the most important development in the Muslim law, so far as India is concerned, has been the changed attitude towards life-interests and limited estates under Hanafi law. Several of the earlier decisions proceeded on the assumption that the decision by the Privy Council in Musummat Humeeda's case (1872) did not permit effective life interests under Hanafi law. It was submitted in the earlier editions that it was erroneous so to interpret the decision—a submission that was not in accordance with the opinions expressed in other text books. Recently, however, a judgment has been delivered by the Privy Council, after which there seems little obstacle left in the way of life interests being recognized under Hanafi law ; and some decisions of the High Courts since then have upheld life-interests under that system.

The subject is of cardinal importance in the development of the forms that dispositions of property may take. I may,

no doubt be subject to a bias in measuring its importance owing to my having been for some considerable period the only vocal protagonist (so far as I am aware) of the opinion that life-interests and similar dispositions are permissible under Hanafi law. In any case, the Hanafi and other Muslim texts contain (I have submitted) materials on the basis of which Muslim law may develop so as to permit the most modern modes of disposition. I trust that the subject will receive the careful attention that it deserves.

Legislation has made the law of wakfs simpler and brought it into greater conformity with the ancient texts. Public policy seems (it must be admitted) opposed to property being tied down in perpetuity except for charity in the ordinary acceptation of the word. So far as family settlements are concerned, it is not unlikely that Muslims may themselves see the need of a form of disposition restricted to the period within the rule against perpetuities. In a wakf al al aulad the number of descendants entitled to benefit may increase to such an extent, as to reduce the interest of each beneficiary to negligible proportions. In such cases no individual beneficiary is sufficiently interested to attend to the due administration of the wakf. The result is that the wakf fails altogether to achieve its purpose, or worse still, each beneficiary gets a sort of eleemosynary dole. On the other hand the fetter and clog on the property continue.

In the course of this long period the Courts have on occasions referred to this work with a courtesy and indulgence that would make it incumbent upon me to express my gratitude, were such expression not liable to savour of want of due deference.

In one respect however the view expressed in this work has not been accepted by Courts whose opinion must carry great weight. When a woman consents to marry on the stipulation that she will not be taken away from her parents' residence, it has, in spite of decisions to the contrary, been submitted in this work that she is entitled to hold the husband to his promise. This submission has not been approved. But the liberty has been taken of adhering in this edition to the view expressed in the earlier editions. The principles and

authorities, it is submitted, make it difficult to follow the view taken by the decisions.

Some friendly critics have taken exception to my having introduced references to other systems of law and to certain other matters that do not fall under the direct province of Muslim law. But this work has been written in the conviction that law gains by breadth of view, by comparison and constant examination of principles of universal application. Muslims cannot surely come to harm if they look about instead of narrowly pursuing what may appear to be their own path. A broader outlook occasionally leads to the conclusion that their own path takes a course different from that which at first they conceived it to take. The manner in which the same human problem has been grappled with by men at different times and under different cultures furnishes an experience that law can least afford to neglect.

The spelling of Arabic and other oriental words has been a source of great perplexity. Transliteration with diacritical marks produces uniformity and indicates the spelling in the original, but renders the transliterated words uncouth in appearance and hard to read. For those who do not know the original system of writing and spelling, the correct pronunciation is not by any means indicated : often it is rendered very difficult. Transliteration is therefore manifestly unsuited to a work intended for the use of those who are entitled to treat such words as isolated immigrants, allowed entry, on sufferance, into a territory subject to different laws and regulations. Arabic words ought in fact to be introduced as little as possible in such a treatise as this. But they cannot be altogether shut out. Some Arabic words have become so common in English that they are included in English dictionaries, others in Indian legislation. Many have in this manner acquired spellings of their own, which cannot easily be tampered with. Such are Koran, kazi, and wakf. In the result a consistent system of spelling of all oriental words seems impracticable. A compromise is the only alternative. The result to which my efforts have brought me will, I hope be forgiven its many inconsistencies and other failings, in view of its unpretentiousness and frank admission of imperfection.

When the work was first published I stated that it had been undertaken as a labour of love. So it has continued to be. In the evening of my life I naturally look upon it from a changed aspect. May I now be permitted to tender it as an offering, intended to supplement and to some extent atone, for the shortcomings of a life, which, if it has failed to be more useful and beneficial to my fellow countrymen, has failed not because of the absence of a desire to serve ?

This treatise has been conceived as presenting a body of law based on the religion of Islam and on its authentic expositions: a law that has purported throughout its thirteen and a half centuries of authority in different quarters of the world, to be a call to a purer, cleaner, less selfish life: to a strenuous, knowledge-seeking, responsible life. Man is to be held responsible for the life that he leads. But he on his part is expected to be thankful for it. His life must therefore have been destined to be full and happy. An exposition of the law of Islam must be a practical presentation of this thesis. To mention one result, which cannot be treated as a mere detail in India, I have been at pains to avoid if possible that short sighted policy which thinks that Muslims would be served, if their law were so moulded as to permit of its being used, in times of stress, as a trap for the unwary of other religions, who voluntarily or otherwise come into contact and dealings with Muslims. Above all, the firm conviction underlies this treatise that the law of Islam is living: that it will grow and develop in the future as it has grown and developed in the past.

More than myself two personalities, may be said to be the moral and spiritual makers of this book. To one of them it is dedicated.

One or two names I must mention. Sir Dinshaw F. Mulla was the person who first induced me to undertake this task: though it then seemed to me that there was no room for another treatise on the subject. At that time he was the principal of the Bombay Law School, and I a professor. He pressed me forward when I was diffident and when misgivings held me back. It is a very agreeable duty to express, although apparently so late, my feelings of gratitude.

Shaikh Fazullabhai who originally assisted me in translating citations from Arabic texts has now passed away. But the Bombay Bar is proud to have amongst its members two such scholars of Arabic as Mr. Haindaday and Principal Fyzee. They have always been ready and willing with their help and I have availed myself of it on many occasions, although the responsibility of making proper use of their scholarship has always rested upon me.

A last duty still rests on me. It is to thank the press where these pages have been printed. The printing has been an extremely difficult task : rendered, I am afraid, more difficult by me than it might have been. But the members of the press have co-operated with me in a manner for which to say that I am thankful would be totally inadequate. They seem to have welcomed opportunities for showing how obliging they can be and how willing to take infinite pains. I venture to think that the book is an excellent piece of work so far as their part is concerned. If in spite of all their efforts and of all my own anxiety, some misprints have crept in,—as I know they have, especially in the way the titles of the reported decisions are spelt—I hope my readers will forgive the trouble and annoyance that may result. When so many thousands of references are involved, it is impossible to be sure that all are printed even as the author's copy presents them.

As for the imperfections of the work due directly to the author, I can only repeat words whose significance has become more poignant with the passage of years—that no one is more conscious of his imperfections than the author himself.

Bombay, June 1940. F. B. T.

PREFACE

TO THE FIRST EDITION

I HAVE attempted in this volume to state, in the form of a code, the principles of Muhammadan law relating to the subjects on which it is enforced in British India ; to illustrate such principles by reproducing the effect of some of the more important or striking instances in which they have been applied in the texts of authority, or in cases decided by the British Courts ; and where necessary or desirable, to discuss the principles or their application. The language in which the principles are stated could have been made more uniform had it not seemed necessary to adhere somewhat closely to the words used by the authorities on which they are based.

Many years have elapsed since the first portion of what was meant to form a chapter of this work was written. It was written with the object of presenting the law of inheritance as a coherent whole, instead of a series of more or less detached rules. I had then had some experience as a lecturer on law, and had found that while it is an easy task to make the students learn by rote a few rules which suffice for solving most questions relating to inheritance, most students are apt to overlook the fact that there is anything like a scheme underlying the rules of law ; the consequence being that when their memory is at fault they cannot avail themselves of the aid of inference and reasoning as an index or corrective. It need hardly be said that the teaching of any branch of law on a system which relies mainly on memory, is an injustice to the student no less than to the subjects,—instead of being a training to the mind, it is made to subserve a tendency which it is the object of education to guide and often to counteract. It seemed necessary, in order to safeguard my lectures from this danger, to deal with the law of inheritance in a manner different from that which is usually adopted in existing books on Muhammadan law : the substance of my lectures on the law of inheritance was the first portion of the subject matter of this work which was put on paper with a view to publication. It has since been entirely re-written so as to harmonize with the rest of this work. When I approached the other branches of the law, I found that in a less degree, but in a more insidious form, similar criticism could be applied to their usual presentations : the available texts on Muhammadan law cannot be said to count among their many excellences the merit of giving prominence to the fact that a very few leading principles underlie each subject of the law, and that the whole of that subject is an exemplification of those principles. In regard to the

law of inheritance, not much thought is needed to show that the rules must have some common bearing upon, and some relation to, one central fact. Hence, in regard to this branch, efforts are more frequently made to trace out the scheme of the law. But the fate of the other branches of the law is less fortunate. It is forgotten that Muhammadan law started with a few simple rules, the continued expansion of which forms the body of the law now known to us ; and that the most important mode of expansion was undertaken not piecemeal, but in the form of comprehensive expositions of the law as a whole so that whatever other features the rules of Muhammadan law may have, they must have the characteristics of inter-dependence and coherence.

It will be seen, therefore, that though this work is couched in a form to facilitate reference by the busy practitioner, it has been undertaken with the object of elucidating the principles of the law. I have, at the same time, endeavoured to include every rule to be found in the original texts, which has either been applied, or is likely to be applied, to Muslims in British India. Many of the latter class of rules have had to be extracted from books hitherto not translated into English. In addition to the original texts, it is believed that a reference will be found to every reported decision of any importance pronounced by the courts in British India or by the Privy Council in appeal from such courts ; the decisions of English Courts have been mentioned where English law may be applicable on the grounds of justice, equity and good conscience ; and references to Hindu, Roman, and other systems of law have frequently been made in the hope that they will be of interest, and may sometimes throw light on the subject under discussion.

No one can be more conscious of the possibilities of error in a work of this nature than its author, and I can only say that every effort has been made to avoid error. " Where with intention I have erred,"—where, I mean I have chosen to differ from the views expressed by authorities whose reputation would have been sufficient to give dignity even to erroneous views (assuming them to be capable of error), or where I have strayed into expressing opinions on points uncovered by authority, I trust that I may find justification in the fact that it is beneficial in the interest of the law as a science that authors should venture where judges fear to tread.

From one form of boldness, however, I have studiously refrained. I have never dared consciously to differ from the views expressed in the original texts of Muhammadan law. This forbearance may no doubt itself appear to be of questionable wisdom, since the exhibition of some contempt for the ancient text writers has, not infrequently, been the main credential of a right to speak with authority on Muhammadan law. My attitude towards the texts is, however, based on the fact that seeming inconsistencies or errors in the texts are, in many cases, only examples of that conciseness which is possible, and even

necessary where both the writer and reader carry their law in their heads, and do not keep it stored up in libraries; at other times they exemplify the desire of the old authors to write in such a manner as not to be easily understood by those who do not devote long years of study to the subject, or who seek to be their own teachers instead of sitting at the feet of a master. This frame of mind is well illustrated by such maxims of the Christian theologians as "Si quis capere potest, capiat" or "Qui semetipsum docet, asinum habet discipulum, asinum magistrum." When, on the other hand, it is remembered that the texts are printed without any marks of punctuation, without arrangement into paragraphs, without any distinction in the size of the letters, without footnotes, and seldom with any headings, with hardly anything to indicate where one word ends, and another begins—the marvel is that they should be intelligible, in most cases, to those who refer to them only occasionally and piecemeal. Nothing could testify more emphatically to their lucidity.

I have, of course, not considered myself bound by the arrangement or classification of the various subjects usual amongst the Arab text writers. The sequence of topics prevalent among them, though it still preserves traces of logical analysis, has become cumbrous and not seldom confusing, owing to the texts, as they were orginally written, having been overlaid by the insertion of details relating to allied topics, which were not present to the minds of the original authors. Thus, for instance, it comes about that the whole law of maintenance is dealt with in the texts, in the book on divorce. The explanation being, no doubt, that the earliest texts must have contained a casual reference merely to the maintenance of a divorced wife, then as occasion arose, rules about maintaining an undivorced wife were added, and then the rules about maintaining all other relations—each succeeding set of rules being placed by the side of the topic most nearly allied to itself.

My indebtedness to previous writers which has been acknowledged in the course of the book, must be repeated here, and I must add that the debt is frequently greatest where acknowledgment seems out of place—where, for instance, a difficult question has been so elucidated that its obscurity has been for ever dispelled, and all subsequent treatment of it must follow the same method that has been proved to be so successful.

With reference to the help that friends and well-wishers have given to me, I can hardly express myself adequately. In some cases tendering thanks is in itself a privilege, and accepting them not far removed from conferring a fresh obligation. It is owing to the encouragement I received from Sir Basil Scott, Chief Justice of Bombay, that I decided to print my manuscript copy. Mr. Justice Bachelor and Mr. Justice Heaton, have with great kindness read or looked over portions of the book as they have been printed, and have evinced such interest in the

book, as even to lighten a task which has ever been in itself a labour of love. Mr. S. E. Kurwa, Barrister-at-Law, has been kind enough to read a great portion of the work, in manuscript and in proofs, and verify most of the authorities cited, and has checked and corrected the table of enactments. Amongst other friends who do not belong to the law I must mention Shaikh Faizullabhai Sahib, Principal of the Anjuman-i-Islam Schools, where I received a part of my early education, and thank him for translating texts from the Arabic, which he is eminently qualified to do by his wide and precise knowledge of that language, by his familiarity with books on Muslim law and theology, and by that modesty of temperament which made him ever willing to consider such suggestions as I could make to ensure the accuracy of his renderings. I barely refer to Mr. Hasan Latif, and refrain from mentioning more of such friends, as I fear that those who are not lawyers prefer to have little connection with that portion of human activity with which lawyers are concerned.

January, 1913. F. B. T.

PREFACE

TO THE SECOND EDITION

IN this edition I have noted the authorities up to date ; some new "sections" have been added, and slight changes made in the method of presenting the subject. In the first edition I often included in a single section several rules of law which were intimately connected. But this made some sections unduly complex ; and occasionally caused important rules of law to be buried in a sub-clause of a sub-section. I have, therefore, in this edition cut up each such section into several, numbering them independently ; and have tried to avoid the danger of the context being overlooked either by a direct reference to the connected sections, or by the elaborate headings, sub-headings and marginal notes, which it is hoped will give a true orientation of the rule in question. I trust that this alteration will meet with the approval of a distinguished critic who was kind enough to commend the arrangement even as it was in the first edition.

I have to thank Mr. S. E. Kurwa of the Bombay Bar for his having altered and added to the index so as to adapt it to the present edition. Several friends have been kind enough to point out clerical or printer's errors, amongst whom I must specially thank Sir Lawrence Jenkins and Mr. J. D. Inverarity.

June, 1919. F. B. T.

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Zamin (Syed) *v.* Syed Akbar A. K., 412, 414.
Zamin *v.* Tasadduq, 181.
Zamani Begam *v.* Khan Muhammad Khan, 678, 681.
Zamir Ahmad *v.* Abdul Razzak, 669.
Zamir Husain *v.* Daulat Ram, 687.
Zamro *v.* Sha Mohammad, *373.*
Zarabibi *v.* Abdul Rezzak, 274, 281, 284.
Zauhra Bi (Mt.) *v.* Muhammad Yusuf, 329.
Zebaishi *v.* Naziruddin, 735, 745, 747, 754.
Zeebunnissa *v.* Mrs. Danagher, 300.
Ziadin (Pir) *v.* Pir Ahsan, 619.
Ziauddin *v.* Abul Hasan, 682.
Zinat B. (Mt.) *v.* (Mt.) Aimna & Karam Din, *608.*
Zoihooroodeen *v.* Baharoollah, 36, 423.
Zohuron *v.* Burgess, 52.
Zooleka Bibi *v.* Syed Zunul Abedin, 392, 534, 543 ff.*, 545,* 554, 557, 581, 586, 607 f.
Zouch d. Abbett *v.* Parsons, 371.
Zubaida Sultan *v.* Dawood Ismail, 563, 570, *629,* 632.
Zuzurdust Khan *v.* his wife, 57, 59, 245.

ABBREVIATIONS : METHODS OF CITATION.

KORAN (QURAN) : Cited by numbers of Sura (Roman numerals) and verses (Arabic numerals), e.g. II. 177 = the 177th verse of the second Sura. Different editors of the Koran (in original as well as translation) follow different numberings of the verses : but the differences are slight—at the highest a difference of 5 may be found. So a verse may bear in one edition a number 4 or 5 higher or lower than in another. The numeration of the verses followed in this work is that of a copy written by Al-Hajj Muhammad Shakar-zadeh at the command of Sultan Mahmud of Turkey in 1246 A.H. = 1830, Christian Era. This numeration has been followed by Mr. Marmaduke Pickthall, in *The meaning of the Glorious Koran* Hyderabad (Dn.) perhaps the most accurate rendering in English. Other translations, Sale's, Rodwell's (Everyman's Library, having the inestimable advantage of the Suras being chronologically arranged) and Palmer's (World's Classics). Muhammad Ali's : elaborate notes & explanations : (but of a particular school). Mirza Abdul Fadla's (Surat 1916) deserves to be beter known.

THE LAW REPORTS : recognized abbreviations used with slight alterations : letters I.L.R. omitted from references to Indian Law Reports Series. Privy Council decisions : as far as possible "Indian Appeals" cited, & the name of the Indian Court from which the appeal was taken is given in ( ). ALL INDIA REPORTS : letters AIR printed immediately after the date, which is given in square brackets e.g. [1923] AIR (SIND).

Bail. I. = Neil B. E. Baillie, *Digest of Moohummudan Law*, Part I, 1865 (1st ed.), 1869 (2nd ed.), mainly a translation of the *Fatawa Alamgiri* (Hanafi law). References to both editions are given : the pages of the second edition in parentheses, unless the two numbers agree. Thus Bail I. 533 (542) = p. 533 of the first edition of the Baillies' Digest Part I and p. 542 of the second edition. Bail I. 49 = p. 49 of both editions. Bail II. = the second part of Baillie's Digest (only one edition, 1869). The first seven books of Part II consist of translation of the Sharaiu'l-Islam. Book VIII (pp. 323-403) is an additional treatise on the law of inheritance, apparently a part of Sir William Jones, *Digest*.

HED. = S. G. Grady's edition of Hamilton's Hedaya (2nd ed. 1870).

MACN. = W. H. Macnaghten, *Principles & Precedents of Moohummudan Law* (ed. by W. Sloan).

Ameer Ali, *Mahommedan Law*, Vol. I. (3rd & 4th edd. 1904, 1912), Vol. II (4th & 5th edd. 1917, 1929), in each case the page of the later edition is in parentheses.

The references are to pages throughout, unless otherwise indicated ; par. = a paragraph on the page cited, numbering also the incomplete paragraph (if any) with which the page commences. l. = line, s. = section, sent. = sentence, col. = column.

MUHAMMADAN LAW

CHAPTER I

INTRODUCTION

§1.—The Sources of Muhammadan Law.

Conscious and unconscious development of law.

In tracing the history of legal institutions, we must distinguish between two classes of forces operating on their development and growth. These forces may be the result either of conscious efforts at improvement, made by persons exercising authority and power, or unseen currents of thought effecting imperceptible changes often against the professed ideas of the time. In the earlier stages of society men are not governed by strict law ; its place is taken by custom, prescribing courses of conduct that are semi-consciously followed and enforced rather by instinct and habit than by definite sanctions. We may expect therefore customs to be flexible and susceptible of spontaneous variation to keep pace with the development of public opinion. Yet we are told with truth that custom lies upon us heavy as frost and deep almost as life. Writers on Muslim law have been too apt to take into consideration only those forces that have been applied consciously, after the spread of Islam, and to ignore those rudimentary ideas, which, in the words of Sir Henry Maine, " are to the jurist what the primary crusts are to the geologists, and which contain potentially all the forms in which Law has exhibited itself."[1]

Importance of pre-Islamic customs.

It is not surprising indeed that the personality of the Prophet Muhammad should loom so large in the minds of all who approach any matter associated with him or his religion, as to draw their attention away from the study of anything not connected with him ; for " more than any man that ever lived Muhammad shaped the destinies of his people."[2] But law has to be traced for its true origin to a period far anterior to its articulate enunciation. Long before an idea can be crystallised into a positive enactment, it must have

[1] *Ancient Law*, New Ed. (1930) p. 2.
[2] Nicholson, *Liter. Hist. of Arabs*, 179.

floated in the minds and hovered over the actions of the people, amongst whom it subsequently takes definite shape. Thus, to take our start from the Quran for discovering the first origins of Muslim institutions, is to leave out of consideration a great portion of the really illuminating history of those institutions ; it is to omit to study that which would often be the only explanation of the varying forms taken by the rules of law, or the interpretations given to them, and of the controversies and disputations that puzzle later generations ; it is to commence our study, not when the phenomena with which we have to deal are few and simple, but when they have become perplexing from their number and diversity.

Quran not code :

Those who have written on the laws of Islam, and have ignored the customs and usages that prevailed before the Quran was revealed, cannot take refuge under either the form or substance of that book. For, though the Quran resembles a code in that it derives all its authority from itself, and came into force from being promulgated as such, yet it does not, in any portion of it, profess to be a code complete in itself. It was given to the world not as a code, but in fragments, during a period of 22 years (609 to 632 after Christ). It was never collected and arranged in the life-time of the Prophet. At his death the Quran consisted of the passages taken down on palm-leaves or skins " put promiscuously into a chest observing no order of time."[3] Abu Bakr (who succeeded the Prophet as Khalifa and died in 634 after a rule of two years) had the various passages forming the Quran, collected for the first time. Zaid ibn Thabit, who was entrusted with the work, says : " I sought for the Quran and collected it from the leaves of the date and white stones and the breasts of people who remembered it." " What Abu Bakr did else, being, perhaps, no more than to range the chapters in their present order, which he seems to have done without any regard to time, having generally placed the longest first."[4] Another sixteen years elapsed, and then 'Uthman ordered the second collation of the Quran ; and then (in 650 after Christ, *i.e.*, 18 years after the death of the Prophet) it took the textual form in which we have it at the present day. All the transcripts now existing are from 'Uthman's edition : for the varying copies then existing were committed to the flames. Since then there has been no alteration. There is, says Sir William Muir, " probably no other work in the world which has remained twelve centuries with so pure a text."[5]

—neither in form

[3] Nicholson, *Liter. Hist. of Arabs*, 179.
[4] Sale, *Koran, Prel. Disc.*, s. 3.
[5] Muir, *Life of Mahomet*, (1877), 558.

The Quran differs from a code in regard to its contents no less than in regard to its form. A very small portion of it has any reference to law. It refers to itself thus,— —nor in substance.

> "This is the scripture whereof there is no doubt, a guidance unto those who ward off (evil), who believe in the unseen, and establish worship, and spend of that we have bestowed upon them; and who believe in that which is revealed unto thee (Muhammad) and that which was revealed before thee, and are certain of the hereafter.—Quran, ii. 2-4.

It thus becomes obvious that the main purpose of the Quran is not that of a code. It indeed gives expression to Islam as a religion, but this it does most often unconsciously, (if the expression may be permitted) and spontaneously rather than categorically,— in the form of reflections on life, and about the future, rather than of dogmas. From dogmas the Quran is singularly free. Religion[6] in this connection must be understood as a "divine influence underlying and supporting every relation of life and every social institution."[7] And still the Quran is one of the shortest of the great religious books of the world. It is less in length than the New Testament taken by itself. Again, Islam itself is not promulgated in the Quran as a new doctrine, but as a continuation of the old religions that were brought by the Prophets before Muhammad, to their tribes— Islam no innovation. No dogmas in Islam.

> "Say (O Muslims): We believed in Allah and that which is revealed unto us and that which was revealed unto Abraham, and Ishmael, and Isaac, and Jacob, and the tribes, and that which Moses and Jesus received, and that which the Prophets received from their Lord. We make no distinction between any of them, and unto Him we have surrendered."—Quran, ii. 136.

Nor is this so only with the purely religious part of Islam. Take the law of inheritance. That subject is distinguished in the language of the law by the term fara'iz, i.e., "the ordinances of God,"—as though giving it prominence over all other laws—and the Quran is fuller and more explicit on this branch of the law than on any other. Even this subject is not completely stated in the Quran. We find, for instance, that the Quran is silent as to such rules of succession already established by usage, as did not require alteration: consequently nothing is said in it about the rights of inheritance in favour of sons and other male agnates, except in so far as the customary law relating to them was modified in favour of females and cognates.[8] Illustration from law of inheritance.

[6] Indeed Arabic word translated religion is *din* = path or way.

[7] Max Müller, *Intr. to Science of Relig.* (Lond. 1873) 152.

[8] I have taken liberty of using words *agnate & cognate* in meanings somewhat different from those in Roman law. By *agnate* I mean person related entirely through males, i.e., descended from a common male ancestor, all the links being male. By *cognate* I mean a person descended through a common ancestor but through at least one female link.

Like amending Act not Code.

The legislative portion of the Quran must therefore be compared, if at all, to an amending Act, rather than to a Code. Had it been otherwise, it would have lost much of its force and conciseness ; for the Arabs were tenacious of their existing customs, and needed no repetition of them.[9]

Pre-Islamic customs why not studied. (1) Known to Arabs.

Thus the very circumstance that their old usages and customs were so familiar to the Arabs as not to require repetition, was a cause why they came to be unduly neglected in Islam, and why the Quran is in our times always taken as the starting point for the study of the law. But the course that may have been natural and convenient in countries in which, and at a time when, the pre-Islamic customs of Arabia were familiar to all, is followed, cessante ratione, at the present day in India. Thus writers on the law of inheritance commence the subject, by treating of what is laid down in the Quran without referring to what preceded it. As well might the reader of a treatise seal up its earlier chapters and commence its perusal from the middle. The result is that the scheme underlying the law of Islam is lost in a number of disconnected details, which bewilder the reader, as he has no means of discerning their relation to the parent theory.

(2) Admiration for Prophet, aversion to days before him.

But there is another, and not less significant, cause for the neglect of all that preceded the Prophet. There soon arose, on the one hand an enthusiastic admiration and love for his character, and on the other, an aversion for the period before Islam, and all connected with it. It is difficult for non-Muslims, and for men who are not acquainted with the character of Muhammad, to have any conception of the feelings with which he came to be regarded,—" with his mighty powers of imagination, elevation of mind, delicacy, and refinement of feeling." [10] Instances may be easily multiplied to show how eager the followers of Islam were from the earliest times to see

[9] Arabic word *rawasim* = monuments recording CUSTOMS & USAGES of the people, allied to *rasm*, which originally = mark, & then acquired meaning of custom & law. *Rusûm*, plural of *rasm*, is well known revenue term.

[10] " ' Ten years ' said Anas, his servant, ' was I about the Prophet, and he never said as much as " uff " to me.' ...The worst expression he ever made use of in conversation was, ' What has come to him ? May his forehead be darkened with mud.' When asked to curse someone he replied, ' I have not been sent to curse, but to be a mercy, to mankind.' He visited the sick, followed any bier he met, accepted the invitation of a slave to dinner, mended his own clothes, milked the goats, and waited upon himself." " He never first withdrew his hand out of another man's palms, and turned not before the other had turned." " He was the most faithful protector of those he protected, the sweetest and most agreeable in conversation. Those who saw him were suddenly filled with reverence ; those who came near him loved him. They who describe him would say, ' I have never seen his like, either before or after ' : " Lane-Poole, *Mohammad*, p. xxix. See Tirmizi, *Jama*, 410.

the Prophet, or to be able to claim the least connection with him.[11] How strongly the personality of the Prophet, as a guide in the smallest concerns of life, dominated the minds of men of the greatest intellect and learning, may be exemplified by the fact that the Imam Ibn Hanbal[12] would not eat water-melons, because, though he knew that the Prophet ate them, he could not ascertain in what manner he did so.[13]

(3) Reforms of Islam transformed Arab Society.

Nor was a personal admiration for the Prophet the sole origin of the desire to refer to the Prophet as the great exemplar of life, and to take no notice of the pre-Islamic customs, save incidentally in a casual manner. The reforms introduced by Islam were such as to bring about a complete transformation of the society of the Arabs. So conscious were the Arabs themselves of this change, that they began to refer to the period before Muhammad as the ayyam-al-jahiliyya, i.e., "the period of ignorance or rather wildness or savagery, in antithesis to the moral reasonableness of a civilized man."[14] For the Arabs were enjoined by their new religion,—

> "Be careful of your duty toward Allah in Whom ye claim (your rights) of one another, and toward the wombs (that bare you). Verily, Allah hath been a watcher over you." Quran, iv. 1.

It was natural to think with horror of the days of superstition and idolatry, when the widow formed part of the estate of her deceased husband and could be "inherited" like chattels and goods, and when daughters were buried alive,[15] to distrust all the precedents of

[11] ADMIRATION & LOVE FOR PROPHET, *e.g.*, "Is it possible, father of Abdulla, that thou hast been with Muhammad?" was the question addressed by a pious Muslim to Hudzifa in the Mosque of Kufa: "Didst thou really see the Prophet, and wert thou on familiar terms with him?" "Son of my Uncle, it is indeed as thou sayest." "And how wert thou wont to behave towards the Prophet?" "Verily we used to labour hard to please him"—"Well, by the Lord!" exclaimed the ardent listener, "had I but been alive in his time I would not have allowed him to put his blessed foot upon the earth, but would have borne him on my shoulders wherever he listed."—Hisham ibn Muhammad al Kalbi (died 204 A. H.), *Sirat-un-Nabi* 295 (ed. by F. Wustenfeld). "Upon another occasion the youthful 'Ubeda listened to a companion who was reciting before an assembly how the Prophet's head was shaved at the Pilgrimage, and the hair distributed amongst his followers. The eyes of the young man glistened as the speaker proceeded. He interrupted him with the impatient exclamation—'Would that I had even a single one of those blessed hairs! I would cherish it for ever and prize it beyond all the gold and silver in the world.'" Al-Waqidi (d. 208 A. H.), *Kitab-ul-Maghazi*, 279.

[12] IBN HANBAL, leader of one of the four Sunni schools: great reputation for learning: 80,000 men & 60,000 women said to have attended his funeral.

[13] This was, no doubt, an extreme case, and may go towards justifying remark with which Abu Ja'far-at-Tabari explained his omission to refer to the opinions of Ibn Hanbal in his great commentary: "Ibn Hanbal," Tabari is reported to have said, "is not a theologian, but a traditionist." (Arib Ibn Sa'ad's *Kamil-ut-tawarikh* quoted in Prof. Browne's *Literary History of Persia*, I. 360). Muhammad Ibn Ishaq in his *Fihrist* (6th Discourse, *On Jurisprudence, the Jurists and Traditionists*) seems to agree; he does not deal with Ibn Hanbal's teachings, though there are separate sections dealing with Malik, Abu Hanifa, and Shafi'i.

[14] Nicholson, *Lit. Hist. of Arabs*, 30.

[15] Quran, vi. 138; xvi. 59; xliii. 15-17.

the days of brutal ignorance, and to fear the retention of anything from the old manners and customs, unless there was some living proof that the Prophet of God did not disapprove of it.[16] For now the Arabs were taught that,—

> "It is not righteousness that ye turn your faces to the East and to the West; but righteous is he who believeth in God and the last day and the angels and the scripture and the prophets; and giveth his wealth, for love of Him, to his kinsfolk and to orphans and the needy and the wayfarer and to those who ask, and to set slaves free; and who is instant in prayer and payeth the poor-due (zakāt). And those who keep their agreement[17] when they make one, and the patient in tribulation and adversity and time of stress. Such are they who are sincere. Such are the God-fearing."—Quran, ii. 177.

Quran starting point FIRST SOURCE of law.

These feelings find no equivocal expression in the law: the pre-Islamic customs are hardly ever referred to by the Muslim faqihs (canonical lawyers)[18] for the purpose of elucidating the law; the Quran is for them the first source of the law, in point of time, no less than in point of importance: and if the Book is silent, it is supplemented by or interpreted in the light of the practice of the Prophet. Traditions recording the actions and sayings of the Prophet (which are called the sunna, hadith or riwayat) thus take their place as the second of the usul[19] or main sources of the laws and institutions

[16] Ibn Hisham (d. 213 A.H.) recension of Ibn Ishaq's *Life of the Prophet* reports Jafar ibn Abu Talib as addressing the Negush of Abyssinia in terms, showing how early Muslims regarded *Jahiliyya*,—and giving sort of COMPENDIUM OF TEACHINGS OF ISLAM: "O King! We were a barbarous folk, worshipping idols, eating carrion, committing shameful deeds, violating the ties of consanguinity, and evilly entreating our neighbours, the strong amongst us consuming the weak; and thus we continued until God sent unto us an Apostle from our midst, whose pedigree and integrity and faithfulness and purity of life we knew, to summon us to God, that we should declare His unity, and worship Him, and put away the stones and idols which we and our fathers used to worship in His stead: and he bade us be truthful in speech, and faithful in the fulfilment of our trusts, and observing of the ties of consanguinity, and the duties of neighbours, and to refrain from forbidden things and from blood; and he forbade us from immoral acts and deceitful words, and from consuming the property of orphans and from slandering virtuous women; and he commanded us to worship God, and to associate naught else with Him, and to pray and give alms and fast.

[17] *Ahd* in original which may be rendered treaty, contract; this verse is relied upon in law as basis of binding nature of contracts, agreements or promises.

[18] The following references to PRE-ISLAMIC CUSTOMS are of interest:—"The Arabs observed some of the prohibitions of the Quran, for they did not marry mothers or daughters or aunts on either side, and the grossest thing they did was that a man took two sisters in marriage at the same time, or that the son succeeded to his father's wife"—Shahristani, *Kitabu'l-Milal Wa'n-Nihal* 440. (ed. by Cureton), "The Arabs had their own laws which they followed; and Islam maintained some of them and repealed others..Their custom forbade marriage with the mother and the daughter: this was maintained. They used to disapprove of a man marrying the widow of his father and Islam forbade this altogether. The practice of cutting the right hand of the thief prevailed among them, and Islam upheld this."—*Saba'i-ku-udh-dhahab*, 102. Goldzihr *Muhammedanische Studien* (Halle 1889-90) contains a chapter on traditions in Vol. II.

[19] *Asl.* plural *usûl*, is usually translated "source" or "foundation." On ambiguity of English word, "source" see Austin, *Jurisp., Lect.* 28 (4th Ed.): II. 526-8; Holland, *Jurisp.* (12th Ed.), 55-56 on its three senses: (1) quarter from which

of Islam. Islamic customs of course stand on a different footing.

TRADITIONS, SECOND SOURCE.

There are frequent references to the authority of the traditions in the sayings of the Prophet himself ; e.g., " The Prophet said ' that which the Prophet of God hath made unlawful is like what God hath made so.' " [20] Again Anas reports : " The Prophet of God said to me ' Son, (if you are able,) keep your heart, from morning till night, and from night till morning, free from malice towards anyone.' Then he said ' Oh my son, this is one of my laws, and he who loveth my laws verily loveth me, and he who loveth me will be with me in paradise.' " Foreseeing the danger that might arise from the zeal of too devoted followers when asked to advise on a point of horticulture he said, " I am no more than man, but when I enjoin anything respecting religion, receive it ; and when I order anything about the affairs of the world, then I am nothing more than man."[22] As to the relative authority of the Quran and the sunna he said : " My words are not contrary to the words of God, but the word of God can contradict mine." [21]

Sunna, repository of old customs.

Pre-Islamic usages have thus been ousted from recognition in Islam and the sunna has been made to take their place. Yet a good many of the old customs must be lying embedded in the traditions themselves. For, taking the usual classification of the sunna,—into the sunnatu'l-fi'l (i.e., the traditions about what the Prophet did), the sunnatu'l-qaul (that which he enjoined by words), and thirdly the sunnatu'l-taqrir (that which was done in his presence, without his disapproval),—the last must obviously represent largely the original customs and usages of the pre-Islamic Arabs. And, again, where the standard set by the example and precept of the Prophet was found to be too novel or too high, there was a natural tendency, to revert to the old customs and views of life. This tendency accounts for those rules of divorce, which in practice have fallen from the high standard set by Islam, but are nevertheless recognized as law, though admitted to be sinful.[22] It explains the stringent way in which the rights of women are interpreted, though the interpretation may be opposed to logic and principle.

The task, however, of investigating the sources of the ideas and notions imbedded in the law is not easy. We have seldom any means of distinguishing, in the sunna what portion of the practice of the Prophet was a departure from the pre-existing usages.

we obtain our knowledge, (2) mode in which, or persons through whom, those rules have been framed, which have force of law ; and (3) authority which gives them that force.

[20] *Mishcat-ul-Masabih*, I. 6, 2.

[21] *Mishcat-ul-Masabih*, I. 6, 3.

[22] See ss. 140, 142, comm.

Even where any course of conduct is reported to have been disapproved of, there is often nothing to show whether the conduct disapproved was in accordance with a prevalent pre-Islamic usage.[23] It must, therefore, be admitted that the traditions can, after all, throw only a fitful and imperfect light on the institutions of the Arabs before Muhammad—too imperfect very often to allow of our putting forward any theory that is not gratuitous and premature. Yet, we have the authority of Sir Henry Maine, for thinking that even theories which may be so characterized, "rescue jurisprudence from that worse and more ignoble condition not unknown to 'ourselves,' in which nothing like a generalization is aspired to, and law is regarded as a mere empirical pursuit."[24]

Pre-Islamic customs ousted.

Having recognized how important and integral a part of Islamic institutions the pre-Islamic customs are, the reader will gather, from what has just been said, how, and through what reasons, the second stage in the history of Muhammadan law is reached,—when all avowed dependence upon the aid of those customs is thrown off by the faqihs (canonical lawyers) of Islam. Henceforth the development of the law has necessarily to be referred only to forces contained within Islam itself,—viz., the Quran and the traditions.[25]

Rapid expansion of law in 1st century.

So long indeed as the Arabs were confined, in their activities, to the precincts of Mecca and Madina, the Quran and the reports about the practice of the Prophet were ample for all their affairs.

[23] Scholars, having studied EARLY HISTORY OF MUSLIM INSTITUTIONS have been able to glean information, "scanty & uncertain at best," from following & similar sources: (i) great lexicons such as *Lisan' ul-Arab* by Jamaluddin ibn Mukaraam (d. 711 A. H.); *Qamus* of Pherozabadi; collections of poems, such as *Kitab-ul-Aghani* of Abul Faraj Isfahani; *Iqd-ul-Farid* by Ibn Rabbihi (laureate of Abdul Rahman III. of Spain); *Hamasa* of Habib bin Aws (d. 245 A. H.); (ii) Arabs have a saying: "poetry is the public register of the Arabs"; (iii) allied to poetry, are proverbs: collections by Mofaddal-ul-dabbi (cir. 170 A. H.); Maydani (cire. 523 A.H.); (iv) geographical works of Hasan ibn Ahmadal-Hamadani, named *Jezirat-ul-Arab & Al-Iklil*: book vi. of latter work treats of traditions of pre-Islamic times; (v) accounts of modern writers, such as Lane, Burton Hurgronje on customs, manners now prevailing in Muslim countries, are also helpful; (vi) much information in Commentaries on Quran by Taebari, Zamakhshari & Baizawi, &c., on those portions of Quran which altered pre-existing usages—notably about infanticide (Quran, vi. 137), orphans, women (*ib.* iv. 18-20); (vii) Mr. Price & M. Caussin de Perceval have made full use of these sources in their books; (viii) See also Prof. de Goeje's Article, *Tabari & Early Arab Historians* in Enc. Britt. (9th Ed.) xxiii., 1 *sqq.*; (ix) Long after this was written, Mr. Justice A. Rahim's *Princip. of Muhamm. Jurisp. accord. to Manafi Maliki Shafi'i & Hanbali Schools* (1911) made its appearance. Its first pages show that views expressed here are not opposed to those of persons far better qualified to speak on subject than present author.

[24] *Ancient Law*, 3rd Ed., 175.

[25] What has been said about Quran, & *sunna*, may afford some explanation of why writers on law of inheritance are guilty of so gross inversion of historical order in treatment of subject, as to begin its exposition with statement of laws of inheritance contained in Quran, instead of dealing first with general pre-Islamic scheme on which the system is based—as though it would be detrimental to dignity & authority of Quran if considered in its chronological order, after pre-Islamic customs.

But, in the course of the twenty years that the Prophet gave the law,—ten of which were passed in his early struggles, before his influence was of a nature to affect the conduct of the Arabs as a nation,—he could not possibly have encountered all the varied cases that would spring up in the later days of Islam, when it spread from Arabia to Persia and Spain. How rapidly the occasion arose for expanding the law, may be more easily stated than realized. Within twenty-three years of the advent of the Prophet, Damascus was taken. Syria and Mesopotamia were added in the course of four more years. Another four sufficed to carry the armies of the Khalif to Egypt and to Persia. In the 41st year of the Hijra the Muslims were at Herat ; in the 56th year, at Samarqand ; Carthage fell in the 74th year ; Toledo in the 93rd.

Muslim conquests.

These armies did not go merely for conquest. The dynamic force that roused the Arabs to such intense activity was religion :[26] theologians and teachers of religion accompanied the Arab armies for giving to the conquered nations the light of Islam.

During all these years of conquest, the laws of the new religion might conceivably have consisted of only the few legal rules contained in the Quran, with nothing else to fall back upon but scanty reports of the practice of the Prophet. In that case the local laws and usages could have been displaced only to a very slight extent. We should then have had independent systems of Islamic law for each country where that religion had spread—each system based on the laws of the particular country, altered by a few new principles introduced by Islam. There would have been different schools of Muhammadan law divided territorially, as there are of Roman law. The law relating to land partially exemplifies this process. But that is an exceptional case. As a rule, the schools of Islamic law have primarily no territorial basis. Their differences arise not from their having different substrata in different territories, but from the same general principles having been differently interpreted by the teachers and doctors of the different schools. The law of the Hanafis, the Shafi'ites and the Ithna Asharis differ, but the followers of the same school whether in Algeria or in India are governed by the same laws. This unity in the laws of the Muslims could not have been possible if at the same time that the new faith began to spread, there had not arisen a number of jurists distinguished alike for their zeal for Islam, and for their ability

Codification by faqihs.

Schools of Muslim law.

[26] "The Muslims were the army, & their wars were for the faith, & not for the things of the world" : Ibn-ul-Tiqtaqa, *Al-Fakhri* (ed. by Ahlwardt, 1860, 101), by Prof. Deremburg, 1895. Prof. Browne's rendering.

to systematize the science of law,—who wrote treatises that supplied the place of codes, transforming Muhammadan law from a few detached rules to complete systems of jurisprudence.[27]

Political influences.

For the purpose, however, of following the main currents of thought that may be traced in the expansion of Islamic ideas, it must be recalled to memory, that, after the death of the Prophet, his first four successors (called al-khulafá-ur-rashidún or "the just Khalifs") carried on the Government of the Muslim empire in much the same manner as the Prophet had done.[28] This course was natural, not only because of their personal characters, but because the memory of the Prophet was so recent that any departure from his practice would have received violent opposition. The earlier Khalifs were, at the same time, actively and avowedly assisted by an advisory Council of the as hab (companions) of the Prophet, who could well claim to be the repositories of the thoughts and ideals of the Prophet. But this did not last long. The assassination of Ali, the fourth Khalif, was followed by the accession of Mu'awiya (A.H. 40), a shrewd ruler and statesman, not a religious head. The majority of the Ummayyad dynasty (as the descendants of Mu'awiyas were called) were kings of the same character if not of the same ability. Their profession of Islam was mainly actuated by worldly considerations.[29]

Traditions.

It was during the reign of the Ummayyads that the full possibilities of the traditions, as a source of the law were realized : it proved to be an enormous power in the hands of the authorities, to shift the responsibility for any decision and to give it stability by referring to alleged reports of the practice of the Prophet which could be so easily manufactured. The third class of the traditions —the sunnatu'l-taqrir, resting as it does on the tacit approval of the Prophet, lent itself to most easy manipulation for the support of any course of conduct approved by common sentiment, or desired by the legal authority of the time. For, the sunna is authoritative only so far as its contents go, whereas the Quran has its legal force in itself, and its very words constitute the law : the two

Nature of authority.

[27] Prof. Mirza Kazim Beg of University of St. Petersburg, in tracing *Progress of Islamic Jurispr.* (*Journ. Asiat.*, Ser. Quatr., Tom., XV., 158, *sqq.*), mentions names of 27 EMINENT FAQIHS (men learned in the law) who died within first century of Hijra, and as he says, the list is by no means exhaustive. The *Tarikh illama al Andalus* of Abdul al Wahd Abdullah ibn Md. al Azdi ibn ALFAIAZ, written in Hijri 403 gives in alphabetical order lives of 1642 doctors, jurists, etc. of Spain. Al Ishbilis, *Fihrist*, Hijri 575 mentions titles of 1400 books.

[28] The government of the Prophet & first 4 Khalifs, is described in *Al-Fakhri* in interesting passage, set out, Prof. Browne, *Liter. Hist. of Pers.*, I. 188-189.

[29] Walid II. (125-26 A.H.), one of last Ummayads, went so far as to suffer his concubines to take his place in public prayers, & to use Quran as target for his arrows : Chauvin, *Essai Sur l'Historie de l'Islamisme*, 179 ; *Al-Fakhri*, 159.

differ from each other in the same way as the unwritten law, of the English lawyers, differs from what they call written law :[30] the sunna could, when occasion required, be explained and distinguished, with far greater ease than the Quran. Hence, it is not surprising that the " forging of traditions became a recognized political and religious weapon." " While every impartial student of Islam," says Prof. Nicholson, " will admit the justice of Ibn-Qutayaba's [31] claim that ' no religion has such historical attestations as Islam,' he must at the same time cordially assent to the observation made by another Muhammadan, ' In nothing do we see pious men more given to falsehood than in Tradition.' "[32] Indeed out of the vast store of the sunna, Abu Hanifa (A. H. 80-150) is said to have considered only 18 as trustworthy. The process of forgery might have been stopped, had some such steps been taken for the early collection of the traditions in an authentic and authoritative form as was done with the Quran. But in the days of the first Khalifs the life of the Prophet was too vividly present before their minds for any such action, and later some of the staunchest friends of Islam were, for various reasons, opposed to the traditions being collected. It was also apprehended that, if they were put in writing, they might come to compete with the Quran itself.[33]

Forged tradition.

Historical attestations of Islam.

It was only in the reign of Umar II. (99-101 A.H.) and it is said at his special request, that Abu ibn Shihab az-Zuhri (who died in 120 A.H.) made the first known collection of the traditions. At about the same time Abdul Malik ibn Juraij made another collection. These collections were arranged however not according to the subjects with which they deal, but according to the names of the companions relating them, and were thus called masnads, which means " attributed to, or related, or alleged (on the authority of another)." It is not till the appearance of the Muwatta of Malik ibn Anas (who died in 179 A.H.) that we get a Musannaf, i.e., a collection of traditions arranged and classified according to

Collection of traditions.

[30] Austin, *Jurispr.* I., 195.

[31] Died 276 A.H. ; author & Qazi at Dinwar.

[32] *Liter. Hist. of Arabs*, 145.

[33] Prof. D. B. Macdonald, *Muslim Theology*, 76. This feeling well illustrated by fact that in second century of Hijra Abdur Rehman ibn Hamala Al Aslam Traditionist (d. A. H. 144) had to plead defective memory, before he could induce his teacher Sa'id ibn Al Musayyib to permit his teachings to be reduced to writing. That these fears were not unfounded, is shown by history of Jews, who also had code of traditions ; it was saying with pharisee that " the words of the Scribes were lovely above the words of the law, and more weighty than the law and the prophets." This is supposed to be alluded to in Matthew, XV, 6 : " Thus have ye made the commandment of God of none effect by your traditions." History of traditions amongst Christians also affords interesting parallel on some points ; see, *e.g.*, Dr. Weiss, *Life of Christ*, (transl. J. W. Hope.) I. 17, *sqq* ; I. 143.

subjects. This book has been called "the first great Corpus of Muhammadan Law," [1] though, according to more recent research, Zaid b Ali's Majmu'al Fiqh,[2] would seem to claim that title. In the meantime, Ibn 'Ali Ajwa (who was executed in 155 A.H.) had confessed to having circulated 4,000 false traditions. A century later, when Abu Da'ud as-Sijistani wrote the Kitab us-Sunan, (one of the six most authoritative Sunni books on the Traditions) he found 500,000 in circulation, of which he considered only 4,800 to be genuine. Abu Hanifa's opinion has been already mentioned.

Sunna traditions.

The task of distinguishing the genuine from the spurious traditions was undertaken by the collectors of the sunna with that earnestness and sense of duty which characterised the early Muslim jurists, and in the result there has arisen a body of rules allied to those of forensic evidence.[3]

Renaissance of Islam : Abbasides.

At about the same time events had happened in the political world of Islam, which were fraught with momentous consequences to its future. In the year 127, A.H. (750 of the Christian era), Marwan the Umayyad Khalif was defeated and dethroned, and the empire fell into the hands of Abdul Abbas as-Saffah, the first of the Abbasid Khalifs of Baghdad. This dynasty reigned from 132 to 656, A.H., (*i.e.*, 750 to 1258 of the Christian era). The Abbasids traced their descent from the uncle of the Prophet, and, both by this close connection with him, and their long rivalry with and hostility to the Ummayyads, they came forward as the restorers of Islam after the period when the principles of that religion had been relegated to a secondary position by Mu'awiya and his successors. "It was," in the picturesque language of Al-Fakhri, "a dynasty abounding in good qualities, richly endowed with

[1] Nicholson, *Liter. Hist. of Arabs*, 337.

[2] Ed. Griffini, Milan, 1919 ; cf. *Encycl. of Islam* II. 103, *s. v. Fiqh* (by Goldziher.)

[3] De Goeje well describes form of RECORDING & mode of INVESTIGATING TRADITIONS : "Each event is related in the words of eye witnesses or contemporaries, transmitted to the final narrator, through a chain of intermediate reporters (*rawis*), each of whom passed on the original report to his successor. Often the same account is given in two or more slightly divergent forms, which have come down to us through different chains of reporters. Often, too, one event or one important detail is told in several ways, on the basis of several contemporary statements, transmitted to the final narrator through distinct lines of tradition. The writer, therefore, exercises no independent criticism except as regards the choice of authorities ; or he rejects accounts of which the first author, or one of the intermediate links, seems to him unworthy of credit, and sometims he states which of several accounts seems to him the best."—*Enc. Britt.*, (9th Ed.) XXIII, 1. De Goeje is speaking of Arab historians, but his words apply equally to process followed by traditionists. They tested reliability of traditions purely by their opinion whether or not the reporters were "worthy" persons. Shias, for instance, reject traditions in which one of persons comprising chain of *râwis* is opponent of Ali. Books however full of law of EVIDENCE & PROOF. Thus besides book in *Fatawa-i-'Alamgiri* devoted to evidence generally, last Chapter of Book on Wills deals with EVIDENCE required to PROVE wills.

generous attributes, wherein the wares of Science found a ready sale, the merchandise of Culture was in great demand, the observances of religion were respected, charitable bequests flowed freely, the world was prosperous, the Holy Shrine was well cared for, and the frontiers were bravely kept." It was also at this period that men like Imams Ja'far as-Sadiq (A.H. 80-148), Abu Hanifa (A.H. 80-150), Malik ibn Anas (A.H. 95-175), ath-Thauri (A.H. 95-161), ash-Shafi'i (A.H. 150-204), ibn Hanbal (A.H. 164-24) and az-Zahiri (A.H. 202-270) flourished—than whose names, we have no greater in the history of Islamic jurisprudence.

Law complete code for all times.

These great lawyers, philosophers and theologians—for they "took all knowledge for their province," and were eminent in every branch of it known in their day—placed before themselves the task of completely stating the law so as to embrace the whole body of jurisprudence, and to deal with all conceivable phases of human activity, not only for their own time, but for all future times.[4] They must have soon found that the system "which had sufficed to guard the rights to a few sheep or camels"[5] had to be transformed, before it could fulfil the function that they assigned to it. Clearly such a transformation could not have been brought about, if they had had to restrict themselves to the Quran, and such of the traditions as could be proved to be authentic.

Historical value of traditions,—

Much has been said to minimize the importance of traditions, and throw doubt or even discredit, on them as a source of Muhammadan law. Their value in the development of the law, and for its interpretation, no less than for its historical study must not however be overlooked. "How woefully we may go astray," it has been observed, "if we isolate each document, or fact, and consider it apart from the total picture and from popular tradition. Any sound historical judgment must take into account not only the documents but also the common tradition, while it must treat not merely of the facts in isolation, but the total picture of which they are elements."[6]

Systematic study of.

With the closer study of the traditions, a desire seems to have arisen in the minds of the exponents of the day to create other

[4] MUSLIM JURISPRUDENCE, a most comprehensive subject which embraces all that a believer should think, do and be, cannot stand alone inasmuch as it is RELIGIOUS LAW, therefore requires divine or quasi-divine sanction." *Influence of Judaism on Islam* by Rev. Alfred Guillaume, M.A., in *Legacy of Israel*, Oxford (Clarendon Press) 1927, p. 151.

[5] MacDonald, *Muslim Theology*, 83.

[6] J. N. Figgis, *Civilization at Cross Roads*, (Lond. 1912), Appx. pp. 238, 239. The author adds: "Further it is not to be doubted that even in regard to the most thoroughly 'documented' historical facts, TRADITION plays a large part in our belief. Creighton said somewhere that apart from tradition there was not sufficient evidence to prove that Julius Caesar ever lived."

sources. Increase of appetite had grown by what it fed upon. The traditions illuminated the underlying principles of the law. They suggested new modes of elucidating difficulties or broadening the foundations.

THIRD SOURCE of law IJMA. The first resource of which the faqihs availed themselves after exhausting the sunna, bears a close relation to it. Failing the Quran and direct precedents of the practice of the Prophet himself, the best guide to the law seemed to be the "consensus of his companions," who were imbued with his spirit and may well be supposed to be repositories of his thoughts. This, the third asl or foundation of the law according to Muslim faqihs is called ijma, which "is defined as agreement of the jurists among the followers of Muhammad in a particular age on a question of law."[7]

The minds that were capable of arranging and evolving a whole system from the undigested materials in their possession, did not leave the ijma' in a nebulous state. It may be said of them that nothing that they touched they did not elaborate and refine : we have a carefully complied set of rules as to the classes of matters on which ijma' may be effective, the persons whose opinions are to be authoritative, the course that has to be followed where there is a conflict of authorities, and other cognate subjects.[8]

Ijma not sufficient. It does not require much consideration to see that calling in aid ijma' could not furnish all the materials for the construction of a code theoretically complete. For ijma', too, could throw light only on the cases that actually arose in the course of a few years, and could hardly keep pace with the speculative powers of keen philosophers, who had their ideas expanded by the great territorial strides that Islam had made in the course of the century. To cope with all the cases conjured up by speculation, no less powerful

Hiatus in law. an agency was necessary than the right of the jurist to apply his own unfettered reason to the problem before him. This was, however, a very great step to take, and amongst the leaders of

[7] Abdur Rahim, *Muham. Jurispr.* (1911), 115-136.

[8] The great HINDU LAW-GIVER, at end of code, proceeds in manner that may be compared with interest to course followed by Muslim lawyers : "If it be asked," says Manu, XII., 1 "how it should be with respect to (points of) the law which have not been (specially) mentioned?—(the answer is) 'that which Brahmanas, who are Shishthas (*i.e.*, eminent), propound, shall have legal (force).'" Place of "eminent Brahmanas" filled in Islam by companions of Prophet in his life-time, and his successors after him : "roots" of Hindu Law are four : revelation (through inspired seers), traditions from sages ; usages ; equity as approved by reason (Manu II. 6). In *Doctor and Student*, I. 4, it is stated that LAW OF ENGLAND is grounded on 6 principal grounds : (1) law of reason ; (2) law of God ; (3) on divers general custom of nation ; (4) on divers principles that be called maxims ; (5) on divers statutes made in Parliament : Holland, *Jurispr.* 50, *n.*

Muslim thought there was keen controversy on the subject. Some of the Doctors refused to believe that any further knowledge could safely be sought outside the Quran and the precedents approved by the Prophet and his companions ; for, they asked, is it not laid down that,—

> "And with Him are the keys of the invisible. None but He knoweth them and he knoweth what is in the land and the sea. Not a leaf falleth but he knoweth it, not a grain amid the darkness of the earth, naught of wet or dry but (it is noted) in a clear record."—Quran, vi. 59.

For these doctors the clear record or as another translator has rendered it the "perspicuous book" of God was none other than the Quran. The most notable of the literalists was Da'ud az-Zahir (d. 270 A.H.). He did not have many followers. But his school represents in an extreme form one very important direction of activity that learning took in Islam at this period—the study of the Quran, and of its interpretation, classed as a separate science.[9] Many volumes are written on this subject : the greatest amount of erudition and ingenuity have been spent upon it : every word and even letter of the Sacred Book has been counted.[10] The kinds of arguments deducible from the Quran are categorically laid down. Its words and sentences have been classified, so as to show which have meanings that are obvious, and which recondite : concordances have been prepared, stating under which of the numerous classes each word comes : and each sentence has been definitely and authoritatively characterized, as capable of receiving either only the literal meaning, or of permitting the statement to be expanded.

Scientific study of Quran interpretation.

Those who are familiar with such facts as that the twelve tables are the foundation of the whole fabric of Roman law, and that Gaius wrote six books on them,[11] can have little difficulty in understanding that, when the results produced by a long series of interpretations and expositions of a short and simple rule of law, dealing with a large subject, are stated in the form of a number of bald propositions, they are apt, at first sight, to appear far-fetched, and, occasionally unscientific. The student of Muhammadan law, who on a bare reading of the verses of the Quran, or the traditions, both of which together form the basis

Growth of law : interpretation : exposition.

[9] Prof. Browne refers to QURAN as a "theological kernel"; *Liter. Hist. of Persia* I, 270. Jalauddin as Suyuti, *Al-Itaqa fi Ulum al Quran*, contains 80 general heads (e.g., abrogated verses revealed in peace & war etc.) Alburhan, *fi Ulum al Quran*, by Badruddin Md. b. abd. al ZARKASHI (704 after Christ) also deals with science of interpreting Quran.

[10] There are 6,239 verses ; 77,934 words ; 323,621 letters.

[11] Hunter, *Rom. Law* (3rd Ed.), 16.

of that law, considers himself qualified to criticize the interpretations put on them,[47] must be compared to the student of English law, (if such could be found) who would be bold enough to embark on a criticism of the interpretations put on the Statue of Frauds, or of Uses, or, to take a more recent piece of Legislation, the Workmen's Compensation Act, without any knowledge of previous decisions, and without being acquainted with the doctrine of stare decisis, and its exigencies, without a notion of the judgments on which the law of England has been built up. The latter is, no doubt, a rare being : the present writer is conscious that he must have failed in his efforts not to swell the ranks of the former.

Criticism of methods : interpretation.

'Purpose,' 'intention,' 'object' of law

"Such words as 'purpose,' 'intention' have a different sense when used in ordinary parlance, from that which they bear when applied in criticism and science. In ordinary parlance, a man's 'purpose' means his conscious purpose, of which he is the best judge ; in science the 'purpose' of a thing is the purpose it actually serves, and is discoverable only by analysis. Thus, science discovers that the 'purpose' of earthworms is to break up the soil ; the 'design' of colouring in flowers, is to attract insects, though the flower is not credited with foresight, nor the worm with disinterestedness ....This has been well put by Ulrici,...'It would be .... absurd to think that because a poet cannot say with perfect philosophic certainty, in the form of reflection and pure thought, what it was that he wished and intended to produce, that he never thought at all.'"[12]

This applies mutatis mutandis to the first principles laid down by a great legislator or moralist.

QIYAS : FOURTH SOURCE.

It has already been said that the rigid school of law that az-Zahir represents, found favour with few. But though the majority of the doctors were agreed on the necessity of having recourse to pure reasoning in order to supplement the Quran, sunna and ijma' for the development of law, they had great difficulty in fixing upon the exact form in which, and the limitations with which, reason could safely be employed in questions of law and religion. Even the first step forward gave rise to serious controversies. Of the leaders of the four great Sunni schools, three were opposed to Abu Hanifa in his wide use of qiyas, or reasoning by analogy from the Quran, sunna and jima', and to the two latter sources being restricted within the strictest limits.

Permissibility of qiyas.

Controversies.

Familiar as we are in our days with the free and bold application of old rules to new circumstances, for introducing new principles of law, an apology seems due for any justification of so simple a process as qiyas, which strictly does not even purport to create new principles, but merely to apply old established principles to new

[12] Moulton, *Shaksp. as Dram. Artist*, (3rd Ed. 1897), 27.

circumstances.[13] But, as Sir Henry Maine says : " The warning cannot be too often repeated that the grand source of mistake in questions of jurisprudence is the impression that those reasons which actuate us at the present moment in the maintenance of an existing institution, have necessarily anything in common with the sentiment in which the institution originated."[14] Together with this warning we must recall to mind the anxiety of writers in the eighteenth century after Christ, to disprove the imputation that Judges made law, and the pains taken by Bentham and Austin in the nineteenth century, to prove and justify the opposite theory,[15]—and we must remember that the period with which we are dealing, is not the eighteenth or nineteenth century, but a thousand years anterior to it ; and then we may succeed in an endeavour to realize what a great struggle it must have been for the first Muslim jurists, steeped in the theology of Islam, when that religion had but just been given to the world, to proceed on the basis that the system of life as given by the Prophet was not complete in every detail, whether of law or of faith. It must have seemed to them a bold thing to claim that the minds of ordinary men, however learned and profound, could complete anything emanating from the Prophet of God.[16] They had not the perspective of thirteen centuries to see how much, that was never dreamt of in their philosophy, lay in the seemingly simple rules that they feared to study, lest they may be chastised for attempting to rival the Prophet.[17]

Doubts as to qiyas.

[13] See *Journ. Asiat.*, Ser. III, Tom. 14, p. 243, on *Ahl-ul-Qiyas*, & *Ahl-ul-Sunna*, i.e., those who give prominence to *qiyas* & *sunna*, respectively, as sources of law. Abu Zaid Abdulla b. Umar AL DABRUSI (430 Hijri) in *Taqwin* elaborated laws regarding *Qiyas*. The Privy Council in *The Tagore case* (1872) L. R. I. A. Supp. Vol., 47, 67-8 applied analogy of gifts to wills ; and in *Baqar Ali K.* v. *Anjuman Ara B.*, (1902) 30 I. A. 94 = 25 All. 236, 254, considered it " safer to follow this ANALOGY in regard to *waqfs* than to draw logical conclusions which may seem to an acute modern dialectician to follow from the words of the old texts."

[14] *Ancient Law*, 3rd Ed., p. 189.

[15] Hale, *Common Law*, Ch. VI., cited Austin, *Jurispr.*, Lect. 37 : Bentham, *Works*, III., 223, 230-31 ; V., 248-9, 497-8 ; VI., 53-57 ; VII., 197, 261.

[16] This cannot be better illustrated than by *Munqidh mina't Dalail* of the great philosopher al-Ghazali (d. 505 A.H.) :—" As to those who, professing, by their lips, the faith of the Prophet, place the ordinances of RELIGION on the same footing as (the rules of) PHILOSOPHY,—they in reality repudiate belief in prophecy ; for, with them the Prophet is no more than a wise man, who has been placed by a higher authority as a guide for men. Now this is to ignore the essence of the Prophet's function : TRUE FAITH in the Prophet implies belief that there exists a sphere above our intelligence, and that, to those who are within that sphere, are revealed truths that human intelligence cannot compass—just as the ear cannot perceive things that are perceptible by the eye, and as the sense of touch cannot perceive notions of the mind."

[17] " CRITICISM," it has been said by a modern English writer, speaking of the 19th Century, " proves totally unable to distinguish between what has been essential in the greatness of its idols, and what has been as purely accidental, as, to use Scott's illustration, the shape of the drinking glass, is to the flavour of the wine it contains."

Tradition four sources of law : Quran, Sunna, Ijma Qiyas.

The Quran, the sunna, ijma' and qiyas are therefore recognized at the present day as the foundations of Islamic law.[18] A well-authenticated tradition which is to be found in the Kitab-us-Sunan of Abu Da'ud Sijistani as well as the Masnad-i-Darim, and the collection of Abu Abdullah Tirmizi, invests these four sources with the approval of the Prophet himself. For it is related that when Mu'az was being sent to the Yaman, the Prophet asked him on what he would base his decisions : " I will judge them according to the Book of God," he replied.—" But if that contains nothing to the purpose ? "—" Then upon the precedents of the Prophet."—" But if that also fails you ? " " Then I will make efforts to form my own judgment." And the Prophet raised his hands,[19] and said, " Praise be to God, who guides the messenger of His Prophet in what He pleases."

OTHER SOURCE of law.

In addition, however, to the four chief sources[20] of the law to which the text writers consciously refer, we find that law is occasionally supplemented by urf or local usage.[21] The law so obtained would be likely to be best adapted to the varying classes of people who embraced Islam, but it was distinguished in the language of the jurists from the shariat or religious law which was derived from the four sources so far mentioned. The treatises however which in Islamic law take the place of codes, occasionally refer to the customs of the country.[22] Yet, there is too little direct reference to the pre-Islamic customs of the Arabs, which, as has been seen, forms a great part of the foundation of the law, but which—when not rejected altogether—were assimilated or transformed into a purely Islamic emanation.[23]

'URF or custom.

OTHER MODES of reasoning.

Reference must be made to certain other modes of reasoning besides Qiyas, which have gained varying degrees of importance as resources available to lawyers. They deserve attention, if only as illustrations of the growth of the concept of law amongst Muslim jurists.

Istihsan. (juristic equity.)

The first of these was adopted by Imam Abu Hanifa for relief from absolute dependence on analogical reasoning. " Analogy,"

[18] *Fazl Karim* v. *Mowla Baksh*, (1891) 18 I. A. 59 = 18 Cal. 448, 460.

[19] Or, as in *Mishcat-ul-Masabih* : " the Prophet struck his hands on the breast of Muaz," Book XVI., Ch. iii., part 2 ; Aghnides, *Introd. Moh. Law.* 76.

[20] On expression " source " of law see p. 6 *n.* 19.

[21] Originally, 'URF = known or public. The English word " tariff " is the same as the Arabic *ta'rif* which is a derivative from *'urf*.

[22] See, e.g., *Hidaya, Books on Zakat, Widda, Ariat ; Tahrir-ul-Akkam*, Book on *Qarz ;* Sir Wm. Jones, *Dig. of Shia Laws*, I., 180 ; Malcolm, *Hist. of Persia*, II., 311-17, 319, 326, 346, 351 contains interesting account of *'Urf* in Persia.

[23] In view of importance of CUSTOM in British India, question further considered in s. 10, comm. : Abdur Rahim, *Muhamm. Jurispr.* 136, 137.

says Sir H. Maine, "the most useful of instruments in the maturity of jurisprudence, is the most dangerous of snares in its infancy."[24] Abu Hanifa adopted as a corrective, istihsan,[25] which means literally "approbation," and has been translated "liberal construction," or "juristic preference." This term was used by the great faqih to express the liberty that he assumed, of laying down such a rule of law, as, in the opinion of the exponent, the special circumstances required, rather than the rule that analogy indicated.[26] This, it need hardly be pointed out, is a weapon that can hardly be given to any but the fountain-head of legislation. But the objection, taken against it was, not only that it left an almost uncontrolled discretion in the exposition of the law, but what was far more important in the eyes of the Mussulmans, that it applied to the law a test not referable to the Quran and religion, but to external circumstances independent of Islam. The use of istihsan was not acquiesced in by the colleagues of Abu Hanifa.

Istishlah. (public good)

Another great faqih, who like Abu Hanifa is the leader of one of the four great schools of Sunni law and who was also a great traditionist (differing in this respect from Abu Hanifa), Malik ibn Anas, (94-179 A.H.),—Imam Malik, who will be mentioned presently as the founder of a school of Sunni law—also felt the necessity of some surer test for the development of law on right lines, than the use of analogy : for analogy ensures, no doubt, the expansion of the law so as to preserve common features, but through it a formal symmetry is not seldom obtained at the sacrifice of utility, or even good sense. He considered the introduction of istihsan, as recommended by Abu Hanifa, to be open to grave objections. With the aim of reconciling these considerations, he proposed the use of istislah,[27] i.e., "seeking peace," or "amending." He laid down, that ordinarily analogy was to be the means by which the law should be made to expand, but, if it appears that a rule indicated by analogy is opposed to general utility, then istislah,

[24] *Ancient Law*, (3rd Ed.) 19.

[25] *Kitabul Istihsan*, by Shamsul-Aimmah Abu Bakr, Muhammad b. Ahmed al Sarakshi, 485 A.H. ; Abdur Rahim, *Muham. Jurispr.* 164 ; Aghnides, *Intro. Moh. Law* 93, *sqq.*

[26] Parke, J., *Mirehouse* v. *Rennell*, (1883) 1 Cl. & Fin., 527, 548 : "We must apply those rules of law,"—"which we derive from legal principles and judicial precedents,"—"where they are not plainly unreasonable and inconvenient, to all cases which arise, and we are not at liberty to reject them, and to abandon all ANALOGY to them in those cases to which they have not yet been judicially applied, because we think that the rules are not as convenient and reasonable as we ourselves could devise. It appears to us to be of great importance to keep this principle steadily in view ...for the INTERESTS OF LAW AS A SCIENCE."

[27] Abdur Rahim, *Muham. Jurispr.* 166 ; Aghnides, *Intr. to Mohn. Law*, 102.

" amendment," should be resorted to. By this means the faqih could avail himself of the same powers as those that Abu Hanifa desired, but he was restricted in two directions : according to Imam Malik, the rule of law pointed out by analogy could not be set aside either at the option of the individual exponent of the law, or with reference merely to the circumstances of the particular case : it could be disregarded only if it would be harmful to the public in general.[28]

Ijtihad.

As a method of reasoning in law and giving juristic exposition, ijtihad has gained almost equal footing with the four first foundations of the law. Ijtihad means " labouring hard, or studying intensely to arrive at a sound opinion or judgment," and is allied to the expression (ajtahido) used by Mu'az on the occasion above referred to.

Mujtahids.

The authority of the mujtahid[29] is based not on his holding any office in the State, but is derived purely from the learning and reputation of the individual.[30] The qualifications of the mujtahid consist of a complete knowledge of the Quran, i.e., he should know the sacred text by heart, and be able to say when and where each verse was revealed, and he should also have a perfect knowledge of all the traditions, and all the branches of the science of law. He should besides be a man of austere piety. In short the qualifications required are such, that so far as the Sunni law is concerned, after the death of ibn Hanbal (241 A.H., 856 after Christ) there have been no recognized Sunni mujtahids. There has not been even a muqallid (or mujtahid of the third class) recognised by the Sunnis since Imam Qazi Khan (d. 592 A.H. ; 1196 after Christ). The scholars Tabari and as-Suyuti, who have written valuable commentaries on the Quran, and the former of whom is also known as a great historian, were denied says ibn Kalikan[31] by public opinion, their claim to be considered mujtahids.[32]

[28] Prof. Mirza Kazim Beg., *Journ. Asiat.* Ser. Quatr., Vol. 15, 158, *sqq.*, influence of *ijtihad* in growth of Muh. Law. Goldziher on *Ijtihad & Fatawa* ; *Zeitschrift* of Germ. Or. Soc. LIII., 645, sqq.

[29] MUJTAHID = person entitled to use *ijtihad* or juristic discretion in expounding the four original sources of law at first hand.

[30] Abdur Rahim, *Muham. Jurispr.* 168-171.

[31] Ibn Khallikan, *Wafiat-ut-A'yan* (tr. by De Slane), I. 201.

[32] For use of *ijtihad* in Persia, see Sir John Malcolm, *Hist.* II, 313, *sqq.* Amongst Shias *mujtahids* are still recognized, though perhaps their position is not so strictly defined : see e.g. *Baqar Ali K.* v. *Anjuman A. B.*, (1903) 30 I. A. 94, 108 I. 11 (will, par. 3, refers to *Mujtahid ul asr* = ' religious head for the time.') ISTIDLAL inferring one thing from another, amongst Malikis Shafi'ites, Abdur Rahim, *Muham. Juris.*, 166 *Istishab*, in Shafi'i school, Aghnides *Intr. Moh. Law* 103 *sqq.*, *Taqlid*, Aghnides, *Intro. Muh. Law.* 117.

Administration of law by kazis :

The capacity of growth in Muslim law may seem to be exhausted when the succession of mujtahids comes to an end. The books on the powers of the kazis and muftis, allow them wide discretion in the application of the law to the facts to be adjudicated upon. This shows that though progress was arrested in one direction, it was given great scope in another.[1] The extensive use of these discretionary powers by the kazis and muftis is illustrated by the compilations of the fatawa or decisions of great Muslim judges.[2] fatawa. Many points are settled by these decisions on which the texts that preceded them can give no definite guidance.[3]

Kazi and mujtahid.—

It may appear paradoxical to give almost unlimited powers to the kazi, and at the same time place such difficulties in the recognition of any mujtahids for so many centuries. The explanation seems to be that the mujtahid is a representative of religion. He exercises as such a great though indefinite authority in secular law. His real function is to lay down man's religious duties. Assistance is not sought from him in enforcing secular rights.[4] The qazi on the other hand exercises no voice in fixing the doctrine of religion, and gives orders only about the affairs of the world—though they have to be decided in accordance with religious laws. The distinction between the two offices should be borne in mind, and will throw some light on the reasons which may have induced Imam Abu Hanifa to suffer imprisonment rather than accept the office of Qazi-ul-Quzat. Nothing shows more emphatically the great weight and authority exercised by the religious heads in an Islamic Country, than that the deposition of the late Sultan Abdul Hamid of Turkey was formally based on the fatwa of the Shaikh-ul-Islam.[5] The religious head can hardly exercise functions.

[1] On KAZI, see s. 5B *n*. History of functions of LAW OFFICERS in Muslim countries deserves study, as wide discretion in their power permits of their giving EQUITABLE INTERPRETATIONS to seemingly immutable rules. "Fusion of Law & Equity" effected in Muslim Law by assigning to ordinary Judges additional functions of Praetor & Chancellor. See von Hammer, *Hist. de l'Emp. Ottoman.* III., 310, *et passim* ; Malcolm, *Hist. of Persia*, II., 317, *sqq.* Sir Malcolm Mc. Ilwraith, *Mohammedan Law Courts of Egypt : Nineteenth Cent.*, Oct. 1916, p. 740 ; *Hamira B.* v. *Zubaida B.* (1915) 43 I. A. 294, 301, 302 = 38 All. 581, 589 ; Hed. 333, on (*Abab* =) duties of kazi.

[2] *Mathar Saheb* v. *Hossain S.*, (1912) 23 Mad. L. J. 734, 737.

[3] Great portion of Hanafi law based not on views of Abu Hanifa, but on *jatau a* (= decisions) of his disciple Qazi Abu Yusuf.

[4] For illustrations of distinction in Muslim texts between rules of mere OVERT CONDUCT & RULE OF CONSCIENCE, see Bail. I., 208 (par. 2) ; 213 (par. 1, 2, 3) ; 217 (par. 3) ; 231 (par. 2) ; 404, (*ll.* 5-8) ; Bail. II., 109, (*ll.* 4-7) ; 116 (*ll.* 17-19) ; 211 (*ll.* 8-11).

[5] In giving that *fatwa*, Shaikh-ul-Islam, consulted, & was assisted by learning of, Rt. Hon. Syed Ameer Ali : E. F. Knight, *Awakening of Turkey*, 347-9. Office of Shaikh-ul-Islam created at time of capture of Constantinople, 857, A. H.—Shakespeare makes Henry V. consult Archbishop of Canterbury on point whether he was legally entitled to French Crown.

in addition to his normal authority, the still wider powers of a speculative nature in the domain of religion, which would be his, by right, if he were acknowledged as a mujtahid. The fatawa of the qazis and muftis on the other hand, while necessary for the case, and decisive of it "had no ulterior authority except such as was given to it by the professional repute of the magistrate, who happened to be in office at the time. They should be compared in this regard not to the decisions of the English Law Courts, but to the responsa prudentium of Roman law.[6] They would not have filled so important a place in legal literature, had they not been carefully compiled from the decisions of the most famous qazis, and by persons who had themselves achieved eminence as exponents of the law.[7]

No religious legislation :

The practical shape that the development of the Hanafi law took, may, therefore, be indicated by saying that, the power of giving theoretical expositions of the law, so as to bind the conscience of the people (which is legislation in the exalted regions of religion), is denied to any mujtahid or canonical exponent,

discretion in adjudicating.

but that those who are charged with the practical administration of justice, are given ample liberty to use their discretion, as the facts of each case may require.[8]

'Ijtihad' in Shia law.

A difference that has arisen at this stage between the Shias and Sunnis is that the Shias recognise Imams as their heads in all matters both spiritual and secular for a much longer period than the Sunnis.[9] Mujtahids consequently come to hold quite a different rank in the Shia hierarchy ; but they continue to be recognized to the present day. Apart from this, the principles underlying the two systems have many similarities,[10] though they arrived at complete maturity at different periods, and hence the influence of ijtihad is not the same in both. The continued existence of imams and mujtahids amongst the Shias may account for the

[6] Cicero calls them RES JUDICATA, *Top.* 5, 28. Hunter, *Roman Law*, 60, 119. After some fluctuations, laid down by Constitution of Justin : "Non exemplis sed legibus judicandum est."—Cod. VII., 45, 13.

[7] *Fatawa-i-'Alamgiri* is very full in book on *Adab-i-Kazi* ("Duties of Kazi"). 19th Chapter deals with *Ijtihad* by *Kazi* : see p. 24 *no.* 19.

[8] "Chancellor in England with his clerks could frame new writs, but it was for the Common Law Judges to decide on their validity."—Holland, *Jurispr.* 63, citing Spence, *Equity Jurispr.* I., 325.

[9] Thus Abu'l Fatah al Shahrastani says of belief of one of Shia Schools : "Ali united," according to them, "in his own person the knowledge of all mysteries, and communicated it to his son Muhammad Ibn-ul-Hanafiyya, who passed it to his son, Abu Hashim, and that the true possessor of this universal knowledge is the true Imam"—*Kitab-ul-Milalwal Nihal*, Part I., 169. See also Pocock, *Historiae Arabum*, pp. 23, 237, 257 : Sale, *Koran, Prelim. Disc.*, s. 8.; Malcolm, *Hist. of Persia* II., 346, sqq.

[10] *Akbarally* v. *Mahomedally*, (1931) 34 Bom. L. R. 655, 661, 662, 664, 668.

few collections of the fatawa of Shia qazis. There is less room for them in a system where a higher authority is present.

Muhammadan Law and Religion.

That religion has a paramount influence on Muhammadan law is not a point in which that system differs from the systems of law governing the nations of the West.[11] The Greeks spoke of law "as a discovery and gift of God." [12] The priestly colleges moulded the Roman law.[13] In 1456, Chief Justice Prisot declared, in England, that "Scripture was the Common Law on which all classes of Laws were founded."[14] And it would probably be difficult to produce anything in the texts of Muslim law equalling the following dialogue in quaintness or the power and confidence with which religious sanctions are wielded. Argument of Counsel: "There is the law of the land for many things, and many things are tried in Chancery which are not remediable in the common law, and some things are only a matter of conscience between a man and his confessor." The Chancellor answers: "I know that every law is, or ought to be, according to the law of God. And the law of God is, that an executor who is badly disposed shall not waste all the goods, &c.; and I know well, that if he does so, and does not make amends, if he has the power, unless he repents, he shall be damned in hell." [15] As late as in 1857, Chief Baron Kelly and the Court of Exchequer laid down that "Christianity is part and parcel of the law of the land."[16] This decision was overruled only in 1917, and then not without the dissent of the Lord Chancellor.[17]

Muhammadan Law and modern requirements.

Portions of Muhammadan law are no doubt inapplicable to modern conditions. This can hardly cause surprise if any attention is paid to the period of times when the texts on Muslim law were written.[18] The inapplicability must be ascribed, in part at least, to the fact that the substantive law of Islam, so far as it is applied in India, has been divorced from the adjective law. The two form integral portions of one system, and each suffers by a disregard of the other; hence, though the adjective Muhammadan law is not as such directly applicable in British India, a reference to it may occasionally explain the real scope and effect of the sub-

11 See s. 5D, comm.

12 Demosthenes, *Adv. Aristogeit*, 1., 774; Plato, *Gorgias*, 484B; Chrysppus *apud* D. Laert. VII., 88; Holland, *Jurisp.* 18, 19, 43, 47.

13 Cf. "Lex ...ratio est recta summi Jovis," Cicero, *De Leg.*, II., 4.

14 Year Book, 34 Hen. VI., 40, cited Holland, *Jurispr.*

15 Year Book, 4 Hen. VII., 5, cited Harvard L. Rev., 214, *n.* 74.

16 *Cowan* v. *Milborne*, (1867) L. R. 2 Ex. 230.

17 *Bowman* v. *Secular Society* [1917] A. C., 407.

18 The author of the *Hidaya* died in 1196.

stantive law and may even be a guide as to how it should operate in particular cases.[19]

Historical study of Muhammadan Law.

This preliminary survey of the elements composing the law of Islam, cannot be brought to a conclusion, without a reference to the difficulties of taking into account even the most important of the forces that have moulded it. It is easy, no doubt, to adopt a formal classification and enumeration of them. But we must not be misled into thinking that the Quran, sunna, ijma, qiyas and ijtihad represent each of them a single force. A real study of the history of Muslim institutions can no more end with discovering whether a rule of law has been based on one or other of these" foundations," than the historical study of English law can satisfactorily begin and end when it has been discovered, whether an Act of Parliament originated from the House of Lords, or the House of Commons, whether a particular decision was given by a Chancery, or Common law Judge. To take an example : the history of waqfs must take into account not only what is laid down in the books that are cited in our law Courts, and consists not merely in separating (so far as possible) the influence, in the law, of each of the five forces that have been named, but must go back to the earliest records of similar transactions that can be discovered. If this is undertaken, passages may be found in the old Arab poetry throwing light on the dispositions made by the pre-Islamic Arabs, which were the precursors of the waqfs of our day.[20] The history of the Barmaki family in the days of the khalifs of Baghdad, and of the institutions established in Spain, or the schools of Roman law at Beyrout and Cæsarea, may aid us in the endeavour to distinguish the accretions of ideas derived from the theories that prevailed amongst the theologians, and from the legal systems of neighbouring lands with whom Islam came into contact.

§2.—Schools of Muhammadan Law in India

Schools of Muhammadan Law.

Without referring to the religious and political controversies that arose amongst Muslims it may be useful to indicate the origin of the main schools of Muhammadan law prevalent in India. " If each sect has its own rule according to Muhammadan law," say

[19] *Khajah Hidayat* v. *Rai Jan*, (1844) 3 Moo. I. A. 295, 318. These views may now be supported by *Hamira Bibi* v. *Zubaida Bibi* (1916) 43 I. A., 294, 301, 302 = 38 All. 281, 289 : " Rules of EQUITY and EQUITABLE CONSIDERATIONS are not foreign to the MUSSALMAN system."

[20] E.g., disposition of Cais ibn Al-Khatim's palm-garden, mentioned in *Kitab-ul-Aghani* II., 160 ; W. Robertson Smith, *Kinship, Marr. in Early Arab*, New Ed. (1907) 117, *sqq.*

their Lordships of the Privy Council,[21] " that rule should be followed with respect to that sect." Every sect does possess its own books, and the books of another sect are generally not recognized as of binding authority.[22]

Sunnis and Shias.

The followers of Islam are divided into two main divisions, Sunni and Shia. Each of them is again divided into a number of schools, having its own books of authority. There are four schools of Sunni law, taking their rise from the four great doctors, (1) Abu Hanifa (A.H. 80-150), (2) Malik ibn Anas (A.H. 95-175), (3) Shafi'i (A.H. 150-204), and (4) ibn Hanbal (A.H. 164-241). Each of them promulgated his own exposition of the law. None of them admitted an allegiance to any of the others. At the same time, not only was there no antagonism between them but each respected the ability and knowledge of his predecessors or contemporaries. There is, therefore, a kind of comity, amongst the followers of the four Sunni schools. The books written by the authors belonging to one of these schools often refer (on matters where the doctors are not unanimous) to the opinions of those belonging to another school, and the references are always made in terms of respect. But, beyond this, it is recognized that the follower of any of the Sunni schools may adopt any one of the four great doctors as his guide : only he must follow the teachings of that doctor consistently.

I. Sunni Schools

The majority of the Sunnis in India are followers of the Hanafi school, named after Imam Abu Hanifa. Two of the disciples of the great Imam Abu Hanifa, have acquired a reputation and authority nearly equalling that of himself. These two are Imam Abu Yusuf (the kazi'l kuzat under the Khalif Harun al Rashid) and Imam Muhammad.[23] Two very authoritative texts of this school, the Fatawa 'Alamgiri, and the Hidaya were translated early in the last century, and are well known in the British courts. Some other works have also been translated, but the translations have not attained the same eminence.

1. Abu Hanifa

(i) Abu Yusuf

(ii) Muhammad

2. Maliki, 3. Shafi'ite 4. Hanbali schools of Sunni Law.

Of the three other schools of Sunni law Shafi'i alone has any considerable number of followers in India. It has, therefore, been deemed unnecessary, as a rule, to refer to the law and doctrines of Malik or Hanbal. There are a number of Malikis in Arabia and Algeria. The followers of Hanbal are, it is believed, almost

[21] (*Rajah*) *Deedar Hossein* v. (*Ranee*) *Zuhooroon-Nissa* (1841) 2 Moo. I. A. 441.

[22] *Akbarally Adamji Peerbhoy* v. *Mahomedally Adamji Peerbhoy*, (1931) 57 Bom. 551 = 34 Bom. L. R. 655.

[23] " Imam " distinguishes Muhammad the disciple of Abu Hanifa from the Prophet. Rules relating to preference to be given to opinion of Abu Hanifa, Abu Yusuf or Imam Muhammad, are of practical importance : see s. 11A.

extinct except in Saudi Arabia ; the followers of ibn Saud, the Ikhwans, are Hanbalis.

II. Shia schools. With the Shias the different schools arose as the result of dynastic troubles, and disputes as to the person entitled to succeed as the rightful Imam. The general Shia law had already been settled prior to these disputes and troubles. The result is that though the four schools of Sunni law differ from each other to a far greater extent than the Shia schools, there is very little hostility amongst the various Sunni schools. The Shia schools do not observe the same comity towards each other.

Shia Ithna Ashari School. The Shia Ithna Ashari law is the system [1] of law followed by the great majority of the Shias in India. There are several well-known Shia Ithna Ashari texts. Amongst them is the Sharaiul-Islam, a work of great authority stating in very concise terms the whole of the law. This has been accurately rendered by Mr. Neil B. E. Baillie, and published as the second part of his " Digest of Moohummudan Law."

Shia Ismaili School. The law of the Ismaili Shias as applicable to Daudi Bohoras and to the Sulaimanis is less easy to discover. Some of their texts have been printed and published and translated if at all, only quite recently, and in fragments. For the last edition I had the advantage of notes from the Daaimul-Islam, a leading text of Ismaili law made by Shaikh Faizullabhai Sahib (to whose learning and ability I alluded in the preface to the first edition). For the present edition I have had the benefit of the assistance of Mr. A. A. A. Fyzee, Bar-at-Law, Principal, Government Law College, Bombay. He has verified the references to the Daaimul-Islam. As that work is not printed references to the pages have not been given, but there is no difficulty in verifying the citations as the context indicates where the subject is treated.

There are other Shia schools. Their laws are mentioned in this work only in so far as there are decisions reported with reference to transactions governed by them.

A statement of the most important texts will be found at the end of the next chapter.

A LIST OF IMAMS

A.—THE SUNNI IMAMS.

1. ABU HANIFA Nu'man ibn Thabit al Kufi, A.H., 80—150 (699-767). Imam Abu Hanifa had two celebrated disciples,—
   (*a*) ABU YUSUF (Ya'qub ibn Ibrahim al Kufi) 113-182 (731-798) (Fatawa-i-Baramika);
   (*b*) [Abu Abdulla] MUHAMMAD ibn Husain Ash Shaibani 132-187 (749-802).
2. Abu Abdullah MALIK ibn Anas, A.H. 95-175 (713-795).
3. Abu Abdullah Muhammad ibn Idris ash-SHAFI'I, A.H. 150-204 (767-819).
4. Abu Abdullah Ahmad Ash-Shaibani al Marwazi, IBN HANBAL, A.H. 164-241 (780-855).
5. Abu Abdulla Sufian ath-THAWRI A.H. 95-161 (713-777).
6. Abu Dawood Sulaiman AZ ZAHIRI, A.H. 202-270 (817-883).
7. Muhammad ibn Abdul WAHHAB, born Najd, 1691, A.C. brought up in School of Hanbal.

B.—THE SHIA IMAMS.

I.—The six Imams whom all the Shias recognize :

1. ALI ibn Abi Talib al Murtaza (son-in-law of the Prophet).
2. HASAN ibn Ali al Mujtaba.
3. HUSAIN ibn Ali Ash-Shahid.
4. 'Ali ibn Husain ZAINUL ABIDIN as-Sajjad.
5. Muhammad AL-BAQIR.
6. JA'FAR-AS-SADIQ A.H. 80-148 (765).

II.—The twelve Imams of the Ithna Ashari Shias— include the first six Shia Imams mentioned above, and the following six :

7. Musa al-Kazim d. 799.
8. Ali ar-Riza.
9. Muhammad al-Jawad.
10. Ali al-Mahdi.
11. Hasan al-Askari.
12. Md. Abu al-Qasim al-Mahdi, al-Qā'im.

III.—The Imams recognized by the Ismaili Shias— include the first six Shia Imams mentioned above and :

7. Ismail'l ibn Ja'faras-Sadiq.
8. Muhammad.
9. 'Abdullah.
10. Ahmad.
11. Husain.
12. 'Ubaidu'l-lāh al-Mahdi (first Fatimid Khalif of Egypt).
13. Qā'im bi-amri'l-lāh.
14. Mansur bi-'l-lāh.
15. Mu'izz li-dīni'l-lāh.
16. Aziz Billah.
17. Hakim.
18. Zahiruddin.
19. Mustansir.
20. Musta'li.
21. 'Amir.
22. Abul Qasim at-Taiyib.

CHAPTER II.

OPERATION OF MUHAMMADAN LAW IN INDIA

§1.—Subjects on which Muhammadan Law Prevails.

Application of Muhammadan law.

1. Muhammadan [1] law is said to "apply to" or "to be applicable to" or "to govern" the parties or the transaction, or "to be enforceable," or "to be the rule of decision," when any particular issue between the parties before a Court has to be determined in accordance with rules of Muhammadan law.[2]

Policy enjoined on State by texts.

The Muslim texts on law contain all the rules incumbent on a Muslim to follow. The texts, therefore, contain not only (1) the law that a Muslim must follow as the subject of a Muslim state, but also (2) the law that ought to be enforced by a Muslim sovereign, or the policy that a Muslim state ought to adopt towards zimmis,[3] or non-Muslim subjects. The exposition of that policy is beyond the scope of the present work. But it may be stated that a Muslim state is required to adopt a policy which in substance is the same as that followed in British India. "We are commanded," says the author of the Hidaya, "to leave them (viz. non-Muslim subjects) at liberty in all things which may be deemed by them to be proper according to their own faith."[4]

First recognition of Muhammadan law in India.

The steps by which Muhammadan law found recognition in British India, and the political reasons that actuated the English rulers to leave undisturbed the personal law of the peoples of India, form an interesting part of the history of this country.[5] The first step was taken by Warren Hastings,

[1] I adhere to *Muhammadan* (instead of *Muslim*) with compunction as my co-religionists growingly disapprove of the word Muhammadan—especially when it is used in the sense of a follower of Islam. For the Prophet's name the spelling *Muhammad* was adopted by the Oxford English Dictionary as long ago as 1903. Cf. I. P. Huges (cited in Oxford Eng. Dict.) : "The only correct way of spelling the word under consideration is *Muhammad*....the incorrect spelling, *Mohammed*."

[2] The word *semble* indicates that a rule of law seems to follow from what is laid down, but has not itself been expressly laid down. The word or words *quaere* or *sed quaere*, imply that the law on the subject requires further enquiry, elucidation, consideration or examination.

[3] *Zimmi* = person (non-Muslim) for whom (i.e. for whose safety) responsibility is accepted by Muslim State, non-Muslim subject of Muslim State.

[4] Hed. 57, (col. II, *ll.* 5-9); cf. Bail. II., 215 (par. 4.).

[5] Cf. *Indian Chief* (1800) 3 Rob., Adm. Rep., 28 : *locus classicus* : "The law of nations applying to the Eastern part of the world," "is different from what prevails ordinarily in Europe, and the Western parts of the world, in which men take their present national character from the general character of the country, in which

who, in 1772, framed what was adopted as s. 27 of the Regulation of the 17th of April 1780 : " In all suits regarding (1)[6] succession,[7] (2) inheritance, (3) marriage, (4) caste, and (5) other religious usages or institutions, the laws of the Koran with respect to Mahomedans and those of the Shaster with respect to the Gentoos, shall invariably be adhered to." SECTION 1.

GENERAL SURVEY OF ACTS.

This regulation, as the table at the beginning of this chapter shows forms the basis of most of the Acts under which Courts in British India administer Muhammadan law : s. 10, comm.

Four subjects mentioned.

These enactments may in regard to their contents be grouped as follows : *First*, " The High Courts[8] at Calcutta, Madras and Bombay, (in the exercise of their original jurisdiction)[9] and the Presidency Small Causes Courts[10] in suits against the inhabitants of Calcutta, Madras or Bombay as the case may be, shall, in matters of (1) inheritance and succession to lands, rents and goods and (2) in matters of contract, and (3) dealing between party and party,— (A) when both parties are subject to the same personal law, or custom having the force of law,—decide according to that personal law or custom ; and (B) when the parties are subject to different personal laws or customs having the force of law,—decide according to the law or custom to which the defendant is subject."[11] *Secondly*, there are features common to —(1) the Madras Civil Courts Act III. of 1873 (Madras Regulation II. of 1806) applying to Courts in the Madras Presidency, (2) Act XII. of 1887, s. 3 (see Bengal and Assam Laws Act VII. of 1905, ss. 2, 3) applying to the Civil Courts in Bengal, the North-Western Province and Assam (i.e. Bengal, Bihar, Agra and Assam), and (3) the Burma Laws Act XIII. of 1908, s. 13 (applying to the Courts in Burma). Their common features are— (1) mention of " (i) succession, (ii) inheritance, (iii) marriage, (iv) caste or any religious usage or institution " (2) A provision similar to (A)

they are resident. And this distinction arises from the nature and habit of the countries. In the Western parts of the world, alien merchants mix in the Society of the natives ; access and inter-mixture is permitted ; and they become incorporated to almost the full extent. But in the East from the oldest times, an immiscible character has been kept up ; foreigners are not admitted into the general body and mass of the Society of the nations ; they continue strangers and sojourners as their fathers were : *Doris amara suam non intermiscuit undam.*" *Akbarally* v. *Mahomedally* (1931) 57 Bom. 551.

[6] The figures (1)—(5) are not in original. [7] " Succession " added in 1781.

[8] Government of India Act, 1935 (26 Geo. V, c. 2), s. 223 enacts that the law to be administered shall be same as before commencement of Part III. of Act, viz., as laid down in Govt. of Ind. Act, 1915 (5 & 6 Geo. V, c. 61), s. 112. (See order in Council under Gov. of Ind. Act, 1935, s. 320(2) ; Gov. of Ind. (commencement & transitory provisions) (No. 2) Order 1936, 18 Dec. 1936. See *Orders in Council under Gov. of Ind. Act*, 1935 (published by manager of publications, Delhi, Govt. of Ind. Press, New Delhi, 1937), p. 280. The earlier statutes relating to High Courts, viz., 21 Geo. III., c. 70, s. 17 ; 37 Geo. III., c. 142, s. 13, not affected by Charters of High Court. See cls. 19, 20, & 21. Sec. of State's Desp. accompanying First Lett. Pat. or Charter, dated London, 19 May, 1862. Despatch printed in 1901 ed. of Bom. H. C. Rules, reprinted, Mulla, Civ. Pro. Code.

[9] In their appellate jurisdiction, H. Cts. have to consider whether Muffassal Court of first instance has decided according to law laid down for it.

[10] Pres. Sm. C. Ct. Act XVI of 1882, s. 16.

[11] Gov. of Ind. Act, 1915, s. 112, (see *n.* 8). The figures (1), (2) (3) and letters (A), (B) are not in the original.

SECTION 1. Custom

above follows. (3) The Burma Act also mentions the Buddhist law where the parties are Buddhists. No provisions corresponding to (B) is made. (4) Custom having the force of law is referred to in Madras Civil Courts Act, 1873 (qualifying such custom with the words "and governing the parties or property concerned"): and also in the Burma Laws Act, 1898. (5) But custom is not mentioned in Act XX. of 1887—though religious usage or institution is the 4th matter with reference to which the provision is made.

Fourteen to sixteen subjects mentioned.

Thirdly, (1) the Central Provinces Laws Act XX. of 1875, ss. 5 and 6, (2) Oudh Laws Act XVIII. of 1876, s. 3, (3) Punjab Laws Act IV. of 1878, s. 11, and (4) Regulation VII. of 1901, mention 15 or 16 subjects: viz. (i) inheritance (or succession), (ii) special property of females, (iii) betrothal, (iv) marriage, (v) dowry, (vi) adoption, (vii) guardianship, (viii) minority, (ix) bastardy, (x) family relations, (xi) wills, (xii) legacies and gifts, (xiii) partition, (xiv) or any religious usage or institutions. In the Oudh and Punjab Laws Acts "divorce" is mentioned after "marriage." These Acts (1) agree with the secondly mentioned Acts, in containing a provision similar to (A), (2) no provision being made corresponding to (B), and (3) custom being required to be enforced. The Central Provinces Act says with reference to custom: "When among any class or body of persons or among the members of any family any custom prevails." (4) All except the firstly mentioned (High Court) Acts provide in effect that cases not otherwise provided for by the section in question or by any other law for the time being in force, shall be decided in accordance with justice, equity and good conscience. (5) The Burma Laws Act, s. 13(2) interposes before "justice, equity and good conscience," "the law administered by the High Court of Calcutta." *Fourthly*, for the mufassal of Bombay, Regulation IV. of 1827, s. 27 does not specify any subjects but states generally that the law to be observed in the trial of suits shall be successively: (1) Acts of Parliament and Regulations of Government applicable to the case, (2) usage of the country, (3) law of the defendant, (4) in the absence of specific law and usage, justice, equity and good conscience.

Family custom.

COMMON FEATURES.

A general survey of these Acts brings out certain common features—(i) most of them enumerate the matters to be governed by Muhammadan law. Some do so very elaborately. But the enumeration is really not of much assistance. Thus the one subject on which there has been controversy in India, pre-emption (s. 5), and which is of great importance in many provinces is nowhere mentioned. Guardianship, minority and partition are practically governed by Acts of the Legislature; betrothal is hardly of any importance.

(i) Subjects enumerated.

(ii) When personal laws differ.

(ii) The case where parties are subject to different personal laws is only dealt with in the statutes relating to the High Courts and rule (B) has been interpreted in accordance with justice, equity and good conscience,—which seems to be much more powerful than the letter of rule (B).

(iii) Custom.

(iii) As regards custom, similar observations may be made: see s. 10 comm. But the Shariat Act, 1937 (see s. 6A (1)(*b*).) has now ruled out custom with reference to 10 subjects and enables Muslims to do so with regard to 3 more.

SECTION 1A
Succession and inheritance.

1A. (1) The Muhammadan law of succession and inheritance [12] is directed by the Legislature to be applied to Muslims all over British India ; but so much of the Muhammadan law and usage, as prohibits succession by apostates [13] from Islam, is not enforceable in British India.[14]

Shariat Act 1937.

(2) On 7 Oct. 1937 the Muslim Personal Law (Shariat) Application Act,[15] XXVI. of 1937 (hereinafter called the

[12] See also s. 7. "The law of SUCCESSION is in any given case to be determined according to the PERSONAL LAW OF THE INDIVIDUAL whose succession is in question": *Balvant Rao* v. *Baji Rao* (1921) 47 I. A. 213. "The Muhammadan and Hindu laws, being PERSONAL LAWS, are attached to the followers of each religion wherever they may be living" : *Budansa Rowther* v. *Fatma Bi*, 26 Mad. L. J. 260 = [1914] Mad. W. N. 278 = 15 Mad. L. T. 107 ; *Ghulam Abbas Ali K.* v. *Amatul Fatma* (1921) 48 I. A. 135 ; cf. *Nabi Bakhsh* v. *Ahmed Khan*, (1924) 51 I. A. 199 (LAH.). Being matter of LAW, Ind. Ev. Act s. 57(1) applies & Courts will take JUDICIAL NOTICE of "all laws or rules having force of law now or heretofore in force, or hereafter to be in force in any part of British India." The effect of this provision has been thus explained : "With regard to the facts enumerated in s 57" (of the Ind. Ev. Act), "if their existence comes into question, the parties who assert the existence or the contrary"—viz. persons asserting or denying the fact that the law is to certain effect—"need not in the first instance produce any evidence in support of their assertions. They need only ask the Judge to say whether these facts exist or not, and if the Judge's own knowledge will not help him, then he must look the matter up ; further, the Judge can, if he thinks proper, call upon the parties to assist him. But in making this investigation the Judge is emancipated entirely from all the rules of evidence laid down for the investigation of facts in general. He may resort to any source of information which he finds handy, and which he thinks helps him. Thus, he may consult any book or obtain information from a bystander : " Woodroffe & Ameer Ali, *Ind. Ev. Act*, p. 487 (6th ed). This does not mean that the Court has no power to permit the fact (that Muhammadan law is to a certain effect) being proved by sworn depositions : see (*Newab*) *Mulka Jehan Saheba* v. *Mahomed Ushkurree Khan*, (1873) L. R., I. A. (SUPP. VOL.) 192. High priests gave evidence as to presumption of Muhammadan law on girl attaining puberty, p. 194, *ll.* 1-5, also p. 194 (par. 4), 195 (par. 1, 4), 196 (*l.* 3 from bottom), p. 198 (par. 4) ; and in *Muhammad Hamid* v. *Mian Mahmud* (1922) 50 I. A. 92, 102, Lord Cave, L. C., refers to Maulvis called as experts in Muhammadan law ; *King* v. *Sutton* (1816) 4 M. & S. 532, 542 (meaning of TAKING JUDICIAL NOTICE). It is submitted, therefore, with the greatest deference that in *Aziz Bano* v. *Muhammad Ibrahim Husain*, (1915) 47 All. 823, 835, the Court was at liberty to examine Maulvi Nasiri Sahib, and to refer to his opinion : not under Ind. Ev. Act, s. 45, which refers to foreign law ; but because under s. 57 the Court was empowered to inform itself of the law in any manner it chose,—without being under necessity of conforming with Ind. Ev. Act : *Bhagwan Singh* v. *Bhagwan S.*, (1898) 21 All. 412, 423, (P.C.) (usual method of ascertaining law) ; *In re Chenworth Ward* v. *Dwelley* [1894] 2 Ch. 488, 495.

[13] It has not been possible altogether to avoid use of this expression ; but though it has offensive association, etymologically, it merely means "one who has withdrawn." 'Apostate' in law books is *murtadd*, i.e., one who turns away from an object and "in law signifies a renunciation of the Muhammadan faith" : (*Mt.*) *Khan B.* v. *Pir Shah* [1884] 19 Punj. Rec. 353, (No. 132) ; cf. *Abraham* v. *Abraham* (1863) 9 Moo. I. A. 195, 244 cited more fully below.

[14] CUSTOM, see s. 10 below ; (*Mt.*) *Khurshadi B.* v. *Sec. of St.*, (1925-26) 5 Pat. 539.

[15] Shariat Act XXVI., 1937, s. 2 : "Notwithstanding any custom or usage to the contrary, in all questions (save questions relating to agricultural land) regarding intestate succession, special property of females, including personal property inherited or obtained under contract or gift...the rule of decision in cases where the parties are Muslims shall be the Muslim Personal Law (Shariat)." (see s. 6A(1)(*b*) below for text of Shariat Act). SHARIAT (pron. shar-ee-yat or shar-eeya) : *Shari'a* (*shar'*) *lit.* = "road to watering-place, path to be followed" (*Enc. of Isl.*,

SECTION 1A.

Shariat Act, 1937) which extends to the whole of British India excluding the North-West Frontier Province,[16] came into operation. After that date, notwithstanding any custom or usage to the contrary, in all questions regarding intestate succession (save questions relating to agricultural land) the rule of succession, in cases where the parties are Muslims, shall be the Muslim personal law (Shariat).[17]

Castes Disabilities Removal Act.

The law depriving apostates of certain rights is abrogated by the Caste Disabilities Removal Act,[18] XXI. of 1850, which is as follows :—

"*An Act for extending the principle of section ix. Regulation* VII. *to* 1832, *of the Bengal Code, throughout the Territories subject to the Government of the East India Company.*

Preamble : Bengal Regulation VII. of 1832.

"Whereas it is enacted by section ix. Regulation VII. 1832, of the Bengal Code, that 'whenever in any civil suit the parties to such suit may be of different persuasions when one party shall be of the Hindu and the other of the Muhammadan persuasion : or where one or more of the parties to the or parties of any property to which, but for the operation of such laws, they

iv. 321), technically = "canon law of Islam, totality of Allah's commandments"—not "law" in modern sense of word, but comprising infallible body of ethical rules which must be obeyed by everyone who is (i) subject to the law of Islam (*mukallaf*) (ii) has attained years of discretion (*bāligh*), & (iii) is possessed of normal mental powers (*aqil*). "Shariat means matters which would not have been known but for the communication made to us by the law giver," Abdur Rahim, *Muh. jurisp.* According to Schacht fundamental tendency in growth of *shari'a* was religious evaluation of affairs of life. The *shari'a* in the words of Snouck Hurgronje, is a doctrine of duties, a code of obligations; individual rights have a secondary place in it (*Enc. of Isl.* ii. 105). *Shariat* consists of the totality of commands (singular *hukm*, plural *ahkam* : *ahkam* being also used as a synonym of *shari'a*), derived from the "*shari'a* evidence" (*adillah shariyah*) which in turn are derived from the four sources of law,—*Qur'ān, sunna, ijmā* & *qiyas*. (Aghnides, *Muh. Theor. of Finance Intro.* p. 1). *Shar'i* = "anything connected with the *sharia*." The Muslim doctors put commands comprised in *shari'a* under 5 heads (*al-ahkam al-khamsa*) : —(1) *farz* = human act strictly enjoined; (2) *mandub* = a thing that human beings are advised to do; (3) *makruh* = a thing that should be avoided; (4) *ja'iz* or *mubah* = a thing about which *shari'a* is indifferent; and (5) *haram* = an act strictly forbidden. Agnides, 109 *sq.* : *Enc. of Isl.* iv. 322; Fyzee, *Intro.* 21. For a Shia view, see *al-Bābu'l-hādi 'Ashar*, Trans. Miller § 113. The commands of *shari'a* are also divided under (1) *ibādāt* = religious duties, which include the rights of God (*huquq Allah*) & the rights of men (*huquq al-'ibād*) & (2) *mu'āmalāt* = worldly duties : Abdur Rahim, *Muh. Jur.*, 201, *sqq.* *Fiqh* = (Muslim) jurisprudence; *fiqh* along with *tafsir, hadith* & ancillary knowledge = *shari'a*. The relation between *shar'iat* and *fiqh* is a matter of some nicety. See Goldziher *Enc. of Isl., s. v. Fikh* II., 105; Fyzee, *Intro. to Mah. Law*, 19-25.

[16] For which see the North Front. Fr. Shariat, Act VI. of 1935. See Table of Enactments, between pp. 26, 27.

[17] The "ORDINARY LAW, to which the members of the intestates' tribe & religion are subject" (Oudh Estates Act I. of 1869, s. 23), does not mean the personal law uncontrolled by custom or Acts of the Indian Legislature. "Ordinary law" includes not only custom, but also *sanad* containing rule of succession enforceable by Act : *Badri Narain* v. *Harnam* (1922) 49 I. A. 276, 283; *Ghulam Abbas Ali* v. *Amatul Fatma*, (1921) 48 I. A. 135; (*Mussammat*) *Parbati* v. (*Rani*) *Chandrapal* (1909) 36 I. A. 126; *Narindar* v. *Achal Ram* (1893) 20 I. A. 77 (FAMILY CUSTOM). PERSONAL LAW applies wherever the person be living : *Badansa R.* v. *Fatma Bi*, (1914) 26 Mad. L. J. 260.

[18] Short title : Act XIV. of 1897.

would have been entitled ; and whereas it will be beneficial to extend the principle [19] of that enactment [20] throughout the territories subject to the government of the East India Company. It is enacted as follows :—

SECTION 1A. Caste Disabilities Removal Act.

" So much of any law or usage now in force within the territories subject to the government of the East India Company, as inflicts on any person forfeiture of rights or [21] property, or may be held in any way to impair or affect any right of inheritance,[22] by reason of his or her renouncing, or having been excluded from the communion of any religion, or being deprived of caste, shall cease to be enforced as Law in the Courts of the East India Company, and in the Courts established by Royal Charter within the said territories."[23]

No forfeiture of rights or property, nor right to inheritance by apostasy.

The preamble contains two recitals : (*a*) s. 9 is recited, under which (when the parties to a suit are of different persuasions) the laws of Islam are not to operate so as to deprive any party of any property to which but for the operation of such laws he would have been entitled ; (*b*) secondly, that it would be beneficial to extend the principle of s. 9.

The enacting part of the Act directs Courts to cease to enforce so much of any law or usage as (1) inflicts on any person forfeiture of rights or property, or (2) may be held in any way to impair or affect any right of inheritance by reason of his or her renouncing or having been excluded from the communion of any religion or being deprived of caste.

The Act accordingly applies only to protect the actual person [24] who either renounces his religion or has been excluded from the communion of any religion : such a person does not lose any right of property or of succeeding as heir. When once a person has changed his religion and changed his

Only person himself protected by the Act.

[19] " The preamble recites that it will be beneficial to extend the *principles* : not, be it observed, the *provisions* but the principles ... that, so far as an enactment can prevent it, no one shall in British India suffer for his religious convictions."—*Gul Mahammad* v. (*Mt.*) *Wazir B.* [1901] 36 Punj. R. 191 (No. 60). But this observation and also that on p. 199 overruled by *Mitar Sen* v. *Maqbul*, (1930) 57 I. A. 313, (on app. from 3 Luck. 154) see *n.* 24.

[20] " Total irrelevance " of preamble to enacting part of Act : (*Srimati*) *Matangini Debi* v. (*Srimati*) *Jaykali Debi*, (1869) 5 Ben. L. R. (o.c.) 466, 492 = 14 W. R. (o.c.) 23 (per Peacock C. J.). But see *Rohini Lal* v. *Gobind Krishna Narain*, (1911) 38 I. A. 87 = 33 All. 356.

[21] " Or " is not a misprint for " of " : *Nowroz Ali* v. (*Musst.*) *Aziz Bibi*, (1876) 11 P. R. (Civ. Judgts.)—No. 124, p. 255, 264-265 : effect of Act discussed pp. 258-263 ; compared with previous enactments pp. 257-268.

[22] " Of any person " should be read in here : so as to read : " the right of inheritance of any person by reason of his or her renouncing "—otherwise " the words *his* or *her* not easy to apply, because there is not a person expressed in the Act who is represented by *his* or *her* : " *Mitar Sen* v. *Maqbul*, (1930) 57 I. A. 313, 317.

[23] See *Kery Kolitany* v. *Mooneeram Kloita*, (1873) 13 Ben. L. R. (F.B.) 1 ; *Muchoo* v. *Arzoon Sahoo*, (1866) 5 W. R. 235 : s. 335 comm.

[24] *Mitar Sen* v. *Maqbul*, (1930) 57 I. A. 313, disapproving of *Bhagwant* v. *Kallu*, (1888) 11 All. 100 which had held Act wide enough to protect any person from having any right of inheritance affected by reason of any person having renounced his religion or having been excluded from caste, which " would apparently mean that if a Hindu becomes a Muhammadan, then the descendants of that Muhammadan throughout the ensuing generations without any limit would always derive their succession under the Hindu law of succession and not under the Muhammadan law," 57 I. A. 316. *Manna* v. *Chand*, [1902] 37 P. R. 460 (No. 104) also overruled ; also *Rupa* v. *Sardar Mirza*, (1920) 1 Lah. 376, *Vaithilinga* v. *Ayyathorai*, (1917) 40 Mad. 118 took the correct, narrower view : descendants of Hindu convert to Christianity have therefore no interest in property of their unconverted relatives.

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personal law, that law will govern the right of succession of his children, though this may work hard to some extent upon expectant heirs. The Act does not confer on any party the benefit of the Hindu or Muhammadan law.[25]

Succession to land : *lex loci.*

The rule of private international law adopted by English Courts is that succession to land in England is governed by the law of England. The law of India similarly adopts the lex loci for the discovery of the right heir to land.[26]

Inheritance : transfer : difference.

There is a great deal of difference between inheritance and a voluntary transfer. The former is laid down by law or custom. Hence attempts to lay down how property shall be inherited fail.[27]

Family agreements : settlements.

The Privy Council have recognized and given effect to an agreement that a certain estate shall be alienated and that it shall descend to the nearest male heir,—an agreement by which a summary settlement was varied in accordance with a family arrangement.[28] They have also considered (1) the effect of a compromise on a taluqdari estate, and (2) the applicability thereto of the Oudh Estates Act I. of 1869 ; (3) a special custom of descent which might affect only the principal estate of the family, and (4) the incorporation (by a declaration under s. 32A of that Act) of properties into a taluqa so as to impose upon them descent by primogeniture.[29] Family settlements and agreements are referred to in s. 457A, com.

In construing Bom. Reg. IV. of 1827, the term "caste" is not restricted

[25] *Mitar Sen* v. *Maqbul Hasan Khan*, (1930) 57 I. A. 313, 317, *ll.* 24-26. But *semble*, rights previously acquired will not be affected : cf. *Mohammad Abdussamad Khan* v. *Kurban Hussain*, (1903) 31 I. A. 30 (Oudh) : There it was held that an entry under Oudh Estates Act could not divest rights previously acquired on the death of a person who had died before the Act was enacted. *Mukerji* v. *Alfred*, [1909] 44 P. R. 102 (No. 36) ; *Bhagwan Bakhsh* v. *Drigbijai*, (1930) 6 Luck. 487 ; *C. V. N. C. T. Chidambaram Chettyar* v. *Ma Nyein A.*, (1923) 6 Rang. 243 (Hindu having adopted Islam, his estate governed by Muhammadan law : his Hindu wife & children excluded from inheritance) ; *Abdul Aziz K.* v. (*Chaudhari*) *Mahbub Singh*, [1936] 34 All. L. J. 488 ; *Himayut Ali* v. *Mohumed Ali*, (1850) 5 S. D. A. (N. W. P.) 417, (if deceased is Sunni, estate devolves by Sunni law ; if Shia by Shia law) ; *Nuwab Mohumed Hoosein A. K.* v. *Lumanya Begam*, (1851) VI. S. D. A. (N. W. P.) 350. See *Abdus Sakur* v. *Abubakkar*, (1930) 54 Bom. 358, 362. (Cutchhi Memon makes declaration under Cutchhi Memon Act XLVI. of 1920 : his estate governed by Muhammadan law ; but he may succeed under Hindu law to estate of his mother who not having made declaration, her estate governed by Hindu law : there is no reciprocity in this respect).

[26] *Ayubsha* v. *Babulal*, (1937) 39 Bom. L. R. 1324, 1327, *ll.* 9-14, Eng. Courts recognize as heir to land in England, only one who is legitimate by law of Eng. and will not recognize, a man illegitimate in the eyes of that law even though he be legitimate according to his personal law. Bom. Rg. IV. of 1827, requires usage of country in which suit has arisen to be enforced.

[27] "INHERITANCE does NOT depend UPON THE WILL of the individual OWNER ; transfer does ; inheritance is a rule laid down (or in the case of custom, recognized) by the State not merely for the benefit of individuals but for reasons of public policy—Domat, 2413. It follows directly from this that a private individual, who attempts by gift or will to make property inheritable otherwise than the law directs, is assuming to legislate & that the gift must fail & the inheritance take place as the law directs. This was well expressed by Lord Justice Turner in *Soorjomone Dossee* v. *Denobundoo Mullick*, (1857) 6 M. I. A. 555 ; 'A man cannot create a new form of estate or alter the line of succession allowed by law for the purpose of carrying out his own wishes or views of policy'"—*Juttendromohan Tagore* v. *Ganendromohan Tagore*, (1872) L. R. I. A. SUPP. VOL. 47, 64, 66. (*Tagore case*).

[28] *Raja Mohan* v. *Nisar Ahmad K.*, (1933) 60 I. A. 103 ; contrast *Appa Kotty Kombi Avulla* v. *Kottayi Matha*, (1934) 68 M. L. J. 282.

[29] *Mohammad Sadiq A. K.* v. *Fakhr Jahan B.*, (1931) 59 I. A. 1.

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"Caste" defined : explained.

to Hindus.[30] "It comprises any well-defined native community governed for certain internal purposes by its own rules and regulations."[30] Act XII. of 1887, s. 37 mentions questions regarding "caste"[31] amongst those to be decided in accordance with Muhammadan law.

Statutory alterations of Muhammadan law interpreted in view of general law.

The Muhammadan law may have to be applied with a statutory limitation or alteration which changes the conditions under which the general law operates. In that case the statute must affect the principles on which Muhammadan law is based, which the Court will consider. If the Legislature introduces a change in the law without considering all the bearings of the alteration, or making the principles underlying the law to bear upon the alteration, it may become the duty of the Court to interpret the alterations in view of the principles of the law. One of the principles of the law of succession is that there are certain persons who have claims on the estate and the shares are adjusted so that as far as possible the claims of all those persons may be satisfied.[32] In view of this principle the provisions of the Bom. Hereditary Offices Act (Watan Act) III. of 1874 preventing daughters from inheriting were so applied that the mother did not take the diminished share ($\frac{1}{6}$ instead of $\frac{1}{3}$) when there was a daughter,—since the daughter inherited no share out of the estate.[32]

Marriage mahr divorce.

2. The Muhammadan law of marriage, mahr (dower),[1] divorce,[2] and the family relations[3] generally, is enforced throughout British India.[4]

[30] *Abdul Kadir* v. *Dharma*, (1893) 20 Bom. 190 ; *Sayad Hashim S.* v. *Huseinsha*, (1888) 13 Bom. 429, (previous decision holding contrary not followed); *Bai Jina* v. *Kharwa Jina Kalia*, (1907) 31 Bom. 366 ; *Abraham* v. *Abraham*, (1863) 9 Moo. I. A., 195, 239-40 ; *Kery Kolitany* v. *Mooneeram Kolita*, (1873) 13 Beng. L. R. 1 75-76 (F.B.) = 19 W. R. 367.

[31] Oxford Engl. Dict. : word CASTE (*a*) ultimately derived from Latin *castas* = pure, unpolluted, (*b*) through Span. & Portug. *casta*, (feminine of *casto*), which originally in those languages = "pure or unmixed (stock or breed)," (*c*) later came to mean "race, lineage, breed"—"In its Indian application" caste is stated to be derived from Portug. Meaning in English given in Oxford Dict. (1) "one of the several hereditary classes into which society in India has from time immemorial been divided ; the members of each caste being socially equal, having the same religious rites, & generally following the same occupation or profession ; those of one class have no social intercourse with those of another." (Leading four castes (Brahmans, Kshatriyas, Vaisyas & Sudras) then parenthetically mentioned : its sub-divisions indicated). "This is now the leading sense, which influences all others." Other senses mentioned in Oxford Dict. include : (2) a hereditary class resembling those of one class have no social intercourse with those of another. Four leading castes exclusive privileges." In Islam (it is well known) there are no 'castes.' Objection has also been taken against applicability of term "sects" to Sunni & Shia, "schools (*mazhab*, pl. *mazahib*) of Muhammadan law," being preferred : Goldziher in *Vorlesungen*, 1st ed., 51 ; *Enc. of Isl.*, ii, 104. As a matter of terminology it is true that the Oxford Dictionary seems to treat *sect* and *school* as almost interchangeable : see s. 1. "sect." In this work the division of Sunnis & Shias & similarly outstandingly distinct communities are occasionally spoken of as *sects* ; and *schools* is applied to divisions of the same larger community.

[32] *Amirabi & Mahmulla* v. *Abasaheb*, (1930) 55 Bom. 401.

[1] *Syed Sabir Husain* v. *Farzand Hasan*, (1937) 65 I. A. 119.

[2] *Ahmed S.* v. *Bai Fatma*, (1930) 55 Bom. 160, (Muslim wife, 16 years old may sue for dissolution of marriage without guardian).

[3] There is no JOINT FAMILY : see s. 213 comm.

[4] After 7 Oct. 1937, when Shariat Act, 1937 came into operation, notwithstanding

SECTION 2.

It has never been questioned that the Muhammadan law of marriage and divorce ought to be administered to Muslims. Marriage is not expressly mentioned in the enactments relating to the Presidency towns; but "the rights and authorities of masters of families and fathers of families" have to be preserved.[5] Marriage is a matter of contract under Muhammadan law.[6] There is no other marriage law that is directly applicable to Muslims. The British Indian Acts relating to marriage and divorce have not been applied to Muslims.[7]

Change of religion after marriage.

A marriage between Hindus in accordance with Hindu rites is governed by Hindu law. Hindu law will decide whether or not it has been dissolved. If a woman originally a Hindu marries a Muslim, the validity of her second marriage will be tested by Muhammadan law. For that test, it will have first to be determined whether or not (according to Hindu law) the first marriage was dissolved prior to the second marriage.[8]

Gifts.

3. The Muhammadan law of gifts is enforced all over British India, though the courts have differed in their reasons for doing so.[9]

Muhammadan law of gifts: all over India.

After the coming into operation of the Shariat Act XXVI. of 1937, notwithstanding any custom or usage to the contrary, in all questions regarding gifts, the rule of decision in cases where the parties are Muslims shall be the Muslim Personal Law (Shariat). Prior to the Shariat Act the law of gifts had not been mentioned in all the enactments requiring Muhammadan law to be enforced in British India.[10] The Transfer of Property Act, 1882, s. 129, expressly saves the Muhammadan law of gift from being affected by the provisions of that act relating to gifts, which may therefore be taken as a legislative recognition[11] of the correctness of the view taken by the Courts.[12]

any custom or usage to the contrary, in all questions (save questions relating to agricultural land) regarding marriage, dissolution of marriage, including *talaq*, *ila*, *zihar*, *lian*, *khul mubaraat*, & dower the rule of decision in cases where the parties are Muslims, shall be the Muslim personal law (*shariat*).

[5] Cf. s. 18. [6] 21 Geo. III., c. 70, s. 18; 37 Geo. III., c. 142, s. 12.

[7] In regard to several matters it is not clear whether Muhammadan law is altered in British India e.g.: (1) legitimacy or establishment of parentage: s. 215; (2) rights of husband to chastise wife: s. 24; (3) operation (if any) of Caste Disab. Rem. Act XXI. of 1850 (see s. 1, above) on legal effects of marriage & guardianship ss. 1, 88, 248, below.

[8] *Budansa Rowther* v. *Fatima B.*, (1914) 26 Mad. L. J. 260. Cf. *Mahomed Jusab* v. *Haji Adam*, (1911) 37 Bom. 71 (seriously argued that Muslim father's duty to maintain son governed by English & not Muhammadan law).

[9] Law of gift enforced: *Zohoorooddeen* v. *Baharoolla*, [1864] W. R. 185 (Bengal); *Shumsoolnissa* v. *Zohra B.*, (1873) 6 N. W. P. 2 = Agra (F.B.) ed. 1874, 286 (N. W. PROV.); *Chekkonekutti* v. *Ahmad*, (1886) 10 Mad. 196; *Khader Hussain* v. *Hussaini B.*, (1870) 5 Mad. H. C. R. 114 (Madras).

[10] See Table of enactments at beginning of this chapter.

[11] This expression used (Scott C. J.) in *Manji Karimbhai* v. *Hoorbai*, (1910) 12 Bom. L. R. 1044, 1050, relying for proposition implied in it on *Swifte* v. *Jewsbury*, (1874) L. R., 9 Q. B., 301, 312; *Morgan* v. *Lond. Gen. Omnibus Co.*, (1883) 12 Q. B. D. 205-7. In former, Coleridge C.J. speaks of "Parliamentary exposition of a Statute."

[12] *Ma Asha* v. *B. K. Haldar*, (1936) 14 Rang. 439 (F.B.); cf. *Ma Mi* v. *Kallander Ammal*, (No. 1) 54 I. A. 23 (RANG.).

In Burma (excepting in cases coming within the ordinary original civil jurisdiction of the High Court) a gift of immoveable property by one Muslim to another must be made by a registered instrument duly attested in accordance with the Transfer of Property Act, s. 123. SECTION 3. Burma.

The reasons assigned for administering the Muhammadan law of gifts to Muslims, where the legislature has not expressly directed it to be done are either justice, equity and good conscience,[13] or that "questions as to gifts between Muhammadans are covered by the express provisions as to questions regarding...'any religious usage or institution.'"[14] Equity : religious usage.

4. The Muhammadan law of contract so far as it is not affected by nor inconsistent with legislative enactments[15] is enforceable in British India. Contracts.

The Indian Contract Act, s. 1, safeguards that, "Nothing herein contained shall affect the provision of any statute or regulation not hereby expressly repealed ; nor any usage, or custom of trade, nor any incident of contract not inconsistent with the provisions of this Act." So the rule of damdupat in Hindu law, has been enforced as not being inconsistent with the Contract Act.[16] But by the Transfer of Property Act, ss. 86, 88 so far as interest on mortgages is concerned all other rules are abolished. Interest.

The law of Islam prohibits the taking or giving of interest.[17] But the prohibition has become obsolete : even on a claim based so entirely on Muslim law as that of the mahr of a widow, the custom of taking interest is recognized by the courts in British India, partly owing to the almost universal practice amongst Muslims to give and take interest and partly owing to the operation of the Interest and Usury Acts XXXII. of 1839, XXVIII. of 1855.[18] On mahr.

[13] *Alabi Koya* v. *Mussa Koya*, (1921) 24 Mad. 513, 519-20 ; (*Mt.*) *Shums-ul-Nissa* v. (*Mt.*) *Zohra B.*, (1873) 6 N. W. P. 2 (F. B.) = *Agra* (F. B.) (ed. 1894) 286 (law of gifts applied on ground of justice); (*Mt.*) *Chundo* v. *Hakeem Alimooddeen*, *ib.* 28 (F.B.) (law of pre-emption applied on same ground).

[14] *Vahazullah* v. *Boyapati*, (1906) 30 Mad. 519, 521 ; *Gobind Dayal* v. *Inayatulla*, (1885) 7 All. 775 (F.B.) (similar view as to pre-emption, per Mahmood J.)

[15] E.g., Ind. Contr. Act, 1872 ; Trans. of Prop. Act, 1882 ; Interest & Usury Acts XXXII. of 1839 & XXVIII. of 1855.

[16] *Nobin Chunder* v. *Romesh*, (1887) 14 Cal. 781 ; *Saunadanappa* v. *Shivbasawa*, (1907) 31 Bom. 354 ; *Madhwa* v. *Venkataramanjul*, (1903) 26 Mad. 662, 971.

[17] See *Mishcat-ul-Masabih* : Traditions as to INTEREST, Book XII. Ch. 4, Part 2. "Abu Hurairah, said : The Apostle of God, said 'verily a time is coming to man when all will eat interest ; and if he will not eat the interest, its impression will reach him, such as the giving interest, the witness of it, or the writer of it.'"

[18] *Soorma Khatoon* v. *Altaffoonnissa K.* (1863) 2 Hay 210 ; *Hamira B.* v. *Zubaida B.* (1910) 33 All. 182 (F.B.); affirmed (1916) 43 I. A. 294 = 38 All. 581 (INTEREST allowed on MAHR. as Muhammadan law held not applicable); (*Mt.*) *Fakrunnissa* v. *Moulvi Izar-us Sadiq*, [1921] AIR (P. C.) 55 = 25 C. W. N. 866 (CENTR. PROV.) (penult. sentence of judgt. : "allowance not strictly as INTEREST, but as means of preventing her position being adversely prejudiced by unsuccessful controversy raised by appellants," Lord Buckmaster). *Adv. Gen.* v. *Yusufally*, (1921) 24 Bom. L. R. 1060, 1105 (large body of evidence that amongst Daudi Bohora community of traders INTEREST paid & received as matter of course—"It is charged between defts. 1 & 2, & Mullaji himself ; & there are many other striking instances.") See per Peacock C. J. *Woomatul F.* v. *Meerun-munnissa*, (1868) 9 W. R. 318, 324, 325, (calculation of interest on *mahr* justified as representing profits that might have

Pre-emption.

5. The Muhammadan law of pre-emption is enforced in Bengal and the North-West Provinces. In the Madras Presidency it has been held to be contrary to justice, equity and good conscience.[19] In the Bombay Presidency, it is recognized as established by custom in the Gujarat, but the courts are reluctant to enforce it in places where it has not been customarily followed.[20] It is enforced between co-sharers in Burma.[21]

Majority.

5A. The capacity of Muslims to act in the following matters, namely, marriage, dower,[22] divorce and adoption, is not affected by anything contained in the Indian Majority Act, IX. of 1875, but is governed by the Muhammadan law.[23]

Ss. 5A to 5E refer to certain matters to which Muslim texts give importance. The subjects dealt with are neither expressly declared to be applicable in British India, nor to be inapplicable.

Age of MAJORITY varies.

As to the age[23] at which Muslims must be considered legally capable of performing juristic acts,[24] it is not necessary that the law of majority should be uniform in reference to all transactions. Competence to enter into one transaction may be attained earlier than another. Thus the French Civil Code[25] recognises different ages for capacity for marrying, and for entering into other contracts, and the ages of competence differ for males and females. In England an infant however young may hold an advowson or patronage of a benefice, and may present to the benefice on an avoidance thereof.[26] In India a similar want of uniformity exists. This is partly the

(*a*) Majority Act, except marriage, &c.

accrued); *Mia K. v. Bibijan*, (1870) 5 Beng. L. R. 500 = 14 W. R. 308; *Kuar K. L.* v. *Pirbhupal*, (1874) 6 N. W. P. 358 (F.B.); *Hamira B.* v. *Zubaida*, (1916) 43 I. A. 294, affirming (1910) 33 All. 182 (F.B.). [*Contra*: *Ram L. M.* v. *Haran C. D.*, (1869) 3 Beng. L. R. O.C., 130.] See s. 109: interest on *mahr*.

[19] *Ibrahim* v. *Muni M. U. S.*, (1870) 6 Mad. H. C. R. 26.

[20] Question of applicability of law of pre-emption dealt with in Ch. XI: s. 533A.

[21] *Syed Ebrahim* v. *P. M. Syed Khan*, (1925) 4 Rang. 13.

[22] In *Abi Dhunimisa B.* v. *Md. Fathiuddin*, (1917) 41 Mad. 1026, held (it is submitted wrongly) "that to relinquish *mahr* is not to act in the matter of dower," certain observations in judgment seem irreconcilable with result. See p. 1029 last 14 *ll.* The case dissented from: *Qasim H. B.* v. *Kaniz S.*, [1932] A. L. J. 781. *Mozharul I.* v. *Abd Ghani*, [1925] AIR (CAL.) 322; Suhrawardy J. seems in one part of judgment to leave point open; but his decision is that entering into contract of *mahr* is such act. Sulaiman C. J. in [1932] A. L. J. 781, considers Suhrawardy J. to have refused to follow 41 Mad. 1026. See *Syed Sabir Husain* v. *Farzand Hasan*, (1937) 65 I. A. 119 (dower is fundamental feature of marriage).

[23] "The Muhammadan age of puberty is nine": *Sadiq G. K.* v. *Jai Kishori*, (1928) 30 Bom. L. R. 1346, 1351 (P.C.) (OUDH): evidence of MAJORITY discussed.

[24] "SUI JURIS," commonly used by English lawyers to predicate legal competence to act, did not, in Roman law signify arrival at any age of legal majority: "A child just born, if not under the *potestas* of the father, was *sui juris*." Hunter, *Rom. Law*, 194.

[25] Artt. 388, 144, 145, 148, 903, 305; see also artt. 374, 376-7, 476, 477.

[26] Hals. *Laws of Engl.*, XVII. 10, s. 243; cf. *Brocklebank* v. *Brocklebank Borlase*, (1911) 27 T. L. R. 569 (infant co-respondent without guardian *ad litem*).

deliberate policy of the legislature : for the enactment dealing with the subject is specifically barred from affecting capacity in certain matters.[27] Secondly, the Act itself contemplates two different ages of majority, depending on a circumstance that may be fortuitous,—whether a guardian has been appointed by the Court. Thirdly, as regards matters not expressly excepted from the operation of the Indian Majority Act, it does not seem to be anywhere enacted in general terms, that in the absence of any special law to the contrary, non-attainment of majority shall incapacitate the person in question in regard to all acts in the law.[28] In regard to specific juristic acts, the law has laid down that the attainment of majority is a condition precedent to capacity for doing them.[29]

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(*b*) Law as to juristic capacity.

It follows that the Indian Majority Act has no application at all to such matters as marriage, dower, divorce or religion : as regards other matters, though in accordance with the provisions of the Act a person may be considered a minor, yet there is no law stating in terms the effect of a person being a minor,[29] or laying down that non-attainment of the age of majority incapacitates the minor from doing any act in the law whatever : to that extent the effect of a person being under the age of majority is left doubtful in regard to acts referring to matters[30] that are neither expressly excepted from the effect of the Majority Act, nor expressly covered by some such enactment as the Indian Contract Act, s. 11. In regard to such matters it would seem that the rule of Muhammadan law operates. In Muhammadan law the age of puberty is generally the age of majority[31] or rather puberty fixes the time of attaining the capacity to perform juristic acts generally. But there are special provisions for specified juristic acts, such as marriage and wills, and the law of the different schools is not uniform on these points. These will be considered in their proper places.

(*c*) Effect of being minor.

(*d*) Puberty is majority.

5B. The texts on the law of Islam abound with rules[1]

Presumptions : Adab-i-Kazi.

[27] See Ind. Major. Act IX. of 1875, s. 2.

[28] Fr. Civ. Code, 902 : general rule as to acquiring property : " all persons can dispose of or receive property by donation *inter vivos*, or by will, excepting those whom the law declares incapable of so doing."

[29] Most important of such provisions is Ind. Contr. Act, s. 11. Under Guard. & Wards Act MINOR is person, who, under the " provisions of the Indian Majority Act is to be deemed not to have attained his majority." It is not anywhere laid down in general terms (as in French Code, art. 902) that effect of being minor is incapacity legally to act without guardian : but guardian is empowered to act on behalf of the minor & to exercise rights over minor's property.

[30] E.g. capacity to make wills or *wakfs*. Thus in 1871 Dwarkanath Mitter J. said : " Every ACT done by a MINOR is not necessarily null & void. Those acts which are prejudicial to his interests can be questioned & avoided by him after he reaches his majority " : *Rajendra Narain L.* v. *Suroda Soonduree D.*, (1871) 15 W. R. 548 ; (with regard to contracts this is not the case : *Mohori B.* v. *Dhurmo Das*, (1903) 30 I. A. 114 (CAL.)).

[31] *Puberty* was age of majority under early Roman law, but legislation altered its effects. See Hunter, *Rom. Law*, 608.

[1] *Adab-i-Kazi* (or proper PROCEDURE to be followed by *Kazi*) referred to : *Hamida B.* v. *Zubaida B.*, (1916) 43 I. A. 294 = 38 All. 581, Lord Parker. *Mahomed Oosman* v. *Essack S. M.*, [1938] Bom. 184, 189 (religious pre-deliction of judge irrelevant). See s. 12, com.

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primarily consisting of directions[2] to the Kazi[3] as to the decision that he must give, should the evidence before him be to a certain effect. It is sometimes not easy to determine whether or not these rules are presumptions of law, and thus saved under Indian Evidence Act, s. 103.[4]

Declaration of intention.

Nor is it easy to appreciate the exact effect, in British India, of one particular class of presumptions (assuming that they are presumptions of law falling within s. 103)[5] with which the texts abound : viz. where it is laid down that a statement on oath of a party to certain specified transactions, should, unless the contrary is proved, be presumed to be a true account of the nature of the transaction. The presumption does not arise (it will be observed) merely from the existence of the facts making up the transaction in question, but from those facts, coupled with the statement on oath of the favoured party, made before the kazi. It is based on the peculiar procedure followed at the trials of cases by the kazi.[6]

[2] Cf. *Mairaj Fatma* v. *Abdul Wahid*, (1921) 43 All. 673 = s. 608 *ill.*

[3] *Muhammad Yussub* v. *Sayad Ahmed*, (1861) 1 Bom. H. C. R. APPX. xviii ; *Sattappa* v. *Mahomed Sahib*, (1935) 60 Bom. 516, 530, 531. FUNCTIONS & OFFICE OF KAZI IN INDIA : Word *kazi* has obtained sufficient recognition in English literature to merit three or four entries in Oxford Dict. : *Cadi, Cazee, Kadi, Kazi*, being other variants ; preference apparently given to *Cadi* (hallowed by translators of *Arabian Nights*). Spelling *Qazi* was adopted in this work on basis of representing Arabic letter *qaf* by *q* (without a *u* following). Oxf. Dict. does not admit any word in *q* without a *u* immediately following & KAZI is usually adopted in Indian Legislation. Word KAZI is etymologically derived from root word meaning of decree, ordain or judge, & in texts KAZI is technical designation of judge. *Kazis* (judges) were however often invited to officiate at marriages or supervise *talaqs* ; kept records relating to these transactions. *Bikani Mia* v. *Shuklal Poddar*, (1892) 20 Cal. 116, 147. In India, after strictly judicial functions of *kazi* transferred to judges & magistrates appointed by British Government, officers bearing designation of *kazis* were for some years retained as legal advisers of British Courts. Beng. Regul. IV. of 1783, s. 16, provides for references being made of any question arising in Muhammadan or Hindu law to *kazi* or *pundit* of Court, respect being had to law in which each is conversant. See also Regul. XIX. of 1793. Subsequent enactments RESTRICTED FUNCTIONS of *kazi* to preparation and attestation of deeds & instruments & to general superintendence & legalization of ceremonies of marriage, funerals & other domestic occurrences, see s. 23. There have been & possibly there are now, similar Acts providing that *kazis* shall keep registers of marriages, etc. In absence of such Acts there are at present day no precise functions to be performed by person calling himself, or generally called, *kazi* in India. But a community or *jamaat* may by its own customs (as to customs see Shariat Act, 1937, s. 2), or usages, or religious tenets, recognize some person as being primarily or even exclusively entitled to perform ceremonies usual or considered necessary at the solemnization of marriages, or on pronouncing divorce. Such persons may and are occasionally designated *kazis*. See s. 11B.

[4] Even on matters of mere evidence consideration of principles that Muslim lawyers would apply may be of assistance : (*Khajah*) *Hidayat Oollah* v. *Raijan Khanum*, (1844) 3 Moo. I. A. 295, 318 ; ss. 10, 11B. comm.

[5] Viz. " The burden of proof as to any particular fact lies on that person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of the fact shall lie on any particular person." On distinction between burden of proof as matter of substantive law, & of adducing evidence, see : *R.* v. *James Stoddart*, (1909) 25 T. L. R. 612, 616-17 (C. C. A.) ; *Pickup* v. *Thames Ins. Co.*, (1878) 3 Q. B. D. 594, 599, 600 (C. A.); *Wakelin* v. *Lond. & S. W. Ry. Co.*, (1886) App. Cas. 41, 52.

[6] The PROCEDURE in KAZI'S COURT as follows : (1) Plaintiff orally states his facts not on oath : if cause of action disclosed ; (2) defendant asked either to admit facts,

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In the early legislation in British India provisions having an effect very similar to that of the presumptions of Muhammadan law under consideration, were recognised : under Regul. XV. of 1793, s. 10, the mortgagee is required to swear or solemnly declare that the accounts he may deliver in, are true and authentic.[7] But the scheme of the Indian Evidence Act as well as the principles underlying the adjective law of British India leave it to the court which sees and hears the witnesses give evidence, to determine whether the statement made on oath is to have credence, and, if so, to what extent.[8]

Declaration of intention : presumption.

One particular species of presumptions of the nature referred to is of some general importance, viz. where the act is such that different legal results may flow from it, and its effect depends upon the intention with which it was done ; the Muslim law frequently is to the effect that if the person says that he acted with a particular intention, he is to be presumed to have acted with that intention. Are these presumptions of Muhammadan law nullified by operation of the Indian Evidence Act, s. 106 ? A consideration of s. 106, ill. (*a*) seems to show that it is only " where a person does an act with some intention other than that which the character and circumstances of the act suggest," that the burden of proving that intention is on him.[9] So that where the overt acts of the party show a different intention from that which is alleged, the onus is placed on the person making the allegation. But there seems to be no provision for the class of acts just mentioned, viz. where the acts are capable of being interpreted as indications of an intention equally one way or the other.

Option to fix nature of acts.

The question may not be merely of academic interest, inasmuch as the rule of Muhammadan law often gives in effect an option to the actor to determine the character of equivocal acts,—a position that introduces the distinction between presumptions of law and the inferences that may be drawn from facts proved.[10]

Verbal explanations : rules of law.

5C. The texts contain many illustrations and precedents relating to the construction of words or guides to interpretation, in the sense of what (according to the practice and usages

or deny on oath ; (3) if he does the latter, plaintiff produces witnesses who can swear to his statement, & their testimony taken if they are trustworthy witnesses ; (4) defendant asked to produce his evidence, if any. The presumption is alternately in favour of plaintiff & defendant, after each of first three stages. If all four stages complete, kazi decides whom to believe. Function of witnesses is, it will be observed, analogous to that of jury in early English system, where jurymen were chosen from amongst persons who knew circumstances of their own knowledge, & swore to them. See Pollock & Maitland, *Hist. of Eng. Law*. I., 117, 119 ; II., 619.

[7] Cf. Ghose, *Mortgages*, (4th ed.) p. 99.

[8] Ind. Ev. Act, s. 114, *ill.* (6) : s. 114 " coupled with the general repealing clause at the beginning of the Bill " (i.e. *Ind. Evid. Bill*), Sir J. F. Stephens said in legislative council, " makes perfectly clear that courts of justice are to use their own commonsense experience in judging of the effect of particular facts & that they are to be subject to no technical rules whatever."

[9] Ind. Evid. Act, s. 4, *ill.*

[10] Characterised as very important : *R.* v. *Stoddart*, (1909) 25 T. L. R. 612. 616, Lord Alverstone C. J.

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prevalent at the time) is to be implied unless the contrary is expressed.[11] An unconsidered reliance on such portions of the texts has frequently misled the Courts. But such illustrations must be distinguished from those indicating the substantive law.[11]

Illustrations : explanation of Arabic words.

Illustrations given in the texts and particularly in collection of fatawa, which apparently explain the effect to be given to the use of certain words, are often merely in the nature of guides to the interpretation of Arabic expression. Such illustrations ought to be considered of little assistance in India, where the language is not Arabic. Arabic expression, even if they have a settled meaning in law, are apt to be used in India with a new significance acquired here which is not necessarily the same as that which they had at the time when, and in the country where, the Muslim texts of law were written.[12] Moreover, transactions of such illustrations or examples are very likely to be misleading.

Translations.

To refer to such translations for interpreting documents, originally written in an Indian vernacular, and rendered into English for the Court, or to refer to such translations for interpreting documents in the English language based on English conveyancing practices, is extremely unsafe. "Rules of construction," said Lord Macnaghten, "are rules designed to assist in ascertaining intention."[13] This is often overlooked.

On the other hand, there are many illustrations, where, for the sake of brevity or clarity, a given position is dramatized by the statement of the facts being put in the mouth of the agent : such a statement has to be considered as a recital of what has occurred, in order that an exposition may be given of the operation of law on the facts recited, rather than as mere words uttered at the time, irrespective of previous events. To distinguish examples of

[11] Good illustration : (*Syed*) *Sabir Husain* v. *Farzand Hasan*, (1933) 56 All. 401, reversed, (1937) 65 I. A. 119 ; another instance : Hed. 679 (col. ii. last *l.*) 682. It is erroneous (it is *submitted*) to interpret texts in such sense as to lead to inference that because usual or normal transaction is to particular effect, it is not possible to bring about different result even when it is desired to do so : "unless some authority had been cited to show the transaction invalid, EFFECT should have been given TO THE MANIFEST INTENTION OF THE PARTIES"—(*Nawab*) *Umjad A.* v. (*Mt.*) *Mohumdee B.*, (1867) 11 Moo. I. A. 517, 548—cited more fully s. 352, comm. The principle is specially important where law of British India recognizes new transaction or developed form of ancient transaction : e.g. trusts (see s. 352) ; gift (ss. 420, 443) & *ariat* are normally revocable, but surely there is no need why donor should revoke, nor (it is submitted) is there any reason to prevent donor tying himself down not to revoke it (s. 443) ; so *wakf* for three or more generations taken to be for all descendants in perpetuity, but (it is submitted contrary intention may be indicated & would be given effect to unless it is obnoxious to any specific law : s. 507. Bequest made to person who predeceases testator lapses under Hanafi law, but testator may expressly provide that heirs of legatee take it on his predeceasing testator (s. 590).

[12] A striking *ill.* is furnished by misuse of expression *hiba bil iwaz*, which is so persistent that "Indian form of *hiba bil iwaz*" has been coined as name for it.

[13] *Bhagvati Bamanji* v. *Kali Charan Singh*, (1911) 38 I. A. 54, 64. These words originally used by Wilson J in *Ram Lal Sett* v. *Kanai Lal Sett*, (1886) 12 Cal. 663, 678, to which P. C. "desired emphatically to call attention," cited as Lord Macnaghten's words in *Dinbai* v. *Nasserwanji Rustomji*, (1922) 49 I. A. 323, 329.

the one kind from those of the other, is not always as easy as the importance of doing so is obvious. The misuse of Arabic words and misunderstandings arising from it are well exemplified in the law of hiba bil iwaz.[14] SECTION 5C.

At the same time the books on the law of Islam are full of references to the "form,"—"formula" would often represent the sense more accurately—with which the legal transactions in question must comply. The authorised forms or formulae are generally given in the texts at the beginning of each chapter immediately after the definitions. As most of the transactions are cast in Muslim law into the shape of contracts, the form mostly consists of the words of "declaration and acceptance," ijab o qubul, which give effect to the juristic act. Coupled with these forms of declaration and acceptance, are statements of the results of disregarding the technical phraseology or recognised formulae of the law, and this is frequently followed by a consideration of the effect of the intention with which the forms are used : as, for instance, whether the use of the strict form, the technical formula, is effective without any intention on the part of the speaker to give to the formula the effect it has in law, and conversely, whether the intention itself, without the use of the formula, is effective. Forms in Muhammadan law.

English writers on Muhammadan law have been apt to pay too little attention to these forms, but this attitude has been based, it is submitted, on a total misconception. For the disregard of what the authors have to say regarding the formulae is grounded apparently on the familiar principle that the intention is all in all and words of little importance. Except in regard to marriage, divorce and pre-emption it may be said at once that the Muhammadan law usually agrees with the rule of English law on this point. This fact however goes a very little way towards proving that attention to the formulae would be labour spent fruitlessly. The decisions of the English Courts given at a time when the Common law Courts were steeped in formalities, are still consulted for the purpose of discovering the exact ambit of legal rights and liabilities, and it is for this purpose that the formulae of declaration and acceptance should similarly be consulted : to arrive at an accurate conception of the nature of the transactions dealt with by the texts, and the terminology employed. Forms : formulae.

5D. Occasionally the texts fix certain civil overt acts with legal effects dependent upon the motive or intention with which the acts are done or words uttered. These rules of law are sometimes such that no effect can be given to them in British India ; at other times they are enforceable. Intention : motive.

Rules of Muhammadan law, based on the intention and motive with which formal words are uttered, have been generally treated as having no force whatever in British India. Whether they have any force is a question deserving consideration. In the law of Islam the intention and motive of the Their importance.

[14] Cf. *Cheekati Zamindar* v. *Ranasooru Dhora*, (1889) 23 Mad. 318, 323.

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agents frequently determine which one or more of several possible legal results follow from the same acts. "In all acts," says the author of the Hidaya, "regard is paid to the spirit and intention."[15] Modern systems of law are, it is true, opposed to considerations introducing uncertainty into the effects of transactions—uncertainty which cannot be easily removed by attention being paid to overt acts alone. But the Muslim law, which is merely an offshoot of Islam as a religion, could not be affected by such considerations: for just as in secular matters intention (except as expressed in overt acts) is relegated to the background, so in religious matters, ceremonies and formalities, when divorced from religious intentions, are under most systems, ineffectual from a religious point of view. The hidden motive or intention affects the transaction "between the man and his God" or "in conscience," or in a religious point of view.[16] But it is recognised by the Muslim jurists that secular courts may be unable to find out the real effect of certain acts, according to the law of God, and that it may even be necessary to give decisions in conflict with what "conscience" might dictate to the parties. This, it is submitted, is not enough to alter the substance of the law, which is, that the determining factor, in regard to the effect of certain transactions, is the intention and motive of the agent. The means by which the Court endeavours to discover the intention or motive, or its inability to do so adequately, is a matter of adjective law, or the result of the limitations under which all human investigations are made. They do not necessitate a conscious disregard of the substantive law: though Courts may be able to give no more than an imperfect effect to the law. On the other hand, in the earliest texts, a consciousness is observable of the fact that law is a practical science, that its rules must be based on existing circumstances; and that what mere speculative reasoning may point to, has to be tested, checked and corrected by its being practicable.[17] By the necessity of things, the court administer-

Religious and secular effect of same words or acts.

Conscience.

[15] Hed. 520 (col. i.).

[16] These expressions used in antithesis to "with the *kazi*" "as before the judge," "judicially," or "in law": Bail. I. 27 (*ll.* 25-27), 208 (in a question between the man and his God) (par. 2), 213 (par. 1, *l.* 3, par. 2, *l.* 11, par. 3, *l.* 9), 217 (par. 3) 231 (par. 2), (232), 292, 294 (par. 3, last *l.*), 401 *l.* 1, (404 *l.* 9) (spiritual and temporal matters); 404 (*ll.* 5-8), (407 *l.* 7), 529 *l.* 12, (538 *l.* 12) (lawful judicially but sinful); Bail. II. 109 (*ll.* 4-7), 110 (*ll.* 17-19), 211 (*ll.* 8-11); Hed. 79 col. i; Hed. 33-4 contrasts "the appearance" with "the reality," Hed. 75, col. ii, before kazi and before God. *Durrul Mukhtar* (see s. 317, com.) contrasts OBLIGATIONS OF MORAL & of LEGAL NATURE. "God concerns Himself with your secret character & leaves you to follow appearances"—Umar's *Instructions to kazis*: see s. 11B, com. "The law falls into five of these categories: the obligatory, the commended, the permissible, the disapproved (i.e. not punishable by the law but disliked by the religious) & the forbidden."—Guillaume: *Legacy of Israel*, 164.

[17] E.g. Hanafi doctors were disinclined to allow dedication of property for mosque, unless property dedicated quite divided off from all private property. This strict view of law was modified: NECESSITY causing ALTERATION IN LAW: "It is recorded also" says the *Hidaya*, "that when Abu Yusaf went to Baghdad and beheld the narrow and crowded condition of that place, he held the appropriation to be lawful and absolute in either case,—that is, whether the mosque be in the lower storey and the dwelling in the upper, or *vice versa*:—but this he admitted out of NECESSITY. The same is recorded of [Imam] Muhammad when he went to Rai, the Capital of Iraq (the ancient Chaldea) and for the same reason."—Hed. 239 (col. ii).

ing the law cannot altogether ignore this circumstance, but the functions of the courts render it unsafe for them to do that which it is the province of the legislature to do. See ss. 348, 437, 462. SECTION 5D.

5E. The Muslim law relating to crimes, procedure, and slavery, is not enforceable in British India ; but it may have to be referred to for collateral purposes.

Law of crimes, procedure, slavery.

A good many provisions of the law in the Muslim texts apply to slaves or are illustrated with reference to them.[18] The law of slavery was never made applicable in British India,[19] and by the Indian slavery Act, v. of 1843, it is provided that slaves shall not be sold in execution of decrees or orders or enforcements of any demand of rent or revenue (s. 1), that no rights arising out of alleged property in slaves shall be enforced by the Courts (s. 2), that no slave shall be dispossessed of or prevented from taking possession of property acquired by him, by his own exertions, or by inheritance or gift, etc., (s. 3) and that any act that would be a penal offence if done to a free man, shall be equally an offence if done to any person on the pretext of his being in a condition of slavery (s. 4). The general intention of the legislature in passing this Act is to relieve all persons then subject to slavery from all the disabilities arising out of that status, and " in construing this remedial statute, the Courts ought to give to it the widest operation which its language will permit." [20] Ceremonies or tenets by which one person agrees to become the slave of another, who is to be the master of the mind, property, body and soul of the other can, as a source of property or legal rights, have no legal operation after 1843.[21]

Slavery.

Indian Slavery Act.

Scope of the Act.

Ceremonies or tenets or agreement to become slave.

The determination of the law that would be applicable to questions arising in British India as to the effect of slavery, the slave being in a country where slavery is recognised, would depend on private international law. It may not be easy to say how far the Slavery Act must be taken to affect, not

Rights of slaves.

[18] Macn. *Mooham. Law*, 312 concise chapter on SLAVERY ; " *Prec. of Slavery.*" Case II., " enumeration of different modes by which slavery is created.

[19] There are no means by which status of slaves, as known to Muhammadan law, can arise in British India.

[20] (*Sayad*) *Mir Ujmuddin K.* v. *Ziaul-Nissa B.*, (1879) 6 I. A. 137 = 3 Bom. 422, 429, 430.

[21] *Giyana Sambandha P. S.* v. *Kandasami T.*, (1886) 10 Mad. 375, 475, (by ceremony of *dattam*, gift made of certain *tambirans* (disciples) who devoted themselves, their soul, body, & wealth to *guru* : *held* SLAVERY ACT s. 3 applied : though ceremony may be pious motive for gift, & reason for upholding it when completed & executed, it could not be recognized as source of property or legal right in those cases in which the *tambiran* acquiring property, either refused to surrender it or devoted it to charity, thereby clothing it with special trusts, religious or charitable : agreement of *tambiran* to become slave of *guru* can have no legal operation after 1843) ; followed *Adv. Gen.* v. *Yusufalli*, (1921) 24 Bom. L. R. 1060, 1066, 1075, 1087, 1094 (*Daudi Bohora Case*,—where defendants' witnesses said that according to tenets of their religion *Mullaji* was master of mind, property, body & soul of his followers : though allegation that this was part of their tenets not proved). Cf. *Mansoorali* v. *Taiyabali*, [1935] AIR (NAG.) 156, 162 (power of *dai* after *meshak*) ; *Poonoo B.* v. *Fyez B.*, (1874) 15 Beng. L. R. (APPX.) 5 (argued that marriage contract made husband slave of wife).

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disabilities arising from the status of slavery, but rights arising therefrom.[22] The illustrations given by the texts refer to slavery and occasionally it has not seemed possible or advisable to omit, or to alter the form of the illustration.[23]

Civil rights or status :

all religions equal.

6. Civil rights,[24] with reference to status, or property,[25] may be connected with religious[26] tenets or beliefs : the Court will if necessary consider such tenets and beliefs and give a decision upon them,[27] without pronouncing on their truth or regulating religious ceremonies.[28]

" The western nations, who attach so much importance to titles, orders and decorations have no pretence for treating with levity the marks of distinction conferred by the sovereign authority and highly valued in the East." [29] Some expressions of opinion would be refrained from if these words uttered in the highest tribunal were constantly borne in mind.

See the Civil Procedure Code, 1908, s. 9, (Code of 1882, s. 11), and the decisions under it.

[22] See cases on Caste Disab. Rem. Act, XXI. of 1860 on similar distinction : s. 1, com.

[23] Contract to serve for one's whole life a particular master allowed by Eng. law : *Wallis* v. *Day*, (1837) 2 M. W. 273 ; Smith, *Lead. Cas.* (1903, 11th Ed.), I. 430. Slavery not abolished in England till 1834 : slave trade abolished in 1807.

[24] Cf. *Syed Diljan Ali*, v. *Bibi Akhtari B.*, (1925) 4 Pat. 747, 748 ; *Muhammad Waliul Haq* v. *Ludpud Upadhya*, (1937) 16 Pat. 389 (right to bathe in Saptadhara *kund* (pool) at Rajgir).

[25] *Shahbas Khan* v. *Umrao Puri*, (1908) 30 All. 181 (every person may make such USE of his own PROPERTY as he thinks fit, provided that he do not cause injury to others, or offend against the law) ; *Niadar* v. *Tika*, (1910) 9 I. C. 45 (recital of prayers on another's land without his permission forbidden, per Karamat Husain J.) ; *Muhammad Salim* v. *Ramkumar*, (1928) 26 All. L. J. 1001 (cows may be sacrificed in plaintiff's own house) ; *Nanbhai Singh* v. *Qadir Bux*, [1930] 28 All. L. J. 875 (do.) ; *Kandhe* v. *Jhanjan Lal*, [1936] 34 All. L. J. 444 (do.).

[26] Dissenters, however numerous, will not prevail against those who hold religious tenets & opinions held by community in its origin or foundation : s. 481, ill (2).

[27] *Narantakath* v. *Parakkal*, (1922) 45 Mad. 986, 998. ESSENTIALS OF ISLAM : unity of God ; Muhammad his prophet Ahmedyans are followers of Islam : *Kasam Khan* v. *Kazi Isub*, (1925) 50 Bom. 148. See s. 9.

[28] FREEDOM & EQUALITY OF ALL RELIGIONS : *Mokoond Lal S.* v. *Nobodip C. S.*, (1898), 25 Cal. 881, 885 : " The Court judicially administering the law cannot say that one religion is better than another." *Vasudev* v. *Vannaji*, (1880) 5 Bom. 80, 82 (if no right of property involved—no right to sue. " It is the policy of the state to protect all religions but to interfere with none ") ; *Mahomed Oosman* v. *Essack Saleh*, [1938] Bom. 184=39 B. L. R. 504, 507 ; *Krishna S. T. C.* v. *Krishanama C.*, (1882) 5 Mad. 318 ; *Elayalwar Reddiar* v. *Nambriumal C.*, (1899) 23 Mad. 298. Religious questions involved in *Krishnasami* v. *Krishnama* (1883) 5 Mad. 313, 315. See also *Narasimma C.* v. *Sri Kristna Tata C.*, 6 Mad. H. C. R. 449, approved in *Krishnama* v. *Krishnasami*, (1870) 2 Mad. 62, (P.C.). Cf. *Syed Amin Sahib* v. *Ibram Sahib*, (1868) 4 Mad. H. C. R. 112 ; *Adv. Gen.* v. *Yusufali*, (1920) 24 Bom. L. R. 1060, 1093 ; *Gul Md.* v. (*Mt.*) *Wazir B.*, [1901] 36 Punj. Rec. 191, 198, 201 (No. 60) : " All religions are on a level before the law " ; " There being no presumption that it is better for the child to be brought up as a Muhammadan rather than a Christian ; or *vice versa*." Compare *Thornton* v. *How*, (1862) 31 Beav. 14 ; *O'Hanalon* v. *Logue*, [1906] 1, L. R. 247, cited at length in *Jamshed* v. *Soonabai*, (1907) 33 Bom. 122, 205-211 = 10 Bom. L. R. 417 at p. 485. See s. 194A.

[29] *Sri Sunkur Bharti* v. *Sidha Lingaya Charanti*, (1843) 3 Moo. I. A. 196, 217-218.

§ 2.—CHOICE OF LAW.

Choice of law how made by the forum.

6A. (1) The question whether the rights of the parties must be governed by [any particular school [1] of] Muhammadan law or by some other system, depends primarily upon the legislative enactment constituting the Court that has to adjudicate upon the matter. *Semble,* in British India the Courts are required [2] to act as follows :

Legislative direction.

(*a*) where the particular transaction in regard to which the Court has to adjudicate, falls within the denomination of any matter governed by legislative enactments having territorial application,[4]—the law laid down in the said Acts (as being applicable to matters so denominated) must be applied ;

Shariat Act : custom barred.

(*b*)[3] under the Shariat Act, 1937, s. 2, notwithstanding any custom or usage to the contrary, in all questions (save questions relating to agricultural land) regarding—(i)[3] intestate succession, (ii) special property of females, [including personal property inherited or obtained under contract or gift, or any other provision of personal law],[3] (iii) marriage, (iv) dissolution of marriage, including talaq, ila, zihar, lian, khula and mubaraat, (v) maintenance, (vi) dower, (vii) guardianship, (viii) gifts, (ix) trusts and trust properties, and (x) wakfs (other than charities and charitable institutions and charitable and religious endowments),[5] the rule of decision in cases where

[1] Sect. 6A deals with cases where both parties are subject to same law ; s. 8 where personal law of parties is different. See also s. 6B.

[2] *Rajabai* v. *Ismail A.*, (1870) 7 Bom. H. C. R., (O.C.) 27.

[3] Neither the letters, nor the figures, nor [ ] are in the original Act, but are added to make the divisions of the section clear.

[4] E.g. Ind. Contr. Act, Trans. of Prop. Act, &c. Thus, if transaction conforms to definition of agreement for consideration laid down in Contract Act, then that Act will apply. On ORDINARY LAW see s. 1, *n.* Special Acts like BHAGDARI ACT may be applicable : *Ahmed Asmal* v. *Bai Bibi,* (1919) 44 Bom. 727. Much difficulty frequently results from Acts displacing parts of Muhammadan law being enacted without thought to frame-work in which they have to be set : cf. s. 215 ; *Aminabai* v. *Abasaheb,* (1930) 55 Bom. 401. *Mahomed Beg Amin* v. *Narayan Meghaji,* (1915) 40 Bom. 358, 363 (that absence of Regulations which alone permits Court to have recourse to law of defendant, 363, *l.* 24 ; law of defendant cannot justify application of special rule of Muhammadan law to cases of this kind, in which there are two defendants one Muslim, the other Hindu, latter being substantially interested in his own right : 368, *ll.* 1-6).

[5] These ten matters (i)—(x), are mentioned in s. 2. In addition to these 10, three matters—(xi) adoption, (xii) wills, (xiii) legacies—are mentioned in Shariat

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the parties are Muslims shall[6] be the Muslim personal law (Shariat);

Option to elect.

(*c*) some legislative enactments such as the Shariat Act, 1937, s. 3[7] and the Cutchhi Memons Act, 1920,[8] enable Muslims or special classes of persons, if they so desire, to be governed by the Muhammadan law;

Change of school.

(*d*) in some cases, the law does not prohibit a person to change his class,[9] or to elect to be governed by the tenets of a particular Sunni school;[10]

Act, s. 3 (see s. 6A(1)(*c*) of this work). These 3 matters may, if so desired by the party, be introduced into the Shariat Act, s. 2.

[6] The Shariat Act, 1937, does not provide when it is to come into effect: & unlike Cutchhi Memon Act X. of 1938, s. 3, it does not save rights or liabilities acquired or incurred before the commencement of the Act. *Amirbibi* v. *Azizabibi*, (1914) 39 Bom. 563 (*shall* refers to future rights only); & cf. s. 6A(3) & *n*.

[7] SHARIAT ACT, 1937: s. 3: (1) any person who satisfies the prescribed authority —(*a*) that he is a Muslim, (*b*) that he is competent to contract within meaning Ind. Contr. Act IX. of 1872, s. 11, (*c*) that he is resident of British India—may by declaration in prescribed form & filed before prescribed authority declare that he desires to obtain benefit of Act & thereafter provisions of s. 2 shall apply to the declarant & all his minor children & their descendants as if in addition to matters enumerated therein, adoption, wills & legacies were also specified. (2) When prescribed authority refuses to accept declaration under sub-s. (1) person desiring to make same may appeal to such officer as Provincial Government may by general or special order, appoint in this behalf & such officer may if he is satisfied that appellant is entitled to make declaration, order prescribed authority to accept same. The Shariat Act, s. 4 (which is identical with the Cutchhi Memons Act XLV. of 1920, s. 3, as amended by Act XXIV. of 1923 except that the second word in the latter is local instead of Provincial): "4(1) The Provincial Government may make rules to carry into effect the purposes of this Act. (2) In particular & without prejudice to the generality of the foregoing powers, such rules may provide for all or any of the following matters, namely:—(*a*) for prescribing the authority before whom & the form in which declarations under this Act shall be made; (b) for prescribing the fees to be paid for the filing of declarations & for the attendance at private residences of any person in the discharge of his duties under this Act & for prescribing the times at which such fees shall be payable & the manner in which they shall be levied. (3) Rules made under the provision of this section shall be published in the official gazette & shall thereupon have effect as if enacted in this act." Shariat Act, s. 5: "The District Judge may on petition made by a Muslim married woman, dissolve a marriage on any ground recognized by Muslim personal law (*Shariat*)": see s. 209B, below. Shariat Act: s. 6, provisions of the Acts & regulations mentioned below, shall be repealed in so far as they are inconsistent with this [Shariat] Act, namely—'(1) Bom. Reg. IV. of 1827, s. 26; (2) Madr. Civ. Courts Act, 1873, s. 16; (3) Beng. Agra & Assam Civ. Courts Act, 1887, s. 37; (4) Oudh Laws Act, 1876, s. 3; (5) Punjab Laws Act, 1872, s. 5; (6) Central Prov. Laws Act, 1873, s. 5; (7) Ajmere Laws Regul., 1877, s. 4.' The Shariat Act consists of 6 sections.

[8] CUTCHHI MEMONS ACT, XLVI. of 1920, s. 2, as amended by Cutchhi Memons (amendment) Act, XXXIV. of 1923, is as follows: s. 2(1) "Any person who satisfies the prescribed authority—(*a*), that he is a Cutchhi Memon & is the person whom he represents himself to be; (*b*) that he is competent to contract within the meaning of section 11 of the Indian Contract Act (IX. of 1872); & (*c*) that he is resident in British India, may by declaration in the prescribed form & filed before the prescribed authority declare that he desires to obtain the benefit of this Act, & thereafter the declarant and all his minor children & their descendants shall in matters of succession & inheritance be governed by the Muhammadan Law."

[9] These words are from *Abraham* v. *Abraham*, (1863) 9 Moo. I. A. 195, 244: See s. 9 "elected" *n*.

[10] See s. 9 "converted" *n*.

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(*e*) in all other cases the law by which the parties have been customarily[11] governing their own conduct, is generally selected by the Court as that which is most in accordance with justice, equity and good conscience.[12]

Custom.

(2) No principle is recognised by which the possessions of a deceased person may be distributed partly by one law and partly by another according to the locality of the possessions.[13]

lex loci.

(3) The law existing at the date when an action is commenced must decide the rights of the parties unless the Legislature expresses a clear intention to the contrary.[14]

Acts not retrospective.

Illustration.

A Memon died in Mombasa. The question arose whether his estate was governed by Muslim or Hindu law. The facts appearing (from the judgment) to have been proved were : (*a*) the deceased's father, with his wife and children, including the deceased, belonged to the Memon community of Cutch, who follow the Hindu and not Muhammadan law of succession ; (*b*) they migrated to, and settled in, Mombasa about half a century before the Judgment ; (*c*) at Mombasa, the succession to Muslims is, in general, governed by Muhammadan law, "although it would probably be open to immigrants to prove that they have brought with them and preserved a custom establishing a special law of succession ;"[15] (*d*) eleven cases were

Migration of families.

[11] See *Abdurahim Haji I. M.* v. *Halimabai*, (1915) 43 I. A. 35 = s. 6A *ill.* *Fatimabibi* v. *Adv. Gen.*, (1881) 6 Bom. 42, 51 (per West J. : general principle of public law of British India is that of supporting PRIVATE CUSTOMARY LAW of each of the principal classes except where it has been distinctly superseded by statutory rule : Charter of Supreme Court, ss. 29, 41 ; 2 Moo. I. A. at p. 423). *Ghulam Abbas Khan* v. *Amatul Fatma*, (1921) 48 I. A. 135 (OUDH.) (Where private customary law has been superseded only to some extent it will come into operation beyond the point where superseded). *Abdul Halim K.* v. *Saadat Ali K.*, (1932) 59 I. A. 202 (on difficulties that may arise). *Kunhambi* v. *Kalanthar*, (1914) 38 Mad. 1052 : (law may not, in its origin, be based on custom. Main portion of Muhammadan law promulgated by Prophet, & did not arise by spontaneous adoption ; but force of Muhammadan law in British India derived from fact that large numbers of people have been governing their conduct in accordance with it ; & that legislature requires it to be enforced in regard to people who have been following it.)

[12] *Rajabai* v. *Ismail Ahmed*, (1870) 7 Bom. H. C. R. (O.C.) 27. See *Muhammad Ismail* v. *Lala Sheo Mukh*, (1913) 17 C. W. N. 97 = 15 Bom. L. R. 760 (P.C.) ; *Akbarally* v. *Mahomedally*, (1931) 57 Bom. 551. See s. 1A.

[13] *Mahomed Haji Abu* v. *Khatubai*, (1918) 43 Bom. 647, 677, (per Scott C. J.) : upheld in *Khatubai* v. *Mahomed*, (1922) 50 I. A. 108. Effect of DOMICILE : *Khambatta* v. *K.*, (1934) 59 Bom. 278.

[14] *Delhi Cloth &c. Co.* v. *Income-tax Commr.*, (1927) 54 I. A. 421, 425 ; *Colonial Sugar &c. Co.* v. *Irving*, [1905] A. C. 369 ; *Tarak Nath* v. *Panchanan*, [1937] AIR (CAL.) 150 = 41 C. W. N. 382, citing *Young* v. *Hughes*, (1858) 4 H. & N. 76 ; *Moon* v. *Darden*, (1848) 2 Ex. 22 ; *In re Joseph Suche & Co.*, (1875) 1 Ch. D. 48. *Mohammed Abdussmad* v. *Kurban Khan*, 31 I. A. 30, 37 (OUDH) : ("It is not however in accordance with sound principles of interpreting statutes to give them a retrospective effect" per Lord Lindley) ; *Ram Sahai Singh* v. *Debi Din*, (1932) 54 All. 482, 489 ; cf. s. 490A(1) *nn.* ; Maxwell, *Interpr. of Stat.* (5th ed.) 361.

[15] A Hindu family MIGRATED many generations ago from Mithila (where Mitakshara law prevails) to Bengal (where Dayabhag law prevails) ; family continued joint, retaining its customs, usages, religious observances, according to Mitakshara.

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proved of succession among members of the Memon community at Mombasa according to Muhammadan law ; (*e*) the only documentary evidence also was in accordance with this view. On the other hand (*f*) in a few cases distribution was proved in accordance with Hindu law ; also (*g*) a custom, or at least a practice, more nearly resembling the rule obtaining among Hindus, than any regulating such cases among Muslims [but see s. 364A], was proved allowing ornaments given to the wife in the husband's lifetime to remain with the widow only during her life, or until re-marriage. *Held*, that the question was simply one of the proper inference to be drawn from circumstances. There was no distinctive political or social organisation established by Memons for themselves, nothing to show that they, as a body, ever claimed to be outside the system of law which naturally follows from their religion : hence the presumption may easily be drawn that they had accepted the law of the people they had joined in another country,—the case being different from that of a Hindu family migrating from one part of India to another. "The analogy is that of a change of domicile on settling in a new country, rather than the analogy of a change of custom on migration within India." Hence, the trial Judge was wrong in throwing the burden of proof on the respondent to show that (i) there was a Muhammadan custom applying to Memons in Mombasa, (ii) this custom was ancient and invariable, and (iii) it had superseded the custom which governed the Cutch Memons in such cases before migration. The true inference to be drawn from the facts was that the custom of Hindu succession had ceased to be generally observed by the Memons in Mombasa.[16]

Question simply of proper inference.

Law delivered to the Courts.

The question whether any issue should be determined in accordance with a rule of Muhammadan or other law, depends (in the words of Sir E. Perry Chief Justice)[17] upon the law delivered to the Court by the Sovereign. A preliminary distinction is, however, important : (i) It is not competent to parties to create as to property any new law to regulate the succession to it ab intestato ;[18] but (ii) where there are different laws as to property applying to different classes, parties may be considered to have the law as to property (whether in respect of succession ab intestato or in other respects) of the class to which they belong ;[18] again (iii) no rule as to the use and enjoyment of property which a man's ancestors may voluntarily have imposed on themselves can be of compulsory obligation on a descendant of theirs, acquiring his own wealth.[18]

Novel law of succession cannot be created.

Alternative laws may be open.

Mitakshara not Dayabhaga held to govern : *Soorendranath* v. (*Mt.*) *Heeramonee*, (1868) 12 Moo. I. A. 81. "When any family migrates to another province it carries its own law with it, unless it can be shown that he has renounced his original law, in favour of the law of the place to which he has migrated."—*Balwant Rao* v. *Baji Rao*, (1920) 47 I. A. 213, 219.

[16] *Abdurahim* v. *Halimabai*, (1915) 43 I. A. 35 (East Africa) (observations on EMIGRATION : CONTACT WITH OTHER RELIGIONS : formation of new CASTE : INTER-MARRIAGE : change of DOMICILE : CHANGE OF CUSTOM) ; *Ma Yait* v. *Maung C. M.*, (1921) 48 I. A. 553, 563, 564 (continuity of sect : migration ; new occupation). See *Muhammad Ismail K.* v. *Lala Sheo Mukh*, (1913) 17 C. W. N. 97.

[17] *Khojas & Memons' Case* : *Hirbae* v. *Sonabae*, (1847) Perr. Or. Cas, 110, 122.

[18] *Abraham* v. *Abraham*, (1863) 9 Moo. I. A. 195, 242, 243 ; *Tagore case* I. A. SUPP. VOL. 47, 64, 66 (cited s. 1A, com. *n.* 27).

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The law may be delivered by the Sovereign, either : (1) when the court is constituted ; certain general directions being given ; e.g. in the Letters Patent of the High Courts, or the Civil Courts Acts ; or (2) when any Act is passed, the legislature may provide for its extent with reference to the occasions, or circumstances, or transactions, or as between parties particularized.

Principles on which choice of law made.

The bases on which these directions of the legislature are given, or the principles in accordance with which the Sovereign delivers one system of law or another for being enforced, depend on the following, amongst other considerations :—(1) The legal result of certain transactions is to be determined by the courts according to rules enunciated by the legislature itself, irrespective of the intention of the parties to the transaction, and irrespective of the place where the transaction has taken place ; (2) in regard to other matters, the law is fixed with reference not only to the nature of the transaction, but to the locality in which it takes place,—lex loci ;[19] (3) in regard to still other matters the law is determined with reference to the persons concerned in the transaction,—lex personæ or the personal law.

Operation of law in British India.

Sometimes it is not easy to decide how the law operates on a particular transaction, or state of facts. From a reference, however, to the Acts of the legislature, it would seem that the course to be followed in British India in the majority of cases is to turn to the real nature of the transaction, irrespective of the disguises consciously or unconsciously imposed on it[20] by the parties or circumstances. The rule of decision applicable to the transaction as it is in reality and in substance, must then be applied to it. Subject to an enactment requiring a fixed rule of decision to be followed between all persons, the Muhammadan law and usage will prevail where the parties are Muslims ; either because the subject is specified, as being governed by the Muhammadan law, or under the rule of justice, equity and good conscience.[21] It may, however, still be of importance to determine whether a particular transaction is to be classed under one head or the other, in order to determine whether it was intended to be included under one legislative provision or under another. Moreover the Shariat Act, 1937 excludes custom.

Hanafi, Shafii

6B. The Shafii school is a substantive system on a footing of equality with, not a subordinate offshoot from, the Hanafi school, nor a divergence or variation from the ordinary Muhammadan law.[22] The same holds true of the other ancient schools such as the Maliki and Hanbali schools of Sunni law, and the Ithna Ashari and Ismaili schools of Shia law.[23]

Maliki Hanbali

Ithna Ashari Ismaili schools.

19 *Khambatta* v. *K.*, (1934) 59 Bom. 278.

20 Cf. *Rajabai* v. *Ismail Ahmed*, (1870) 7 Bom. H. C. R. (O.C.) 27.

21 When once a person has changed his religion & CHANGED his PERSONAL LAW that law will govern the rights of succession of his children : *Mitar Sen* v. *Maqbul Hasan*, (1930) 57 I. A. 313, 317.

22 *Md. Casim C.* v. *Zahiroodin*, (1902) 5 Bom. L. R. 8, 16. See s. 7A.

23 *Akbarally* v. *Mahomedally*, (1931) 57 Bom. 551, 562. See ss. 7A, 559.

Muslim parties : Muhammadan law applicable.

7. Where both the parties to a transaction are Muslims [24] of the same school, the Muhammadan law of the particular school [25] to which they belong will govern the matters hereinbefore mentioned.[26]

Inheritance.

See s. 8, com. Every school of Islam has its texts giving authoritative expositions.[23] The claimants to inheritance may be of a different religion from the deceased, but the law governing the succession will be that of the school to which the deceased belonged.[27] Rather difficult questions arise when the parties, or some of them, have changed their religion : s. 9, com.

Law of adherents of a recognized school.

7A. A community of Muslims consisting of adherents of a school possessing a substantive system such as is referred to in s. 6B, will be presumed to have adopted the law of that school : such adoption need not therefore be proved in the same way as an exceptional custom varying the general law. If a member of such a community asserts that the law applicable is different, the burden of proving the assertion as a custom, will be on him : he must adduce evidence of the class requisite for proving that the law as established by the authorities has become obsolete or been superseded.[28]

Law becoming obsolete.

[24] Muslim, either from BIRTH or by subsequent CONVERSION : *Abraham* v. *Abraham* (1863) 9 Moo. I. A. 195, 239 ; *Jawala* v. *Dharam*, (1866) 10 Moo. I. A. 511, 537-539 ; *Raj Bahadur* v. *Bishen*, (1882) 4 All. 343, 350 ; *Khambatta* v. *K.*, (1934) 59 Bom. 278 ; *Mitar* v. *Maqbul*, (1930) 57 I. A. 313, 317 ; *Abdul Aziz* v. *Mahbub*, (1936) 34 All. L. J. 488 ; cf. s. 1A.

[25] (*Rajah*) *Deedar Hn.* v. *Ranee Zuhoor*, (1841) 2 Moo. I. A. 411 ; *Hayat N.* v. *Md. A. K.*, (1890) 17 I. A. 73, 78 ; *Ali Husain* v. *Fazal Hn.*, (1914) 36 All. 431 ; *Akbarally* v. *Mahomedally*, (1931) 57 Bom. 551.

[26] Presumption that they are governed by Muhammadan law : *Ibrahim R.* v. *Shaikh Ibrahim*, (1922) 49 I. A. 119 ; *Khatubai* v. *Mahomed Haji Abu*, (1922) 50 I. A. 108, 111. Subject to CUSTOMS : see s. 10.

[27] See s. 559, *Balwant Rao* v. *Baji Rao*, (1920) 47 I. A. 213, 219 ; *Nancy alias Zohuron* v. *Burgess*, [1866] 1 W. R. 271 ; *Hayatun N.* v. *Md. A. K.*, (1890) 17 I. A. 73 = 12 All. 200 (single issue was whether deceased lady was Sunni or Shia : 17 I. A. 74 ; onus thrown on appellants to show that she was Shia as they sought to eject respondent from possession, having been duly registered as owner in books of revenue authorities (p. 75); she visited Sunni shrine in company of Sunni *pir* or spiritual guide, whose office & functions are unknown among Shias (p. 76); she observed during widowhood 11th day of each month & held *maulud sharif* meetings in her house, these being admittedly Sunni rites (p. 77); *musha* doctrine was applied in litigation 1805-1870 between her grandfather & his brother (p. 78); succession to her father's estate treated as that of Sunni (p. 79). *Held* that her father was Sunni, & that " begets a PRESUMPTION that his DAUGHTER also was a Sunni (p. 80); during whole period of married life her outward acts & observances amounted to profession of Shia faith (p. 81). " What the just inference from these facts would have been, had she died on the same day as her husband, it is not necessary to consider ; " per Lord Watson). *Sharof* v. *Shafiaboo*, (1935) 71 M. L. J. 247 (question whether deceased Ismaili or Ithna Ashari Shia); *Abdulsakur* v. *Abubakkar*, (1930) 54 Bom. 358, 362 (Cutchhi Memon made declaration under Cutchhi Memon Act XLVI. of 1920 : he remained heir to another Cutchhi Memon who did not make such declaration : declarant heir to non-declarant : not *vice versa*. cf. *Appakoth Kombi Avulla* v. *Kottayi Matha*, (1934) 68 M. L. J. 289.

[28] *Mahomed Cassim C.* v. *Zahiroodin*, (1902) 5 Bom. L. R. 8, 16 ; *Akbarally*

When only one party Muslim.

8. Where the parties are not both Muslims (of the same school), the High Courts and the Courts of Burma are required to determine the rights of the parties in accordance with the law of the defendant ; and the other Courts to act according to justice, equity, and good conscience.[29]

Examples of defendant's law prevailing.

If a Shia sues his wife who is a Sunni for restitution of conjugal rights, the wife may under this rule obviously plead a defence valid only in Sunni law.[30] Where a Shia wife sued her Sunni husband for dissolution of marriage on the ground of the husband having accused her of adultery, the law of the defendant's school was applied,[31] also where she defended a suit for restitution.[32] A more complex case arose where the wife's defence to a suit for restitution of conjugal rights was that the marriage was dissolved because she had renounced Islam, having been converted to Christianity. The rule that the defendant's law should be enforced was held not applicable by the Court. It was decided that by the plaintiff's own law (he was a Muslim) the marriage was dissolved, owing to the wife's apostasy, and that though St. Paul (as cited by Elsmie, J.) says : " The woman which hath a husband that believeth not, if he be pleased to dwell with her, let her not leave him " (I. Cor. vii. 13), and in a sense the wife was taking advantage of her own wrong, yet that the plaintiff could not have custody of a woman as his wife who was not such according to any law binding upon him.[33] Similar difficulties may arise in the unlikely event of the maintenance of collaterals under s. 335, coming before the Courts.

Explanations and limitations of rule :

The decisions point towards various explanations and limitations of the rule : (*a*) Its application has apparently been confined to cases where there have been dealings between the parties to the suit, and the suit brought in respect of them. In one case the plaintiff's title depended on a gift of lands. The gift was originally between Muslims, and though the donor[34] afterwards dealt with non-Muslims who were not subject to Muhammadan law, the plaintiff

(*a*) Dealings between parties,

v. *Mahomedally*, (1931) 57 Bom. 551. In *Maula Bakhsh* v. *Amiruddin*, (1913) 1 Lah. 324, member of " a peculiar sect called *Ahl-i-Koran* or *Chakralvi* made *wakf* of property for mosque limited to use of his own sect : *wakif* (settlor) *held* to be " as good a Muhammadan as any one could be," and " bound by the law applicable to Muhammadans generally " : accordingly *wakf* held good, but condition that it was for benefit of his own community held void. The view may no doubt have been taken that law of *Ahl-i-Koran* governed the case, but Courts evince an increasing desire to make law uniform & discourage minute distinctions & divisions : see s. 11(2).

29 *Bikani Mia* v. *Shuk Lal Poddar*, (1892) 20 Cal. 116, 179 ; *Budamsa Rowther* v. *Fatima Bi*, (1914) 26 Mad. L. J. 260. Courts tend to follow justice, equity & good conscience : s. 8, com. ; *Muhammad Raza* v. *Abbas*, (1932) 59 I. A. 236, 245.

30 *Nasrat H.* v. *Hamidan*, (1882) 4 All. 205 (not stated that wife given benefit of her own law because she was defendant).

31 (*Mt.*) *Fakhr Jahan* v. *Md. Hamidullah*, (1928) 4 Luck. 168, 173.

32 *Aziz Bano* v. *Muhammad Ibrahim Husain*, (1935) 47 All. 823 (personal law of defendant applied).

33 (*Mt.*) *Khan B.* v. *Pir Shah*, [1884] 19 Punj. Rec. 354 (No. 132).

34 Nawab of Carnatic was the donor.

SECTION 8.

was no party to any such dealings. It was held that the plaintiff could not "by the donor's acts be rendered subject (as regards her property) to any other than the Muhammadan law." [35] In the result, the plaintiff's law was applied, and not the defendant's. (*b*) "The concluding words of the section," says Garth, C. J., "it is clear,...do not mean this that when a Hindu purchases land from a European, in which the vendor has only a limited interest, the Hindu purchaser is to be in any better position than a European purchaser would be;"[36] and Pontifex, J. says that the true construction of the section must confine the words "their inheritance and succession" to questions relating to inheritance and succession by the defendants. (*c*) These dicta were referred to with approval by Westropp, C. J.,[37] and the view,[38] that the validity of a mortgage by a follower of Islam to a Hindu mortgagee, "if the latter be the defendant, should be tested by Hindu law," was held open to doubt,—and was characterized as "a proposition which seems to involve a serious misapprehension and misapplication of Bombay Regulation IV. of 1827, s. 26." (*d*) Mahmood J., held that the word parties, "as used in the Bengal Civil Courts Act, s. 24, does not mean parties to an action, but must be interpreted with reference to the inception of the right to be adjudicated upon." [39] But (*e*) the Calcutta High Court [40] doubted whether on a Hindu creditor suing the heirs of a Muslim debtor, the Muslim law applied; and (*f*) in Bombay [41] the rule of Hindu law was applied so long as the debtor was a Hindu, and the Muslim law when the debt was transferred to a Muslim. The case last cited arose out of a suit for redemption; the original mortgagor was a Hindu who had transferred the equity of redemption to a Muslim (the plaintiff). The Court held (over-ruling the contention of both parties) (1) that the Hindu law of damdupat should be given effect to, though both parties to the suit were Muslims; (2) that the rule applied only so long as the debtor was a Hindu, but not after the equity of redemption was assigned to the plaintiff. See the cases of converts: s. 9. The case of succession is very different. There the estate devolves according to the law by which the deceased is governed. See ss. 1A, 6A, comm., s. 559.

(*b*) succession by the defendant,

(*c*) Bom. Regul. IV. of 1827, s. 26,

(*d*) parties at inception of right,

(*e*) as between debtors and creditors,

(*f*) damdupat,

(*g*) succession.

Proof of being Muslim,—

9. Profession [1] of the faith of Islam (i.e. of a belief in the unity of God and the mission of Muhammad as a Prophet

[35] *Azimunnisa* v. *Clement Dale*, (1868) 6 Mad. H. C. R., 454, 474-475.

[36] *Sarkes* v. *Prosonomoyee Dossee*, (1881) 6 Cal. 794, 806, 808.

[37] *Lukshmandas* v. *Dasrat*, (1880) 6 Bom. 168, (F. B.) Westropp C. J. Melville & Kemball, JJ.

[38] *Goverdhan* v. *Sakharam*, (1861) 8 Harrington, S. D. A. Rep. 189.

[39] *Gobind D.* v. *Inayatullah*, (1885) 7 All. 775, 793 (F. B.).

[40] *Bussuntaram M.* v. *Kamaluddin A.*, (1885) 11 Cal. 421.

[41] *Ali Sahib* v. *Shabji*, (1895) 21 Bom. 85 (question alluded to but not decided); *Sitaram* v. *Sayad Inayatkhan*, (1917) 11 Bom. 636, 650; *Abdool Razack* v. *Aga Mahomed J. B.*, (1894) 21 I. A. 56, 64.

[1] See s. 7, com. Wakf Act VI. of 1913 speaks of (1) "persons professing the Mussulman faith," (2) "following the Mussulman faith," & (3) "who conform to tenets or doctrines of Hanafi school."

or messenger of God)[2] are necessary and sufficient for establishing that the person so professing is a Muslim.[3] Where a person professes or is alleged to belong to, or to have been converted[4] to, or (being a Sunni) to have elected[5] to belong to, a particular school or community,[6]—the question will be decided with reference to the tenets, ways, and (in cases where, or matters in which, customs are enforceable)[7] to the customs, of the particular school or community : provided, that (1) where such person's avowed belief and conduct in the past do not conform to those of any recognized school of Islam,[8] the Court will apply that law to him which will be in accordance with justice, equity, and good conscience ;[9] and (2) the Court will not permit anyone to commit a fraud upon the law by pretending to be a convert to Islam in order to elude the personal law by which he is bound.[10]

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—of particular school.

Anomalous cases.

Fraud on law.

Questions have arisen whether a particular person is to be classed as a Muslim for the purpose of the law to be applied to him.[11] (1) Where

[2] *Narantakath* v. *Parakkal*, (1922) 45 Mad. 987 (essential doctrine of Islam : unity of God & Muhammad's prophethood) ; *Q. E.* v. *Ramzan*, (1885) 7 All. 461 ; *Atta Ullah* v. *Azim Ullah*, (1890) 12 All. 494.

[3] *Jivan Khan* v. *Habib*, (1933) 14 Lah. 518, 523 ; *Narantakath* v. *Parakkal*, (1922) 45 Mad. 986 : Aghnides, *Intro. Mdan. Law*, 135, sq. (discussion based on ancient texts).

[4] Cf. " The law has not, so far as their Lordships can see, prohibited a Christian convert from changing his class. The inconvenience resulting from a change of succession consequent on a change of class is no greater than that which often results from a change of DOMICILE." —*Abraham* v. *Abraham*, (1863) 9 Moo. I. A. 195, 244 ; cf. also *Ma Yait* v. *Maung Chit Maung*, (1921) 48 I. A. 553, 563, 564, (on immigration, inter-marriage & new occupations).

[5] A Muslim belonging to any of four schools of Sunni law (Hanafi, Shafii, Maliki, or Hanbali) may elect to belong to any of the other three schools he pleases, & legality of his subsequent acts will be governed by tenets of Imam whose follower he may have become : *Muhammad Ibrahim* v. *Ghulam Ahmad*, (1864) 1 Bom. H. C. R. 236, 239, 245, 247, 249 ; *Fazil Karim* v. *Maula*, (1891) 18 Cal. 448, 459, 461 (P. C.) See *Najbunnissa* v. *Mahomed Shafi* (unreported) noted in s. 210, com. This right to elect to belong to any school has come before Courts only with reference to Sunnis : but it is submitted there is no difficulty in electing to belong to any school of Islam.

[6] *Abdul Hamid* v. *Abdul Aziz*, (1934) 13 Rang. 27 : a COMMUNITY contains certain suggestion of social unity, e.g., family, language, clothes & manners of living : its members have certain circumstances of nativity, religion or pursuit common to them, but not shared by others among whom they live.

[7] See the Shariat Act, 1937, s. 2 (which is reproduced in s. 6A(2), above.

[8] *Narantakath* v. *Parakkal*, (1922) 45 Mad. 986 (Ahmediyans form community of Muslims, notwithstanding differences on matters other than unity of God & Muhammad's prophethood) ; *Hakim Khalil* v. *Malik Israfi*, (1917) 2 Pat. L. J. 108 (do.).

[9] See *Raj Bahadur* v. *Bishen Dayal*, (1882) 4 All. 343.

[10] Cf. *Khambatta* v. *K.*, (1934) 59 Bom. 278.

[11] Cf. (*Bhaiya*) *Sher Bahadur* v. *Bhaiya Ganga Bakhsh Singh*, (1913) 41 I. A. 1 (OUDH) (effect of Hindu father treating illegitimate son by Muslim woman as high

SECTION 9.
1. MUSLIMS BY BIRTH.

a person is born a Muslim he would be recognized as such,[12] the burden of proof being on those who allege that such a person does not follow Islam.[12] (2) Where it is not alleged, nor shown, that the parties are Shias, there is a presumption that they are Sunnis, "to which sect the great majority of the Muhammadans of this country belong: as has been pointed out by Baillie in the introduction to his Digest of the Imameea Law."[13] (3) The Sunnis may become adherents of any one of the four schools of Sunni law at their choice, and an adherent of one school may transfer his allegiance to another, by a mere declaration to that effect.[14]

School of Islam to which parties belong.

2. IS BELIEF IN ISLAM REQUIRED?

In a suit for partition, the issue was whether the family to which the parties belonged, consisted of Hindus or Muslims. The Court held that they were neither the one nor the other; that to be recognized as one or the other under s. 24 of Act VI. of 1871, not only must one call oneself a Hindu or Muslim, but must be an orthodox believer in, and must follow and observe, that religion.[15] "That is to say, their status before the law depends absolutely on their religious belief, and this in the strict sense of the term." This proposition must (*semble*) refer not to the state of the mind itself, but in so far as that state is externally manifested. For, as Brian, C.J., said in 1478, "It is trite law that the thought of man is not triable, for even the devil himself doth not know what the thought of man is"; [16] and another old authority has said, "The intent of man is uncertain, and a man should plead such matter as is, or may be, known to the jury."[17] It is difficult therefore to give any force to the epithet "orthodox" in the ruling cited.[15] The Courts will decline to pronounce any particular version of a religion the true or orthodox one.[18] So the Privy Council held that for determining whether the marriage of an alleged convert with a Muslim is valid, the question of conversion must be decided not by an enquiry into the state of mind of the alleged convert, but by an enquiry into the conformity of her acts to an external standard, viz. to the conduct that may

Thought of man not triable.

caste Hindu, on construction of father's will); *Jivan Khan* v. *Habib*, (1933) 14 Lah. 518; *Narantakath* v. *Parakkal*, (1922) 45 Mad. 986.

[12] For an instance of "a Muhammadan family that in matters of WORSHIP had adopted the HINDU religion," (incredible as it may sound) "but which was governed by Muhammadan law," see *Azima B.* v. *Munshi Shamalanand*, (1912) 40 Cal. 378 (P.C.), Syed Saheb Ameer Ali was party to this decision; *Bhagwan Singh* v. *Drigbijai*, (1930) 6 Luck. 487 (propositus & his ancestors for four generations Muslims: though propositus observed certain HINDU CEREMONIES: held to be Muslims); *Bhagwan Koer* v. *J. C. Bose*, (1903) 31 Cal. 11 (P.C.); *Jiwan K.* v. *Habib*, (1933) 14 Lah. 518.

[13] *Bafatun* v. *Bilaiti Khanum*, (1903) 30 Cal. 683, 686; *Akbarally* v. *Mahomedally*, (1931) 57 Bom. 551; (*Mt.*) *Iqbal Begam* v. (*Mt.*) *Syed B.*, [1933] AIR, Lah. 80.

[14] *Muhammad Ibrahim* v. *Gulam Ahmed*, (1864) 1 Bom. H. C. R. 236; cf. *Fazil Karim* v. *Maula Buksh*, (1891) 18 Cal. 448, 459, 461 (P.C.); see *Najbunnissa* v. *Mahomed Shafi* (*unreported*) noted s. 210.

[15] *Raj Bahadur* v. *Bishen Dayal*, (1882) 4 All. 343, 347 sqq.; see also *Assan* v. *Pathamma*, (1897) 22 Mad. 494, 504, 506; *Kunhimbi* v. *Kandy*, (1930) 27 Mad. 77; *Azima B.* v. *Munshi Shamalanand*, (1912) 40 Cal. 378 (P.C.). Similar difficulties might have been encountered by Sir J. Arnould in *Agha Khan Case*, (1866) 12 Bom. H. C. R. 323, had evidence as to origin of Khojas been less conclusive.

[16] Cited *Brogden* v. *Metrop. Ry. Co.*, (1877) 2 A. C. 666, 692, (Lord Blackburn)

[17] (1465) Y. B. Ed. IV. 89, quoted Holland, *Jurispr.*, (7th Ed. 105, *n.*)

[18] See s. 6, *n.* on FREEDOM OF RELIGION.

reasonably be expected from a person of her alleged religion. The lower Court's ruling was held to be liable to exception, inasmuch as no court could test or gauge the sincerity of religious belief. In the cases of an alien in belief embracing Islam, profession, with or without conversion, is necessary and sufficient to remove the bar to marriage arising from unbelief or difference of creed.[19]

SECTION 9. Profession of Islam enough.

Circumcision[20] may be an important test whether a person considers himself, and desires to be recognized, as a Muslim—but the question of his religion must be decided with reference to all the tenets, beliefs, and customs of the particular school to which he professes to belong ; and by testing the allegation in the light of the conduct of the alleged convert, and other circumstances.[21]

Circumcision as test of Islam.

Where, on the other hand, it is shown that the parties to the suit are pretending to be converts to Islam, in order to elude the personal law applicable to them, the courts will not allow the pretended conversion to affect the rights and liabilities of the pretended. converts.[21] See s. 195 and com.

3. PRETENDED CONVERSION.

Will conversion affect rights that had their inception previous to the change of religion?—see s. 194A. "Whether a change of religion, made honestly, after marriage, with the assent of both spouses, without any intent to commit a fraud upon the law, will have the effect of altering rights incidental to the marriage is a question of importance, and it may be, of some nicety."[22] The difficulty lies in applying the principles[23] to the facts of any particular case, especially with reference to a transaction like marriage with its far-reaching consequences.[24]

4. HONESTY CONVERSION. Effects of—on rights already accrued.

The personal law is changed when the person changes his religion and the new law will govern the rights of succession of his children, though it may work hardly to some extent upon expectant heirs.[25] A Muslim married a Christian woman in Christian form : she adopted Islam : talaq was held applicable and the marriage held dissolved on talaq being pronounced.[26]

Change of personal law,—succession.

talaq.

[19] *Abdul Razak* v. *Mahomed Jaffar B.*, (1894) 21 I. A. 55 (No evidence tending to show that alleged convert made any PROFESSION OF ISLAM : "she said she knew nothing about the Muhammadan religion ; all her life she lived & worshipped as a Burmese," 21 I. A. 64 : she was not allowed to go to mosque, her child not brought up as Muslim : held she was not Muslim) : (*Mt.*) *Hyatun-N.* v. *Sayyid Md. A. K.*, (1890) 17 I. A. 73, 81 noted s. 7, com., p. 52, *n.* 27.

[20] *Sahebzadee B.* v. (*Mirza*) *Himmut B.*, (1869) 12 W. R. 512 (perhaps went too far in implying that want of CIRCUMCISION was necessarily conclusive : on circumcision, see Hughes, *Dict. of Isl. sub verb.* p. 57. Court following Bail. II. 265, gave benefit of law to plaintiff, considering him Muslim). Bail. II. 265, deals with "impediment of infidelity," & lays down that—in considering whether an infant (who cannot declare or choose his religion) should be excluded from inheritance as infidel,—"the construction of the law is IN FAVOUR OF ISLAM." The provision disentitling non-Muslims from inheriting, would be subject to Caste Disab. Rem. Act, XXI. of 1850 : s. 1A, above.

[21] *Skinner* v. *Orde*, (1871) 14 Moo. I. A. 309 ; *Skinner* v. *Skinner*, (1897) 25 Cal. 537, 546 = 25 I. A. 34 ; *Re Ram Kumari*, (1891) 18 Cal. 264.

[22] *Skinner* v. *Skinner*, (1897) 25 Cal. 537, 546 = 25 I. A. 34.

[23] Principles enunciated in *Govind Dayal* v. *Inayatulla*, (1885) 7 All. 775 ; *Ali* v. *Shabji*, (1895) 21 Bom. 85.

[24] See, e.g. *Zuburdust K. & wife*, (1870) 2 N. W. P. 370, referred to in com.

[25] *Mitar* v. *Maqbul*, (1930) 57 I. A. 313, 317 (*ll.* 27-29) ; *Chidambaram* v. *Ma Nyein Me*, (1928) 6 Rang. 243 ; *Bhagwan Singh* v. *Drigjibai*, (1930) 6 Luck. 487.

[26] *Khambatta* v. *K.*, (1934) 59 Bom. 278 affirming 36 Bom. L. R. 11.

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5. CONVERTS AND CHOICE OF LAW.

The following propositions were laid down by the Bombay High Court,[27] as governing converts,—(1) Muhammadan law generally governs converts to that faith from the Hindu religion.[28] (2) A well-established custom of such converts, following the Hindu law of inheritance, would over-ride the general presumption. (3) The custom should, however, be confined strictly to cases of succession and inheritance. (4) The burden of proof lies on the party who alleges a special custom, at variance with the general Hindu law applicable to these communities.

CUSTOM.

Propositions 2-4 show how the discussion slides into contact with the law relating to the proof and enforceability of custom : see s. 10. It does not depend upon the leanings of individual judges. Judges who stood out against a wholesale application of non-Muslim law without proof of custom were instrumental in a clearer perception of this aspect : though, as s. 10, com. shows, even now—in spite of decisions by the highest tribunal—there is great misapprehension on the subject.

6. RETENTION BY CUSTOM CONVERTS ON—

The third proposition above, confines the scope of custom strictly to matters of succession and inheritance,—(1) As to gifts, Tyabji, J., has said,[29] " inasmuch as no authority [29] has been cited in support of the proposition that Khojas, in the cases of gifts, are governed by Hindu law, I am not disposed to apply the Hindu law to Khojas, more than in decided cases."

1. Gifts.

2. Adoption.

(2) The law of adoption is not a part of the law of inheritance or succession ; the presumption in the case of converts being that they have abandoned their original law, a convert to Islam alleging the retention of the Hindu law of adoption, must prove it.[30]

3. Joint family.

(3) The Hindu law of joint family firms has been applied to Muslims in Bombay.[31] But Beaman, J., strongly protested : " I would not extend the Hindu law of the joint family one inch further than the authorities [29] compel me.[32]

4. Family custom.

(4) In the case of a Muslim family if a custom governs the succession to ancestral estate, the presumption is that it attaches also to the personal acquisition of the last owner left by him on his death ; and it is for the person who asserts that these properties follow a line of devolution different from that of the ancestral estate, to establish it.[33] But two instances of division in accordance with Muhammadan law (and not the family custom) may be sufficient to rebut the presumption that the self-acquired properties are also governed by the custom.[34]

5. Widow's estate.

(5) A Hindu widow was governed by a custom inflicting, on remarriage, forfeiture of the

[27] *Bai Baiji* v. *Bai Suntok*, (1894) 20 Bom. 53, 57 ; approved 23 Bom. 539.

[28] *Budamsa Rawther* v. *Fatma Bi*, (1914) 26 Mad. L. J. 260 = [1914] Mad. W. N. 278 = 15 Mad. L. T. 107.

[29] *Moosabhai* v. *Yacoobbhai*, (1904) 29 Bom. 267, 276. *Semble*, " authority " must here be read in wider sense including " proof of custom."

[30] *Bai Maohhbai* v. *Bai Hirabai*, (1911) 32 Bom. 264 (Chandravarkar J.). See ss. 7A, 218.

[31] *In re Haroon*, (1894) 14 Bom. 189 (Sargeant, C. J. & Scott, J.); *Haji Noor Md.* v. *Macleod*, (1907) 9 Bom. L. R. 274 (Russell, J.).

[32] *Jan Mahomed* v. *Datu J.*, (1913) 38 Bom. 449, 550.

[33] *Murtuza Hus. Kh.* v. *Md. Yasin*, (1916) 43 I. A. 269, 274, ff., 282 ; *Mohammad Sadiq* v. *Fakhr J.*, (1931) 59 I. A. 1, 9.

[34] *Mohammad Sadiq* v. *Fakhr, J.*, (1931) 59 I. A. 1, 9.

Hindu widow's estate in her deceased husband's property. She adopted Islam, re-married, and continued in possession for over 12 years of her deceased Hindu husband's property. Held : there being no change of character in her possession, by adverse possession she perfected her title only to a widow's estate, and the reversioners of her Hindu husband were entitled to the property.[35] See s. 6.[36] SECTION 9.

7. CONVERSION FROM ISLAM Customs altering Muhammadan law of,—

In the case of conversion from Islam to another religion, again, difficult questions may arise : (*a*) A Muslim and his wife both became converts to Christianity : the husband afterwards applied for divorce under the Divorce Act IV. of 1869 : the Court held[37] that he could not do so, as the Act applied only to monogamous marriages ; and that an application for restitution of conjugal rights would have been similarly dismissed, as the woman had lost her status as a Muslim wife by her conversion.[38] (*b*) A Hindu woman, after having married in accordance with Hindu law, adopted Islam : it was held that she could not marry a Muslim husband during the life-time of her Hindu husband.[39] (*c*) A Bill purporting to consolidate Muslim law on Dissolution of Marriage, and the effects on marriage of apostacy by a married Muslim woman, has been introduced (1938) in the Central Legislature. The Bill, cl. 5, provides that the conversion of a married woman to a faith other than Islam shall not by itself operate to dissolve her marriage.[40]

Dissolution Marriage Bill.

Wife's apostacy effect. on marriage.

10. (1) The Shariat Act XXVI. of 1937 provides that on and after 7 Oct. 1937, the rule of decision in all questions (save questions relating to agricultural land) having reference to the ten matters enumerated in the Act, shall, when the parties are Muslims, be the Muslim personal law (shariat), notwithstanding any custom or usage to the contrary. The Cutchhi Memons Act, X. of 1938, provides that on and after 1 Nov. 1938, all Cutchhi Memons shall in matters of succession and inheritance be governed by the Muhammadan law, but nothing in the said Act affects any right or liability

Shariat Act. Matters excluded from operation of custom.

35 See *Bhagwan* v. *Drigbijai*, (1930) 6 Luck. 487, noted above p. 56, *n.* 12.

36 *Parbati* v. *Ram Prasad*, (1931) 7 Luck. 320 ; *sed quære* ; that case purports to follow *Lajwanti* v. *Safachand*, (1924) 51 I. A. 171 & other cases in which no allegation of CONVERSION to Islam. See also (*Mt.*) *Suraj Jotee* v. (*Mt.*) *Attar*, (1922) 1 Pat. 706 ; *Vitta Tayaramma* v. *Chata Kondu Sivayya*, (1918) 41 Mad. 1078 (F. B.).

37 *Zuburdust K. & wife*, (1870) 2 N. W. P. 370.

38 But see Bail. I. 182, (183), Hed. 66, which show that where both parties APOSTATIZE together, the marriage subsists to this extent, that if they both become Muslims again, their marriage continues.

39 A custom would not be held "reasonable" if opposed to public policy ; cf. *Budamsa R.* v. *Fatema Bi*, (1914) 26 Mad. L. J. 260 (alleged custom that a woman may marry again during life-time of her husband without being divorced, held invalid).

40 My view on the Bill has been expressed in (1938) XVI. Bom. L. Journ. p. 85. The bill (submitted) alters the existing law, & discriminates between Islam & other religions in a manner opposed to the principle of EQUALITY OF RELIGION : s. 6, com.

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acquired or incurred before 1 Nov. 1938, or any legal proceeding or remedy in respect of any such right or liability : any such legal proceeding or remedy may be continued or enforced as if the said Act had not been passed.

Custom enforced if reasonable, certain and ancient.

(1A) Subject to s. 10(1)[1] the Courts will enforce such customs and usages as are held to be reasonable,[2] certain,[3] and sufficiently ancient, and found[4] to have been adopted[5] by a community or body of persons.[6] Such customs, in regard

[1] I.e. custom may be enforced except (1) in decision of questions regarding the 10 matters excluded by Shariat Act, 1937, s. 2 : see s. 6A(1)(*b*) above ; (2) in regard to succession & inheritance of Cutchhi Memons custom not enforced ; (3) Shariat Act, s. 3 gives an option of adding three more to the 10 matters, viz. adoption, wills, & legacies. These 10 or (as the case may be) 13 excepted matters are referred to in present context as "MATTERS SO EXCLUDED."

[2] *Barrow & Bros.*, v. *Dyster*, (1884) 13 Q. B. D. 635 (evidence of usage rejected as incorporation of usage into written contract—which contained arbitration clause—would have made interested parties, judges in their own cause). Recital of prayers on another's land without his consent forbidden by Muhammadan law : right to such recital cannot be acquired by custom : Karamat Husain, J. *Niadai* v. *Tika*, (1910) 9 I. C. 45 (ALL.) ; cf. *Ehsan Beg* v. *Rahimat Ali*, (1931) 10 Luck. 547.

[3] Custom on which appellant relied was alleged in three markedly different forms : in (1) former plaint : rights were said to arise from current & immemorial custom of dynasty of parties ; (2) in affidavit : that by custom, women after marriage lose all rights of inheritance (from paternal side) ; (3) in present plaint : that by custom among Sunnis & Shias alike, women entitled to their proper *mahr*, but to no other rights of inheritance to their paternal relations. P. C. did not give to this variation in allegations such weight as to crush appellant's case, but assumed that he relied upon a custom by which in case of intestacy daughters were excluded by brothers & sisters in favour of male paternal collaterals : *Abdul Hussein* v. *Bibi Sona*, (1917) 45 L. R. 10, 15, 16 (SIND) ; *Charanjit Singh* v. *Amir Ali K.*, (1921) 2 Lah. 243. Custom must be proved in exact form in which alleged. Court will not take evidence tending to prove CUSTOM WIDER THAN IS ALLEGED, as proof to extent of allegation, taking rest of evidence as surplusage, *Moult* v. *Halliday*, [1908] 1 Q. B. 125, 129 ; *Hirbai* v. *Gorbai*, (1875) 12 Bom. H. C. R. 294 ; *Sayad Abdulla Edrus* v. *Sayad Zain*, (1888) 13 Bom. 555, 566 ; *Hammerton* v. *Honey*, (1876) 24 W. R. 603 (Jessel M. R. at p. 604) ; but see *Farquhar* v. *Newburg Rural Council*, [1909] 1 Ch. 12 (C.A.) ; *Bai Saker* v. *Vora Ismail*, (1936) 60 Bom. 919. CUSTOMS distinguishable, in strict terminology of English law, from USAGE : see Hals. *Laws of Eng.*, X 221 (s. 442) ; Bayley J. speaks of usage as "the legal evidence of custom" : *Read* v. *Rann*, (1830) 10 B. & C. 438, 440. Usages (unlike customs) (*a*) need not have existed from time immemorial, nor (*b*) need they be confined to limited locality, but (*c*) they must be consistent with general law : *Dashwood* v. *Magniac*, [1891] 3 Ch. 306, 370 : *Crouch* v. *Credit Foncier*, (1873) L. R., 8 Q. B., 374 (Blackburn J.). On TIME IMMEMORIAL : see *Chintamani Rao* v. *Ramchandra*, (1931) 56 Bom. 82. Distinction between custom & usages seldom observed even by eminent authorities : Aske, *Customs & Usages of Trade*, (1909) 13.

[4] STANDARD OF PROOF required for establishing custom in supersession of general law is very carefully laid down in decisions of the P. C. : see s. 10A.

[5] I.e. CONSCIOUSLY ACCEPTED AS HAVING FORCE OF LAW : fact that claims of daughters & sisters had been ignored, & married daughters treated as estranged from family, may be explained by Muslim ladies' reluctance to insist on their unquestioned rights ; they often prefer maintenance ; females are under influence of male relations ; mere partition among males without reference to females cannot count for much ; judgments between other parties valuable but not binding : *Mirabibi* v. *Vellayanna*, (1885) 8 Mad. 464, approved *Abdul Hussein* v. *Bibi Sona*, (1917) 45 I. A. 10, 16-17 ; *Bai Saker* v. *Vora Ismail*, (1936) 60 Bom. 919. Many instances explained as decisions by family council or head of family, 45 I. A. p. 18.

[6] The body of persons may consist merely of single FAMILY, e.g., *Nisar* v. *M. Ali*, (1932) 59 I. A. 268, 271 (FAMILY CUSTOMS).

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to matters not so excluded, will be enforced, even though the persons that have adopted them are Muslims, and the customs are opposed to the law of Islam,[7] and notwithstanding that the Legislature has not expressly directed the courts concerned to enforce customs or usages.[8]

Convert may renounce old law or abide by it.

(2) In regard to matters not so excluded, a convert to Islam may renounce the old law,[9] or if he thinks fit, may abide by the old law, notwithstanding that he has renounced his old religion :[10] and it had, prior to the Shariat Act 1937 been held[11] that the Khojas,[12] Cutchhi Memons.[13] Sunni

[7] Courts other than those of Bengal, East Bengal, Assam & United Prov. required to enforce customs ; High Courts, O. C. J. required to enforce usages ; as to Bengal & other excepted places, see Table of Enactments, Ch. I.

[8] *Kunhambi* v. *Kalanthar*, (1914) 38 Mad. 1052.

[9] I.e. law applicable to him before his conversion to Islam : *Khambatta* v. *K.*, (1934) 59 Bom. 278.

[10] *Muhammad Ibrahim Rowther* v. *Shaikh Ibr. R.*, (1922) 49 I. A. 119, 123 (MAD.), citing *Abraham* v. *Abraham*, (1863) 9 Moo. I. A. 195, & reversing 39 Mad. 665 : *Khatubai* v. *Mahomed*, (1922) 50 I. A. 108, 111, 112 = 47 Bom. 146, 150, 151. See however, *Hirbai* v. *Gorbai*, (1875) 12 Bom. H. C. 294. See also s. 1A.

[11] In spite of clearest pronouncements of P. C., it is frequently overlooked that SUCH JUDGMENTS are decisions or FACT & NOT LAW, & cannot bind strangers. As between persons who were not parties to the original decisions, such JUDGMENTS can only (under Ind. Evid. Act, ss. 13, 43) be relied upon as INSTANCES OR TRANSACTIONS: *Gobinda N. S.* v. *Shama L. S.*, (1931) 58 I. A. 125, 136. This point is treated at length in s. 10A.

[12] *Hirbae* v. *Sonabai* ("*Khojas & Memons' Case*"), (1847) Perr. Or. Cas. 100 = Mor. Dig. II, 431 ; *Hirbae* v. *Gorbai*, (1875) 12 Bom. H. C. R. 294 ; *Gangabai* v. *Thaver M.*, (1866) 1 Bom. H. C. R. 71, 73 ; *Moosa Haji Joonas* v. *Haji Abdul Rahim*, (1905) 30 Bom. 197 ; *Saboo Sidick* v. *Ally Mahomed*, 30 Bom. 270 ; *Mangaldas* v. *Abdul*, (1914) 16 Bom. L. R. 565 ; *Fida Husain* v. *Monghibai*, (1936) 38 Bom. L. R. 397 ; *Jan Mahomed* v. *Datu Jafar*, (1913) 38 Bom. 449-552, (detailed history of application of Hindu law). Among KHOJAS OF KASUR by custom, between sons & daughters, sons exclude daughters from immoveable property ; if there is no male issue & daughter & sister left, daughter excludes sister : (*Mt.*) *Allajowai* v. (*Mt.*) *Fatma*, [1888] 23 Punj. Rec. 128 (No. 52).

[13] *Khojas & Memons' Case*, (1847) Per., Or. Cas. 140 = Morl. Dig. II, 431 ; *Ashabai* v. *Haji Tyeb*, (1882) 9 Bom. 115 ; *Abdul Cadur* v. *C. S. Turner*, (1884) *ib.* 158 ; *Mahomed Siddick* v. *Haji Ahmed*, (1885) 10 Bom. 1 : see the cases in last *n.* (i) not proved affirmatively, that CUTCHHI MEMONS have adopted (as part of their customary law) Hindu law of joint family as whole, or adopted distinction existing in that law between ancestral & joint family & self-acquired property ; but (ii) they were held—now see Shariat Act 1937—to be subject by custom to Hindu law of succession & inheritance as it would apply to intestate separate Hindu possessed of self-acquired property, & no more ; (iii) they have acquired by custom power (which is unaffected by Shariat Act 1937, unless declaration made under s. 3 thereof) of disposing of whole of their property by will : *Adv. Gen. Bombay* v. *Jimbabai*, (1915) 41 Bom. 181 ; *Bai Saker* v. *Vora Ismail*, (1936) 60 Bom. 919. HALAI MEMONS OF BOMBAY not governed by Hindu law : *Khatubai* v. *Mahomed Haji Abu*, (1922) 50 I. A. 108, 112 (Bom.). HALAI MEMONS OF KATHIAWAR & GONDAL governed by Hindu law : *Asha* v. *Noor Mahomed*, (1932) 10 Rang. 461. HALAI MEMONS OF MORVI in Kathiawar : *Adam Bai* v. *Haji Allarakhia*, (1935) 37 Bom. L. R. 686. MEMONS IN MOMBASA governed by Muhammadan, not Hindu law : *Abdurahim* v. *Halimabai*, (1915) 43 I. A. 34 = s. 6A *ill.* KHARWA COMMUNITY OF BROACH forms caste of its own bound by rules of that caste : *Bai Jina* v. *Kharwa Jina*, (1907) 31 Bom. 366. MUSLIMS OF SATPURA PLATEAU : *Birdichand* v. *Noor Mahomed*, [1933] AIR (NAG.) 16. SUNNI BOHORAS OF VALLASAN, BORSAD TALUKA, GUJARAT : *Bai Sakar* v. *Gafoor Kassam*, (1936) 60 Bom. 919.

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Khojas, Cutchhi Memons, Sunni Bohoras, Molesalam Girasias, Halai Memons, Ahmadia sect.

Bohoras of Gujarat,[14] Molesalam Girasias of Broach,[15] and Halai Memons of Porbunder[16] were governed by the Hindu law of inheritance and succession, though they profess the Muslim religion.[17] Members of the Ahmadia sect of Qadianis are Muslims governed by Muhammadan law.[18]

Immigrants may preserve custom.

(2A) Even where the succession to Muslims is in general governed by Muhammadan law, it would probably have been open to immigrants to proye that they had brought with them and preserved a custom establishing a special law of succession.[19]

Election to abide by old law.

(2B) Custom and (in the case of converts to Islam) an election to abide by the old law[20] differ fundamentally as sources of law : but the election so to abide must also be proved from actings and conduct, which would establish custom.[21]

Mapillahs.

(3) Several families[22] of the Mapillahs[23] of North Malabar were, prior to the Shariat Act, 1937, held to be

[14] *Bai Baiji* v. *Bai Suntok*, (1891) 20 Bom. 53. For BOHORAS see *Abdulali Ismailji & Huseinbi*, (1893) 7 Bom. 180 ; Fyzee, *Ismaili Law of Wills*, p. 3, *n.* 2. See s. 10(5A) *n.* on word BOHORA.

[15] (*Maharana Shri*) *Fateh S.* v. (*Kumar*) *Harisingji*, (1894) 20 Bom. 181.

[16] *Khatubai* v. *Md. Haji Abu*, (1922) 50 I. A. 108 (BOM.) The word MEMON = convert, not applied to all branches of Hindu converts (e.g. Khojas) : (*a*) body of Memons which came from Sind, settled in Cutch, known as CUTCHHI MEMONS ; (*b*) another body from Sind settled in Halai Prant of Kathiawar designated HALAI MEMONS : (i) part of whom came to Bombay & are Halai Memons of Bombay, (ii) part to Porbunder : *Khatubai* v. *M. Haji Abu*, (1922) 50 I. A. 108, 112 (Bom.) ; HALAI MEMONS OF BOMBAY are governed by Muhammadan law : *Khojas & Memons Case*, (1847) Perr. Or. Cas. 110, 115 ; *Khatubai* v. *Mahomed Haji Abu*, (1923) 50 I. A. 108 (BOM.) affirming *Mahomed Haji* v. *Khatubai*, (1918) 43 Bom. 647.

[17] CUSTOM amongst KHOJAS & CUTCHHI MEMONS proved only as to inheritance & succession as applicable to separated property : not as to rules relating to joint family property : *Haji Oosman* v. *Haroon Saleh Mahomed*, (1923) 47 Bom. 369 ; *Jan Mahomed* v. *Datu*, (1914) 38 Bom. 449 ; *Fidahusain* v. *Monghibai*, (1936) 38 Bom. L. R. 397 ; *Bai Sakar* v. *Gafoor Kassam*, (1936) 60 Bom. 919. Of course e.g. as regards marriage, Muhammadan law applies : *Abdul Razak* v. *Adam Usman*, (1936) 37 Bom. L. R. 603.

[18] *Khatib Ahmed* v. *Israfil*, (1917) 2 Pat. L. R. 108.

[19] As at MOMBASA : *Abdurahim* v. *Halimabai*, (1915) 43 I. A. 35, 40.

[20] *Mahomed Casim Curlay* v. *Zahiroodin*, (1902) 5 Bom. L. R. 8, 16, 17 (class of EVIDENCE requisite to prove that LAW as established by authorities has become OBSOLETE or been superseded).

[21] *Muhammad Ibrahim R.* v. *Shaikh Ibr.*, (1922) 49 I. A. 118, 124 (MAD.).

[22] FAMILY & LOCAL CUSTOMS : *Narayansing* v. *Niranjan*, (1923) 51 I. A. 37, 60 ; *Zarifunnissa* v. *Shafiq-uz-Zaman Khan*, (1928) 55 I. A. 303 = *Dy. Commssr. Bara Banki* v. *Receiver*, (1928) 56 M. L. L. 601 (P.C.) (OUDH) : family custom how attached to estate, how destroyed.

[23] Also written MOPLAHS, including 806,000 out of 843,000 of Muslim population of Malabar : name originally applied to Arab traders, & their descendants, now used to include all indigenous West Coast Muslims, also converts from lower Hindu caste : *Imp. Gaz. of Ind.* (2nd ed.) XVII., 60.

subject to the Marumakkatayam law, though they are Muslims.[24] SECTION 10.

(4) Among the Lubbais of the Coimbatore District in the Madras Presidency, no custom prevails excluding females from succession.[25] Lubbais.

(5) A great number of Muslims in the Punjab were prior to the Shariat Act, 1937, held to be governed by rules of customary law at variance with Muhammadan law.[26] Punjab customary law.

(5A) The Daudi Bohoras[27] (Mustalian Ismaili Shias) are, in matters of charity and wakf, subject to the Shia[28] Muhammadan law, unless customary variations (on matters not so excluded[1]) are proved.[29] The peculiar position of the Mullaji does not prevent the Daudi Bohoras from Daudi Bohoras.

[24] See *Assam* v. *Pathumma*, (1889) 22 Mad. 194 ; *Kunhumbi* v. *Kandy Moithin*, (1903) 27 Mad. 77.

[25] *Muhammad Ibrahim R.* v. *Shaikh Ibr. R.*, (1922) 49 I. A. 119, reversing (1915) 30 Mad. 664.

[25] E.g., KASHMIRI, residing & carrying on business of comb-maker in Jhelum city governed not by Muhammadan law but by custom, under which, will of more than a third of estate consisting of self-acquired property, valid : even if in favour of heirs : (*Musamat*) *Mehetal* v. (*Mussamat*) *Husan*, (1913) 48 Punj. Rec. No. 17, p. 60. PATHANS & AGRICULTURISTS IN PUNJAB governed by Muhammadan law of inheritance : *Nathu* v. *Murad B.*, (1920) 2 Lah. L. J. 450. QURAISHIS OF VILLAGE HARDOSHEIKH governed by custom : *Barket Ali* v. *Sutan Bibi*, (1915) 33 I. C. 787. BARA MUSLIMS of CHAM KHANNU village (Peshawar District) inherit according to custom : *Shakinallah K.* v. *Abdulla K.*, (1912) 15 I. C. 939. These decisions must now be read subject to the Shariat Act 1937, which however saves questions relating to agricultural land : see s. 6A(1)(*b*) above.

[27] DAUDI BOHORAS mostly descended from Hindu converts to Islam made by Abdulla missionary (*dai*) sent by head of community from Yaman during time of Almustansir, 18th Imam : see in *re Abdul Ali Ismailji & wife Huseinbi*, (1883) 7 Bom. 180 ; *Bom. Gaz.* (1899) IX., ii., pp. 25-34 ; R. E. Enthoven, *Tribes & Castes* of Bombay, (1920) I., 197—208. Sh. Faizullabhai, *High Priest of Daudi Bohora Community*, p. 2 ; Fyzee, *Ismaili Law of Wills*, 3, *n.* 2.

[28] Parties will have law contained in their own texts applied, but (in absence of proof) those texts will be presumed to accord with Ithna Ashari Shia texts, which in their turn will be presumed to accord with Hanafi texts : so stated generally in *Adv. Gen.* v. *Yusufalli*, (1922) 24 Bom. L. R. 1060, 1076 ; in greater detail in *Akbarally* v. *Mahomedally*, (1931) 57 Bom. 551. Cf. s. 11B.

[29] *Akbarally* v. *Mahomedalli*, (1931) 57 Bom. 551 ; *Adv. Gen.* v. *Yusufalli*, (1922) 24 Bom. L. R. 1060, 1096. In *Mansoorali* v. *Taiyabali*, [1935] AIR. Nag., 156 it is said : "if he is the Chief Priest then it would seem to follow that he has certain powers including powers of management of all the trust or waqf property belonging to the community"—this it is submitted is contrary to what was held in the two Bombay decisions cited above—"as also the power to EXCOMMUNICATE persons who flout his authority or disobey him." On power of excommunication see *Adv. Gen. ex. rel. Daya Muhammad* v. *Muhammad Husein*, (1879) 12 Bom. H. C. R. 323 ; *Haji Bibi* v. *H. H. Sir Sultan Muhammad Shah, Agha Khan* (*Aga Khan Case*) (Aga Khan has no right of determining who shall or shall not remain in community). See *Nelawa* v. *Gurshiddappa*, (1936) 39 Bom. L. R. 211, 214 (par. 2) (before Civil Courts can recognize EXCOMMUNICATION so as to affect civil rights, it must be shown that (1) law applicable recognizes such power in any person to deprive another of his civil rights ; (2) particular dignitary given authority under that law to exercise such powers ; (3) events entitling exercise of powers have taken place, (4) misconduct entailing liability to excommunication is held proved, in course of enquiry not entirely opposed to natural justice).

SECTION 10. creating binding and irrevocable wakfs or trusts in favour of charity.[30]

Non-Muslims. (6) Non-Muslims may, by their customs, be subject to Muhammadan law.[31]

Hindu law. (7) Hindu or other laws and usages may partly[32] or wholly govern Muslims,[33] regarding matters not so excluded [1] on which Muhammadan law is ordinarily enforceable.

Family custom. (8) Family customs [relating to succession] may be discontinued either intentionally or accidentally so as to let in the ordinary law.[34]

[30] *Adv. Gen.* v. *Yusufalli*, (1922) 24 Bom. L. R. 1060 LEADING DAUDI BOHORA CASE : INDEX OF POINTS dealt with : numerals refer to pages of 24 Bom. L. R., reference to *Mansoorali* v. *Taiyabali*, [1935] AIR (NAG.) 156 are given in [ ] :— CHARITIES, Muhammadan law compared with English law, 1074, with Hindu law 1084 ; CUSTOM, 1084 ; DAI, see 'Mullaji' ; DAWAT = spiritual kingdom of Daudi Bohoras & their general affairs, 1066, 1103, 1111 ; DAUDI BOHORA COMMUNITY, their laws, 1076, ways & customs, 1064, 1066, 1068, their texts & writings, 1072, 1074 ; DARGAH, 1094, 1095, 1100 ; FEASTS as objects of wakf, 1089 ; GHULLA (GHALLA) (=offertory box) 1063, 1089, 1099, 1107, 1111 ; IMAM, 1071 ; INTEREST on money, 1105 ; LAW by which DAUDI BOHORAS governed, 1076, see also "texts" ; MASJID, 1089 ; MESHAQ (MITHAQ) = oath of allegiance, 1072, 1093, [162, col. I, 163, col. i.] ; MULLAJI, authority as representative of God, 1066, 1070, 1075, 1109, 1110, as *dail mutlaq* (51st *dai*) 1070, 1071, 1073, 1075, 1102, 1105, [158,, col. ii] ; OWNERSHIP of mosque, 1090 ; TRUSTEESHIP, 1091 ; claim of unaccountability, 1091 ; NASS, appointment of successor by *dai'l-mutlaq* either in writing or verbal : *nass jali* is open & clear appointment, *nass khafi* is only hint or indication of appointment : [158, col. ii, 159, col. ii] PERPETUITY, rule again, 1083 ; SAINT, 1095-8 ; SALAM, 1104 ; SLAVERY, 1087 ; TAKIAT (TAQIA), 1073 ; TEXTS & writings, 1072, 1074 ; TOMB, wakf for, 1094, 1100 ; TRUSTEESHIP, 1092 ; WAKF, valid objects for, 1089, moveables as subject of, 1089 ; ZAKAT, 1104.

[31] E.g. HINDU POPULATION OF BEHAR governed by Muhammadan law of PRE-EMPTION : *Fakeer Rawot* v. *Sheikh Emambuksh*, [1863] W. R. (F. B. RUL.) (Sp. No. 143). Custom is very important in PRE-EMPTION, rights of property affected by it : see Chapter on Pre-emption : *Putli Kunwar* v. *Janki Das*, (1924) 46 All. 813 (*wakf* by Hindu for temple : but probably word *wakf* was used in sense merely of permanent settlement : without any implication that Muhammadan law was to be applied).

[32] Cf. *Ahmad Asmal* v. *Bai Bibi*, (1916) 41 Bom. 377 (fully referred to in s. 577).

[33] E.g. *Khatiza* v. *Ismail*, (1889) 12 Mad. 380, (people known as NAVAYATS occasionally supposed to mean "new comers," but more probably NAVAYAT = plural form of Arab *nuti* = navigator, sailor, on the West Coast, descendants of Arab merchants that settled several centuries ago at Bhatkel in North Canara, have adopted Hindu system of managing joint family property). Custom to ADOPT in Punjab referred to in *Md. Umar* v. *Md. Nizamuddin*, (1911) 30 I. A. 19 (CAL.). Oudh Estates Act I. of 1869 (see s. 226 below) lays down special rules of inheritance & permits adoption amongst the Muslim referred to.

[34] FAMILY & LOCAL CUSTOMS in India : *Narayan Singh* v. *Niranjan*, (1923) 51 I. A. 37, 60 ; *Zarifunnissa* v. *Shafiq-uz--Zaman*, (1928) 55 I. A. 303 = *Dy. Commissioner of Bara Banki* v. *Receiver*, (1928) 56 Mad. L. J. 601 (P. C.) (OUDH) how FAMILY CUSTOM ATTACHED TO ESTATE : how DESTROYED. Succession is one of matters in respect of which Shariat Act 1937 excludes custom. *Rajkishen* v. *Ramjoy*, (1872) 1 Cal. 186, 195, (P. C.). Estate alleged to descend to eldest male under FAMILY CUSTOM : P.C. held that former members of family did not regard that manner of succession, if it ever prevailed, in light of family custom, but as INCIDENT or CONDITION OF TENURE which had been determined by Regulations of Government (p. 195); assuming that that family custom existed, family were induced to regard former state of things & ancient tenure at end ; & to consider &

SECTION 10. Wills : Cutchhi Memons.

(9) In respect of the power of making wills, Cutchhi Memons (it has been held)[35] have acquired by custom testamentary power to dispose of their estates without the restrictions that the bequests must be within the bequeathable third and that they cannot be in favour of the heirs (ss. 579, 579A); a similar decision (as to which, *quaere*) has been given in regard to Khojas.[36]

Shariat Act, s. 3 declaration,—

(10) Under the Shariat Act, 1937, s. 3, any person, who satisfies the prescribed authority that he is (*a*) a Muslim, (*b*) competent to contract within the meaning of the Indian Contract Act, 1872, s. 11, and (*c*) a resident of British India, may make, in the prescribed form a declaration and file it before the prescribed authority, declaring that he desires to obtain the benefit of the Shariat Act, 1937 ; and thereafter the provisions of the Shariat Act, 1937, s. 2 shall apply to the declarant and all his minor children and their descendants, as if in addition to the ten matters specified therein, adoption, wills and legacies were also specified.[37]

Adoption, wills, legacies.

Where Legislature expressly requires custom to be enforced.

The Legislature's directions to enforce customs prevalent amongst Muslims are not uniform.[38] Customs are not specifically required to be enforced in Bengal, the North-Western Provinces and Assam, where Act XII. of 1887

treat property as ordinary estate held under British Govt., p. 192); no principle or authority could be found for holding that a manner of descent of ordinary estate depending solely on family usage may not be discontinued so as to let in ordinary law of succession; such family usages are in their nature different from TERRITORIAL CUSTOM which is *lex loci*, binding all persons within local limits in which it prevails ; DISCONTINUANCE OF FAMILY USAGE, whether accidental or brought about intentionally by the concurrent will of family will destroy it (pp. 195-6). Distinction between LOCAL and FAMILY CUSTOM : *Narayan* v. *Niranjan*, (1923) 51 I. A. 37, 60, 61. Cf. Punjab Laws Act, s. 11, Oudh Laws Act, s. 8 (s. 557 com.).

[35] *Adv. Gen.* v. *Jimbabai*, (1915) 41 Bom. 181 ; *Adv. Gen.* v. *Karmali*, (1903) 29 Bom. 133, 148-149.

[36] *Fidahusain* v. *Monghibai*, (1936) 38 Bom. L. R. 397. This is a single decision on this point by a single Judge,—in which rules in s. 10A, seem entirely overlooked : (1) previous decisions referred to as binding authorities ; (2) alleged decisions between other parties in which alleged custom found to exist, considered binding ; (3) deductions made from law there laid down. See s. 10A, com., summary (2)(i)—(vii) : *Rupchand* v. *Jambu Pershad*, (1911) 37 I. A. 33 (ALL.).

[37] Effect being that notwithstanding any custom or usage to contrary, in all questions (save questions relating to agricultural land) regarding ADOPTION, WILLS & LEGACIES, rule of decision when declarant & his minor children & their descendants are concerned would after declaration be Muslim Personal law (Shariat). Shariat Act, 1937, s. 3 is practically to same effect as Cutchhi Memons Act of 1920, s. 46 (amended by Act XXXIV. of 1923) & repealed by Cutchhi Memons Act X. of 1938).

[38] *Abdul Hussain* v. *Bibi Sona Dero*, (1917) 45 I. A. 10, 13, 14. Contrast reference to " principle " in preamble to Caste Disab. Rem. Act XXI. of 1850 : s. 1A, com. : *Ramchand Khanna* v. *Goswami Ram Puri*, (1923) 45 All. 501, (though custom of pre-emption relating to house property admitted in Benares yet no presumption raised as to custom for pre-emption of land ; such custom held not proved in spite of some evidence, including a judgment).

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prevails. But even where the Acts specifically enact that Muhammadan law shall be enforced, without reference to customs, the Privy Council has held that evidence is admissible to prove a custom of succession at variance with Muhammadan law.[39] The reason seems to be that the law adopted by the customs of the people is that to which justice, equity and good conscience points as the law governing the parties. Against this principle the considerations on which some of the earlier decisions proceeded were held not to prevail.[40]

Importance of custom relatively to other law.

Custom "exists as law in every country, though it everywhere tends to lose its importance relatively to other kinds of law."[41] It has lost a great deal of its importance in Muhammadan law as administered in British India, owing (1) to the exclusion by the Shariat Act, 1937, from the operation of customs, of the ten stated matters to which three other matters may be added at the option of parties (see the Shariat Act, s. 3); and (2) to the fact that the texts to which the Courts refer for the law of Islam, were, to all intents and purposes codifications, and the authority of mujtahids and kazis has not descended in its plenitude upon the British Courts in India. The original customary law being thus disguised beyond recognition—clothed, as it is, in the garb of a canonical exposition of the law,—the courts have been far more averse to recognizing any custom altering the laws as laid down in the texts, than they would have been, had custom been formally referred to in the Arabic texts as the origin of a considerable portion of law, or had custom been treated in the same manner as (for example) the writers on Hindu law treat it. The result is also that where the texts have laid down a particular rule of law, such a rule will be enforced though it may be proved that it had its origin in custom, and that the custom was opposed to the strict law of Islam.[42] For the courts will not go behind such commentaries, and will not interpret anew the authorities on which the exposition of the law purports or appears to be based, but will (s. 11), consider themselves bound by the prevalent interpretation.[43]

References to customs in texts.

Express references to custom are not, however, absent from the texts themselves.[44] The place of custom in the evolution of the law of Islam in

[39] *Muhammud Ismail Khan* v. *Lala Sheo Mukh*, (1913) 15 Bom. L. R. 76 (P.C.) = 17 Cal. W. N. 97, reversing, *Jammya* v. *Diwan*, (1900) 23 All. 20; *Hakim Khan* v. *Gul K.*, (1882) 8 Cal. 826, 830; *Jaffro* v. *Chitta*, (1936) 58 All. 889.

[40] *Muhammad Ismail K.* v. *Lala Sheo Mukh*, (1913) 15 Bom. L. R. 76 = 17 Cal. W. N. 97, (P.C.); cf. *Aga Mahomed Jaffer* v. *Kulsom B.*, (1897) 24 I. A. 196 = 25 Cal. 9.

[41] Holland, *Jurisp.* (7th ed. 1895) 52; cf. "USAGE or rather the spontaneous evolution by the popular mind, of rules, the existence & general acceptance of which is proved by their customary observance, is, no doubt, the oldest form of law-making:" *Ib.* 50.

[42] Cf. *bada'i* or innovated form of divorce, see s. 142, com.

[43] *Aga Mahomed Jaffer* v. *Kulsom B.*, (1897) 24 I. A. 196 = 25 Cal. 9, 18.

[44] See e.g. Bail I. 97, 126, (127), 146, 300 (392), 546 (555), 559 (567), 562 (571); Bail II. 16, 109, 116, 212, 216; Bail I. 596, (607): "But this varies with the change of place & times"—referring to length of time for which mutawallis may grant a lease. *Muhammad Yussub* v. *Sayad Ahmed*, (1861) 1 Bom. H. C. R. APPX. 18, 23; *Muhammad Ibrahim* v. *Ghulam Ahmed*, (1864) 1 Bom. H. C. R. 236, 247 last 4 *ll.* from *Tafsir-e Amandi*, p. 362.

some of its aspects has been discussed in the Introductory Chapter. We find it stated in one text that "what is customary, is as if stipulated." [45]

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Customs which were—sanctioned by Prophet.

The following illuminating quotation from Mr. Justice A. Rahim's "Muhammadan Jurisprudence" is transcribed with his kind permission: "Those customs and usages of the people of Arabia which were not expressly repealed during the life time of the Prophet, are held to have been sanctioned by the law-giver by his silence. Customs (urf, ta'amul, adat) generally as a source of laws are spoken of as having the force of ijma and their validity is based on the same texts as the validity of the latter. It is laid down in Hidaya that custom holds the same rank as ijma in the absence of an express text,[46] and in another place in the same book, custom is spoken of as being the arbiter of analogy.

Custom overrides analogy or qiyas.

"Custom does not command any spiritual authority like ijma of the learned, but a transaction sanctioned by custom is legally operative, even if it be in violation of a rule of law derived from analogy, it must not, however, be opposed to a clear text of the Koran or of an authentic tradition.[47] There is agreement of opinion among the Sunnis, that custom overrides analogical law, and a student of Muhammadan law cannot help noticing that custom played no small part in its growth especially during the time of the Companions and their successors. The Hanafi writers on Jurisprudence include custom as a source of law, under the principle of istihsan or juristic preference." [48]

Where Legislature expressly requires custom to be enforced: Case of Khojas & Memons.

Where the Legislature has expressly declared that customs shall be enforced, a new set of considerations comes in. One of Sir Erskine Perry, C. J.'s memorable judgments [49] (1847) deals with the question from all its bearings. It deals first, with the question, what it is that gives to customs their binding force? They represent, the Chief Justice holds, those rules regulating the various relations of life, which the exigencies of man have framed long before written laws, which have been spontaneously adopted, and with which the legislator in his wisdom or indifference or want of skill, has not interfered. When (as in Rome) the mere suffrage of the people can give to rules the force of law, there might be some ground for holding that customs may have "the validity of a law per se," but "according to English law," and "to the sound principle of universal law, the custom would require the sanction of the court, as representing the sovereign authority, before it obtained any legal validity" (p. 119). Secondly, if there exists a custom that is ancient,

[45] *Wajizul Muhit*, cited Ameer Ali, I. 150 (219): *wa'lma'ruf kalmashrut* = "what is customary is as if stipulated." Ameer Ali translates it: "what is customary is as if conditioned."

[46] *Hidaya*, VI. 177-8.

[47] [Customs may be enforced in British India though opposed to Koran or Sunna as explained in s. 10, com.]

[48] Abdur Rahim *Muhamm. Juris.*, 136, 137, citing *Radd-ul-Muhtar*, III. 408-409: *Fathul Qadir*, VI., 65: whereas English law apparently requires customs to be confined to limited locality (Hals. *Laws of Eng.*, X. 2, 19, 221, 220), law of Islam requires just the reverse.

[49] *Hirbae* v. *Sonabai*, (*Khojas & Memons' Case*), (1847) Perr., Or. Cas. 110, 117, 123 = Morl. Dig. II. 431. Cf. *Kunhambi* v. *Kalanthur*, (1914) 38 Mad. 1052.

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Conflict between Muhammadan law and custom.

not injurious to public interests, and does not conflict with any express law of the ruling power, it is, he holds, entitled to receive the sanction of the court of law (p. 121). Thirdly he considered whether if persons generally governed by Muhammadan law, set up a custom inconsistent with the law of Koran, the custom is invalid on the same principles on which in England, a custom conflicting with an Act of Parliament is invalid.

Sovereign delivers law to courts.

His answer is that Courts have to give decisions in accordance with the law as "delivered to them for administration by their sovereign" (p. 122). This led him to a consideration of the legislative enactments requiring the enforcement of customs: as a result of which the Chief Justice lays down that the law to be enforced by the Courts which are subject to such an enactment,[50] is not that law which Muslims ought (in the opinion of the Court) to observe in accordance with their religion: nor is it the law of Islam interpreted in accordance with what the Court thinks is its true interpretation: but that that law should be enforced, which the parties are proved to have themselves adopted, and which, evidence shows, has been prevailing amongst them—subject to its not being opposed to public policy.

Freedom of religion.

The case of Khojas and Memons.

Sir E. Perry, therefore, held that the Hindu law ought to be administered to the Khojas and Memons, who by their customs and usages had been following that law, though they professed Islam.[51] Prima facie no doubt it is unlikely that whole bodies of Muslims rejecting the commands of their own law, and the influence of their own religion, should adopt, merely by way of custom, the entire complicated and technical law of the Hindu joint family.[52] But (1) probabilities of conduct however important they may be in the consideration of the evidence adduced in any particular case, do not affect the rules of law that may be applicable after the facts are found. (2) As regards the Khojas, they did not at their first conversion to Islam adopt the whole of the law, or even religion of Islam.[53] They retained many of the Hindu customs and ways which they had been following prior to their adoption of Islam.[54]

Shafii's conservatism: resistance to custom.

The special characteristic of the Shafi school is adherence to precedent, a conservative tendency that would resist modification by fluctuating custom.[55]

[50] After *Muhammad Ismail K.* v. *Lala Sheo M.*, (1913) 15 Bom. L. R. 76 = 17 Cal. W. N. 97 (P. C.), less stress necessary on terms of enactment.

[51] To same effect (with examination of books on jurisprudence): *Tarachand* v. *Reeb Ram*, (1866) 3 Mad. H. C. R. 50, 55-57 (*per* Frere & Holloway, JJ.).

[52] *Jan Mahomed* v. *Datu Jaffer*, (1913) 38 Bom. 449, 460.

[53] *Adv. Gen.* v. *Muhammad Hussain*, (1866) 12 Bom. H. C. R. 323 (history of Khojas traced) = s. 481, *ill.* (2). E.g. Khojas until recently did not recite Koran, but had religious book of their own, representing Koran for them: within last 40 years or so they have commenced to read Koran for themselves.

[54] Election by community to RETAIN Hindu LAW after conversion, may (somewhat inaccurately but innocuously) be spoken of as adoption of custom: there is no mode of proving such election except by way of inference from conduct that would establish custom: *Muhammad Ibrahim R.* v. *Shaikh Ibrahim R.* (1922) 49 I. A. 119 = 45 Mad. 308, 314 (P. C.). *Bai Sakar* v. *Vora Ismail*, (1936) 60 Bom. 919, 929; *Mahomed Casim Curtay* v. *Zaheroodin* (1902) 5 Bom. L. R. 8, 16, 17, (evidence that law as established by texts has become obsolete).

[55] *Mahomed Cassim C.* v. *Zahiroodin*, (1902) 5 Bom. L. R. 8, 16.

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A special custom as to a particular right may be engrafted on, or alter the general law ; [56] and such a custom may, subject to the Shariat Act, 1937, be enforced ; as, for instance, a Muslim widow may, contrary to the law of Islam [57] acquire a life interest in the whole of the property of her husband ; [58] or may altogether lose the right to inherit ; [59] or the rule of primogeniture may be held to prevail ; [60] and this may happen although in all other respects the parties may be governed by the Muslim law of inheritance. Sometimes the Legislature alters rights of inheritance.[61] But the Muhammadan law will prevail except to the extent that it is displaced by custom.[62]

No deductions from customary rules.

As to the attitude of the Legislature in regard to custom, even where custom is given priority over Muhammadan law, as in the Punjab Laws Acts, " the Legislature did not show itself enamoured of custom rather than law, nor does it show any tendency to extend the ' principles ' [63] of custom to any matter to which a rule of custom is not clearly proved to apply. It is not the spirit of customary law, nor any theory of custom or deductions from other customs [64] which is to be a rule of decision, but only 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

Difference between custom and Acts.

[56] *Aminabibi* v. *Abasaheb*, (1930) 55 Bom. 401 ; *Irshadulla K.* v. (*Md.*) *Fakhira Bibi*, (1937) 12 Luck. 592.

[57] Contrast reference to " principle of Reg. VII. of 1832, s. 9 " in preamble to Caste Disab. Remov. Act, XXI. of 1850. *Gul Md.* v. (*Mt.*) *Wazir B.*, (1901) 36 Punj. Rec. 191 (No. 60) (Robertson J.).

[58] Shariat Act, 1937, see s. 6A (1) (*b*) above : custom affecting intestate succession to agricultural land is saved : so that custom as regards succession affecting agricultural land may prevail. Widow by general Muhammadan law, takes ¼ or ⅛ of estate : s. 611.

[59] *Mahomed Riasat Ali* v. *Hasin Banu*, (1893) 21 Cal. 157 (P. C.) virtually over-ruling (*Musumat*) *Sarupi* v. *Mukh Ram*, (1870) N. W. P. 227. In *Hub Ali* v. *Wazirunnissa*, (1900) 26 All. 496 ; *Abdul Hussein Khan* v. *Sona Dero*, (1917) 45 I. A. 10 (SIND), custom held not proved. The Kabyles of Algeria, " retain non-Islamic usages formerly embodied in written *kanouns* (i.e. *qanuns* or laws guaranteed to them by treaty with the French Government,—one of which is the denial of all rights of inheritance to women."

[60] See *Mahommad Azmat* v. *Lalli Begum*, (1881) 9 I. A. 8 = 8 Cal. 422, 425 par. 3) 427 (par. 2) ; *Mirabibi* v. *Vellayanna*, (1865) 8 Mad. 464 (custom excluding females from inheritance set up, but held not proved).

[61] E.g. (i) for Taluqdars of Oudh, Oudh Estates Act, I. of 1869, Oudh Est. Amdmt. Act, III. of 1910 (nearest male agnate under rule of lineal primogeniture to succeed) : *Abdul Latif Khan* v. (*Mt.*) *Abadi Begum*, (1934) 61 I. A. 322 (LUCK.), (ii) Bom. Heredit. Offices (often called *Watan*) Act, (Bom. Act III. of 1874) : *Aminabi* v. *Abasaheb*, (1931) 55 Bom. 401 (daughters excluded).

[62] *Irshad Ullah Khan* v. (*Mt.*) *Faikra K.*, (1937) 12 Luck. 592 (succession governed by custom : heirs so determined governed by s. 579(*a*) under which bequest in favour of heirs not valid without consent of other heirs).

[63] *Muhammad Imam A. K.* v. *Sardar Husain K.*, (1898) 25 I. A. 161 = 26 Cal. 81 ; (*Mirza*) *Mahomed Akul B.* v. (*Mirza*) *Kayum B.*, (1876) 25 W. R. 199 (custom of strict PRIMOGENITURE set up & enforced). See also Oudh Estates Act I. of 1869, ss. 8, 23 : Rule of primog. recognised amongst some taluqdars ; Brit. Gov. empowered to give SANADS declaring succession to be regulated by that rule.

[64] Certain amount of deduction impossible to resist : *Hashmatali* v. *Nisabul-Nisa*, (1924) 52 I. A. 172 (right of brother's daughter in question : settled by judicial decision that son represented deceased father) : see s. 10A, com. : " instances when unnecessary."

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or abolished, and has not been declared to be void by any competent authority.]." [65]

" It is a general rule that customs are not to be enlarged beyond the usage ; because it is the usage and practice that makes the law in such cases, not the reason of the thing : for it cannot be said that a custom is founded on reason : though an unreasonable custom is void,...it is no particular reason that makes any custom law, but the usage and practice itself without regard had to any reason for such usage ; and therefore you cannot enlarge such custom by any parity of reason, since reason has no part in the making of such custom. Now in the construction of Acts of Parliament it is otherwise ;...the reason that induced the law-makers to make such Acts to take away the common law may be and is usually urged in making construction of them. Therefore, in doubtful cases we may enlarge the construction of Acts of Parliament according to the reason and sense of the law-makers expressed in other parts of the Act, or guessed by considering the frame and design of the whole." [66]

Continuance of custom.

Custom implies continuance. The continuance of customs and usages as to dealing with property may be enjoined by law. But, unless so enjoined, having been adopted voluntarily, they may be changed, or lost by desuetude.[67]

Election.

The election by a family of converts to retain in part the customs of their unconverted predecessors, is not invariable or inflexible. They and their descendants may change things in their very nature variable, as dependent on the changeful inclinations, feelings and obligations of successive generations of men. As to things which do not belong to the jurisdiction of conscience, but are things of convenience or interest, indifferent in themselves, tribunals that have a discretion, and have no positive lex fori imposed on them, should rather proceed on what actually exists than on what has existed ; and in forming their own presumptions, should have regard rather to a man's own way of life than that of his predecessors. Though race and blood are independent of volition, usage is not.[68]

Jurisdiction of conscience : things of convenience.

Desuetude.

" A judgment declaratory of law as having always been, would bind ; but it would be a different thing if subsequent customs became incorporated in the law." [69]

Custom and public policy :

A custom though prevalent and though affecting questions not excluded by the Shariat Act, 1937, s. 2, will not be recognised or enforced by the

[65] *Daya Ram* v. *Sohel Singh*, (1906) 41 Punj. Rec. 390, 410, (No. 110) per Robertson, J.,—approved : *Abdul Hussein* v. *Sona*, (1917) 45 I. A. 10 (SIND) ; *Bai Saker* v. *Vora Ismail*, (1936) 60 Bom. 919 ; *Muharram Ali* v. *Barkat Ali*, (1930) 12 Lah. 287, 290 (cases collected).

[66] *Arthur* v. *Bokenham*, (1708) 11 Mod. 148, 160-161.

[67] Breach however in a particular instance need not destroy it for all time : exclusion (contrary to the custom) consented to, is not BREACH OF CUSTOM : *Zarif-un-nisa* v. *Shafiq-uz-Zaman Khan*, (1928) 55 I. A. 303, 315, (par. 3). On general law becoming obsolete or being superseded by custom : see *Mahomed Casim* v. *Zahiroodin*, (1902) 5 Bom. L. R. 8, 16, 17 ; *Raj Kishor* v. *Ramjay*, (1872) 1 Cal. 186, 195, 196 (P. C.) ; see ss. 10, 5A, *n*.

[68] This paragraph condensed from *Abraham* v. *Abraham*, (1863) 9 Moo. I. A. 125, 243-244.

[69] *Balwant Rao* v. *Baji Rao*, (1920) 47 I. A. 213, 222 : " The distinction is pointed out in *Vasudevan* v. *Secretary of State*, (1887) 11 Mad. 167."

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Courts if it is opposed to public policy.[70] Alleged customs having the effect of varying the "common law of the Muhammadans" relating to inheritance were rejected, because they were immoral; in concluding that they were immoral, the Privy Council referred to the terms of reprobation in which the Fatawa Alamgiri, Hidaya and Koran refer to zina (illicit intercourse) which was involved in the custom in question.[71] Thus public policy, with reference to questions otherwise governed by Muhammadan law, must, *semble*, be understood by the standard of Muhammadan lawyers, or at least, regard has to be paid to that standard.[72] Similarly, referring to the presumptions from acknowledgment in the Muslim law of parentage and marriage, Dr. Lushington said: "We apprehend that in considering this question of Muhammadan law, we must at least to a certain extent, be governed by the same principles of evidence which the Mussulman lawyers themselves would apply to the consideration of such a question."[73] Similar remarks were made by West J. in considering whether a particular object of bounty should be pronounced useful and beneficial to the community, so as to take it out of the rule against perpetuities, and bring it within the exception to that rule made in favour of charities, or objects useful and beneficial to the community. "But useful and beneficial in what sense?" he asked: and answered: "The Courts have to pronounce whether any particular object of a bounty falls within the definition, but they must in general apply the standard of customary law and common opinion amongst the community to which the parties interested belong."[74]

Policy of Muhammadan law:

Principles of evidence.

Standard of custom or common opinion for determining whether objects useful or beneficial.

10A. (1) The standard of proof[1] required for establishing the prevalence of custom in supersession of the general law has been laid down with great precision by the decisions: but the question of fact to be decided before custom

STANDARD OF PROOF CUSTOM: PREVIOUS JUDGMENTS

[70] See s. 10, *Malus usus est abolendus*, Co., Litt. s. 212; cf. *Cuthbert* v. *Cumming*, (1855) 10 Ex. 809, 815, 816, on appeal (1855) 11 Ex. 405.

[71] *Ghasiti* v. *Umraojan*, (1893) 20 I. A. 193 = 21 Cal. 149.

[72] Hindu law has occasionally been said to adopt different ATTITUDE TOWARDS PROSTITUTION: Cf. *Mathura* v. *Naikin*, (1850) 4 Bom. 515; *Venku* v. *Mahalinga*, (1888) 11 Mad. 393. Hindu law also more favourable to custom: *Tarachand* v. *Reeb Ram*, (1866) 3 Mad. H. C. R. 50, 56.

[73] (*Khaja*) *Hidayat Oollah* v. *Rai Jan*, (1844) 3 Moo. I. A. 295, 318, followed in *Ashrufood Dawlah* v. *Hyder*, (1866) Moo. I. A. 94, 107. ISLAMIC LAW OF EVIDENCE highly developed: "It is not lawful for a witness to testify to anything that he has not seen except *nasab*, death, marriage, consummation & the authority of a Judge: & it is competent to him to testify to these matters, when informed of them by a person in whom he has confidence."—Bail. I. (425, 428).

[74] *Fatmabibi* v. *Adv. Gen.*, (1881) 6 Bom. 42, 50; *Bai Sakar* v. *Vora Ismail Gaffoor*, (1936) 60 Bom. 919, 938, citing *Abdul Hussein* v. *Sona Dero*, (1917) 45 I. A. 10, 12; Koran IV. 8.

[1] STANDARD OF PROOF summarized at end of s. 10A comm. PREVIOUS DECISIONS are, under Ind. Evid. Act, ss. 13, 43, INSTANCES in which custom recognised: not binding authorities laying down that custom prevails. Proof of custom in one case does not make that custom JUDICIALLY NOTICEABLE in all subsequent cases: *Gobinda N. S.* v. *Shama L. S.*, (1931) 58 I. A. 125, 136; *Bai Saker* v. *Vora Ismail*, (1936) 60 Bom. 919; *Abdul Hussein* v. *Sona Dero*, (1917) 45 I. A. 10; *Re Parker ex parte Turquand*, (1885) 14 Q. B. D. (C. A.), 636, 645; *Southwell* v. *Bowditch*, (1876) 1 C. P. D. 374; *Moult* v. *Halliday*, [1898] 1 Q. B. 125, Hals. *Laws of Eng.* X.

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can be accepted by the Court as having the force of law, is frequently overlooked. Previous judgments[1] in which the custom has been so accepted are relevant as instances or transactions in which the custom was asserted, not as decisions binding on persons who were not parties thereto.[1]

Judicial notice of of custom.

(2) But where any custom is well established and proved in several cases as governing a community, or body of persons, the Court may take judicial notice of that fact ;[2] and the burden of proving that a rule of law opposed to the said well established custom prevails, and that any person belonging to the said community or body of persons is governed by such a rule, may be thrown on the person making the allegation.[3] When migration from India to Mombasa and settlement among Muslims following the Muhammadan law of succession was proved, the presumption was readily drawn that the Muhammadan law was adopted by the settlers.[4]

Pleading and proving customs.

Where a custom is pleaded and has to be established in a Court, two issues are involved : one an issue of fact : whether the custom has been

pp. 272-4, par. 500-503 ; cf. *Bai Baiji* v. *Bai Suntok*, (1894) 20 Bom. 53 ; *Dahyabhai* v. *Chunilal*, (1913) 38 Bom. 183, 187 ; *Shivji* v. *Datu*, (1874) 12 Bom. H. C. R. 281 ; *Shambher* v. *Gayanchand*, (1894) 15 All. 379 ; *Gangabai* v. *Thaver*, (1863) Bom. H. C. R. 71, 73 ; *Re Chenworth*, [1902] 2 Ch. 488 *ex parte Powell, Re Matthews*, (1875) 1 Ch. D. 501 ; *Lohr* v. *Aitchison*, (1878) 3 Q. B. 558, 562 ; *Akbarally* v. *Mahomedally*, (1931) 57 Bom. 551 ; *Edelstein* v. *Schuler & Co.*, [1902] 2 K. B. 144, 155, 156. See *George* v. *Davies*, [1911] 2 K. B. 145, court took judicial notice of custom which 12 years before another court had felt unable to notice judicially in *Moult* v. *Halliday*, [1898] 1 Q. B. 125. For somewhat parallel instance in India, see *Gopalayya* v. *Raghupatiayyen*, (1873) 7 M. H. C. R. 250; *Vayidinada* v. *Appu*, (1885) 9 Mad. 44 : & cf. Mayne, *Hindu Law*, s. 136. Roman law : best evidence to produce judgments of courts of law : Dig. 1, 3, 34. REFERENCES TO PREVIOUS JUDGMENTS : (*Mussumat Bebee*) *Bechun* v. *Sheikh Hamid Hussein*, (1811) 14 Moo. I. A. 377, 388, (question whether amount of *mahr* Rs. 40,000 : P. C. referred to other reported cases from Bihar where Rs. 40,000 mahr was mentioned, saying : " These cases cannot of course be regarded as evidence in the cause, but as MATTERS OF HISTORY they are consistent with the testimony of the witnesses "); *Imperial Oil Soap* v. *Maslihuddin*, (1921) 2 Lah. 83 (judgment relied upon was based on compromise or confession). Cf. *Syed Shah Muhammad Kazem* v. *Syed Abi Saghir*, (1931) 11 Pat. 288, 333 (judgment referred to not as proof of any particular fact, but to show that at that time question of private nature of property could have been, but was not raised).

[2] *Kunhambi* v. *Kalanthar*, (1914) 38 Mad. 1052, cases collected. *Gireeshachandra* v. *Rabeendranath*, (1930) 61 Cal. 694.

[3] Prior to Shariat Act, 1937, custom that Khojas & Memons were governed by Hindu law of succession considered well established & burden of proof for establishing rule of law opposed to Hindu law of succession thrown on person alleging it : *Abdurahim* v. *Halimabai*, (1915) 43 I. A. 35, 39 = 18 Bom. L. R. 638, 639 ; *Hirbai* v. *Gorbai*, (1875) 12 Bom. H. C. R. 294, 305 ; *Rahematbai* v. *Hirbai*, (1877) 3 Bom. 34 ; *In re Haji Ismail*, (1880) 6 Bom. 452 ; *Ashabai* v. *Haji Tyeb*, (1882) 1 Bom. 115 ; *Mahomed Sidick* v. *Haji Ahmed*, (1885) 10 Bom. 1 ; *In goods of Moolbai*, (1876) 2 Bom. H. C. R. 276.

[4] *Abdurahim* v. *Halimabai*, (1915) 43 I. A. 35=18 Bom. L. R. 635.

actually observed as a course of conduct having binding force; the other an issue of law: whether the custom has legal force.[5]

Customs in India: family, local.

Custom has developed in India on its own lines.[6] There being no State religion, the law of Islam is enforced on general grounds of justice, equity and good conscience. Lord Buckmaster referred to the difficulty of applying all the strict rules that govern the establishment of custom in England to Indian circumstances which find no analogy in England. It is evident that many of the customs held to be proved in India could not have existed from time immemorial.[7] But the custom set up must be shown to have a certain degree of antiquity.[8] "Custom binding inheritance in a particular family has long been recognised in India, although such a custom is unknown to the law of England and foreign to its spirit."[9] Such a custom must be proved

Antiquity of custom.

Family custom.

[5] *Mahammad Kamil* v. *Imtiaz Fatima*, (1909) 36 I. A. 210, 220 = 31 All. 557, 570 (existence of CUSTOM is question of FACT); *Kunhambi* v. *Kalanthar*, (1914) 38 Mad. 1052. How far findings relating to custom can be subject of SECOND APPEAL: *Kakarla Abbaye* v. *Raja Venkata Papayya Rao*, (1905) 26 Mad. 24 (duty of court to examine sufficiency of evidence as to (i) antiquity, (ii) uniformity, (iii) its credibility & weight "as custom is transcendent law.")] (But] see *Palaniappa* v. *Srimati Devasi Kamma*, (1917) 44 I. A. 147 (MAD.) & other cases collected in commentaries Civ. Pr. Code, s. 100(1)(b) on "usage having force of law.") Function of High Court in second appeal restricted to determine whether lower Court has acted on illegal evidence or upon evidence which legally insufficient to establish custom: *Hashimali* v. *Abdul Rahman*, (1906) 28 All. 698; *Kalandar* v. *Kalandar*, (1921) 41 M. L. J. 437, following *Kunhambi* v. *Kalanthar*, (1914) 38 Mad. 1052, 1063 as "the leading case." *Hamerton* v. *Horney*, (1876) 24 W. R. 603, 604 (custom described as local common law: Jessel M. R.: it must be certain in respect of persons whom it is alleged to affect); *Lockwood* v. *Wood*, (1844) 5 Q. B. 50, (on customs generally); *Khojas & Memons' Case*, Perr., Or. Cas. 100, Mor. Dig. II. 431; *Howard* v. *Pestonji*, Per. Or. Cas. 535; *Tatachand* v. *Reeb Ram*, (1866) 3 Mad. H. C. R. 50, 55-57; *Bhau Nanji* v. *Sundrabai*, (1874) 11 Bom. H. C. R. 249; *Mathura Naikin* v. *Esu Naikan*, (1880) 4 Bom. 545; *Bai Saker* v. *Vora Ismail*, (1936) 60 Bom. 919. Lord Hobhouse speaks of the COMMON LAW OF THE MUHAMMADANS in *Ghasiti* v. *Umraojan*, (1893) 21 Cal. 149, 153, (P. C.); *Moult* v. *Halliday*, [1898] 1 Q. B. 125 (custom must be REASONABLE). Custom must not be opposed to PUBLIC POLICY: must be CERTAIN: *Returaji Dabain* v. *Pahlwan Bhagat*, (1919) 33 All. 196 (F. B.); *Rama Kanta D.* v. *Shamanand*, (1919) 36 I. A. 49 (reversing Cal. H. C.); *Tyson* v. *Smith*, (1888) 9 Ad. & El., 406, 421; *Simpson* v. *Wells*, (1872) L. R., 7 Q. B., 214.

[6] Its importance: *Kakarla Abbaya* v. *Raja Venkata P. R.*, (1905) 29 Mad. 24.

[7] *Abdul Hussein* v. *Sona Dero*, (1917) 45 I. A. 10 (Sind); *Likhraj* v. *Anrudh*, (1906) 28 All. 434 (custom of pre-emption need not be IMMEMORIAL) following *Kuar Sen* v. *Mamman*, (1895) 17 All. 87; *Gokul Dichhit* v. *Maheshri D.*, [1905] All. W. N. 266; *Mohidin* v. *Sivlingappa*, (1899) 23 Bom. 666; see also *Birbae* v. *Gorbai*, (1875) 12 Bom. H. C. R. 204, 316-7, 319-20 (Khoja case); *Chintamanrao Appasaheb* v. *Ramchandra*, (1931) 56 Bom. 82 (on TIME IMMEMORIAL); *Moult* v. *Halliday*, [1898] 1 Q. B. 125; *Universo Insurance Co. of Milan* v. *Merchants Marine Insurance Co.*, [1897] 2 Q. B. 93.

[8] *Ramalakshmi* v. *Sivanandha*, (1872) I. A. (SUPP. VOL.) 1, 3; & see *Doeta Jagmohan* v. *Srimate Nimu*, (1831) Montriou, Cas., H. L. 596.

[9] *Abdul Hussein* v. *Sona Dero*, (1917) 45 I. A. 10, 14 (SIND). "A LOCAL CUSTOM is one binding on all persons in the local area within which it prevails and differs entirely from a FAMILY CUSTOM binding only on members of the family as to rules of descent and so forth": *Narayan Singh* v. *Niranjan*, (1923) 51 I. A. 37, 60 *per* Lord Sumner citing *Rajkishore Singh* v. *Ramjoy*, (1872) 1 Cal. 186 (P. C.): (evidence considered by P. C.); *Bhagwan Bakhsh* v. *Drigjibai*, (1930) 6 Luck. 487, FAMILY OR TRIBAL CUSTOM not proved, *Md. Umar* v. *Md. Niazuddin*, (1911) 39 I. A. 19 (PUNJ.); *Md. Kamal* v. *Mt. Imtiaz*, (1909) 11 Bom. L. R. 1210; *Soorendranath Roy* v. (*Musst.*) *Heeramona*, (1868) 12 Moo. I. A. 81, 91 ("prevalence in any part of India of a special custom of descent in that place of the property of people of that class or race, stands on the footing of usage or CUSTOM OF THE FAMILY"),

SECTION 10A.

by satisfactory evidence but without insisting on "the rigorous and technical rules applicable in England.[10]

Public policy Muslim standard.

Public policy, with reference to questions governed by Muhammadan law would apparently be understood by the standard of Muslim Lawyers, or at least regard to be paid to that standard.[11]

Proof of customs : (1) instances.

In order that the texts may be overridden by proof of custom, the evidence must satisfy the Court that the majority at least of the given class of persons looks upon the customary rule put forward as binding. This may be established by (1) a series of well-known concordant and on the whole continuous instances, so that the common consent of the class in question is clearly demonstrated by the number of instances proved ;[12] (2) by general

(2) general evidence.

evidence of custom : under English law—which as stated above is more rigorous and technical than the law in India—' in proving an immemorial custom the usual course taken is to call persons of middle or old age to

explained.

state that in their time, usually at least, half a century, the custom has always prevailed. This is considered in the absence of countervailing evidence to show that the custom has existed from all time." [13] "A custom possible in law, being reasonable and otherwise fulfilling the requisites of a good custom may be established by very slender evidence." [14] "It is

Hearsay evidence on custom.

admissible for a living witness to state his opinion on the existence of a family custom, and to state as the grounds of that opinion, information derived from deceased persons, and the weight of that opinion would depend on the

Hashmat Ali v. *Nasibul Nisa*, (1924) 52 I. A. 172. The Centr. Prov. Laws Act XX. of 1875, s. 5, proviso, requires effect to be given to any CUSTOM PREVAILING AMONGST MEMBERS OF ANY FAMILY & otherwise legally binding, though inconsistent with general law : See Table of Enactments at beginning of Ch. II.

[10] *Roshan A. K.* v. *Chaudhri Asghar*, (1929) 57 I. A. 20, 33 (on death of M. K., widows allowed, in accordance with custom recorded a few years later in *wajib-ul-araiz*, to succeed without any claim made by other heirs : held sufficient to establish supersession of Muhammadan law of succession).

[11] See s. 10, com. : custom & policy of Muhammadan law.

[12] *Akbarally* v. *Mahomedally*, (1931) 57 Bom. 551, 562 ; *Khojas & Memons' Case*, (1847) Perr., Or. Cas., 110 ; *Kunhambi* v. *Kalanthar*, (1914) 38 Mad. 1052, 1063 ; *Mahomed* v. *Zahiroodin*, (1902) 5 Bom. L. R. 8, 17 (*ill.* 1-4) (evidence that a demand which would be justified by general law had been resisted, referred to, as showing that custom had made that demand unjustifiable) ; *Charanjit* v. *Amir Ali*, (1921) 2 Lah. 243 ; *Roshan Ali K.* v. *Chaudhri Asghar Ali*, (1929) 57 I. A. 29, 33.

[13] Hals, *Laws of Eng.* : *Custom*, X., 22 §20 : *Hamerton* v. *Honey*, (1876) 24 W. R. 603. In England, if man about 50 years old comes forward & asserts certain custom, his testimony constitutes *prima facie* proof : general evidence of custom as distinguished from proof of custom by instances, see below. As to PROOF OF CUSTOMS, see Hals. *Laws of Eng.*, Tit. *Custom, Usage* ; Aske. *Custom* ; S. Roy, *Cust. & Cust. Law in Brit. Ind.*, Tagore Law Lect., 1908. *Dahyabhai* v. *Chunilal*, (1913) 38 Bom. 183, (proof of custom of pre-emption) ; *Janki Misir* v. *Ranno Sing*, (1913) 35 All. 472 ; *Jivan Lal* v. *Kallu*, (1905) 28 All. 170, 173 (interesting but unsuccessful attempt by caste to adopt new set of customs by resolving to do so in caste meeting).

[14] Of course in absence of contravening evidence : Hals. *Law of Eng.* : *Custom*, X. 23, § 30 ; Where custom does not displace general law but merely adds new incident not inconsistent with it, great body of evidence not necessary : *Johnson* v. *Clark*, [1908] 1 Ch. 303, 309 (Parker J.) ; see *Hirbae* v. *Gorbai*, (1875) 12 Bom. H. C. R. 294 ; *Ali Asghar* v. *Collector*, (1917) 39 All. 574 ; (evidence examined in great detail ; custom alleged in Punjab generally, amongst Beswadars of Palwal, in particular ; to exclude daughters from inheritance : custom held not proved).

position and character of the witness and of the persons on whose statements he has formed his opinion."[15] In England "the rule is now apparently established" that proof of actual instances is not an essential condition for the reception of proof of reputation, and that want of instances is only material as affecting the value of reputation when received.[16] "Breach of a custom in a particular instance, supposing it to have happened need not destroy it for all time."[17] SECTION 10A.

Instances when not necessary.

The fact that a custom admittedly governing ancestral property extended also to self-acquired property, may be proved by general evidence as to its existence by members of the tribe or family who would naturally be cognisant of it.[18] Instances precisely covering the custom may also be unnecessary where the customary rules already judicially established are such that it would be anomalous and arbitrary to reject the custom alleged :[19] though as already stated the deduction of new rules from customary rules previously established are not permissible in the manner in which deductions from legislative enactments are permissible : customs may not be enlarged by parity of reasoning. Where women are sought to be deprived of their rights on the ground of custom, the proof ought not to consist solely of the fact that they have been ignored, or merely allotted maintenance or treated as estranged from the family. They are very much under the influence of the male members.[20] Lord Birkenhead demurred to the practice of finding facts upon evidence given in other cases, between other parties.[21]

Women's rights.

SUMMARY : STANDARD OF PROOF OF CUSTOM.

The STANDARD OF PROOF required for establishing the prevalence of custom in supersession of the general law[22] may be summarized as follows :

[15] *Garurudhwaja Parshad S.* v. *Saparandhwaja P. S.*, (1910) 27 I. A. 238, 251, 252, (ALL.) ("customs being matter of general interest HEARSAY OF EVIDENCE OF REPUTATION is admissible"); Aske, *Custom*, (1909) 127 ; *R.* v. *Bedfordshire*, (1855) 11 A. & E., 134 = 4 E. & B., 535 ; 3 P. & D., 21 ; *Roe* v. *Parker*, (1792) 5 T. R., 25 ; *Marquis of Anglesey* v. *Lord Hatherton*, (1842) 10 M. & W., 218, 239, ("custom lies in reputation.")

[16] *Crease* v. *Barrett*, (1835) 1 Cr. M. & R., 919, 930 ("proof of facts" viz. of instances "not essential condition of reception of reputation, but only material as it affects its value when received"); *Lord Dunraven* v. *Llewellyn*, (1850) 15 Q. B., 791, 808 (Parke, B.); *Mosley* v. *Davis*, (1822) 11 Price, 162, 172, 180.

[17] *Zarifun-nissa* v. *Shafiq-uz-zaman K.*, (1928) 55 I. A. 303, 317.

[18] *Ahmad* v. *Channi Bibi*, (1915) 52 I. A. 379, 383, 384, (LAH.).

[19] *Hashmat Ali* v. *Nasib-ul-Nisa*, (1924) 52 I. A. 172 (right of brother's daughter to exclude sister's son recognized without proof of instances of such actual exclusion ; because (i) settled by judicial decision that son represented deceased father & (ii) instances of widow representing husband & daughter representing her deceased uncle).

[20] Pointed out long ago : *Mirabibi* v. *Villayanna*, (1885) 8 Mad. 464, which case was strongly approved in *Abdul Hussein* v. *Sona Dero*, (1917) 45 I. A. 10, 17. The observations of Kennedy, J. C., a judge greatly respected for his knowledge of human nature,—in *Usman* v. *Asab*, [1925] AIR (SIND) 207,—though made in J. C.'s Court deserve consideration : he insists on desirability of instances proving that women demanded their shares & were refused : it must be shown that there were no instances in which women took their inheritance : their passive acceptance of bare necessities is not enough.

[21] *Les Affreteur Reunis* v. *Walford*, [1919] A. C. 801, 808. But see cases cited in *Akbarally* v. *Mahomedally*, (1931) 57 Bom. 551. See also s. 10A, "proof" *n.*

[22] *Abdul Hussein K.* v. *Sona Dero*, (1917) 45 I. A. 10 = 45 Cal. 450 (SIND); *Muhammad Ibrahim R.* v. *Shaikh Ibr.*, (1922) 49 I. A. 119 = 45 Mad. 308 ;

SECTION 10A. PROOF OF CUSTOM.

(1) In all cases it lies upon the person who asserts [23] that he is ruled by custom in regard to any particular matter,—

assertion

(*a*) to PLEAD the custom relied upon specifically and with certainty and precision ;

proof : certainty of pleading :

(*b*) to PROVE CLEARLY that he is governed by custom as pleaded, and not by general law ; [24]

(*c*) to prove the PARTICULAR CUSTOM set up.[25]

(2) As to THE PROOF OF CUSTOM,—

(i) NO PRESUMPTION is created in favour of custom, and

(ii) even where the Legislature requires customs to be enforced and it is known that usage or custom is prevalent, the 'PRINCIPLES' OF A CUSTOM are not binding, notwithstanding that the custom be proved ; [26] nor can custom be extended by LOGICAL PROCESS ; [27]

(iii) the custom must be ANCIENT and CERTAIN and not opposed to PUBLIC POLICY ; [28]

appropriate proof : instances :

(iv) the APPROPRIATE MODE OF PROVING the existence of custom is (A) to give evidence of instances in which the custom has been followed,[29] having been consciously accepted as having the force of law, [30] (B) the evidence of such instances may be supplemented by general evidence of custom, and (C) apparently in some circumstances the evidence of a very few instances supported by general evidence may be held sufficient, or (D) even no instances may be insisted upon.[31]

general evidence.

previous decisions :

(v) previous JUDGMENTS of the Courts holding that the community in question was governed by the alleged custom, are only pieces of evidence : the decisions being particular transactions in which the custom had been recognised : the reasons upon which the judgment is founded are no part of

Gobinda Narayan Singh v. *Shamlal S.*, (1931) 58 I. A. 125 (CAL.); *Bai Sakar* v. *Vora Ismail*, (1936) 60 Bom. 919 & cases there cited.

[23] *Abdul Hussein* v. *Sona*, (1917) 45 I. A. 10 (SIND).

[24] This is a QUESTION OF FACT : see s. 10A com. "pleading & proving custom" *n.*

[25] *Ramanand* v. *Surgiani*, (1894) 16 All. 221 ; *Lachman* v. *Akbarkhan*, (1887) 1 All. 490 ; *Gopalayyan* v. *Raghupatiayyan*, (1873) 7 Mad. H. C. R. 250 ; *Hurprasad* v. *Sheo Dayal*, (1876) 3 I. A. 259, 285 ; *Beni Madhab* v. *Jai Krishna*, (1869) 7 Beng. L. R. 152 ; *Rama* v. *Sivanantha*, (1872) 14 Moo. I. A. 570. Custom must be PROVED in EXACT TERMS in which alleged : see s. 10(1A) "certain" *n.*

[26] NO PRESUMPTION ought to be made IN FAVOUR of existence of usage or CUSTOM on ground that it is known that that usage or custom is prevalent. On DEDUCTIONS from other customs, see *Abdul Hussein* v. *Sona Dero*, (1917) 45 I. A. 10, 13, 14 ; s. 10, com. *nn.* 63-66.

[27] *Muharram Ali* v. *Barkat Ali*, (1930) 12 Lah. 286, 290 (cases collected); *Arthur* v. *Bokenham*, (1708) 11 Mod. 148, 160, 161. (Full Court of Com. pleas) (usage & practice makes law & not reason of thing : custom cannot be enlarged by any parity of reasoning).

[28] On ANTIQUITY of custom, see p. 73 ; on its not being opposed to PUBLIC POLICY, see. p. 74.

[29] Reported judgments are very often cited as though every statement of fact in them were binding as *res judicata*, cf. *Gobinda N. S.* v. *Shama L. S.*, (1931) 58 I. A. 125. See s. 10A(1) "proof" *n.*

[30] *Mirabivi* v. *Villayana*, (1885) 8 Mad. 464. In *Mohammad Sadiq Ali K.* v. *Fakhr J.B.*, (1931) 59 I. A. 1, two instances deemed enough ; where, owing to history of family, the custom was of comparatively recent origin.

[31] See cases cited s. 10A, com. "instances where unnecessary."

the transaction and cannot be regarded ; nor any finding of fact other than the transactions itself ; [32]

Decisions based on insufficient evidence.

(vi) the fact that the court may find it necessary to decide the controversy between the parties before it on the basis of the evidence adduced, does not necessarily make the decision a satisfactory precedent if in any future instance FULLER EVIDENCE regarding the custom is forthcoming ; [33]

Scrutiny of custom.

(vii) each particular instance (whether or not supported by a judgment of a Court) must be scrutinized by the Court, attention being specifically directed to such questions as the following : [34] (A) where women's rights are in question were there circumstances that would make it unnecessary for the women to assert their strict rights? such as grant of maintenance marriage expenses, or dowry ; (B) was there any considerable estate in cases where it is alleged that women have no right to inherit? (C) were the women so much under the influence of the men that the conduct of the women cannot count for much? (D) have any women been called to give evidence? (E) was the position of the women witnesses such that their testimony can be considered as independent and fair? (F) is there any proof that the women knew of the custom and stood aside in obedience to it, refraining for that reason from asserting their rights under the general law? [34]

Authoritative interpretation adhered to.

Novel rules of law not deduced.

11. (1) The Courts will not attempt to put their own construction on the Koran in opposition to the express ruling of commentators of great antiquity and high authority,[1] nor give effect to new rules of law that may be logically deducible from the ancient texts,[2] but which have not been deduced by authoritative commentators (nor been adopted by the customs and usages of the parties).[2]

Purposeless distinctions disapproved.

(2) It is very undesirable as to a matter of public right to introduce purposeless distinctions between the law applicable in the case of one community, and that applicable in the case of another.[3]

[32] See s. 10A(1) "proof" *n.*

[33] *Rupchand* v. *Jambu Parshad*, (1910) 37 I. A. 93 (ALL.).

[34] *Mirabivi* v. *Villayana*, (1885) 8 Mad. 464 ; *Abdul Hussein* v. *Sona*, (1917) 45 I. A. 10 ; *Bai Saker* v. *Vora Ismail*, (1936) 60 Bom. 919. See com. on proof by previous instances.

[1] *Baqar Ali K.* v. *Anjuman Ara*, (1902) 25 All. 236, 252-255 = 30 I. A. 94, 111. (danger of relying upon ANCIENT TEXTS of the Muhammadan law & even precepts of Prophet himself, or taking them LITERALLY & deducing from them new rules of law, citing *Abul Fata* v. *Kussomby D. C.*, (1894) 22 I. A. 76, 86, 87) ; cf. *Imdad Ali* v. *Ahmed Ali*, [1925] AIR (OUDH) 518, (Dalal, J. C. : when jurists like Mahmood, J. have interpreted particular precept in particular way, it should be followed).

[2] (*Aga*) *Mahomed Jaffer B.* v. *Koolsom*, (1877) 25 I. A. 196, 204 = 25 Cal. 9, 18 (no express reference to customs), cf. *Col. of Madura* v. *Moottoo*, (1868) 12 Moo. I. A. 397, 436, (duty not so much to inquire whether disputed doctrine—of Hindu law—fairly deducible from earliest authorities, as to ascertain whether it has been received by the particular school and sanctioned by usage). Cf. "deductions from customary rules," s. 10, com.

[3] *Mahammad Mazaffaral Musavi* v. *Bibi Jabeda* K., (1930) 57 I. A. 125, 133 = 57

SECTION 11. Intention of parties given effect to.

(3) Unless any authority is cited to show a transaction to be invalid, effect must be given to the manifest intention of the parties.[4] A power ought to be held to exist which is not against public convenience, nor generally mischievous, nor against the general principles of the law.[5] In denying such a power there would be great general inconvenience and public mischief.[5]

Public convenience.

In absence of law and custom :

analogy.

The Privy Council disapproved of acting upon "logical conclusions which may seem to an acute modern dialectician to follow from the words of the old texts," [1] on the ground that in the absence of rules expressly laid down in the ancient texts or commentaries, it is safer to follow the analogy of another branch of the same school of law.[6]

Discretion to adopt most equitable view.

11A.[7] Where Muslim jurists of authority have expressed dissenting opinions on the same question, the Courts, presided over by the Kazi,[8] have authority to adopt that view which, the presiding officer is of opinion, is, in the particular circumstances,[9] most in accordance with justice.[10]

Cal. 1293 ; *Tremble* v. *Hill*, (1879) 5 App. Cas. 342, 344, 345 (necessity for all Courts in Empire to yield to high authority of Court of Appeal in England ; of utmost importance that in all parts of Empire where English law prevails, interpretation of that law by courts should be as nearly as possible same).

[4] (*Nawab*) *Umjad Ally* v. (*Mt.*) *Mohumdee B.*, (1867) 11 Moo. I. A. 517, 518 (cited at length, s. 352, com.) ; *Bhagabati Barmanya* v. *Kali Charan Singh*, (1911) 38 I. A. 54, 64.

[5] "We are to say whether there is anything against public convenience, anything generally mischievous, or anything against general principles of Hindu law in allowing a testator to give property whether by way of remainder or by way of executory bequest (to borrow terms from the law of England) upon an event which is to happen immediately on the close of a life in being. Their Lordships think that there is not ; that there would be great general inconvenience & public mischief in denying such a power, & that it is their duty to advise Her Majesty that such a power does exist" : *Sreemalty Soorjeemoney Dosee* v. *Dinobundoo Mullick*, (1862) 9 Moo I. A. 123, 135 ; cited & followed : *Tagore Case*, (1872) L. R. I. A. (SUPP. VOL.) 47, 69.

[6] See also *Tajbi* v. *Mowla K.*, (1917) 41 Bom. 485, 492, 493. Similarly in *Khoja & Mem. Case*, Perr., Cr. Cas., 110 = Morl. Dig. II., 431. As to introducing into English common law new rights "which ought to exist according to notions of what is JUST & PROPER," see per Pollock, C. B. in *Jeffreys* v. *Bosey*, (1854) 4 H. L. 815, 936 ; Bowen L. J. in *Dashwood* v. *Magniac*, [1891] 3 Ch. 367 ; Stephens, *Hist. of Crim. Law*, III. 359. As to EQUITY, per Jessel M. R. *in re Hallet's Est.*, (1879) 13 Ch. D. 696, 710 ; per Lord Cottenham *Wallworth* v. *Holt*, (1841) 4 My. & Cr., 619, 635 ; per Lord Eldon *Gee* v. *Pitchard*, (1818) 2 Swanst. 402, 414.

[7] Sect. 11A cited & applied : *Aziz Bano* v. *Muhammad Ibrahim H.*, (1925) 47 All. 823, 837, 23 A. L. J. 768, 781 (Sulaiman, J. very learned judgment) ; *Muhammad Afzal* v. *Muhammad Mahmud*, [1925] 24 All. L. J. 307, 309.

[8] See s. 11B, com. on Kazis.

[9] In choosing between CONFLICTING AUTHORITIES the principles of JUSTICE, EQUITY & GOOD CONSCIENCE should be regarded : (*Sheikh*) *Muhammad Mumtaz* v. *Zubeida*, (1889) 11 All. 460 = 16 I. A. 205, 215 ; *Musa B. B.* v. *Badesaheb*, (1937) 39 Bom. L. R. 1108 ; *Ebrahim* v. *Bai Asi*, (1933) 58 Bom. 236. Cf. "If a decision in one way will involve results which our law considers PREJUDICIAL TO THE PUBLIC INTERESTS OR IMMORAL, it is our duty to decide the other way" (per Farwell, L. J.) in *Re Hoyles* :

SECTION 11A. When Abu Hanifa and his disciples disagree.

There being three exponents of the Hanafi school of Sunni law it became necessary to have some principles for acting when they differed in opinion. These are thus stated in the Tabaqat-ul-Hanafia : "When Abu Hanifa is on one side, and Abu Yusuf and Muhammad on the other, the mufti is at liberty, if he chooses, to follow the opinion of the latter two. But if the one or the other is of the same opinion as Abu Hanifa, the mufti is obliged to prefer that opinion unless jurists of authority have declared their opinion to the contrary." [11] The implication in the last sentence, leaves the Court a discretion, and the British Courts have, therefore, assumed the right of deciding for themselves which opinion they will prefer : this is in accordance with the following statement of the duties of the Kazi :—"If in any case the Kazi be perplexed by opposite proofs, let him reflect upon the case, and determine as he shall judge right ; or, for greater certainty, let him consult other able lawyers, and if they differ, after weighing the argument, let him decide as appears just. Let him not fear or hesitate to act upon the result of his judgement after a full deliberate examination." [12] Mr. Justice Abdur Rahim, with his great authority has said :—"It may be a matter for argument whether on a question of this character (necessity for possession for completing a transfer by gift) it is not open to the Courts, according to the theory of Sunni jurisprudence, in a case where the parties are Hanafis, to adopt a rule of law laid down by jurists of one of the other of the four Sunni schools, if that rule is more in consonance with substantial justice, than the rule laid down by the Hanafi doctors themselves." [13]

Practice in India.

The Kazi's powers.

Adoption of most just rule.

Row v. *Jagg.* [1911] 1 Ch. 179, 187 ; see also *Mirehouse* v. *Rennell*, (1833) 6 Cl. & Fin. 527, 246, passage cited on p. 19, *n.* 26 ; (*Bibi*) *Khaver* v. (*Bibi*) *Rukhia*, (1905) 29 Bom. 468 ; *Vahazullah* v. *Boyapati*, (1906) 30 Mad. 519, 522 ; *Bismillah B.* v. *Nur Md.*, (1921) 44 All. 61 (Imam Muhammad's opinion followed as more reasonable & equitable); *Muhammad* v. *Leg. Rem.*, (1893) 15 All. 321, 323 (Md. preferred to Yusuf : erroneously supposing that *Bikani Mia* v. *Shuklal*, (1893) 20 Cal. 116 (F. B.) so laid down). RELATIVE AUTHORITY OF ABU HANIFA & TWO DISCIPLES : (*Mt.*) *Anis B.* v. *Malik Md. Istafa*, (1933) 55 All. 743 ; *Ebrahim* v. *Bai Asi*, (1933) 58 Bom. 256. When all three imams differ, opinion of Yusuf used to be given preference by the Kazis owing to his experience as chief Kazi ; *Abdul Kadir* v. *Salima*, (1886) 8 All. 149, 162, 166-167 ; *Kulsom Bibi* v. *Golam Hossein*, (1905) 10 C. W. N. 449, 488 ; *Khajah Hoosein* v. *Shahazadee*, (1869) 12 W. R. 344, 346 ; affmd. *ibid.*, 498.

[10] See *Hamira* v. *Zubaida*, (1916) 43 I. A. 294, 301-302, referred to in s. 12, com.

[11] *Journ. As.* 4 Ser. Tom. XV.; cf. Justin., 1, 2, 8, 203. Morl. Dig. I., p. CCLXII. (*Sheikh*) *Abdul Sheikh Koar* v. *Ruheemun-nissa*, (1874) 6 N. W. P. (H. C. R.) 94 (Abu Hanifa preferred to disciples); *Abdul Kadir* v. *Salima*, (1886) 8 All. 162 (Abu Yusuf followed); (*Bibi*) *Jinjira Khatun* v. *Mohammad Fakirulla*, (1921) 49 Cal. 477, 485-9 = 26 C. W. N. 749, 754 (A. Yusuf followed on WAKF); Muhammad *Azizuddin* v. *Leg. Rem.*, (1893) 15 All. 321 ; *Bikani Mia* v. *Sheik Lal Poddar*, (1893) 20 Cal. 110 ; *Ata Muhammad C.* v. *Saiqul Bibi*, (1910) 8 All. L J. 953 (two disciples preferred to Abu Hanifa); *Daim* v. *Assoona Bibee*, (1870) 2 N. W. P. (H. C. R.) 360 (highest Shia AUTHORITIES DIFFERING, Court conceived itself at liberty to consider practice among Shias in India for last 50 years. See also Bail. 1., 564 (573); "When the Judge has given his decision for the validity of a *wakf* of *Mooshaã* his decree is operative, *as in all matters on which there is a difference of opinion.*"

[12] "*Badaia*" of Abu Bakr bin Mas'ud al Kashani (d. 587 A.H.) quoted in *Fatawa Alamgiri*, transl. Morl., *Dig.*, Vol. I., p. CCXL. ; (*Mt.*) *Anis Begam* v. *Malik Md. Istafa*, (1933) 55 All. 743 (relative authority of texts : principle of stare decisis).

[13] *Fakir Nynai Md. Rowther* v. *Kandasawmy K. V.*, (1911) 35 Mad. 120, 129. See

SECTION 11A. Fatawa explained and distinguished.

Rahim, J.'s remarks about fatawa also deserve careful consideration: "The facts must be borne in mind that mostly the fatawas, or opinions of jurists, were delivered in answers to abstract questions, intended to illustrate a certain principle of law: and it would be entirely misleading to treat such opinions as absolute rules of law, having the same authority as a text of the Koran, or a universally accepted ruling of the Prophet, or a proposition established by ijma, or consensus of opinion of jurists. They are mere deductions of jurists, or applications of certain well-established rules in particular cases, actual or suppositional; and until they are shown to have been accepted by consensus of opinion, cannot be regarded as of binding authority. The distinction between the deduction of a jurist in matters which fall within the province of ijtihad, or juristic opinion mujtahidfih, and rules based on nuss, or authority of a text of the Koran, or a well known precept of the Prophet, or sanctioned by ijma, or consensus of opinion, is a principal feature of the Muhammadan legal system, and cannot safely be ignored."[14]

Jurisdiction and functions of the Kazi.

11B. The functions and powers in Muslim states of the Kazi[15] have occasionally been considered, for determining whether the courts in India have jurisdiction in respect of particular matters; *semble,* the jurisdiction of the Indian Courts depends in the majority of cases upon their constitution in accordance with the statutory adjective law.[16]

Other officiants.

The functions of mullas,[17] mujawars,[17] sajjadanishins,[17]

also *Atmanissa B.* v. *Abdul Soban,* (1915) 20 Cal. W. N. 113 (Mookerjee, J.: 'no *Kazi* had authority to deal with administration of *waqf* unless specially authorised to that effect (see s. 11B, com.): consequently Subdte. Judge had no such jurisdiction); (1936) 38 Bom. L. Rep., *Journ.,* 113, 118, 119.

[14] *Mathar S.* v. *Hosain E.,* (1912) 23 Mad. L. J. 734, 737; *Ebrahim* v. *Bai Asi,* (1933) 58 Bom. 256.

[15] See s. 5B, *n.* 4: *Mahomed Ismail Ariff* v. *Ahmed,* (1916) 43 I. A. 127, 134; cf. s. 61; *Sattappa* v. *Mahomed Saheb,* (1935) 60 Bom. 516, 531; *Abdul Alim Abed* v. *Abir Jan B.,* (1928) 55 Cal. 1284; *Mahammad Muzaffar-al-Masavi* v. *Jabeda K.,* (1930) 57 I. A. 125 (CAL.); *Mahomedally* v. *Akberally,* [1934] AIR (P. C.) 53 (CAL.); *Fakir B.* v. *Sakina B.,* (1892) 19 I. A. 157 (CAL.) (marriage register).

[16] See s. 11A com.: *Woozatunnessa B.,* (1898) 35 Cal. 21 (KAZI: wakf); *In re Halima K.,* (1910) 37 Cal. 870 (KAZI: wakf: mutawalli); *Mudhan mirdha* v. (*Mst.*) *Khodeja B.,* [1937] 2 Cal. 79 (F. B.) (KAZI: marriage: wakf: Civ. Pro. Co., s. 15 applies: Court of lowest grade competent to try). But see Shariat Act, 1937, s. 5. *Aziz Bano* v. *Md. Ibrahim Husain,* (1925) 47 All. 823, 837; *Burhan Mirdha* v. (*Mt.*) *Khodeja B.,* [1937] 2 Cal. 79 (Civil Courts take place of KAZI: suit must be brought in Court of lowest grade competent to try it: not necessarily in District Court: if suit valued at Rs. 15, in Munsif's Court).

[17] *Maktumsab* v. *Dadabhai,* (1934) 36 Bom. L. R. 1098, 1101 contains admirable summing up in one sentence: "The MULLA'S office is admittedly a religious one, but there is NO PRIESTLY CLASS AMONGST MUHAMMADANS & any sufficiently instructed person may conduct worship & officiate at marriages, funerals & other religious services, though of course, there are professional experts in these matters." Question primarily as to character of grant. See also *Tattyagouda* v. *Mohodin Sultan,* (1934) 36 Bom. L. R. 1231 (grant for benefit of MULLA); *Biyamma Kashimsaheb Inamdar* v. *Ahmed Saheb Mohaddin Saheb Mulla,* (1934) 37 Bom. L. R. 257 (MULLA); *Mahomed Oosman* v. *Essack Saleh Md. V.,* (1935) 39 Bom. L. R. 502 = [1938] Bom. 184 (MUJAWAR); see *n.* 18; *Allarakhia* v. *Mahommed Abdur Rahim,* (1933) 61

SECTION 11B.

and other officiants have also been occasionally considered.[18]

Powers of Kazi and Court compared.

How far can the British Courts exercise the powers of the Kazi ?[19] Do the rules in the Muslim texts defining the Kazi's powers, constitute substantive or adjective law ? Under the Shariat Act, 1937, s. 5, (now proposed to be repealed by the Dissolution of Muslim Marriages Bill, 1939) the District Judge may on the petition of married women dissolve their marriage. Most of the Muslim adjective law is abrogated by statutes regulating procedure.[18]

Kazi, district and subordinate judge.

The functions of the Kazi and the Chief Kazi in Muslim states have been elaborately considered[19] and the conclusion arrived at, that a Subordinate Judge, not expressly authorized by Government to exercise functions in connection with the administration of wakfs, is not competent to act in that behalf, and that it is doubtful whether a District judge has implied authority to exercise the functions performed by a Kazi under Muslim law. In the majority of cases, the Courts in British India will probably be satisfied with the decision mentioned below,[20] and the dictum,—"The Kazi, whose place in the British Indian system is taken by the Civil Court."[21]

Kazi in India now means religious officiant : not Judge.

Much confusion is frequently caused by a failure to distinguish the person referred to in the texts as Kazi (viz. the judge appointed by the State) from the person designated Kazi in our times in India, viz. an officiant at the performance of marriage and similar ceremonies.[22] A short account of the Kazi's (judicial) office in Muslim states may be useful :

I. A. 50 (SAJJADANASHIN, MUJAWAR ; *see* 457(8), (8A) ; *Muharram Ali* v. *Barkat Ali*, (1930) 12 Lah. 286 (MUJAWAR).

[18] *Mahomed Oosman* v. *Essack Saleh Mahomed Vanjara*, [1938] Bom. 184-=39 Bom. L. R. 502 (question whether particular OFFICE KNOWN TO LAW & whether plaintiff can claim to be entitled to hold it, (A) involves determination of rights, liabilities & functions attributed to the office ; (B) these must consist of some defined functions making up a unit ; so that (i) one individual must perform those functions ; (ii) they cannot well be performed piecemeal,—some by one person & some by another ; (iii) performance of these functions by one person must be usual & customary or necessary for, or at least conducive to, due administration of institution with which alleged office is associated) : [figures refer to pages of [1938] Bom. 184 ; pages of 39 Bom. L. R. 602 in ( ). MUJAWAR : 187 (506), 196 (511), 198 (512), 200 (514), 232 issue (v) (532) ; connotation of OFFICE : 187 (506), 188 (512), 235-6 issue (iv) (534) : (*a*) defined functions making up a unit 198 (512), 200 (514) ; (*b*) necessary for or conducive to administration of institution, 198 (512).

[19] *Atimanessa B.* v. *Abdul Subhan*, (1915) 43 Cal. 467 (extracts cited by Mookerjee, J. refer to : (1) has KAZI POWER to appoint successor to *mutawalli*, unless expressly authorized to appoint ? (p. 476) ; (2) has chief kazi alone such power ? (3) has he such power without being expressly authorized ? (pp. 477, 484) ; (4) as to exchange of properties forming subject of wakf, see s. 467) ; cf. *Burhan Mirdha* v. (*Mt.*) *Khodeja B.*, (1936) [1937] 2 Cal. 79 (F. B.). In *Shama Churn Ray* v. *Abdur Rahim*, (1898) 3 C. W. N. 158, (Ameer Ali, Pratt, JJ.) (Civ. Court of Super. Jurisdn. in District vested, generally speaking, with powers exercised by Kazi under Muslim regime, p. 160) followed : *re Woozatunnessa B.*, (1908) 36 Cal. 21 ; not followed ; *Re Halima Khatun*, (1916) 37 Cal. 870 ; Pugh. J., declined to assume jurisdiction as extensive as that of kazi unless there was some statutory power & authority.

[20] *Burhan Mirdha* v. (*Mt.*) *Khodeja*, [1937] 2 Cal. 79.

[21] *Mahomed Ismail Ariff* v. *Ahmed*, (1916) 43 I. A. 127, 134 = 43 Cal. 1085, 1100 (observations by Syed Sahib Ameer Ali while laying down that, generally speaking, in case of wakf or trust created for specific, or determinate body of individuals, kazi has, in carrying the trust into execution, to give effect, so far as possible, to expressed wishes of founder) ; *Habibar Rahaman* v. *Saidunnisa*, (1923) 51 Cal. 331 ; *Askari Husain* v. *Chunni Lal*, [1930] 28 All. L. J. 205.

[22] Claims to be sole HEREDITARY KAZIS (custom giving monopoly being set up) in

SECTION 11B.

History of kazi's office.

In the early stages of the Islamic state, the various functions of government were not appropriately distributed. All functions and powers of the state and in particular the administration of justice were performed or exercised by the Prophet, and by his immediate successors, the first khalifs.

Power at first centralized.

With regard to the provinces, the powers of the head of the state were, as a whole, delegated by the Prophet and the early khalifs to the generals and prefects appointed for the province : the general who conquered a new territory, acted as judge as well as the leader in prayer. The second khalif Umar seems to have been the first to establish the institution of provincial Kazis to whom the function of administering justice was specifically entrusted.

Provincial kazis.

Decentralization

Decentralization greatly progressed during 200 years. By about 850 after Christ, the Abbaside khalifs it is true still stood at the head of the state ; and continued to be the fountain of all power. When they chose, they acted as the final arbiters of all matters relating to government. Yet their government at Baghdad was influenced by the older Persian government which served as a pattern in many respects. The khalif's power was delegated to and normally exercised by three officers : (1) his civil authority by the wazir ; (2) his judicial authority by the kazi ; (3) his military functions by a general (Amir). In Spain the arrangements were only slightly different.[23]

Justice.

The administration of justice was considered in Islam as a religious duty. Two results followed : (1) the function, when delegated, was entrusted to a

Jurisdiction

member of the faqih (theologian) class ; (2) the kazi had jurisdiction over Muslims only. Non-Muslims were under the jurisdiction of their own ecclesiastical heads or magistrates.[24]

Qalifications for office of kazi.

The kazi " according to the theory of Muslim law had to be male, adult, in full possession of his mental faculties, a free citizen, Muslim in faith, irreproachable in character, sound in sight and hearing and well versed in the presumptions of law." [24] The purely judicial officials in the provisions were appointed (1) at times by the governors ; (2) more often the Abbaside khalifs (750-1258) themselves appointed not only the chief kazi at Baghdad but the provincial kazis ; (3) at times the chief kazi (kazul kuzat) at Baghdad appointed provincial kazis as his deputies. In Egypt a regular series of judges succeeding each other, is found after the year 661.

His jurisdiction, function, procedure.

The kazi at the time of his appointment would either be invested with judicial functions generally and absolutely (ammah mutlaqah), or with limitations stated in the diploma of appointment from the khalif, wazir or

Kasam Khan v. *Kazi Abdulla,* (1925) 50 Bom. 133, & *Abdul Nabi* v. *Syed Ajmal Hussen,* [1935] AIR (NAG.), 123 seem to be based on such confusion : there can be NO MONOPOLY in any person (though he may be known as KAZI) to officiate at marriages, since the law of Islam does not require that function to be performed by any special officer : custom proved in such cases giving an exclusive right to kazis to write & register marriage contracts, is really meaningless : *Maktumsab* v. *Dadabhai,* (1934) 36 Bom. L. R. 1098, cited in s. 11B—in view of fact that marriage need not be written down or registered & NO OFFICIANT IS RECOGNIZED as having exclusive privilege of performing this function : *Gloucester Grammar School Case,* (1410) Y. B. 11 Hen. IV., fol. 24, pl. 21 ; *Sweeney* v. *Coote,* [1907] A. C. 221. See s. 23.

[23] Maqqari, I. 133-134. [24] Hitti, *Hist. of Arabs,* (1937) 225, 326.

governor, as the case may be. The general and unrestricted jurisdiction of the kazi included the following functions and duties : exercising jurisdiction over Muslims only he had (1) to decide cases, (2) act as guardian for lunatics and minor orphans, (3) administer wakfs, (4) impose punishment for violation of the religious law, (5) appoint judicial deputies (naibs) in the provinces, and (6) preside, under certain conditions, at the Friday congregational prayers.[25] SECTION 11B.

Umar the second khalif gave to Abu Musa on appointing him judge (kazi) at Mashari, instructions, which have moulded the entire administration of justice in Islamic states. The following is a translation of Umar's instructions.[26] UMAR'S INSTRUCTIONS TO KAZIS.

" The kazi's function requires, [the enforcement of] either an unequivocal ordinance of the Koran, or a practice that it is permissible to follow.[27] (You must) appreciate this when matters are put before you, for it is useless to utter a plea that is not valid. Treat all Muslims as equal in your court and in the attention they receive ; so neither the man of high station will expect you to be partial, nor will the humble despair of justice from you. The claimant must produce evidence ; from the defendant an oath may be exacted. Compromise is permissible between Muslims, provided no law be violated thereby. After giving judgment, if upon reconsideration you come to a different opinion, do not let the judgment which you have given stand in the way of retraction ; for justice may not be annulled, and you are to know that it is better to retract than to persist in injustice. Use your intelligence about matters that perplex you, to which neither law nor practice seems to apply : study the theory of analogy, then compare things, and adopt the judgment which is most pleasing to God and most in conformity with justice so far as you can see. If a man brings a claim in [the] absence [of the defendant], fix a term by which the defendant is to appear ; if the plaintiff then produce evidence, his claim shall be allowed, otherwise you will be entitled to give judgment against him. All Muslims are credible witnesses except such as have suffered stripes for offences with fixed penalties, such as have been proved to have given false witness, and such as are suspected of partiality on the ground of relationship whether of blood or of patronage. God will judge you in accordance with your secret character, though He leaves you to follow appearance. In the courts of justice avoid fatigue and the display of weariness or annoyance at the litigants : therein God enables you to earn reward and make a handsome store. For when a man's conscience towards God is clear, God makes His relations with man

Law to be applied : Koran : Equality. Practice. Compromise Review. Ijtihad. Analogy. Justice. Ex-parte evidence. Judicial amenities.

[25] Interesting information may be gleaned from ancient Mughal *sanads* appointing kazis in India : cf. (1938) XVI. Bom. Law Journ. 258 (5 sanads set out).

[26] Several copies of these instructions are available, but the variations are not vital. The text reflects the force and directness that one associates with every word & act of that great statesman, Umar. It also indicates how thoroughly imbued he was with the sense of responsibility in respect of all our acts,—a sense of responsibility, upon which the Koran insists as a fundamental principle of Islam. *Roy. As. Socy. Jl.*, [1910] Part. I., 311, 316, contains tr. by Dr. Margouliouth.

[27] The first sentence " delivers the law " to be enforced by the kazi ; cf. *Khojas & Mem. Case*, (1847) Perr., Or. Cas, 110, 122, cited s. 10, com.

SECTION 11B. satisfactory; whereas if a man simulate before the world what God knows that he has not, God will put him to shame."

Want of familiarity with Arabic.

11C. The exposition of Muslim law in India suffers from unfamiliarity with the language of the texts,[1] and with the notions and conditions of life underlying them, from the (*submitted* unfounded) assumption[2] that the texts are confused or inconsistent or inaccurately expressed:[3] that there are no forces of expansion and development within the law of Islam:[4] or that its development cannot be on modern lines or be based on reason:[5] or that a profound understanding of the texts cannot be claimed, unless uncouth, unpractical and fantastic notions are attributed to them as being their fundamental principles; and from misinterpretations caused by the introduction of alien legal conceptions[6] often unconsciously introduced by the lax use of English terms.[7]

Assumption that texts confused.

That law cannot develop.

Foreign legal conception.

Cassamally *v.* Currimbhai, 36 Bom. 214.

Certain observations in a case[2] noted in s. 355, *ill.* cannot be allowed to pass unconsidered. It is said "If there were any hope of expecting from the vast entanglement of the Muhammadan law anything like consistent principles or intelligible classifications or accurately expressed notions, it certainly would appear to me that considering the requisites of a gift are, amongst others, finality and completeness 'in præsenti,' then it might and ought to follow that an announcement on the donor's part that he might at any time during his lifetime revoke the gift, would make the donation entirely invalid." This is based on a misconception of the theory of the Muslim law of gifts, which is explained in s. 348, com. It is evident that its very theory requires that gifts should be revocable. It also illustrates the danger of considering that the whole of the law can be understood from isolated passages and extracts relating to any particular point that has to be decided.

Revocability of gifts not opposed to theory of law.

[1] E.g. *hiba-bil-iwaz*: see ss. 406, 407, 411, comm.: The observation in *Nasir Husain* v. *Sughra B.*, (1883) 5 All. 505. "The author (of the *Sharaia'l Islam*) does not explain what he is pleased to call the most approved opinion:" other passages in the judgment noted in s. 456, com. *n.*

[2] See, e.g. *Casamally* v. *Currimbhoy*, (1911) 36 Bom. 214 = s. 355, *ill.*; *Jainabai* v. *Sethna*, (1910) 34 Bom. 604, 611 ("in Muhammadan law...not easy to understand the principle."—Beaman J.) s. 11c, com.

[3] Cf. Abdur Rahim, *Muh. Jurisp.*, 39-42.

[4] Cf. *ibid.* 192.

[5] Cf. "In Muhammadan jurisprudence, ultimate basis of & justification for law must be sought in human reason." Abdur Rahim, *Muh. Jurisp.* 51, citing *Taudi'h* 418.

[6] Per Syed Ameer Ali: serious inroad that would be made into rules of Hindu & Muhammadan laws if construed in light of legal conceptions borrowed from abroad: *Vidya Varuthi Thirtha* v. *Balusami*, (1921) 48 I. A. 302, 310 (MAD.).

[7] *Cheekati Z.* v. *Ranasoru*, (1899) 23 Mad. 318, 323 per Subramania Aiyar, J.; & *Doe* d. *Dorabji* v. *Bishop of Bombay*, (1848) Perr. Or. Cas. 498, on confusion from LAX USE OF TERMS which connote in one system of law many ideas & incidents, which are insensibly assumed to follow in other system.

Then again it is said that "It is almost impossible...to arrive at any clear understanding of what the real underlying principles of that law upon many of the questions which in an advanced civilization have large and practical importance and are supposed to be answered by a reference to that law, really are. The English Courts are constantly making Muhammadan law for themselves...which, while it may flatter the conservative prejudices of good Muslims, does not in the least resemble anything which the authors of the Muslim law had themselves laid down; but is rather an attempted compromise between the rigidity and inadequacy of the legal notions of a people then living under very primitive social conditions, with their now highly complex social needs and requirements." SECTION 11C.

It is proposed to deal with the assumptions expressed or implied in these remarks. These assumptions frequently underlie decisions on Muhammadan law; and, being of too general a nature to form the subject of direct decision, cannot well be discussed in argument at the bar. They are not, therefore, the less important, nor the less deserving of careful scrutiny.

Difficulties of Muhammadan law.

First, as regards the difficulty of understanding the law, it must be admitted to be very great. It is presented in British India mostly in the shape of reports of decisions on a set of specific circumstances brought before the Courts. The discussions on the law before the Courts consist, in the great majority of cases of the citation of passages from books brought, perhaps, for the first time, to the notice of many concerned. No attempt can reasonably be made at a wide and general survey of the subject: The distinction between courts in England and India cannot be left unreferred to. In England the judges are dealing with their own law, and with that particular branch of it [8] with which they have been familiarized in every detail through having practised it for many years. They easily realize the importance of interpreting the law reasonably and practically: it affects themselves and their own conduct and dispositions. No effort of the imagination is needed on their part to appreciate how every decision will act in practice. In India the judges are more often than not completely out of touch with the ways and lives of those whose conduct is intended to be governed by the Court's decisions. If the original authorities on Muhammadan law are searched, they appear extremely uninviting,—without having any punctuation, or division into paragraphs, or difference of types, or marginal or foot notes. [9] The difficulties are, it must, however, be observed very much lessened by such careful translations of the texts as those by Baillie. Few questions can be left quite in the dark when the chapter in Baillie's volumes on the subject is read. But the difficulty is almost unsurmountable when only isolated sentences out of these translations are read. It is not implied that the application of an ancient law to modern circumstances is easy in any case: but from this

Original texts.

[8] E.g. common law, criminal law, company law, etc.

[9] Early MSS. & printed books, before printing became fine art in Europe, present same characteristics. Even when an English lawyer refers to more ancient authorities on his own law, expressed in his own language, he is called, with more or less contempt, black-letter lawyer.

SECTION 11C.

stricture even law that is well settled and quite recent, cannot always escape. Difficulties in understanding the law laid down in the ancient texts do not in the least degree prove that the text-writers were confused or inconsistent; though being long dead they cannot rise up from their graves, and defend their classifications, or overawe us by the depth of their learning: the difficulty experienced in appreciating their greatness and ability is in proportion to our own ignorance.

Expansion through decisions.

Secondly, there seems to be an allusion, conscious or unconscious, to the controversy whether judges make the law or merely interpret it. It would be presumptuous (even if it were possible) in this work to attempt to contribute to the literature dealing with it. But, in so far as the allusion is based on the assumption that this mode of making the law is a peculiarity of English law, not shared by Muhammadan law, it would probably not have been made, had the learned judge's attention been called to the history of Muhammadan law, to the first general principles enunciated in the Koran, or Sunna, and the effect given to them in the pratice of the Prophet or by his approval, followed by the extension of it through ijma' and qiyas, and the development of it by istihsan or istislah, and finally the full result of it as expounded in the fatawa of the kazis. Had these stages in the growth and development of Muhammadan law been present to the mind of the learned judge he may have taken the view, that has been consistently put forward in this work,—a view opposed to every criticism, on the basis that the expositions of the principles of Muslim Jurisprudence to which lives were devoted, as to a task of religious duty, should contain any inconsistencies of so glaring a nature as may be discovered on the casual attention which they generally receive at present. His Lordship might also have then come to believe that the prejudice is on the part of those who think that, because it is a characteristic of English law to expand, it must be a characteristic of Muhammadan law to be absolutely rigid, and that all expansion of the latter must be from forces brought to its aid from English law.[11]

Forces of expansion within Muhammadan law.

Decisions of English Courts.

Thirdly, with reference to the conservative prejudices of good Muslims being flattered by the expositions of their law in the English Courts, can the remarks be supported in the light of the criticisms levelled against the expositions of Muslim law by even so exalted a tribunal as the Privy Council, and even on a question which seems to Muslims so elementary as that of wakf bar farzandan? But prejudices apart, it is submitted that the first duty of the Court is to grasp the real principles of the law such as they are, and then introduce any new principle, that may be necessary or expedient.

[11] This prejudice appears to include in its composition two elements: (1) desire to avoid common mistake of explaining what is unfamiliar, by what is familiar in one's own experience,—leading to opposite error of considering that no reasoning found in a familiar system of law, (e.g. English law) can be applied to unfamiliar (Muhammadan law): that, therefore, reasoning & logic must be altogether banished from exposition of Muhammadan law; (2) surrender to what has been described as "patriotic ignorance," & defined as follows: "It is a voluntary closing of the mind against the disagreeable truth that, another nation may be, on certain points, equal to our own, or, even though inferior, in some degree comparable to our own:" P. G. Hamerton, *Human Intercourse*, Essay XIX. *ad. init.*

SECTION 11C.

Method and consistency of Muhammadan law.

The dependence of one part of Muhammadan law is so close on every other, that were every branch of it studied as carefully as Sir William Jones studied the law of inheritance, the admiration that that great judge and scholar expressed for the branch that he studied, would in great measure be extended to every other branch. But the incidents of the law of succession, arising as they all do out of one central fact, make it almost imperative that it should be studied as a whole, whereas the lot of the other parts of the law is to be left unstudied, and applied and considered in fragments.

Muhammadan law and modern wants.

Finally, it may not be quite easy to say whether the social needs of the Muslims at the time when the most famous texts were written, were more primitive than of the vast majority of the Khojas to-day—for that is the instance referred to. If they were, then those notions are wrong which prevail amongst Muslims, and (as it seems) amongst all who have professionally studied the past history of Islam : since they are agreed that the Muslims were far more advanced when they were rulers of great empires and the torch-bearers of learning, than they are at the present day.

Influence English law.

The observations made above have seemed necessary for justifying the very existence of the law of the Muslim community and for protecting it from having imposed upon it interpretations of its law that are uncouth, unpractical and fantastic,—interpretations on the basis that propositions of law then represent the Muslim law best, and disclose a profundity of knowledge on the part of the expositor only, when by the exposition the greatest difficulties are created in the way of those who are governed by it. There is no intention in the present work of taking exception to the result ultimately arrived at, or the points that were actually decided in the case referred to, (except in so far as the inadvertence mentioned in the footnote [12] is concerned). It is clear that the expansion of Muhammadan law must, in British India, necessarily take its colouring from English law. Yet it would be an extreme hardship on the Muslims if the whole foundation of their law were liable to be shaken and made uncertain on baseless grounds that the law is unintelligible, or inconsistent, or primitive. The assumption that the law of Islam is incapable of developing and expanding on the lines of justice, equity and good conscience as now understood, is no less a danger for the Muslim community as a whole.

Natural development of Muslim law.

Influence of English law.

Systematization of Muhammadan law.

In a judgment delivered five years after the preceding observations were first published, the same judge used language which indicates that he had by then become fully alive to the considerations referred to above : " By the time of Aurangzeb," said his Lordship, " Muhammadanism, as a temporal power, had perhaps passed its zenith, but through the centuries which separated

[12] " A Muhammadan may devote his property in *wakf* and yet reserve to himself & his descendants in a very indefinite manner, usufruct of property." (*Cassamally* v. *Currimbhai*, (1911) 36 Bom. 214, = 13 Bom. L. R., at p. 762). Wakf is no doubt inadvertently referred to . Under waqf, except under Abu Yusuf's exposition of Hanafi Law, settlor cannot reserve any benefit to himself : Hed. 237 ; Bail. I. 567, II. 218 : Cassamally's case being governed by Shia law the disposition would have been invalid, had it been a *wakf* (which it certainly was not) ; all parties were interested in upholding validity of life interest (see *ib.* 739, Inverarity, *arg.*). The point no doubt escaped Court's attention.

SECTION 11C.

Muhammad from the leading lawyers of Aurangzeb's Empire, Muhammadanism had absorbed and represented in more than one important sphere the highest mental culture. The codification of the Muhammadan law, as it had, in the meanwhile, been shaped by its leading exponents, was the work of men whose minds may be allowed to have been strictly trained to systematize and reduce to coherent and practically applicable principles, much that had been matter of dispute, uncertainty and controversy." [13]

Justice, equity and good conscience.

12. In [14] the absence of an express or implied rule of law,[15] or custom, the Courts will either follow the analogy [16] of the law in similar instances, or decide the matter in accordance with justice, equity, and good conscience.[17] That expression is generally interpreted to mean rules of English law, if found applicable to Indian society and circumstances.[18]

See s. 11, *nn.* ; s. 355.[19]

In some Indian Acts [20] the Courts are expressly required to conform to the principles of English law.

Equitable consideration and Muhammadan law.

" The chapter on the Duties (Adab) of the kazi in the principal works on Mussulman law, [which] clearly shows that the rules of equity and equitable considerations commonly recognised in the Courts of Chancery in England, are not foreign to the Mussulman system, but are in fact often referred to, and invoked in the adjudication of cases." [21]

The phrase " Justice, equity and good conscience."

A vigorous defence has been made by a great judge of the phrase " justice, equity and good conscience." [22] as " denoting those ultimate principles of

[13] *Tajbi* v. *Mowla Khan*, (1917) 41 Bom. 485, 493.

[14] See Umar's INSTRUCTIONS TO KAZIS : s. 11B, com., p. 83.

[15] *Imadul Rahman* v. *Purbi Din*, [1937] AIR (OUDH) 239 (equity, &c. only to be applied in absence of law).

[16] *Baqar A. K.* v. *Anjuman*, (1902) 30 I. A. 94 = 25 All. 236, 252-255 ; *Abdul Hussein* v. *Sona*, (1917) 45 I. A. 10 (SIND).

[17] *Muhammad Raza* v. *Abbas Bandi B.*, (1932) 59 I. A. 236, 245 (par. 3); *Budansa* v. *Fatema*, (1914) 26 Mad. L. J. 260, citing *Subbaraya* v. *Ramasami*, (1900) 23 Mad. 171.

[18] *Per* Lord Hobhouse : *Wagheia* v. (*Sraikh*) *Masluddin*, (1887) 11 Bom. 551, 561 = 14 I. A. 89 ; *In re Kahandas*, (1880) 5 Bom. 154 ; *Dada* v. *Babaji*, (1865) 2 Bom. H. C. R. 36 ; *Wm. Webbe* v. *Wm. Lester*, (1865) *ib.*, p. 52 ; *Mollowo* v. *C. of Wards*, L. R., I. A., (SUPP. V.)86 = 10 Beng. L. R. 312 = 8 W. R. 284 ; but see (*Musamat*) *F. Barlow* v. *Sophia E. Orde*, (1870) 13 Moo. I. A. 277 : On other hand " it has been from time to time pointed out that the rules of ENGLISH LAW AS TO REAL PROPERTY in England can afford no guidance to what has passed under an Indian grant " : *Raja of Pittapur* v. *Sec. of St.*, (1929) 56 I. A. 223, 231. See also First Rep. of Commrs. for preparing Codes for India, p. 9 ; Second Rep., p. 10. Austrian Civ. Code, art. 7, requires courts to decide " in accordance with principles of NATURAL LAW " ; Fr. Civ. Code, art. 4, makes a judge " who refuses to render judgment under pretence that law is silent, obscure, or insufficient " liable to prosecution.

[19] See also *Braja K.* v. *Kuta C.*, (1871) 7 Beng. L. R. 19, 25 ; *Re Kahandas*, (1880) 5 Bom. 154 ; *Hamira B.* v. *Zubaida B.*, (1916) 43 I. A. 301.

[20] E.g. Divorce Act, IV. of 1860, s. 7.

[21] See e.g. Hed. 334 ; *Hamira* v. *Zubaida*, (1916) 43 I. A. 294, 301, 302, (ALL.).

[22] Mr. B. K. Acharya, (1912) *Tagore Lectures on Codification*, traces history

that is right and proper, fair and reasonable, and good and expedient—principles which judges here as elsewhere cannot help resorting to in dealing with the difficult questions not directly governed by existing precedents, which often arise in the course of the administration of justice."[31]

Their Lordships in the Privy Council "thought it right to observe that it is of the utmost importance to the right administration of justice in these courts that it should be constantly borne in mind by them that by their very constitution they are to decide according to equity and good conscience; that the substance and merits of the case are to be kept constantly in view."[32] Justice, equity and good conscience has been adopted as the ultimate test for all the Provincial Courts in India.[33] More recently a decision was reversed, which "failed to appreciate the importance and breadth of the decision of the Board in Robert Watson's & Co.'s case.[34] Their Lordships could see no indication in the report of that case that the period for payment there fixed was so fixed by consent, or by any other considerations than those of justice, equity and good conscience which instructed the decision regardless of considerations purely technical in character."[35]

TEXTS ON MUSLIM LAW

Below is given a brief classified list of selected texts on Muhammadan Law intended for use by practitioners in courts. It has been kindly prepared for this edition by Principal Fyzee, who has followed the system of transliteration with diacritical marks adopted by modern orientalists :

Fuller bibliographical information was given in the last edition of this work based on an analysis and re-arrangement of W. H. MORLEY's *Anal. Dig.*. Vol. I., Lond. 1850, with some additions. Further information may be obtained from : (i) TH. W. JUYNBOLL, *Handbuch des islāmischen Gesetzes*, Leiden-Leipzig, 1910; (ii) N. P. AGHNIDES, *Mohammedan Theories of Finance, (Introd. to Muhammadan Law with a Bibliography)*, New York,

of the phrase, "EQUITY, JUSTICE & GOOD CONSCIENCE," from (1) 3 Nov. 1772; letter from Presidt. in Council to Court of Dir. (Harring. Analys. II. 8) in which "just discernment of the Collector" is said to have "occasioned many changes in process for conducting business of revenue during seven years since Company became possessed of Dewanny;" (2) 26 Mar. 1774, Charter of Supr. Court, Beng., cl. 18 : "Court shall have power to administer JUSTICE in summary manner according to Court of Chancery in Britain"; (3) 5 July 1781, Sir E. Impey's Regul., s. 93 : in all cases of which no specific directions are hereby given, Judges of Sadr Diwani Adalat do act according to JUSTICE, EQUITY & GOOD CONSCIENCE; (4) the phrase then becomes common : Reg. III. of 1793, s. 21; Reg. VI. of 1793, s. 32; Reg. II. of 1802 (MAD.), s. 17; Reg. IV. of 1827 (BOM.), s. 26; Reg. V. of 1931, s. 6; Reg. VII. of 1832, s. 9; Act XXVI. of 1852, s. 3.

[31] *Rajah of Vizianagram* v. (*Raja*) *Setrucherla S. S.*, (902) 26 Mad. 686, 723. 726 (F.B.) per Subramaniya Aiyar, J.; *Jamshed* v. *Sonabai*, (1907) 33 Bom. 122 (exposition of law by Irish Courts may be referred to equally with that by Courts in England).

[32] *Hunoomanpersaud Panday* v. (*Mt.*) *Babooee*, (1856) 6 Moo. I. A. 393, 411 : *Tremble* v. *Hill*, (1879) 5 App. Cas., 342, 344, 345 : see s. 11, *n.*

[33] *Muhammad Raza* v. *'Abbas Bandi B.*, (1932) 54 I. A. (LUCK.) 236, 245 (par. 3).

[34] *Robert Watson & Co.* v. *Ram Chand Dutt*, (1890) 17 I. A. 110 (CAL.).

[35] *Raghubans Narain Singh* v. *Khub Lal Singh*. (1931) 58 I. A. 299, 305, (PAT.) (per Lord Blanesburgh).

1916; (iii) D. G. PFANMÜLLER, *Handbuch des Islam-Literature*, Berlin-Leipzig, 1923, (pp. 235-255); (iv) *Der Islam*, 1923, xiii, (349-355); (v) *Encyclopædia of Islām*, by M. TH. HOUTSMA & others, 4 vols. & *Supplmt.* Leiden-Lond. 1913.

For SHIA BOOKS see (i) "Shī'a," *Enc. of Islām*, iv. 350-358 (R. STROTHMANN); (ii) D. M. DONALDSON, *The Shi'ite Religion*, London, 1933; (iii), (iv) TUSY, *List of Shyah Books* and 'ALAM AL-HODĀ, *Notes on Shyah Biography*, ed. A. SPRENGER, ABD AL-HAQQ & GHOLAM KADIR, Bib. Ind., 107, Calc., 1855; (v) I'JĀZ ḤUSAIN AL-KANTŪRĪ, *Kashf al-Ḥujub wal Astār*, ed. M. Hidāyat Ḥusain, Bib. Ind., N. S. No. 1920, Calc. 1912; Indexes, 1935.

For SOURCES OF LAW of Islam & GENERAL PRINCIPLES, consult (i) C. SNOUCK HURGRONJE, *Le Droit Musulman, Revue de l'hist. des Relig.*, 1898 XXXVII., 109, 174 sqq.; (ii) TH. W. JUYNBOLL, *Law (Muhammadan)* in HASTINGS *Enc. of Relig. & Eth.*, VII. 858-883; (iii) *Enc. of Islām*, S V. "Fikh," "Sharī'a," "Kor'ān," "Ḥadīth," etc. (iv) D. B. MACDONALD, *Develop. of Musl. Theol., Jurispr. & Constit. Theory*, Lond., 1903; (v) IGN. GOLDZIHER, *Vorlesungen über den Islam*, 2nd Ed., Heidelberg, 1925; French Trans. by F. Arin, *Le dogme et la loi de l'islam*, Par., 1920; (vi) H. LAMMENS, *L'Islam : Croyances et Institutions*, Beyrouth, 1926; Eng. Trans. by E. Denison Ross, Lond., 1929 (Ch. v. on Jurispr.); (vii) ABDUR RAHIM, *Muhammadan Jurisprudence*, (Tagore Law Lect., 1907), Madras, 1911; (viii) COUNT LÉON OSTROROG, *The Angora Reform*, Lond., 1927, (Lect. I. *Roots of Law*); (ix) D. SANTILLANA, *Law & Society* in *Legacy of Islam*, ed. SIR THOMAS ARNOLD & A. GUILLAUM'E Oxf., 1931, (p. 284 sqq.); (x) ASAF A. A. FYZEE, *Introd. to Study of Mah. Law*, Oxford, 1931.

A. UṢŪL AL-FIQH (PRINCIPLES OF LAW)

I. SUNNĪ

1. *Risāla*, by Imām Md. b. Idrīs ash-Shāfig'ī : said to be the first work on *Uṣūl* (principles).

2. *Kanzu'l-Wuṣūl*, by 'Alī b. Md. al-Pazdawī (Ḥanafī): "best of works written by later writers and exhaustive" (Ibn Khaldūn).

3. *at-Tawḍīḥ* by 'Ubaidu'l-lāh b. Mas'ūd b. (Ḥanafī)': commentary on it : *at-Talwīḥ*, by Sa'du'd-dīn Mas'ūd b. 'Umar at-Taftāzānī.

II. SHĪ'A (ITHNĀ 'ASHARĪ)

4. *Ma'ālimu'ddin fī'l Uṣūl*, by Ḥasan b. Zainu'd-dīn b. 'Alī b. Aḥmad al-'Āmilī al-Juba'ī : most authoritative elementary manual.

B. FURŪ' AL-FIQH (THE APPLICATIONS OF LAW)

I. SUNNI LAW

(i) ḤANAFI

5. *al-Jāmi'u's-Ṣaghīr*, by Md. b. al-Ḥ. ash-Shaibānī, i.e. Imām Muhammad, (A. H. 187) disciple of Imām Abū Ḥanīfa : very authoritative.

6. *Mukhtaṣar*, by 'Al b. Md. al-Qudūrī al-Baghdādī (A. H. 528): a compendium of great reputation.

7. *al-Hidāya*, by Burhanu'd-dīn 'Alī b. b. Abī Bakr al-Marghīnānī (A. H. 593:): consisting of a commentary on his own *Bidāyatu'l-Mubtadī* : one of the most esteemed works on Ḥanafī Law : of paramount authority in India : transl. by C. Hamilton, orig. ed., 4 vols, 1791 ; 2nd ed. by S. G. Grady, Lond., 1870. Of its commentaries the most famous are (i) *'Ināya*, by Akmalu'd-dīn Md. b. Maḥmūd al Bābartī ; (ii) *Kifāya*, by Jalālu'd-dīn b. Shamsu'd-dīn al-Khuwārizmī al-Kūrlānī.

8. *Sharḥ Viqāya*, by 'Ubaidu'llāh b. Mas'ūd al-Maḥbūbī (A. H. 747).

9. *Jāmi'u'r-Rumūz*, by Shamsu'd-din al-Quhistānī (A. H. 950).

10. *Kanzu'd-Daqā'iq*, by Ḥāfiẓu'd-dīn Abū'l-Barakāt 'Ali b. al-Nasafī (A. H. 710): text based on *Ẓāhiru'd-Riwāya* : highly esteemed ; *al-Baḥru'r'r-Rā'iq*, by the "second" Abū Ḥanīfa Zainu'l-'Abidīn b. Ibr. b. Nujaym al-Miṣrī (A. H. 970): highly esteemed commentary in *Kanzu'd-Daqāiq*.

11. *ad-Durru'l-Mukhtār*, by 'Alā'u'd-dīn Md. b. 'Alī al-Haskafī (A. H. 1071): commentary on *Durru'l-Mukhtār* : *Raddu'l-Muḥtār*, by Md. Amīn known as Ibn 'Ābidīn (A. H.) (1252): "this work may be said to be the last word in the authoritative interpretation of Hanafi law" (Aghnides): modern problems and practical situation discussed : much used in Turkey.

12. *as-Sirājīya*, by Ṣirāju'd-dīn Md. b. 'Abdu'r-Rashīd as-Sajāwandī : highest authority on inheritance among Hanafis : text and trans. Sir Wm. Jones, *Works*, (1799) III. 506-554 ; (1807) VIII. 213-265 reprinted, Alamric Rumsey, 2nd ed., Thacker, Cal. 1890, pp. 12-68 (APPX. 69-106. *Sharīfīya*, by Sd. Sharīf b. 'Alī b. Md. al-Jūrjānī (A. H. 811/A. D. 1411) : comment on *Sirājīya*, Jones, *Works*, (1799) III. 554-592 ; (1807) VIII. 266-322. On Inheritance

13. *Fatāwā Qāḍī Khān*, by Fakhru'd-dīn al Ḥus. b. Manṣūr al-Ūzjandī al-Farghānī Qāḍī Khān (A. H. 592): "a standard work of enduring reputation" (Aghnides). Fatāwā Collections.

14. *Fatāwā 'Ālamgīrī*, compiled by order of the Emperor Awrangzīb, 'Ālamgīr (reigned 1069-1118 A. H. 1658-1707) by a body of shaikhs, under chairmanship of Shaikh Niẓām : highly esteemed in India : Baillie (Neil B. E. Baillie) *Digest of Moohummudan Law*, Part I., (1st ed. 1865 ; 2nd ed. 1875, Lond.) consists mainly of translations from it.

15. *Mejelle* (*Majalla Aḥkām 'Adliyya*), Official Turkish codification of Ḥanafī Law : made in A. H. 1285 by Special Committee under Chairmanship of Aḥmed Jewdet Pasha : based on most authoritative sources : commentary in Turkish : *Duraru'l-Ḥukkām*, by Hoja Emin Effendi Zadeh Ali Haidar. Codes.

16. Kadri Pacha,[1] *Droit Musulman du Statut personnel et des Successions d'apres le rite Hanafite* ; Nawab A. F. M. Abdur Rahman, *Institutes of Mussalman Law*, (see Introduction), Cal. 1907 ; Eugene Clavel, *Droit Musulman*, 2 vols., Paris, 1895 : vol. II. contains text of code prepared by Egypt. Govt., 1875.

[1] Cited in *Abdul Kadir* v. *Turner*, (1884) 9 Bom. 158, Scott, J.

(ii) MĀLIKĪ

17. *al-Mudawwana,* by Ṣaḥnun b. Abū Sa'd b. 'Abdu's-Salām at-Tanūkhī (A. H. 260): greatest Mālikī authority (Aghnides).

18. *al-Mukhtaṣar,* by Khalīl b. Isḥāq (A. H. 767): most famous Mālikī compendium: style is "involved to an unheard of degree and absolutely defies understanding" (Aghnides): numerous glosses & commentaries. F. H. Ruxton, *Maliki Law,* London, 1916, based upon it.

(iii) SHAFI'Ī[2]

19. *Kitābu'l-Umm,* by Imām Md. b. Idrīs ash-Shāfi'ī: very valuable source: full of traditions.

20. *at-Tanbīh,* by Ibr. b. 'Alī ash-Shīrāzī (A. H. 476).

21. *Fatḥu'l-Qarīb,* by Md. b. al-Qāsim al-Ghazzī (A. H. 987): ed. Van den Berg, Leiden, 1894.

22. *Fatḥu'l-Mu'īn,* by Zainu'd-dīn Malībārī (A. H. 982): commentary on his own *Qarratu'l-'Ayn*: numerous glosses: considered of great authority, particularly in India.

23. *Minhāju't-Ṭālibīn,* by Muḥyī'd-dīn Yaḥyā b. Sharaf an-Nawawī (A. H. 676): standard work: (i) Arabic text with French trans. by L. W. C. Van den berg: published by order of Dutch Govt. of Batavia; *Manuel de Jurisprudence Musulmane,* 3 vols, Batavia, 1882-84; (ii) English trans. by E. C. Howard of French rendering of Van der Berg's trans. Lond. 1914: both translations loose: to be used with caution.[2]

(iv) ḤANBALĪ

24. *Dalīlu'ṭ-Ṭālib,* by Shaikh Mar'ī b. Yūsuf (A. H. 1033): commentary: *Naylu'l-Ma'ārib,* by 'Abdu'l-Qādir b. 'Umar ash-Shaibānī.

II. SHIA LAW.

(i) ITHNĀ 'ASHARĪ

25. *Mabsūṭ,* by Abū Ja'far Md. aṭ-Ṭusī.

26. *Sharā'i'u'l-Islām,*[3] (spelt by Baillie: *Sharaya-ool-Islam*), by Najmu'd-dīn Abū'l-Qāsim b. Mu'ayyid al-Ḥillī "al-Muḥaqqiq" (A. H. 676/A. D. 1277): (i) Baillie's *Digest of Moohummadan Law,* Part II. consists mainly of translations from it with a few additional passages translated from other texts; (ii) complete translation by A. Querry, *Droit Mussulman, Recueil des Lois concernant les Musulmans Schytes,* 2 vols., Paris, 1871.

27. *Jawāhiru'l-Kalām,* by Sh. Md. Ḥasan an Najafī, 6 vols., Teheran: the most celebrated commentary on the *Sharā'i'u'l-Islam.*

[2] Shafi'ī authorities & texts cited & discussed: *Md. Ibrahim* v. *Gulam Ahmed,* (1864) 1 Bom. H. C. R. 236; *Md. Casim Curtey* v. *Zahiroodin,* (1902) 5 Bom. L. R. 8.

[3] "The most authoritative work of that school (the one translated by Baillie)." *Baqar A. K.* v. *Anjuman A. B.,* (1903) 30 I. A. 94, 112; *Agha Ali K.* v. *Altaf A. K.,* (1892) 14 All. 429 (F. B.); *Aziz Bano* v. *Muhammad Ibrahim H.,* (1925) 47 All. 823, 828, 829.

28. *Jāmi'-i 'Abbāsi*, by Bahā'u'd-dīn Md. Āmilī (1931/1621): collection of traditions trans. into Persian.

29. *Sharḥ Luma'*, (*Rawḍatu'l-Bahīya*), by Zainu'lĀbidīn b. 'Alī.

30. *Jāmi'u'sh-Shittāt*, collection of *fatāwa* in Persian by the leading Mujtahids of Teheran.[4]

(ii) ISMĀ'ĪLĪ (MUSTA'LIAN BRANCH)

31. *Da'ā'imu'l-Islām*, by Qāḍi Abū Ḥanīfa an-Nu'mān b. Md. b. Manṣūr b. Aḥmad b. Ḥayyūn at-Tamīmī al-Maghribī : died 363/974 : see Asaf A. A. Fyzee, *Ismaili Law of Wills*, Oxford, 1933.

[4] Ameer Ali, (4th Ed.) I. 32.

CHAPTER III.

MARRIAGE.

§ 1.—PRELIMINARY.

'Zina' or illegitimate intercourse.

13. Sexual intercourse between a man and a woman who is neither his wife [1] nor his slave is under the law of Islam unlawful and entirely prohibited.[2]

"Semblance of right."

14. Sexual intercourse, without either the reality or semblance [3] of the right [4] to have it, is termed zina,[5] and the off-spring of such intercourse is necessarily illegitimate.[6]

Marriages: regular, irregular: permanent, temporary.

15. Marriages recognized in Hanafi law are permanent: [7] they may be either regular or irregular.[8] Under Shia Ithna Ashari law besides the permanent marriage (corresponding to the regular marriage under Hanafi law), a relation called

[1] Intercourse after dissolution of marriage also prohibited: Bail. I. 397.

[2] Bail I. 1, citing *Hidaya*, II. 658; *Himmut Bahadur* v. *Shahebzadi Begum*, (1870) 14 W. R. 125, affirming on review (1869), 12 W. R. 512 = 4 Beng. L. R. (A. C.) 103. See Ind. Slavery Act, 1843, s. 5E, com. (*Mt.*) *Haidri* v. *Narindra Bikramji*, (1926) 1 Luck. 184 (no right to MAINTENANCE can result from being continuously kept as concubine *avarudh stree*: decision under Hindu law).

[3] *Shibah* = likeness similitude, figure: from *Shabaha* = he likened, *Alfaraid-ul-durria*, 350-350. See s. 81: marriage established by MUTUAL BELIEF: Bail. I. 83-84.

[4] SEMBLANCE OF RIGHT (= *shubh fil aqd*) arises, where (i) parties have purported to marry, but marriage is irregular: or (ii) where husband purports to revoke such a divorce, as is in law irrevocable (e.g. *khul'*), or (iii) where there is mistake as to identity of wife, or (iv) she is by error supposed to be unmarried, or widow, or divorced woman. Bail. I. 397 (400), 402 (405), 411 (415), 413 (416); II. 93 (par. 3-4): if irregularity or invalidity of acts in question known to parties, no "semblance of right": marriage then not merely irregular, but void: *Ata M. C.* v. (*Mt.*) *Saiqal B.*, (1910) 8 All. L. J. 953: *n.* 14(*d*); & see *nn.* 8 ff. to that judgment.

[5] *Zina*, = fornication or adultery: in Islam punishable by stoning to death, or scourging with 100 or 50 stripes: Bail. I. 2 (1); Bail. I. 151-154: *Ata Mohammad*, v. *Saiqal B.*, (1910) 8 All. L. J. 952, 955, *nn.* 5(*a*), 5(*b*).

[6] Bail. I. 3.

[7] Cf. s. 222(4): *Ata Mahammad Chaudhry* v. (*Mt.*) *Saiqal B.*, (1910) 8 All, L. J. 953 = 7 Ind. Cas. 820 (elaborate judgment by Karamat Hussain, J., on distinction between VOID & IRREGULAR MARRIAGE & STATUS OF ISSUE, in each case: in appeal the case decided on another point).

[8] Arabic word for regular = *sahih* = correct: Baillie translates it "valid." See on irregular marriages ss. 83, 86. Marriages called irregular in this work are called by Ballie & Hamilton, translator of Hidaya, & previous to this work, were called by most English authors INVALID marriages. Invalid is a misleading translation of Arabic word *fasid* which means "vitiated or faulty or irregular," English word "invalid," implies total absence of legal effect, which is not the case with *fasid* or irregular marriages: *Ata Mohammad* v. *Saiqal B.*, (1910) 8 All. L. J. 952, 974, *nn.* 22-24. See Bail. I. 150-158: ss. 83-87. On LEGAL EFFECTS, see s. 24, *nn.*

a temporary marriage[9] (arising of the contract of mut'a) is also recognized. Other schools of Shia law do not recognize the validity of mut'a.[9] SECTION 15.

16. In this work unless the context otherwise indicates (1) the words "marriage," "husband" and "wife," refer, respectively, to a permanent marriage, and persons permanently married, unless there is something in the subject or context showing that a mut'a or persons who have contracted mut'a, are referred to, or included, in the said words or expressions ; (2) "contract of marriage" means and includes all that the law requires to effectuate the marriage (matrimonium), as distinguished from betrothal (sponsalia) or the mere engagement to marry ; (3) a marriage is said to be contracted when the parties have lawfully become husband and wife ; (4) "minor" means in this Chapter a person not competent to contract marriage under s. 11B,—generally a person who has not attained puberty.[10] Permanent marriage. "Contract of marriage."

§ 2.—How the Relation of Marriage Arises.

17. (1) Marriage[11] brings about a relation based on, and arising from, a permanent contract[12] for intercourse and 1. MARRIAGE DEFINED.

[9] Bail. II. 1. See s. 25, on *muta*. E.g. *muta*, is repudiated in *Daaimul-Islam*, (1933) 33 Bom. L. R., *Journal*, pp. 30-32.

[10] Cf. *Mozharul Islam* v. *Abdul Jani*, [1935] AIR (CAL.) 322.

[11] "Exact NATURE & EFFECT OF MARRIAGE under Muhammadan law upon the contracting parties" dealt with in detail by Mahmood J : *Abdul Kadir* v. *Salima*, (1886) 8 All. 149, 154-158 : (i) marriage among Muslims not sacrament but purely CIVIL CONTRACT. [See also *Jay Gunissa* v. *Mahammed Ali Biswas*, [1938] 1 Cal. 139]; (ii) though generally solemnized with recitations from Koran, yet no positive SERVICE PECULIAR to the occasion prescribed by law ; (iii) WRITING not required ; (iv) validity & operation of whole depends upon DECLARATION (or proposal) & ACCEPTANCE (or consent) of contracting parties (or of their natural & legal guardians) before competent witnesses : Bail. I. 4. *Asha B.* v. *Kadir B.*, (1909) 33 Mad. 22 (under Muhammadan law, marriage is contract between parties to live as husband & wife for term of their lives) ; *Ahmed S.* v. *Bai Fatma*, (1930) 55 Bom. 160, 163. "It is probable, that most anthropologists & social writers are in agreement concerning the BIOLOGICAL MEANING OF MARRIAGE. The word has reference to a union of the male & female, which does not cease with the act of procreation, but persists after the birth of offspring, until the young are capable of supplying their own essential needs...The source of marriage then must probably be looked for,"—not in the sexual instinct, but "in the utter helplessness of the newborn offspring, & the need of both mother & young for protection & food during a varying period" : Willystine Goodsell, *Hist. of Family as Social & Educ. Instit.*, (1915, New York), 66, 6, 7, 8. Cf. BARODA SPECIAL MARRIAGE ACT, XV. of 1932 (of Baroda) : monogamous ; male party to be 18 years old ; female, 14 : if under 21, consent of parent or guardian required : prohibited degrees arising out of close relationship, viz. common ancestry : 14 days' residence within jurisdiction by one of parties required : notice of marriage to be filed, notified & published : objection may be taken to marriage by any person : 14 days' time given to objector to bring a declaratory suit : fine of Rs. 1,000 if objection not reasonable & *bona fide*.

[12] Bail. I. 18 ; Hed. 33. As to *mut'a* or temporary marriage : see s. 25.

SECTION 17. Essentials of contract of marriage.

procreation of children, [13] between a man and a woman, who are referred to as "parties to the marriage," and who, after being married, become husband and wife.[14]

(2) A contract effecting marriage [15] is valid (and gives rise to the rights and obligations mentioned in s. 24), provided that it is entered into—[15]

Its essentials and effects.

(*a*) in accordance with the rules and forms contained in ss. 17A to 23, inclusive ;

(*b*) for effectuating the marriage of parties not prohibited from intermarrying (ss. 26 to 53) ;

(*c*) by persons who are competent, under s. 17B, to contract in marriage (as the case may be) either themselves or the parties concerned ; [17]

(*d*) with the intention that it shall come into immediate operation : [18] its coming into operation not being made to depend on a condition or contingency.[19]

The contents of s. 17 may alternatively be stated in the following form :— "Marriage arises in Muhammadan law from a contract,—(*a*) providing for intercourse and the procreation of children ; (*b*) commencing from the time of the contract ; (*c*) made for effectuating a marriage between a man and woman whose intermarriage is not prohibited by law ; (*d*) entered into in accordance with the rules and forms laid down in s. 17A to s. 23, inclusive ; and, (*e*) by a person who has authority to contract in marriage the person purported to be married."

13 Hed. 33 ; Bail. I. 10, 18, 16 ; II. 1 : "also for the solace of life : one of the prime & original necessities of man. Therefore lawful in extreme old age after hope of offspring has ceased & even in the last or death illness" : *Abdul Kadir* v. *Salima*, (1886) 8 All. 149, 155, quoting *Fatawa Alamgiri*.

14 *Haji Ahmed K.* v. *Abdul Gani K.*, [1937] Nag. 299 (marriage contract is *uberrimae fidei* = of utmost confidence, like contracts of insurance, sale, suretyship, releases & compromises, casting duty to disclose all defects : e.g. that girl had suffered from epileptic fits and incurable & hereditary diseases, during her childhood : but in this case there was no contract of marriage : only an agreement (betrothal) to marry : Court *held* that the engagement was justifiably rescinded ; damages were claimed by person rescinding, not party who had failed to disclose) : cf. *Kshitish Chandra C.* v. *Emp.*, (1937) 41 C. W. N. 540. See s. 38A, ill. (7).

15 I.e. contract which (*a*) is not restricted as regards its duration, (*b*) has as its object intercourse & procreation of children.

16 *Maung Kyi* v. *Ma Shwe Baw*, (1929) 7 Rang. 777.

17 (*Mt.*) *Atkia B.* v. *Muhammad Ibrahim Rashid*, [1916] AIR (P. C.) 250 = 34 C. W. N. 345, 347 (col. ii), 254 (col. ii), 358 ; last par. of judgt. : (after puberty she must herself consent to marriage : her grandmother's consent does not bind her) ; *Jay Gunnessa* v. *Mahammad Ali*, [1938] 1 Cal. 139. (See 42 Cal. W. N. *Journal*, p. xxx, for a criticism).

18 So that the legal effects of marriage (see s. 24) arise immediately on contract of marriage : e.g. payment of *mahr* is not condition precedent to conjugal rights : *Abdul Cadir* v. *Salima*, (1886) 8 All. 148. See ss. 106, 107.

19 Option to cancel a marriage is void : Bail. I. 21 (32) ; II. 5, 76.

SECTION 17A.
2. COMPETENCE FOR MARRIAGE.

17A. Every person governed by Muhammadan law is capable of becoming a husband or wife.[20]

The capacity to be married is to be distinguished from the competence to enter into a marriage contract. Competence to do the latter is referred to in s. 17B. Section 17A means that no person is under a legal disability to have the rights and duties of a husband or wife conferred and imposed upon him or her ; and this question is different from the question by whose legal act such rights and duties can be conferred and imposed. The answer to the latter question depends upon whether the person in question is 'sui juris.' If he (including the female in the male in this sentence) is, then he alone can confer and impose those rights and duties upon himself (though instead of acting himself he may employ an agent); if he is not 'sui juris,' then those rights and duties can be conferred and imposed by his guardian for marriage, or by an agent of the guardian.

Competence to contract marriage.
(1) Males.

17B. (1) Under all schools of Muhammadan law a male becomes competent to contract a marriage (whether on his own behalf, or as guardian or agent on behalf of another) when being of sound mind he attains puberty.[21]

(2) Females.

(2) With reference to the competence of a female so to contract a marriage,—

(*a*) under Hanafi and Shia Ismaili law,[22] she becomes competent when being of sound mind she attains puberty.

(*b*) under the Shafii and Maliki law, a thayyiba[23] is

[20] So an injunction will not be granted to restrain marriage of Muslim woman of age : *Muhammad Yamin* v. *Razia*, (1919) 17 All. L. J. 1138.

[21] Bail. I. 10, 55 ; Hed. 39. Consequently minor cannot appoint her own *vakil* to contract her in marriage : *vakil* alleged to be appointed by minor has no authority to act on behalf of minor : *Shafi-ullah* v. *Emperor*, [1934] 32 All. L. J. 387 ; *Mt. Atkia B.* v. *Muhammad Ibrahim*, [1916] AIR (P. C.) 250 = C. W. N. 345, 347 ; *Sadat Ali Karikar* v. *Sm. Abeda B.*, (1928) 32 C. W. N. 641. No injunction can be granted against woman marrying who is of age : *Muhammad Yamin* v. *Razia B.*, (1919) 17 A. L. J. 1138.

[22] *Daaimul-Islam* II. : Marriage by guardians, translated by A. A. A. Fyzee :— "The giving in marriage by fathers is binding on their sons & daughters if they are minors. But they (fathers) have no authority, when they (sons & daughters) attain majority (or puberty)" : 38 Bom. L. Rep. *Journ.*, Apr. 1936, pp. 41, 42. As *they* have no authority, apparently *she* has : doctrine of *thayyiba* does not seem to be alluded to in *Daaim*.

[23] Bail. II. 7. *Thayyiba* = woman who has had sexual intercourse with a man (presumably therefore widow or divorcee). In English law a person under 21 may be contracted by consent of father ; after his death, of mother, if living ; but, if minor is widow or widower, parents have no such authority to consent to her marriage. See (1823) 4 Geo. IV., c. 76, s. 16 ; Hals., *Laws of Eng.*, XVII. 57, *n.* (*g*). Muhammadan law, however, bases rule on knowledge of nature of marriage. REASON assigned : "An adult virgin [is] the same as an infant with respect to marriage, since the former cannot be acquainted with nature of marriage any more than the latter, as being equally uninformed with respect to the matrimonial state ; whence it is that father of such an one is empowered to make seizure of her dower without her consent" : Hed. 34.

SECTION 17B.

competent so to contract but not a woman who is a virgin ;[24] the marriage of an adult virgin governed by the Shafii law, contracted by her father without her consent, has however been held not to be valid ;[25]

3. MARRIAGE OF FEMALE BEFORE PUBERTY.

(*c*) under the Shia Ithna Ashari and Ismaili law :[26] a woman until she attains puberty, is not competent to contract herself in marriage, without the consent of her father or grandfather.[27]

Competence of females to marry : Shia law.

(*d*) under the Shia Ithna Ashari law : (A) a woman who has attained : (i) puberty, (ii) and discretion, and (iii) who is a thayyiba, is competent so to contract ; (B) a virgin who (i) has attained puberty, and (ii) is discreet,[28] may—if her father and grandfather refuse to marry her to an equal though desired by her so to do,—contract herself in marriage, even against the will of both ;[29]

(*e*) under the Shia Ismaili law, the father, and in his absence father's father are guardians for marriage of the minor child or grand-child.

See s. 17A, com., for the distinction between capacity to be married and competence to contract marriage. Four concepts have a bearing on the competence of a woman to contract herself in marriage :—(1) puberty, (2) being thayyiba, (i.e. having had sexual intercourse), (3) discretion, (4) consent of father or grandfather. The Hanafi law requires only (1) puberty. The Shafii and Maliki schools require only (2) i.e. not being a virgin : though this for all practical purposes, implies the first. The Ithna Ashari law is

[24] *Muhammad Ibrahim* v. *Gulam Ahmad*, (1864) 1 Bom. H. C. R. 236 ; cf. ss. 44, 66, 67.

[25] *Hassan Kutti Beary* v. *Jainabha*, (1928) 52 Mad. 39. But see com.

[26] She is never guardian for marriage under Shia law (see s. 64); texts do not contemplate her being appointed agent for marriage.

[27] Bail. II. 7. Irrespective of her being virgin or *thayyiba*.

[28] Bail. II. 7 : being DISCREET,—" is a matter which does not readily admit of ascertainment," Hed. 47, (per Shafii). In Muslim law expression " discreet " seems, however, to have acquired in this connection fairly definite significance : it seems to refer to girls capable of taking care of their person & possessions & not requiring to be under any inhibition from Kazi : that officer having jurisdiction to place PRODIGALS under inhibition,—so that being discreet or having discretion implies average intelligence, independence of character & sense of responsibility.

[29] Bail. II. 7-8 : As regards competence of a VIRGIN, who has attained puberty & is discreet, where there is no refusal on the part of her father or grandfather to marry her to an equal, after being desired to do so, four divergent views are expressed by Ithna Ashari authorities, viz. declaring her competent (i) to contract herself either in a permanent marriage or a *muta* (this view is stated in *Sharai'ul-Islam* to be in accordance with the most generally approved tradition); (ii) to contract herself only in permanent marriage ; (iii) only to enter into a *muta* contract ; (iv) that her father & grandfather have a partnership in authority, so that it would not be lawful for them to act separately from her in the contract. Complications of Shia law do not however end here. Closely connected with this topic is s. 641, *ill.* (*3*).

much complicated by differences of opinion in which all four concepts enter. See s. 20(*2*). The Ismaili law seems to be nearest the Hanafi law, though there seem to be some peculiarities with reference to guardianship for marriage. SECTION 17B.

The salutory rule laid down in Hassan Kutti's case,[30] will, it is hoped, not be questioned when similar cases arise again : though it must be admitted that, so far as the judgments indicate, neither the force of the Shafii authorities which give the disposal in marriage of a virgin to her guardian for marriage (wali), nor the guardian's position was realized. The decision, however, lays down an equitable rule, which may be supported on the statement in the Minhaj (to which the learned judges pointedly refer) that the consent of a virgin who has attained puberty is " nevertheless desirable." Desirability of consent of bride.

18. (1) A contract of marriage must be in unequivocal terms : being contained [1] in a declaration and acceptance, uttered at one meeting and in the presence of two witnesses and otherwise conforming with s. 23.[2] 3. FORM OF CONTRACT OF MARRIAGE. " declaration : acceptance."

(2) Under Hanafi law the contract may be expressed in words implying a sale (bai'), or gift (hiba), or transfer of ownership (tamlik), or any other expression implying a permanent union ;[3] but words implying a mere hiring or lending or permitting, do not give rise to a valid marriage.[4] In Hanafi law.

(3) Under Shia Ithna Ashari and Shafii law (but not under Ismaili [5] or Hanafi law) the declaration and acceptance of a contract of marriage [6] must be made by the use of the Arabic word tazwij or nikah [7] (meaning marriage) : unless In Shia Ithna 'Ashari and Shafii law.

[30] *Hassan Kutti* v. *Jainabha*, (1928) 52 Mad. 39 (adult Shafii virgin's marriage contracted by her father without her consent declared invalid) : see s. 17B(2)(*b*).

[1] There is some tautology in ss. 18 & 23 read together : it has been introduced in view of some decisions.

[2] Bail. I. 10, 237, 239 ; Hed. 38, 87 ; " declaration " (or, to use terminology of Ind. Contr. Act, " proposal ") = *ijab* ; " acceptance " = *qubul* ; cf. definitions of " proposal " " promise " in Ind. Contr. Act, s. 2, (*a*), (*b*). *Maung Kyi* v. *Ma Shwe Baw*, (1929) 7 Rang. 777 ; *Atkia B.* v. *Mahammad Ibrahim Rashid*, [1916] AIR (P. C.) 250 = 21 C. W. N. 345 (evidence of factum of marriage discussed).

[3] Bail. I. 15 ; Hed. 26.

[4] Bail. I. 16. ACKNOWLEDGMENT, though in presence of witnesses not sufficient by itself to constitute marriage, " unless judicially pronounced to be a marriage " : Bail. I. 16, *ll.* 28-29 ; 17, *ll.* 4-8.

[5] *Daaimul-Islam*, does not mention use of Arabic words.

[6] See s. 16(2), as to meaning of contract of marriage.

[7] (*Sheik*) *Moneerooddeen* v. *Ramdhan Bajeekur*, (1872) 18 W. R. Cr., 28, speaks of " *nikah* form of marriage." The word *nikah*, according to Bail. I. 1, *n.* " is in Bengal restricted to what is deemed an inferior kind of marriage in opposition to *shadi*, which properly means joy or festivity, but is commonly applied to first or principal marriage, usually celebrated, with festivities & a good deal of expense." In Bombay *shadi* includes both *nikah*, or actual contract, & celebration of it ; *nikah* is sometimes used to denote nuptial ceremony, distinguishing it from accompanying festivities, which are referred to as *shadi* ; *nikah* also spoken of as *aqd* = " contract." In case of widower remarrying, dispensing with or curtailing celebrations is

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the parties are unable to use the Arabic words, in which case, equivalent words in the language of the parties are necessary.[8]

Futurity : condition : contingency.

(4) Words implying marriage at a future time, or depending on an uncertain future event or condition, do not constitute a valid marriage under any school of law.[9]

Illustrations.

A stipulation by one of the parties to a marriage that the other is free from blindness or paralysis, is apparently of no effect, and the marriage valid absolutely. But a stipulation that the husband should not be impotent is unnecessary, and would be valid, if expressed.[10]

NATURE OF MARRIAGE IN MUHAMMADAN LAW : purely a civil contract. Significance of agency in marriage. Roman law.

Marriage in Muhammadan law is a purely civil contract.[11] The significance of agency being so freely recognized for purposes of marriage and divorce, is well brought out by contrasting the characteristic absence of agency from every department of ancient Roman law,—its absence was partly owing to the fact that, in informal transactions, it was not necessary : " It is not difficult," says Dr. Hunter, " to understand how the idea of agency or representation should appear incongruous in respect of formal transactions. The old forms of mancipatio, cessio in jure, stipulatio, legis actiones, were highly solemn and dramatic. They possessed, in the eyes of the Romans, a species of sacramental efficacy. How, then, could the benefit of one of these ceremonies be given to a person who had taken no part in them, had repeated none of the sacred words, nor performed a single act in the ceremony ? " [12]

Jewish origin of law.

" In the adoption (inter alia, with the curious addition of the milk-relationship i.e. foster-sister and so on) of the Jewish table of kindred and affinity wherein marriage is incestuous, and the insistence on the presence of two witnesses to establish the validity of a marriage, the Muhammadan law is obviously of Jewish origin. Possibly we ought to add the function of the vakil or arranger of marriages, a person invested with far more authority than

usual. " *Nikah* marriage " sometimes used e.g. in *Shoharat Singh* v. *Jafri B.*, (1914) 17 Bom. L. R. 13. (P. C.) as if *nikah* referred only to permanent marriage, & as if it did not include relation arising from *muta*. This, it is submitted, is erroneous : both etymologically, & in language of law *nikah* lit. = conjugal intercourse (see dictionary, s. v. *nikah* : root word *na-ka-ha*). *Nikah* is one of the special expressions by use of which *muta* must be contracted : s. 25(2) ; cf. Bail. II. 39 (*ankahtoki/ankahtoka* = " I have made *nikah* with thee") ; Bail. I. 181, *l.* 1, refers to a *nikah-i-mut'at* = *nikah* by way of *mut'a*, or a marriage of enjoyment (*mut'a* = enjoyment).

[8] Bail. II. 1-3 ; Hed. 26 ; *Sharh-i-Viqayah*, Vol. II., on *Nikah* (*ad init.*) : clear, therefore, that in Ithna Ashari & Shafii law use of expressions implying sale or gift not enough : nor, it seems other expressions not specifically importing marriage.

[9] Bail. I. 17 ; II. 5 (*fourth*) ; cf. s. 17A.

[10] Bail. I. 21, 345 ; II. 60, 61 ; see s. 24. Cf. *Kulsumbi* v. *Abdul Kadir*, (1920) 45 Bom. 151 = s. 38, *ill.* (7) (bride's pregnancy by illicit intercourse concealed).

[11] *Abdul Kadir* v. *Salima*, (1886) 8 All. 149, 154 ; Roman & other European systems compared : 8 All. 156 ; *Maung Kyi* v. *Ma-Shawe Baw*, (1929) 7 Rang. 777 ; *Nowroz Ali* v. (*Mt.*) *Aziz B.*, (1876) 11 P. R. No. 124, pp. 253, 259, statements by (i) Boulnois, J. : " the legal mode of establishing the status of marriage is connected with a religious ceremony," & by (ii) Lord Parker in *Shoharat Singh* v. *Jafri Bibi*, (1914) 17 Bom. L. R. 13 (P. C.), that *nikah* marriage is religious ceremony, are, perhaps, not quite accurate with reference to Muslim law ; but see s. 23, com.

[12] Hunter, *Roman Law*, (3rd Ed.), 610.

the mere bringing together of the interested parties. The vakil is generally the woman's nearest male relation." [13]

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In some of the United States of America, marriage is a civil contract requiring no ceremony or special formality. The following on the "Requisites and Proof of Common Law Marriages," [14] may be helpful in the decision of similar questions arising under Muhammadan law :—

LAW OF STATES WHERE MARRIAGE IS CIVIL CONTRACT : United States. No formality necessary, mere contract enough.

"From early times, it has not always been clear what acts were necessary to the validity of a marriage.[15] According to early civil law the consent of the parties was sufficient ; [16] but it seems doubtful, whether under the early English common law [17] a marriage without a minister was valid.[18] In this country, however, many States have adopted the view that a marriage may be valid even without a ceremony before third parties.[19] The rule is usually stated to be that an agreement to be married henceforth, followed by cohabitation, constitutes the so-called common law marriage.[20] But both on principle and authority, it would seem that the agreement alone is sufficient to consummate a common-law marriage, and that the subsequent cohabitation is important only as evidence of the agreement.

Cohabitation, evidence of contract.

"Moreover, it is clear on the authorities, in the States where formal solemnization is not necessary, that although there is no proof of an actual written or oral contract, the agreement necessary to the formation of a common-law marriage may be inferred solely from the conduct of the parties." The article then proceeds to refer to four situations which are said to be rather common : (1) The only evidence of the agreement may be that the parties have lived together as husband and wife : from this a common law marriage is often inferred, even without proof of an express agreement : an implied agreement being sufficient : see s. 81. (2) The parties may have purported to contract a marriage and lived together, but the agreement at the time it is entered into may be void because of some disability unknown to both parties.[21] If, subsequently, the disability is removed, a new contract is in strictness

Presumption of marriage from conduct of parties.

[13] *Legacy of Islam*, p. 166 (A. Guillaumi : *on Influence of Judaism in Islam*).

[14] Harvard Law Rev., XXVII., 387, 390.

[15] Citing Bryce, *Stud., Hist., Jurispr.*, 811, ff. [16] *Ibid.*, 812

[17] *Ibid.*, 817-818 ; Rodgers, *Domestic Relations*, s. 85.

[18] "By statute, in England, a ceremony is now required : 26 Geo. II. c. 33. But it can be before a civil officer : 6 & 7 William IV, c. 85. In Scotland agreement to be married henceforth sufficient : *Dalrymple* v. *Darlymple*, 2 Hag. Cons. 54."

[19] "*Shorter* v. *Judd*, 60 Kan., 73, 55 ; Pac., 286 ; *Hutchinson* v. *Hutchinson*, 196 Ill. 432 ; 63 N. E. 1023 ; *Chamberlain* v. *Chamberlain*, 68 N. J. Eq. 414 ; 59 At., 813 ; *Tartt* v. *Negus*, 127 Ala. 301 ; 28 So. 713 ; *In re Hulett's Estate*, 68 Minn. 327 ; 69 N. W. 31 ; CONTRA, *Dunbarton* v. *Franklin*, 19 N. H. 257. Some states, by statute, have declared common-law marriage invalid : *Morrill* v. *Palmer*, 68 ; Vt. i. 33 ; Atl. 829. See *Com.* v. *Munson*, 127 Mass., 459-460. Other states have declared marriage a contract, and in such states a contract is usually sufficient : *State* v. *Bittick*, 103, Mo. 183 ; 15 S. W. 325. It is generally held that statutes setting forth the ceremony for marriage are only directory, and even in these states common law marriages are good : *Renfrow* v. *Renfrow*, 60 Kan. 277 ; 56 Pac. 534."

[20] "The disability usually consists in one party having a spouse living and undivorced ; but any disability, such as slavery, that makes the marriage absolutely void, would be sufficient : *Renfrow* v. *Renfrow*, 60 Kan. 277 ; 56 Pac. 534."

[21] See on SEMBLANCE OF MARRIAGE, s. 14, "*semblance*," "*right*," *nn.*

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necessary. If, however, the parties having been ignorant of the existence and removal of the disability, simply live on as before, a new agreement to be man and wife is implied by law from the cohabitation, with the same matrimonial intent that the parties had at the time when the marriage was originally purported to be contracted. (3) Where, however, the parties marry, both knowing of a disability, or simply live together meretriciously, matrimonial intent cannot be inferred from past conduct : hence affirmative proof of mutual consent to marriage, after the disability is removed, is necessary. (4) Again where only one party knows of the disability at the time of the contract of marriage, some courts hold that the mere continuance of cohabitation after the removal of the disability is insufficient evidence of the requisite agreement. Others consider the fraudulent party to be estopped from proving that he did not consent. "On the analogy of ordinary contract principles, it may be argued that there is a valid agreement as soon as the difficulty is removed, since there is apparent mutual consent which is ordinarily sufficient." [22]

DEVELOPMENT OF NOTION OF MARRIAGE IN CHRISTIAN CHURCH. "Consensus facit matrimonium."

"The Christian Church," says Prof. Holland,[23] "adopting from Roman law the maxim that consensus facit matrimonium, though it stigmatised such marriages as irregular, because not made in facie ecclesiæ, nevertheless upheld them as valid, till the Council of Trent declared all marriages to be void unless made in the presence of a priest and witnesses. Before the time of the Council, and, after it, in countries such as France and England, where the decree in question was not received, either of the parties to a clandestine marriage per verba de præsenti, could compel the other, by a suit in the ecclesiastical court, to solemnize it in due form. It has been judicially stated that the English common law never recognized a contract per verba de præsenti [24] as a valid marriage, till it had been duly solemnized, although it recognized it under the name of pre-contract of marriage, a term which covered also promises per verba de futuro down to the middle of last century,[25] as giving either of the parties a right to sue for a celebration, and as impeding his or her marriage with a stranger to the contract." [26]

[22] 27 Harv. L. R. 387 concludes (condensed): "interesting case, recently in Illinois, incorrect : *People* v. *Shaw* 102 N. E. 1031. Defendant married woman in New York, neither knowing of disability. They moved to Illinois, where there was no disability, & continued to live as man & wife. Defendant then deserted woman, & married another : held not guilty of bigamy. Since evidence showed that neither party doubted validity of original ceremony in New York, there was real consent by both to be married when parties lived in Illinois thinking themselves man & wife. Submitted, therefore, that common-law marriage was there contracted, & that defendant guilty of bigamy."

[23] Holland, *Jur.* 257-258.

[24] *R.* v. *Mills*, (1843) 10 Cl. & Fin. 534, 665.

[25] These consequences removed : 26 Geo. II. c. 33.

[26] *Re Ulee ; Nawab Nazim of Bengal's Infants*, (1885) 53 L. T. 711, affirmed 54 L. T. 286. REQUISITES OF VALID MARRIAGE IN ENGLAND : (1) each party should, as regards age, mental capacity, & otherwise be capable of contracting marriage ; (2) they should not, by reason of kindred, or affinity, be prohibited from marrying one another ; (3) there should not be valid existing marriage of either party, with any other person ; (4) parties, understanding nature of contract, should freely consent to marry one another ; & (5) certain forms & ceremonies should be observed : Hals., *Laws of Eng.*, XIV. 218, s. 512.

Where the Nawab Nazim of Bengal, who had other wives, had married an English woman in the Islamic form of marriage, Chitty, J. observed that "such a marriage was not binding on any spouse of English domicile, the reason being that it was not intended to be a marriage; for the notion of marriage in England implies a monogamous connection." [27]

SECTION 18. MARRIAGE IN ENGLISH LAW. With English woman in England

A marriage solemnized in England between a Christian woman and a Muslim domiciled in India, cannot be dissolved by the husband handing to the wife a writing of divorcement.[28] But if she is converted to Islam, the marriage may be dissolved by talaq.[29]

(i) in Muslim form.

(ii) in English form.

19. An illegal condition in a marriage contract is void, and does not invalidate, or otherwise affect, the marriage.

Illegal condition in marriage.

20. (1) The consent to the marriage of a person competent, under s. 17B, to enter into a contract of marriage,[1] must be expressed [2] either by himself [3] or his duly authorized agent or proxy.[4]

CONSENT OF PARTIES TO CONTRACT OF MARRIAGE.

(2) The marriage of a person not competent under s. 17B, to enter into a contract of marriage [5] must, subject to the said section, be contracted by the consent of [6] his or her guardian for marriage [7] or by the duly authorized agent or proxy of such guardian.[8]

(1) parties 'sui juris'

(2) not 'sui juris'.

Illustrations.

(1) H says, in the presence of M and N : "I have married myself to *W*," who is absent. On the information reaching *W*, she says : "I have accepted." This does not constitute a lawful marriage, even though M and N be present when *W* accepts.[9]

(2) H sends a messenger, or writes a letter to *W*, offering her marriage. *W* receives the messenger, or reads the letter, in the presence of two witnesses,

[27] *Rex* v. *Hammersmith, Suptdt. Regist. of Marriage* ; *ex-parte Mir Anvaruddin*, [1917] 1 K. B. 634.

[28] *Khambatta* v. *K.*, (1934) 59 Bom. 278.

[29] Bail. I. 19, 79 ; Ind. Contr. Act, s. 3.

[1] E.g. *Sibt Ahmad* v. *Amina Khatun*, (1928) 50 All. 733.

[2] Form in which consent to marriage contract to be expressed : ss. 18, 22, 23.

[3] Singular includes plural, & masculine, feminine.

[4] Bail. I. 46, 50 ; II. 4, 6, 8, 10 ; *Sharh-i-Viqaya Nikah*, Ch. II. (*Mt.*) *Atkia B.* v. *Muhammad Ibrahim*, (1916) AIR (P. C.) 250 = 21 C. W. N. 349 ; *Jogu Bibi* v. *Mesel Shaikh*, (1935) 63 Cal. 415.

[5] E.g. a minor girl cannot appoint her own *vakil* to contract her in marriage : *Shafi-ullah* v. *Emperor*, (1934) 32 All. L. J. 387 ; *Kullan* v. (*Mt.*) *Piari*, [1879] 14 Punj. Rec. 446, 447 (No. 157). This seems to have been overlooked or misunderstood in *Hassan Kutti* v. *Jainabha*, (1928) 52 Mad. 39, resulting, however, in a very equitable decision ; (*Mt.*) *Atkia B.* v. *Muhammad Ibrahim*, [1916] AIR (P. C.) 250 = 21 C. W. N. 345 ; *Jaygunnessa* v. *Mahammad Ali*, [1938] 1 Cal. 139 (cf. 42 C. W. N. *Journal*, xxx.)

[6] Ss. 54-58 : agents or proxies for marriage.

[7] Ss. 59-68 : guardians for marriage.

[8] Bail. I. 46, 50 : II. 4, 6, 8, 10 : *Sharh-i-Viqaya, Nikah*, Ch. II. : "*On Wali & Equality*" (*ad. init.*)

[9] Bail. I. 10.

SECTION 20.

and declares her acceptance of the offer, in their presence. This constitutes a lawful marriage.[10]

(3) H appoints A his agent for marriage; A contracts a marriage on behalf of H with some woman. Then there is a doubt as to whether H was married to *W*, or to another woman, but H and *W* both say and believe that they were married. The marriage between H and *W* is established.[11]

Puberty and majority in Muhammadan law.

See s. 17B : The word "minor" is liable to be interpreted as defined in the Indian Majority Act; but that Act does not affect the capacity of a Muslim to act in regard to marriage.[12] Attainment of puberty with soundness of mind, is enough for competence generally under Muhammadan law.[13]

Age of competence to marry.

21. With reference to the age of competence to marry, it is presumed in the absence of evidence of attainment of puberty, that males attain puberty at the age of 15 years, and females at the age of 9 [15] years.[14]

Consent under compulsion.

22. Under Hanafi law a contract of marriage is valid, even though it has been made under compulsion, or the declaration and/or acceptance are/is pronounced without any intention to contract a marriage.[15] A similar rule of Hanafi

[10] Bail. I. 11; messenger need not be of full age, nor Muslim.

[11] Bail. I. 83-84 : "And this case is a precedent that MARRIAGE is established BY MUTUAL BELIEF." And cf. s. 81, prov. (1).

[12] See s. 5A, com. : *Ahmed Suleman* v. *Bai Fatima*, (1930) 33 Bom. L. R. 137 (Muslim girl of 16 may sue for divorce without guardian); cf. *Cheekati Zamindar* v. *Ranasooru D.*, (1899) 23 Mad. 318, 323 (on necessity for care in regard to phraseology : confusion caused by lax use of terms : terms embodying a set of ideas is one system sought to be applied to quite another system having very slight if any correspondence).

[13] Bail. I. 4, *n.* 5, explains : "puberty, which is majority, according to Muhammadan law," Hed. 529, see *n.*; *Sharh-i-Viqaya*, book on *Nikah*, ch. I., last 3 lines; (also a Hanafi authority) implies same with reference to marriage of *baligha* = a girl who has attained puberty. See also Bail. I. 431 (438). As regards Shia law *Sharaiul-Islam* states in connection with custody of infants, "when a child has attained to puberty & discretion the power of the parents is at an end." See also Bail. II. 96, *n.*; Hed. 529, (Book XXV., ch. 2); s. 17B(1).

[14] See s. 20, com. (*Mt.*) *Atkia B.* v. *Mahammad Ali*, [1916] AIR (P. C.) 250 = 321 C. W. N. 345 ("according to Muhammadan law a girl becomes a major on the happening of either of two events : (i) the completion of her 15th year : (ii) on her attainment of a state of puberty at an earlier period"); *Sibt Ahmed* v. *Amina Khatun*, (1928) 50 All. 733 (Shia law : girl presumed to attain puberty between 8 & 9); *Nawab Sadek Ali Khan* v. *Jai Kishori*, (P. C.) (1928), 30 Bom. L. R. 1346, 1351, *l.* 22; 55 M. L. J. 88 (Muhammadan age of puberty is 9 for girls); *Zaitun* v. *Shaikh Kommal*, (1924) 22 All. L. J. 423 (presumption may be displaced by evidence of actual attainment of puberty); Bail. II. 96, (puberty established by (i) natural signs, or (ii) by age : viz. 15 years for males & 9 years for females); citing Sir Wh. Jones, *Im. Dig.* 308; *Sharaia* 193; *Kafi*, as cited in *Kifaya*, III. 845, adopted in *Fat. 'Al.* V. 93.

[15] Bail. I. 72 : See however (ENGLISH LAW) : *Scott* v. *Sebright*, (1886) 12 P. D. 21 (marriage under DURESS set aside); *Hussein* (*otherwise Blitz*) v. *Hussein L. R.*, [1938] P. 159 (marriage under threats declared null & void); *Ibrahim Moola* v. *Enayet-ur-Ruhman*, (1869) 12 W. R. 460 = 4 Beng. L. R. (A. C.) 13 (DIVORCE UNDER COMPULSION (s. 123) held good). Ameer Ali, *Mahom. Law*, ii. 543 (483), suggests that Hanafi husband having been coerced to divorce his wife, should declare himself Shafiite, that thus divorce would be invalidated. It is true that Sunni can change

law relating to divorce has been enforced in British India.[15] SECTION 22.

The rule of Hanafi law purports to be based on the following tradition : tradition.
" The Apostle of God said : ' There are three things, which, whether done in joke or earnest, shall be considered as serious and effectual ; one, marriage ; the second, divorce ; and third, taking back.' " [16] But there is also a tradition : Dissent against the rule of Hanafi law.
" 'Aysha said : ' I have heard the Prophet of God say there is no divorce and no emancipation by compulsion : " that is to say for one man to say to another, free your slave and divorce your wife." [17]

" The Hanafis are, on this point, opposed by a formidable array of great jurists like Shafii, Malik, Hanbal, 'Umar ibn 'Abdul 'Aziz, Ibn 'Umar and Kazi Shuraih." [18] So also in Shia law there must be an intention to marry, and it must be demonstrated without any sort of ambiguity.[18]

22A. A contract of marriage brought about fraudulently is void : no mahr will be due unless the marriage has subsequently been ratified [19] by consummation [19] or otherwise.[20] Marriage by fraud.

23. The contract of marriage[21] must be in the form of a declaration and acceptance, expressed at one meeting,[22] and uttered[23] by the parties entering into the contract[24] (either 'FORM OF CONTRACT OF MARRIAGE : WITNESSES. Witnesses to marriage contract.

school to which he belongs without any difficulty (see s. 9, com.), but would rights created before change be altered thereby)? And if divorce under compulsion is otherwise valid, would such change of school be fraud on law? see *Skinner* v. *Skinner*, (1897) 25 Cal. 537, 546 ; *Skinner* v. *Orde*, (1871) 14 Moo. I. A. 309. But of course change of school may be honest.

16 *Mishcat-ul-Masabih*, Book xiii, ch. 12, part 2. (Matthew's trans. I. 119). So, under common law of England, a man was bound by his seal, though affixed against his will : Holmes, *Common Law*, 272 ; citing Briton, Glanville, etc.

17 *Mishcat-ul-Masabih*, XXX', xii, 2.

18 Abdur Rahim, *Mdn. Jurispr.*, 337 ; citing *Hidaya* III. 344 ; *Fathul-Qadir*, III. 244 ; Bail. II. 1. *Daaimul-Islam* is to same effect.

19 This of course implies no further fraudulent concealment : s. 38A, *ill.* (7).

20 *Abdul Latif* v. *Niyaz A. K.*, (1909) 6 All. L. J. 423 (woman suffering from concealed illness which prevented consummation, & subsequently resulted in her death) ; *Haji Ahmed K.* v. *Abdul Gani*, [1937] Nag. 299 (contract of marriage is UBERRIMAE FIDEI : all defects must be disclosed. As to much grosser case of *Kulsumbi* v. *Abd. Kadir*, (1920) 45 Bom. 151, see s. 38A, *ill.* (7) *nn.* ; s. 101(1).

21 Bail. I. 5, 6, 7. Lord Buckmaster speaks of an assertion that marriage was performed in Sunni fashion ; *Irshad* v. *Mt. Kariman*, (1917) 20 Bom. L. R. 790, 795, (P. C.). Difference between Sunni & Shia fashion would not necessarily be in contract , but if there are prayers & benedictions, their wording might be different. Cf. *Badal Aurat* v. *Q.-E.*, (1891) 15 Cal. 79.

22 *Maung Kyi* v. *Ma Shwe Baw*, (1929) 7 Rang. 777 ; *Jogu Bibi* v. *Meset Shaikh* (1935) 63 Cal. 415 ; *Minhaj*, 283 (Bk. 33, s. 2), (Shafii text) goes so far as to say that marriage not legally binding if offer separated from acceptance, by long religious ceremony.

23 Contract may be made by signs in case of dumb persons : Bail. I. 14 ; but not by merely writing in case of persons able to speak : Bail. I. 15. Cf. *Santeshwar Mahanta* v. *Lakhikanta*, (1908) 35 Cal. 813 : under Ind. Limit. Act, ss. 19, 20, there is no valid acknowledgment when person able to write, merely signs an endorsement written by another person). Divorce may, however, under Hanafi law be pronounced either orally, or in writing : s. 143.

24 Parties intermarrying may not themselves be making the contract : see s. 20.

SECTION 23.

for themselves, or as proxies or as guardians) in the presence and hearing of each other, and—

(*a*) under Hanafi and Shafii law in the presence and hearing[26] of two witnesses simultaneously present : the witnesses being (A) sane, of full age and Muslim[27] and (B) under Hanafi law (i) at least one of the two witnesses being a male ; and (ii) if only one witness is a male, then there being two female witnesses besides him ;[21] (C) under Shafii law both witnesses being males.[28]

Qualifications of Witnesses to a marriage contract.

(*b*) Under Shia and Maliki law, witnesses are not necessary for the validity of the marriage contract.[29] Imam Malik seems to hold it necessary that the marriage should be made known,[30] but under Shia law even a positive injunction to secrecy does not invalidate the contract of marriage.[29]

Witnesses to marriage not required by Shia and Maliki law.

As to marriages in marz-ul-maut, see s. 600, *ill.* (8), s. 641, *ill.* (3).

Presence of Mulla or Kaji at the marriage.

It is usual in India for a Mulla or Kazi[31] to officiate at the marriage contract, and to recite benedictions, etc. It has not apparently been alleged in any case that custom has altered, or added to, the simple requirements of the law of Islam.[32] But a marriage not performed in the mode usual in the community would have to be more strictly proved.

[25] *Aklemannessa* v. *Mahomed*, (1904) 31 Cal. 849, 856 ; *Sahabi Bibi* v. *Kamaruddin Sarkar*, (1911) 15 Cal. W. N. 991 (the *majlis* assembled in *khuli* or court-yard : alleged bride, (adult & widow) said to have been somewhere in inner apartment, with other ladies, but in same *bar* : plaintiff's story that 5 men who were not vakils of bride, sent to obtain bride's consent, & that they returned announcing that they had obtained it : the Mulla then performed remainder of marriage ceremony : he admitted that he did not hear bride give her consent : plaintiff stated that afterwards he went into innner apartments, when bride's mother put bride's hand in his : marriage did not appear to have been consummated : defendant who had, according to custom, returned following day to her father's house, never came back to plaintiff. *Held*, essential that words of proposal & acceptance be uttered by contracting parties [*contracting* parties,—not necessarily parties married, guardians or agents of bride & bridegroom may make the contract, see ss. 20, 23(1)] in each other's presence & hearing, & in presence of two male, or one male & two female, witnesses who must be sane & adult Muslims ; whole transaction must be completed at one meeting ; that this not having been done, marriage not validly contracted. The marriage would have been validly contracted, if the five men had been authorized by defendant to contract her in marriage). Cf. *Badal Aurat* v. *Q.-E.*, (1891) 19 Cal. 79, 81, 82.

[26] Hence deaf persons not competent to be witnesses : Bail. I. 7.

[27] Bail. I. 6. (*Mt.*) *Shamul* v. *Dost Mahomed K.*, [1933] AIR (SIND) 317 (those present need not be specifically requested to act as witnesses).

[28] Bail. I. 7 : females are not competent to be witnesses to marriage under Shafii law.

[29] Bail. II. 4-5, *Daaimul-Islam* to same effect : presence & benediction of Kazi strongly recommended.

[30] *Sharh-i-Viqaya*, Vol. II. *Nikah*, Ch. I.

[31] *Kazi* is Arabic designation of judge : see ss. 5B, 11B, comm.

[32] See *Badal Aurat* v. *Q.-E.*, (1892) 19 Cal. 79, 81 ; *Alimuddin* v. *R.*, (1906) 10 Cal. W. N. 982, 984 ; *Abdul Nabi* v. *Syed Ajmat Hussen*, [1935] AIR. NAG., 123. See s. 6A(1)(*b*)(iii) = Shariat Act, 1937, s. 2, under which Shariat governs questions regarding marriage notwithstanding any custom or usage to contrary.

SECTION 23.

Registration of marriages and divorces.

Bombay Regulation XXVI. of 1827 relating to Kajis.

The Indian Legislature has at times partially regulated the formalities and ceremonies, or provided for preserving evidence, of Muslim marriages.[33] E.g. (1) Beng. Act I. of 1876, VII. of 1905 (voluntary registration of Muslim marriages and divorces). (2 Bom. Reg. XXVI. of 1827 (repealed by Act XI. of 1864) : [34] appointment and removal of Kazis and "ensuring an efficient and regular discharge of the functions of their office," with rules for the Kazis "authenticating, and recording marriages, attesting divorces, assisting in religious rites and ceremonies amongst Mussulmans, furnishing means of settling questions of inheritance" : Kazis appointed by the Governor-in-Council : sanad, seal, s. 1 : attending, presiding at, or performing such ceremonies or forms relating to marriage and divorce and to doctrinal and religious rites, as may be inculcated by Muhammadan law : s. 6. Kazi entitled to fees fixed by Zilla Judge with sanction of Sadr Adalat : [34] s. 7. Marriage and divorce to be recorded in book, under penalty. "On the death or dismissal of Kazi said books be delivered by him, or his heirs to Superintendent of Registrar of Zilla for purpose of being deposited with general register." (3) Act XI. of 1864 repealed regulation XXVI. but s. 2 permits Kazil-Kuzat or other Kazi performing, when required to do so any duty or ceremonies by the Muhammadan law." [34] (4) The Kazis Act, XII. of 1880 : local Government may, at the desire of and if it thinks fit, after consulting principal Muhammadan residents of any local area, select and appoint fit persons to be Kazis : s. 2, par. 1. They may be removed, or suspended, for misconduct, absence, insolvency or on own application, or refusal, or unfitness, or incapacity : s. 2. Kazis may appoint naibs : s. 3. But no judicial or administrative powers are conferred on any Kazi or Naib-Kazi appointed hereunder ; nor is presence of Kazi or Naib Kazi necessary at the celebration of any marriage, or performing of any rite, or ceremony ; nor is any person prevented from discharging any of the functions of a Kazi.[35]

Act XI. of 1865.

Kajis' Act XII. of 1880.

Kajis have no judicial or administrative powers : their presence not necessary at marriage : no exclusive right to discharge function.

§ 3.—Legal Effects of a Contract of Marriage.

24. The legal effects of a contract of marriage are : [1]

Legal effects of marriage :

[33] (*Kaju*) *Shaik Mohinoodeen* v. *Usmaljee Momudjee*, (1857) 4 Morris 48, (S. D. A. Bom.) cited in *Kassam Khan* v. *Kaji Abdulla*, (1925) 50 Bom. 133, 141 ; *Bikani Mia* v. *Shuk Lad Poddar*, (1892) 20 Cal. 116, 147.

[34] Act XI. of 1864 also repealed Reg. II. of 1827, which provided for appointment of Hindu Muslim law officers. Act XI of 1864 was repealed by Act VII. of 1868. See *Muhammad* v. *Sayyad Ahmad*, (1861) 1 Bom. B. C. R. APPX. p. xviii.

[35] In spite of this clear provision suits are occasionally brought claiming such rights.

[1] *Shoharat* v. *Jafri*, (1914) 17 Bom. L. R. 13 (P. C.) (well-established law referred to in general terms : judgment itself states that no questions of law arise ; *Asha* v. *Kadir*, (1910) 33 Mad. 22, 24, 25 (ordinary incidents of marriage : modification by contract) ; *Said* v. *Meeram*, (1910) 20 Mad. L. J. 12. LEGAL EFFECTS OF IRREGULAR MARRIAGES stated in Bail. I. 156-158 : (1) Court must separate the parties : s. 86 ; (2) parties may cancel marriage : see ss. 84-87 ; (3) unless consummated wife cannot claim *mahr* ; (4) *mahr* is only due if marriage consummated : & then she is entitled to whichever is less : proper or specified *mahr* ; (5) *iddat* for three courses is incumbent from date of separation ; (6) *iddat* for death is only for three courses : Bail. I. 157 ; (7) maintenance is not due : irregular marriage forms no consideration for agreement for maintenance ; (8) valid retirement has not exactly same effect

SECTION 24. Intercourse.

(1) Sexual intercourse,[2] and the procreation of children becomes lawful ;[3] it is a question of fact, to be decided by the Court, in each particular case whether a wife who has not attained puberty,[4] has reached an age at which the husband ought to be permitted to consummate marriage.[5]

Restraint by husband : 'parda' or 'gosha.'

(2) In the absence of an agreement to the contrary,[6] the husband has the right to guide his wife's movements[6] and in a reasonable manner to restrain her from going out, and showing herself in public ;[7] but he has no authority to prevent her from seeing her parents or other relations within the prohibited degrees.[6]

Mahr.

(3) The husband is obliged to give mahr to the wife : under Hanafi law even though she has expressly agreed to marry without mahr.[8]

Maintenance.

(4) The wife becomes entitled[9] to maintenance from the husband.[10]

Inheritance.

(5) Mutual rights of inheritance become established.[11]

Prohibitions by affinity.

(6) Each is prohibited from marrying any of the relations of the other within the degrees of prohibited affinity ;[12] and after dissolution of the marriage the wife is prohibited during the period of 'iddat from re-marrying.[13]

as consummation ; (9) paternity is established in father (maternity is established in every mother whether marriage regular or irregular, or void) : ss. 214, 215.

[2] Husband does not become *entitled* to sexual intercourse until rights of wife to *mahr* satisfied ; see ss. 106, 107 : during *'iddat* right to intercourse in a way suspended : by intercourse, divorce revoked : s. 151.

[3] Bail. I. 4, 10 ; II. 88.

[4] Cf. Age of Consent Act, X. of 1891.

[5] Bail. I. 54. On allied question of custody, see s. 256.

[6] Bail. I. 449-450 (453-454) ; parents may visit her on Fridays ; other relations once a month. Hed. 144, is more general , about applicability of these details, see ss. 285, 294, com. Bail. II. 85 ; s. 24, com. Hed. 3 ; cf. s. 294, *ill.*

[7] Observance of *parda* or *gosha* : see *Gokal Prasad* v. *Radhu*, (1888) 10 All. 358 ; *Jamiluddin* v. *Abdul Majeed*, (1915) 13 All. L. J. 360. CONTRACT TO CONTRARY, see Hitti, *Hist. of Arabs*, 237-239, on ladies making complete FREEDOM OF ACTION condition precedent to marriage ;" Aysha bint Talhah never veiled her face,—saying that "the public should view the beauty, the stamp of which God had put upon her" and "thereby recognize His grace."—*Al Agham*, X. 54.—A truly pious lady.

[8] Bail. I. 91. See Ch. IV. on *mahr*, ss. 92-117 : sometimes payments are arranged for, which partake of nature of *mahr* as well as of maintenance, see s. 294(4).

[9] Even though she purports to release husband from liability ; Bail. I. 446 (450) ; but see Crim. Pro. Code, s. 488, ch. VIII. on Maintenance.

[10] Bail. II. 83-85 ; cf. s. 88 : rules relating to alimony under Ind. Div. Act, IV. of 1869 : ss. 36-38.

[11] See, however, s. 641, *ill.* (3) ; s. 600, *ill.* (8). Cf. Bail. II. 44, *ll.* 9-10 : "Inheritance is not established except by the law." Cf. *Tagore case*, (1872) I. A. (SUPP. VOL.) 47.

[12] Bail. I. 13.

[13] On *iddat* see ss. 36-40.

SECTION 24. Agreed terms.

(7) Such other rights and duties arise between the husband and wife, as are agreed to [14] between the parties,[15] at the time of the marriage [13] or subsequently thereto [16] provided that the agreement is not inconsistent with any rule of law [17] or of public policy, and in particular with this section,[17] or s. 17.[18]

Woman's status not altered.

(8) A woman does not change her status by being married.[19]

Wife's place of residence.

(9) An agreement that the wife shall be at liberty to live with her parents has been held to be void : [20] *sed quaere*.[21]

[14] *Sunna* (TRADITIONS) *explicit* : "CONDITIONS fixed at conclusion of a marriage MUST BE RESPECTED in the first place" : Bukhari, 54.6 ; 67.53 ; Muslim 16.63 ; Abu Daud 12.38 ; Tirmidhi 9.32 ; Nasa'i 26.42 ; Ibn Maja 9.41 ; Darium II. 11 ; Hanbal IV. 144, 150, ff. ; *Wensinck* p. 146, col. i. EXAMPLES OF STIPULATIONS : *Muhammad Muinuddin* v. *Jamal Fatma*, (1921) 43 All. 650 (in case of dissension or disunion, prospective husband & his father agreed to pay Rs. 15 per month for life, certain property being hypothecated : held valid) : distinguishing (*Bai*) *Fatma* v. *Alimahomed Aiyub*, (1912) 37 Bom. 280 (where agreement really for future separation) *submitted* : this case goes too far in applying English doctrine to Muslim marriages, in which divorce ordinarily at mere wish of husband ; doubtful also whether it is not opposed to observations of Syed Sahib Ameer Ali in (*Nawab*) *Khwaja Muhammad K.* v. *Husaini Begam*, (1910) 37 I. A. 152, 160, where evidently condition that wife may live elsewhere than in husband's house considered enforceable. 37 Bom. 280 expressly dissented from in *Mansur* v. (*Mt.*) *Azizul*, (1928) 3 Luck. 3. See also *Meherally* v. *Sakerbanoobai*, (1905) 7 Bom. L. R. 602 ; *Sabid Khan* v. *Bilatunnessa*, (1919) 25 C. W. N. 888 (option to leave husband's home & live elsewhere on illtreatment or disagreement, held valid : on granting restitution of conjugal rights, declared that conjugal rights must be exercised at *bári* (residence)) of wife's parents). Special terms regarding allowances or maintenance : see s. 294 (KHARCH-E-PANDAN). *Yussof Ali Chowdhry* v. (*Mt.*) *Fyzoonissa*, (1871) 15 W. R. 296 (stipulation for "sum allotted for her maintenances : enforced : Per Cur. : "There is no stipulation in this deed that the plaintiff will be entitled to this sum in case only of her living in the same house with the defendant or that she would forfeit this amount if she lives elsewhere."); *Mt. Sakina Faruq* v. *Shamshad K.*, [1936] AIR (PESH.) 195.

[15] When minors are being married such agreements may be made on their behalf by parents, & will be enforced though the minors are not parties to the agreement : *Khwaja Muhammad Khan* v. *Husaini Begam*, (1910) 37 I. A. 152 (ALL.) ; *Wahidan* v. *Nasir Khan*, (1930) 28 All. L. J. 1012.

[16] Contrast, s. 25(10). *Asha B.* v. *Kadir Ibrahim*, (1909) 33 Mad. 22, 25, 26 ; *Poonoo B.* v. *Fyez Baksh*, (1874) 15 Beng. L. R. appx. 5 ; *Hamidoolla* v. *Faizunnissa*, (1882) 8 Cal. 327 ; *Jamait Ali Shah* v. *Mir Muhammad*, (1916) 51 Punj. Rec. 371, 375, (No. 119). *Abdul Piroj Khan* v. *Hussenbi*, (1904) 6 Bom. L. R. 728. 730. Breach of such terms does not ipso facto give wife right to divorce : *Badrunnissa* v. *Mafiatulla*, (1871) 15 W. R. 555 ; (*Sheik*) *Mohabah* v. *Mymonnissa*, (1863) Marsh. 301.

[17] E.g. special rules under ss. 41(2), 89.

[18] Hence there cannot be option to cancel marriage ; nor, unless marriage is in form of *muta* (which is valid amongst Ithna Ashari Shias only) can persons be married for fixed term only.

[19] See s. 358A. Married woman has generally same power to do all juristic acts (i.e. acts recognised by law as affecting rights & liabilities), as if she were not married, except, of course, in respect of matters in regard to which contract of marriage itself alters her rights or liabilities. See com. ; *Muhammad* v. *Ghulam*, (1864) 1 Bom. H. C. R. 236 ; *Nasrat* v. *Hamidan*, (1882) 4 All. 205 (by marrying a Shia, Sunni woman does not become subject to Shia law) ; *Hayat-un-Nissa* v. *Muhammad*, (1892) 17 I. A. 73 = 12 All. 290 ; *Aziz Bano* v. *Muhammad*, (1925) 47 All. 823.

[20] *Abdul Piroj K.* v. *Hussenibi*, (1904) 6 Bom. L. R. 728 ; *Imam Ali Patwari* v. *Arfatunnessa*, (1913) 18 Cal. W. N. 693.

[21] See s. 24, com.

SECTION 24.

It is submitted that the Court must consider the whole of the particular agreement, to decide whether it operates so as to contravene s. 24(7), and so is void. Under Shia law a stipulation that the husband shall not take away his wife from her own city is binding.[22]

1. WIFE'S STATUS IN MUHAMMADAN LAW.

Wife's personality not merged in husband's.

Islam recognises no equivalent of the manus of Roman law, or the merger of the wife's personality in the husband's.[23] Previous to Islam women were in no better condition than slaves ; see s. 611, com. The Koranic alterations (Sura iv. 33) in the law, however, gave women the privileges that the Married Women's Property and similar Acts gave, in England, and in British India, to women governed by English law.[24]

Nor does she pass out of her natural family. *Patrick's case* 36 Mad. 385.

"A girl on her marriage" it has been stated "passes over to her husband's family under the Muhammadan law.[25] Presumably, what was meant was that the wife goes to live in the husband's family, and house : the remark might have been necessary, as, in Malabar, the husband frequently goes to live in the family (tarwad) of the wife. On the other hand Muhammadan law, certainly, contemplates no such "passing over to the husband's family" as to put an end to the natural relation between the wife and the family in which she is born (cf. s. 225). The natural ties of kinship are jealously protected. Nor does marriage create any "family" ties except the marital relation : the wife is a "stranger" (so far as legal relations are concerned) to her husband's nearest kinsmen (cf. e.g. ss. 343, 344, 611, 641). To say that "there is no obligation on the members of her natural family to maintain her

Nor lose her right to maintenance from her blood relations.

[22] Bail. II. 76 (eighth) "it has been said that such a condition is binding & there is a tradition to that effect." E.g. : H agrees to pay *mahr* of Rs. 100 if he takes W away to his own country : & somewhat less if she does not accompany him. H attempts to carry her away to an infidel city : W is not bound to comply & is nevertheless entitled to Rs. 100 *mahr*. "If the removal is to a Mussalman city, the condition of the contract is binding on her ; though this is liable to some doubt." *Daaimul-Islam* (Ismaili authority) II., *Nikah Shurut* (conditions) "It is related from (Imam) Jaffar b. Muhammad (as Sadiq) on whom be peace, that he said : If a man marries a woman & there is a condition for her residing amongst her (own) people or in a specified country such a condition is permissible to them : & every condition is permissible among Muslims unless it legalizes what is forbidden, or forbids what is permissible." (I am indebted for this translation to Principal Fyzee).

[23] *Nichhabhai Pragji* v. *Isse K. Haji Abdula K.*, (1866) 2 Bom. H. C. R., 297 (wife has power to dispose of her own property by gift, sale, or lease without consent of husband). Cf. *Lala Kundan Lal* v. (*Mt.*) *Musharrafi B.*, (1936) 40 C. W. N. 1093 (P. C.), noted s. 359 ; *Luteefoonissa B.* v. (*Syed*) *Rajoor Rahman*, (1867) 8 W. R. 84 ; *R.* v. *Khato Bai*, (1869) 6 Bom. H. C. R. (Cr. Ca.) 9 (wife may be convicted of theft of her husband's property) ; *Hamidunnessa B.* v. *Sheik*, (1890) 17 Cal. 670 ; Hindu case of *Tekait Mon* v. *Basanta Kumar*, (1901) 28 Cal. 751, (elaborate judgment : several points of general applicability, though in Muslim law marriage is pure contract : s. 17(1) ; in Hindu law sacrament).

[24] Act III. of 1874 ; Ind. Div. Act, IV. of 1869, ss. 24, 25, 31 ; 33 & 34 Vict. c. 93 ; 45 & 46 Vict. c. 72. See, e.g. *A.* v. *B.*, (1896) 21 Bom. 77 (rule of English law that in divorce proceedings husband prima facie liable for costs of wife, except when she has sufficient property of her own, does not apply to Muslims) *Contra*, where parties governed by Eng. Law : *Mayhew* v. *Mayhew*, (1896) 21 Bom. 77 ; cf. s. 202.

[25] *Pakrichi* v. *Kunhacha*, (1911) 36 Mad. 385. Case heard *ex parte* : decision against absent respondent turned upon whether under Muhammadan law, gift by donee's wife's sister & mother becomes void, if husband divorces wife & then dies).

after her marriage, even if she is divorced," [25] is to disregard the principles of the Muhammadan law of marriage, divorce and maintenance. SECTION 24.

Strict equality must be observed by the husband amongst the wives, if he has more wives than one.[26] Other rules regulating matrimonial intercourse, are not likely to come before the Courts. They will be found in the texts. 2. MATRIMONIAL INTERCOURSE.

The question whether the wife has attained puberty arises when it has to be determined whether the father or other guardian of the girl ought to be compelled to part with her to the husband. The Fatawa Alamgiri suggests, that, if the girl goes abroad, the Judge should compel her to appear before himself, and determine himself as to her competency,—but if not, he should direct women in whom he can confide, to inspect her.[27] This (it need hardly be said) does not refer to any such inspection as could come under the denomination of "medical examination," or of an illegal or unjustifiable assault ; [31] presumably, the same kind of inspection is suggested as every witness undergoes when the Judge is watching his demeanour in the box. It cannot be supposed that the Islamic law could empower a Judge to hold a medical examination of a female. The Fatawa 'Alamgiri mentions the inspection by women, as an alternative, in cases where the wife does not "go abroad." These rules are in effect a counterpart of the Civ. Pro. Code, s. 132 and O. XXVI., r. 1, and the Lunacy Acts. of 1853, s. 6, IV. of 1912, ss. 41, 42. In the case of pardanishin women, "the women in whom the Kazi can confide," take the place of the jury of matrons in English law, in regard to the writ de ventre inspiciendo, and to the reprieve in favorem prolis.[32] Where, in the opinion of the Judge, medical examination is necessary or desirable, and the girl refuses to be examined by lady doctors, the point would have to be decided by the Court on the other materials before it, and the Indian Evidence Act, s. 114, and ill. 9, thereto [33] would, no doubt, be taken into consideration. If she does not so refuse, "the women in whom the Judge can confide" would no doubt consist of lady doctors, and their opinion would be the evidence of experts under the said Act.

Question of wife's puberty, how determined : observation by judge : examination by women experts.

Examination by lady doctors.

The right of restraining the wife's movements is an extension of the marital right in rem of the husband (as it is styled in the common law of England) not to be deprived of his wife's society,[34] and to be able to prevent any person being criminally intimate with her ; cf. the interdict de uxore 3. RESTRAINT OF WIFE'S MOVEMENTS.

[26] Bail. II. 85, etc. [27] Bail. I. 54 ; cf. Bail. I. 345 last 3 lines.

[31] *Q.-E.* v. *Juran Charan Dusadah* unreported : referred to by Sir Andrew Scoble in his speech in Legislative Council on Age of Consent Bill, (1891); cf. startling order for arrest set aside in *Padarth Tewari* v. *Dulhin Tapesha Kueri*, [1932] A. L. J. 221 : "if a lady defendant is taken into custody & brought to court against her will or by force," "Judge would be liable to damages for illegal arrest" (p. 223); "an internal medical examination of a lady if not voluntarily submitted to by her, would amount to assault & battery." (*Mt.*) *Atkia* v. *Md. Ibrahim Rashid*, [1916] AIR (P. C.) 250 = 21 C. W. N. 345, 352-3 (there was medical examination as to age, puberty, &c.)

[32] Stephen, *Comment.* 1886, (10th Ed.), II. 307 ; IV. 482.

[33] Viz. "the Court may presume...that evidence which could be, and is not, produced, would, if produced, be unfavourable to the person who withholds it."

[34] In United States abduction of husband from wife has been recognized as actionable wrong : Holland, *Jurispr.* 154, citing decisions.

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exhibenda et ducenda,[35] of Roman law. This right of the Muslim husband to restrain the wife's movements does not conflict with the criminal law of British India relating to false imprisonment ; [36] for the Muhammadan law entitles the husband only to direct and guide his wife's movements with reference to visiting strangers, and showing herself in public.[37] It gives him no magisterial powers of inflicting imprisonment, should she disobey him, or disregard his lawful directions.[38] On the other hand, the wife does not, in the absence of a provision in the contract of marriage to that effect, become entitled to a divorce, or otherwise to be released from the marriage tie by the very fact that any of the stipulations agreed to are broken by the husband.[39]

Husband's right to chastise wife.

For repeated acts of disobedience the husband is allowed (after warning the wife) moderately to chastise her.[40] That privilege is, however, not to be exercised in British India except with great circumspection : he would be liable to be prosecuted for voluntarily causing hurt, or grievous hurt, under Indian Penal Code s. 319, or 323, in which case he would have the onus of proving that he was "justified by law" under s. 79 of the Code ; or, in the Presidency-towns, he may undertake the invidious task of showing that such a right to cause hurt or grievous hurt, is included amongst the rights and authorities of fathers of families and masters of families, which are safeguarded by the statute applicable to the High Courts in their original jurisdiction.[41] But such "rights and authorities" might carry the husband a much shorter distance than he may be inclined to claim, and the distance would depend "on all the circumstances of the case",—including the discretion of the Magistrate.

4. AGREEMENT THAT WIFE MAY LIVE WITH HER PARENTS. IS IT VALID ?

"There is some good authority," it has been said,[42] "for the statement that the condition that the wife shall be at liberty to live with her parents, is

[35] Digest, XLIII. 30, 2.

[36] Ind. Pen. Code, ss. 339, 342 ; Bail. I. 449-50 ; II. 83-85.

[37] *Gokal* v. *Radhu*, (1888) 10 All. 858 (on observation of PARDAH or GOSHA) ; *Jamiluddin* v. *Abdul Majid*, (1915) 13 All. L. J. 360. Cf. as illustration of manners : "Scarcely had she set her eyes on him when she covered her face with her veil ; first weeping & then laughing. Finally she said to me : 'Has my worth so fallen in your eyes that you let strange men like this come into my presence ?'"—E. Powis Mathers, & J. C. Mardrus, *Arab. Nights*, I. 18, Lond. 1923.

[38] See, however, next foll. par. : husband's right to chastise wife.

[39] *Badarunnissa B.* v. *Mafiatalla*, (1871) Beng. L. R. 442 = 15 W. R. 555 ; (*Sheik*) *Mohabuth Ally* v. *Sureemutty Mymonnissa*, (1863) Marsh. 361.

[40] "But those whose perverseness ye fear, admonish them, & remove them into bed chambers & chastise them." Koran IV. 30, 33. On other hand Prophet said : "Those who beat their wives do not believe well," & that "he is most perfect of Mussulmans whose disposition is most liked by his family." *Mishcat-ul-Masabih*, XIII. xi. 2. "Admonish your wives with kindness ; for women were created out of a crooked rib of Adam ; & therefore, if ye wish to straighten it, ye will break it, & if you let it alone, it will always be crooked." Ibid, XIII. xi. 1 ; Bail. II. 87-88 ; *Abdul Kadir* v. *Salima*, (1886) 8 All. 149. Cf. *Asha B.* v. *Kadir Ibrahim*, (1909) 33 Mad. 22, 25. COMMON LAW of England gave husband right to chastise wife : husband's right to restrain personal liberty of wife was negatived : *R.* v. *Jackson*, [1891] 1 Q. B. 671.

[41] See s. 2 ; 21 Geo. III. c. 70, s. 18 ; 37 Geo. III. c. 142, s. 13, set out in table of enactments preceding Chapter II.

[42] *Imam Ali Patwari* v. *Arfatunessa*, (1913) 18 Cal. W. N. 693 : citing Wilson's Digest of Anglo-Muhammadan law, s. 56, Abdul Rahim, [*sic*, for Abdur Rahman]

void." [43] This proposition requires careful scrutiny. (i) It seems to be based on a mere misapprehension of a clause from Baillie I. 94.[42] (ii) Under the Shia law, clearly a stipulation that the husband shall not take away his wife from her own city is binding : under Hanafi law " in 'our' times a husband has no right to insist on his wife's going about with him on journeys." [44] In respect of the law of marriage it is peculiarly unadvisable to introduce needless divergence in the law : s. 11(2): Sunnis and Shias frequently intermarry. (iii) It is submitted, on the authorities,[43] and, for the reasons stated below, on principle, that a stipulation between the husband and wife at the time of the marriage, must be upheld, unless it contravenes any specific rule of law or of public policy : and that an agreement that the wife shall reside in any particular place, does not infringe either any specific rule of law,[45] or public policy, even assuming that it may occasionally deprive the husband of the wife's society : though presumably in such a stipulation it is implied that, for the time being, the husband too should live with the wife's parents. There is no specific provision of law relating to stipulations as to where the wife shall reside : if it had been a matter of public policy [46] there would have been a specific provision directly governing the question : just as there is in the case referred to in s. 41(2). (iv) Moreover it is well established that the husband may validly agree to make to his wife a special allowance in case she lives apart from him. So that the agreement to be allowed to live in any particular place is recognized as binding and as not being against public policy. This is the case where the agreement allowing the wife to live apart is aggravated by a promise by the husband to pay special alimony : [43] but according to some decisions such an agreement is against public policy if not so aggravated. (v) The law is sufficiently partial to the husband, and, it is submitted that

Stipulations for wife's residence in any particular place not opposed to public policy.

Instit. of Muss. Law, art. 7, par. 3 [relevance of which not clear]; *Abdul Piroj Khan* v. *Husseinbi*, (1904) 6 Bom. L. R. 728 (bare statement that law declares agreement of this character void). See Bail. I. 94, *ll.* 3-4 (2nd ed. 94, *ll.* 5-6) : the words " the specification is not valid [viz. as *mahr*] seem torn from context & given entirely general & consequently wrong significance : see texts examined on p. 114. In any case law clearly allows stipulation that during minority wife should stay with parents : *Mt. Nafizunnissa* v. *Bodi Rahiman*, 7 L. B. R. 48 = 6 Bur. L. T. 125 = 20 I. C. 642.

[43] *Khwaja Md. Khan* v. *Husaini Begam*, (1910) 37 I. A. 152, 160 (Subdte. Judge negatived wife's claim to certain allowance on ground of refusal to live with husband : P. C. referred to absence of any condition that it was payable only whilst wife lived in husband's house & decreed it) ; *Yusoof Ali* v. *Fyzoonissa*, (1871) 15 W. R. 296 (see s. 294, *n.*) ; *Muhammad Muinuddin* v. *Jamal Fatma*, (1921) 43 All. 650 ; *Mansur* v. *Azizut*, (1928) 3 Luck. 603 ; *Sabed Khan* v. *Bilatunnessa*, (1919) 25 C. W. N. 888 ; (*Mt.*) *Sakina* v. *Shamshad*, [1936] AIR (PESH.) 195.

[44] Bail. I. 439 (443) *ll.* 1-3 ; II. 76 (eighth : see p. 110, *n.* 22) *Daaimu'l-Islam* II. *Nikah Shurut*, to same effect : " (It is related) from (Imam) Jafar b. Muhammad (as Sadiq), on whom be peace : If a man marries a woman & there is a stipulation for her residence amongst her (own) people, or in a specified country such a stipulation is permissible to them. And every stipulation is permissible among Muslims, unless it legalizes what is forbidden or forbids what is permissible."

[45] Cf. e.g. clear example of such a rule in s. 41(2) : stipulation for divorce from second husband, so that wife may re-marry her first husband, not allowed.

[46] Cf. *Fender* v. *St. John-Mildmay*, [1938] A. C. 1, 25 (no justification for expanding principles of public policy in this country by reference to public policy in another).

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Promises must be fulfilled.

the Court should not be astute to enhance the burden on wives.[47] (vi) The Koran repeatedly insists on righteousness being in him, who performs his undertakings; and strongly disapproves of those who do not perform what they have promised.[48]

The authorities may now be referred to. They were cited in an earlier Calcutta decision,[49] where (it is submitted) the law is more accurately stated. With reference even to this decision, it seems desirable, however, to advert to some considerations: First as to the bearing of the following from the Fatawa 'Alamgiri: "And there is no objection to marrying a woman as a Nuhuriyyah, that is on the terms of sitting with her[50] by day, and not by night."[51] (So that it would appear that even a stipulation partially derogating from s. 24(1) may be valid). Secondly, in the Fatawa 'Alamgiri[52] the condition "that he will not take her away from her own town" is referred to under the rules relating to the specification of dower, and (i) all that is said is that such an agreement cannot take the place of mahr—such a "specification [of mahr] is not valid"—"because there is no mal or property." (ii) It is not suggested that the condition is against public policy. (iii) Such a condition is expressly stated to be valid in Shia law.[53] Thirdly, the Hidaya,[54] was interpreted in the decision as showing that such a stipulation "is not generally considered to be absolutely binding, though any infringement of it may entitle the wife to a larger amount as her mahr than that agreed upon."[49] It is submitted (i) that this interpretation of the Hidaya is based on some misapprehension. The passages occur in the course of an exposition of the effects of a breach of one term of the marriage contract upon other terms. The question considered is not whether any stipulation is "absolutely binding." The argument in the text seems to be that the husband having broken his part of the contract (viz. the stipulation not to carry her out of her native city) cannot ask the wife to abide by her part of the contract (viz. to ask for no

Texts assume validity of such stipulations.

[47] Views expressed above did not commend themselves to the Lahore H. C.: (*Mst.*) *Fatima Bibi* v. *Nur Muhammad*, (1920) 1 Lah. 597 (agreement for wife living with parents held not legal: no defence against husband's claim for restitution of conjugal rights). It is still *submitted*, with utmost respect, that no authority or principle permits husband to escape performance of this particular stipulation; decisions mentioned in *n.* 43 were apparently not cited. The alleged *presumption* (Ameer Ali, *Mah. Law*, (1917, II. 479), (1929, II. 424), that the wife has waived her right under the stipulation (for which no authority is cited) cannot be turned into a complete rescission of the stipulation.

[48] See Koran ii. 177, cited above (p. 6) & in *Tavakalbhai* v. *Imitiyaj B.*, (1919) 41 Bom. 372; & frequently also to same effect e.g. "Oh ye who believe fulfil your undertakings" v. 1. See *Nawab Umjad Ally* v. (*Mt.*) *Mahumdee Begum*, (1867) 11 Moo. I. A. 517, 538 (s. 352, com. "unless some authority had been cited, EFFECT should have been given TO MANIFEST INTENTION of parties.")

[49] *Hamidunnissa B.* v. *Sheik*, (1890) 17 Cal. 670, 673; Hindu case of *Tekait Mon M. J.* v. *Basanta K. S.*, (1901) 28 Cal. 751 contains elaborate discussion, several points of general applicability, though in Muhammadan law marriage is pure contract; in Hindu law, sacrament: *Mi Nafizunnisa* v. *Bodi R.*, (1913) 7 L. B. R. 48 = 6 Bur. L. T. 125 = 20 I. C. 642.

[50] I.e. having sexual intercourse.

[51] Bail. I. 19, *ll.* 15-17. *Fatawa 'Alamgiri*, Cal. ed. 399, *l.* 3.

[52] Bail. I. 94. [53] Bail. II. 76 (eighth).

[54] Hed. 49, col. ii., par. 2: "cases of stipulation in behalf of wife."

higher mahr than that agreed upon) ; that the wife may validly claim that her agreement to marry on the stipulated mahr, was subject to conditions that have been broken, and that this breach entitles her to claim such rights as the general law may give her, beyond those under the contract, viz. if her " proper dower " is higher,[55] to claim that higher amount. In other words that the husband having broken the specific agreement (not to carry her out of her native town) and having claimed his rights under the general law, the wife too, may disregard the specific contract and claim her mahr in accordance with the general law. (ii) Thus the Hidaya (like the Sharaia and the decisions above referred to) assumes the validity of an agreement not to take the wife out of her native city. (iii) The Hidaya does, it is true, contemplate the possibility of the husband infringing the contract by " carrying the wife out of her native city,"—apparently against her desire. This apprehension surely cannot affect the rights of the parties in British India, where the husband may not be able to carry her away without coming into conflict with the criminal law. (iv) Moreover, the question here is not what would follow on a breach of the agreement, but whether the agreement is void : and inasmuch as, by the breach of this stipulation, the rights of the parties are stated in the Hidaya, to be altered,—and altered to the detriment of the person guilty of the breach—it would seem to follow that the stipulation was not void : the rights of the parties cannot be altered by failure to give effect to a void agreement. (v) Indeed it is not easy to discover the principle or reasoning by which, from the fact that the non-performance of an agreement brings about an enhanced liability, the conclusion is drawn that the obligation to perform the agreement is " not absolutely binding." (vi) The fact that an agreement not to take the wife out of her native town is referred to as not being necessarily invalid, seems to furnish a conclusive refutation of the suggestion that such an agreement may be attacked on the ground of public policy. (vii) Moreover the courts cannot lightly take upon themselves to declare agreements to be void on the ground of public policy. A great authority has stated that public policy is an unruly horse to ride. If it is difficult to guide the animal on level ground, it is still more difficult to make him leap over a stile on which a master exponent of equity has affixed the device : " It is the highest policy of the law that contracts should be enforced." [56] And, where a stipulation, favouring the wife in a marriage contract, is sought to be disregarded by the husband, on the ground of public policy,[57] the court will no doubt pause before taking as a guide to high moral purposes, a husband, who was willing to contract in derogation of those purposes. (viii) If the highest policy of the law is that contracts should be enforced, a stipulation favourable to the wife in a marriage contract which the husband can dissolve at will, but by which the wife is bound down for

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Texts hold agreement not to take wife out of her native city, valid.

Such contracts & public policy.

Necessity of holding husband to his word.

[55] See Hed. 49, *n.* ; Bail. I. 130, s. 116, below.

[56] Jessel, M. R., in *Printing Co.* v. *Sampson,* (1875) 19 Eq. 465 ; see also *Fender* v. *St. John-Mildmay,* [1938] A. C. 1 (Judge has no power to act on his individual views or predilections in question of public policy).

[57] (*Sheikh*) *Mohabuth Ally* v. *Mymonissa,* (1862) Mar. 361.

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all time,[58] may be considered to be clothed with something like sanctity.

5. BREACH OF CONDITIONS CONTAINED IN MARRIAGE CONTRACT.

The breach of a valid condition in a marriage contract, does not necessarily give the wife a right to have the marriage dissolved :[57] nor, except under Shafii law, does the husband's inability to maintain her : [58] a separation order on the ground of such inability, is under other systems not valid. But the breach of a condition may raise the amount of the mahr to the "proper dower," where a lower sum has been fixed by the original agreement ; [59] conversely, the specified mahr may be decreed where a stipulation in favour of the husband has been broken by the wife ; [60] or where the wife is discovered to have been unchaste before marriage.[61] A breach of such a condition may be pleaded as a defence to a suit for restitution of conjugal rights.[62] The marriage contract may reserve an option to the wife to divorce herself.[63] A stipulation that the breach of any specified condition (e.g. not to marry a second wife) will ipso facto operate as a cancellation of the marriage is considered below.[64]

6. STIPULATION AGAINST TWO WIVES.

Where the husband has stipulated not to marry a second wife,[65] is the agreement to be deemed to be in restraint of marriage, and thus void, under the Indian Contract Act, s. 26 ? [66] It is submitted, that the fact that that "section is borrowed from the English law," and that by that law marriages in contravention of monogamy are not permitted, cannot affect the question. "The policy of the law is to be considered not from a detached portion of it but from its whole body." [67] The Sharaiul-Islam [68] states that a stipulation in the marriage contract "that the husband shall not marry another wife during the lifetime of the party with whom the contract is made, nor privately entertain a woman as his concubine," is void, inasmuch as it is contrary to the law that the husband may marry four wives. But the question is whether the general law may not be altered by contract. The Courts would presumably lean in favour of such a stipulation. Such stipulations have been set up in several cases.[68] The passage from the Sharaiul-Islam, referred to above, does not appear to have been cited, and where the parties are Sunnis, it would not be binding on them. The cases in the footnotes show the different aspects that the contracts may take. The wife may, by contract, have an option reserved to herself to dissolve the marriage and such an option may be unconditional or conditioned on the husband taking another wife. See ss. 125-134.

58 *Abdul Karim* v. *Amina Bai*, (1935) 59 Bom. 526.

59 Hed. 142 ; Bail. I. 443 (447). 60 Hed. 49.

61 Bail. II. 65, (par. 2). 62 Bail. II. 35 (second). Cf. s. 96A.

63 *Buzloor Ruheem* v. *Shumsoonnissa*, (1867) 11 Moo. L. A. 551, 615 ; see s. 88.

64 *Badarunnissa B.* v. *Mafiatalla*, (1871) 7 Beng. L. R. 442 : ss. 128, ff.

65 See ss. 125, 144, comm.

66 Ind. Contr. Act, s. 26 : "Every agreement in restraint of the marriage of any person other than a minor is void."

67 (*Nawab*) *Umjad Ally Khan* v. (*Mt.*) *Mohumdee Begum*, (1867) 11 Moo. 517, 547 ; Ind. Contr. Act, ss. 23, 26 ; *Charleton, in re Bracey* v. *Sherwin*, (1911) 55 Sol. Journ. 330.

69 Bail. II. 76. *Daaimu'l-Islam* to same effect ; *Sharaiul-Islam* (Bail. II.) is authority for Ithna Ashari Shiahs & *Da'a'im* for Ismailis.

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Result of decisions

As a result of the cases it is submitted that a stipulation in a marriage contract that the husband shall not marry a second wife is enforceable.[69] If such a stipulation is not supported by a clause providing for the consequences of another wife being taken such damages will be claimable as the first wife proves to have resulted from the second marriage, and in the absence of such proof, nominal damages. If the stipulation is accompanied by a clause that on marriage to a second wife, the first wife will have the right to divorce herself, this clause may be enforced. But in the absence of some power derived from a contract with the husband that the wife may put an end to the marriage, she has no power to dissolve the marriage (or divorce herself).[69]

Nursing child.

The wife's duties do not include the obligation of suckling the child, and, under Shia, (but not Hanafi) law, she may demand hire for it. On the other hand, if she is divorced, she is entitled under both schools to claim to nurse the child, and to demand hire for doing so.[70]

MARRIAGE CONTRACTS

24A. The mutual rights of the husband and wife depend, subject to s. 24, upon their marriage contract,[1] which may, and, it is submitted, ought to provide for all special matters, some of which are referred to in the comment.

FORM OF MARRIAGE CONTRACT.

It is very desirable that greater attention be paid to the drawing up of the marriage contract, than the subject has, save in exceptional circumstances, so far received. In the earlier editions of this work suggestions were made (under s. 134, com.) particularly with reference to clauses providing for a power to the wife to effect a dissolution of the marriage. See s. 125. But it seems necessary to draw pointed attention to forms of stipulations. Every contract of marriage ought to provide for matters likely to arise,—keeping s. 24 in mind as well as the special circumstances and requirements of the parties : in particular (i) the time and place when and where the parties shall reside together ; (ii) the husband's control over the wife's movements ;

Stipulations that ought to be included.

[69] (i) (*Beebee*) *Hurron* v. *Shaik Khyroollah*, (1838) Fulton 361 (Court questioned legality of stipulation in contract of marriage NOT TO TAKE A SECOND WIFE ; but legality afterwards admitted : no evidence adduced of damages sustained by reason of second marriage : hence only nominal damages awarded). (ii) (*Shaikh*) *Mahabuth Ally* v. *Mymonnissa*, (1862) Marsh. 361 (STIPULATION AGAINST husband taking SECOND WIFE without first wife's permission, no consequence mentioned on breach, held of no avail to wife who claimed on breach to leave her husband live apart from him. "Unless husband confers power of divorce upon his wife, she cannot of her own accord, have the power.") (iii) *Badarunnissa B.* v. *Mafiatulla*, (1871) 7 Beng. L. R. 442 = 15 W. R. 555 (decree for dissolution of marriage on breach of covenant so long as first wife living, not to marry without first wife's consent, it being stipulated that second marriage would entitle first wife to divorce herself); (iv) *Poona Bibi* v. *Fyez Buksh*, (1871) 15 Beng. L. R. (APPX) 5 (registered document executed on same day as *kabinnama* : providing for reasonable sum for maintenance, document also included provision that she might divorce herself : wife apparently did not desire to divorce, preferring maintenance).

[70] Hed. 146 ; Bail. II. 94.

[1] This section is tautologus but introduced because of importance of *nikahnama* = *kabinnama*, = marriage contract. See Dissol. of Musl. Marr. Bill, 1939.

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(iii) the parents and relations visiting the wife; (iv) maintenance; (v) the husband's marrying another wife and the effects of a subsequent marriage upon the earlier marriage; (vi) the rights of the (first) wife to obtain or bring about a dissolution of her marriage; (vii) mahr: whether any part shall become exigible on the husband marrying another wife; (viii) if she has any property of her own, it is desirable to make special arrangements; (ix) the religion, education and custody of the children; (x) arrangements ensuring kind treatment: provisions for special allowances in case of ill-treatment;[2] (xi) stipulations for maintenance for life even after divorce;[3] (xii) should the wife be competent to remit or reduce the mahr without the consent of specified persons, e.g. her (named) relations?;[4] (xiii) it should also be clearly stated what special effects will follow on a breach of each stipulation; (xiv) provisions for appointing arbitrators or umpires or mediators, and for a form of contingent divorce as explained below; (xv) desertion, cruelty, adultery, failure of affection, existence of previous (concealed) wife, and similar contingencies may be provided for.

SUGGESTIONS FOR CLAUSES IN MARRIAGE AGREEMENT,—

The Sharai'ul-Islam in giving an exposition of the Shia law, lays down that, apart from special contract, in cases where there is "discord" between the parties, the judge should himself select umpires, one from the family of the husband and the other from that of the wife.[5] On this analogy the power to dissolve the marriage may be made to depend upon a decision by umpires, as to whether certain circumstances exist.[6] In particular it may be provided in the contract (as is occasionally done) that the husband shall perform his duties as laid down in the Koran and the traditions, viz. he shall ensure to the wife her conjugal rights and due maintenance, and be kind to her if he wishes to keep her as his wife, or shall divorce her with kindness,—

in form of contingent divorces.

Husband's duties, maintenance.

that if he fails to perform these duties, or under other stated conditions (e.g. if he marries again, or changes his residence, or deserts his wife, or is cruel, or commits adultery, or if terms of affection cannot be continued or if disputes arise, or if he contracts certain diseases or other physical defects)

[2] Such cases as *Muhammad Muinuddin* v. *Jamal*, (1921) 43 All. 650; (*Mt.*) *Hamidan* v. *Muhammad*, [1932] AIR (LAH.) 65, might be consulted in this connection; *Mansur* v. (*Mt.*) *Azizul*, (1928) 3 Luck. 603 (provisions for maintenance dependent on a fresh wife being taken even though plaintiff does not live with him); (*Mt.*) *Sakina Faruq* v. *Shamshed K.*, [1936] AIR (PESH.) 165.

[3] Cf. *Muhammad Muinuddin* v. *Jamal*, (1921) 43 All. 650; (provision for suitable maintenance for life securing against ill-treatment); *Ahmad Kasim* v. *Khatun B.*, (1932) 59 Cal. 833, 834 (no such provision).

[4] (*Mt.*) *Khadija B.* v. *Nisar Ahmed*, [1936] AIR (LAH.) 887.

[5] Bail. II. 88, 89. Dr. Ahmed Shukri, *Mdan. Law of Marr. & Div.* (Columbia Univ. Press, New York, 1917), pp. 122-124 (cited Fyzee, *Muslim Wife's Right of Dissolving her Marr.*: Bom. L. R. *Journ.*, 15 Nov. 1936, Vol. 38, p. 113, 119) says that under Maliki law wife entitled to *talaq* by Court on husband failing to maintain or clothe her, or to provide her with residence, or on abandonment, or cruelty (beating), or introduction of a concubine in conjugal domicile. F. H. Ruxton, *Maliki Law*, (1916) based on Sidi Khalil's celebrated *Mukhtasar*, cited in same article as saying that if husband ill-treats wife & she complains *Kazi* will appoint two arbitrators who may bring about a reconciliation or dissolve marriage.

[6] Viz. circumstances whose existence would make it desirable to dissolve marriage: e.g. cruelty, second marriage, &c. English decisions would be helpful in selecting such circumstances.

—the wife may claim to have the marriage dissolved, and that her claim shall be considered either by a person named in the contract, or by a person or persons to be nominated as umpires respectively by the husband and wife; and if her claim is held by the umpires to be justified, she or the umpires shall have power to effect a dissolution of the marriage, or that the umpires shall at her request be bound to and shall have power to dissolve the marriage and separate her from her husband, or that a dissolution of the marriage shall in that contingency take place. (A provision for a contingent divorce would be valid only in Hanafi law : s. 144). Or it may be provided that if the wife asserts that the husband has committed a breach of certain stated duties, e.g. has deserted her, or has been guilty of cruelty and adultery, or failed to maintain, &c. then her claim shall be placed before umpires to be nominated respectively by herself and her husband, and, on their holding that her assertions are well founded, she, or they or either of them, (as the case may be) shall have the power to pronounce a divorce, or to dissolve the marriage, and that thereupon the marriage shall be dissolved.[7] Or it may be provided that the wife shall herself have the power in these circumstances to dissolve the marriage. The introduction of umpires provides a safeguard against hasty and ill-considered action. The Sharaiul-Islam in the context referred to lays down that the umpires cannot (under the general law) pronounce a divorce without the consent of the husband.[8] It is necessary, therefore, that the marriage contract should expressly stipulate for this power. It may also be stipulated that if the umpires think it just and right, they shall have the power to require the wife to return her mahr or a portion thereof, or even to make a payment in excess of the mahr.

SECTION 24A.

Desertion, cruelty, adultery.

Mahr.

The parties to a marriage may agree that the husband's power of talaq may, or must be exercised by him, or on his behalf by the wife, or by some authority agreed upon by the parties.

The agreement may provide—(*a*) for the exercise of such powers either generally, or, if Hanafi law is applicable, contingently, on the happening of some event, and either at the option of such authority or necessarily on the happening of specified events; and (*b*) either that the husband's power of talaq under the general law shall thereby be restricted to that extent; or that it shall remain unaffected by the agreement.

A talaq pronounced in pursuance of such an agreement is in the absence of something to show the contrary, effective as a single irrevocable divorce.

Syed Sahib Ameer Ali states that clauses are usual in marriage contracts to the effect that should the husband marry another wife, the first marriage will ipso facto be void.[9] Such a clause, provided that it is so worded as to be capable of being interpreted as a contingent talaq, would be valid under Hanafi law and would have the effect of dissolving the first marriage[10] on

Stipulation that marriage dissolved on second marriage.

[7] A form is also given in (1936) 38 Bom. L. R. *Journ.* 113, 121 *q. v.*
[8] Bail. II. 88, 89.
[9] *Mahom. Law*, II. 4th ed., 369, 171. See ss. 125, 144.
[10] Cf. *Furzund Hossein* v. *Janu B.*, (1878) 4 Cal. 588, 589.

SECTION 24A. the husband taking a second wife. If the first marriage has been consummated, the whole of the mahr would then be due. Whether an agreement would be valid to the effect that on a second marriage the first shall be dissolved ipso facto, and that the first wife shall be entitled to her mahr though the marriage with her has not been consummated, would presumably depend upon the question whether the laws relating to mahr and laying down what portions thereof become due on dissolution of marriage, may be altered by agreement between the parties ; or, perhaps, on whether the mahr may irrespective of the Muhammadan law of marriage be claimed as damages or otherwise, under the Indian Contract Act. It is a question that need not arise, unless the marriage contract is very carelessly drawn.

The contents of this section have to a great extent been covered by other sections, but owing to its importance it has been considered best to add it.

§ 4.—MUT'A OR TEMPORARY MARRIAGE.

'Mut'a' or temporary marriage.

25. (1) Under Shia Ithna Ashari law, a contract for a fixed term of connubial life may be validly made. Such a contract is called mut'a :[11] and the parties thereto are called mut'a husband and mut'a wife.

Form.

(2) Mut'a must be contracted by the use of the words tazwij or nikah or mut'a.

Religion. wife. husband.

(3) A man may contract mut'a with a Muslim, Christian, Jewish or fire-worshipping woman but not with a woman following any other religion. A woman may not contract mut'a with a non-Muslim.

(3A) A man may contract mut'a with any number of women.[12]

'Mahr.'

(4) Mahr must be specified in the contract of mut'a otherwise the agreement is void. The mahr must consist of something actually owned, and possessed ; and specified by measure,[13] weight, inspection or description.[14] After the contract is entered into, the woman is entitled to the whole mahr if consummation has taken place ; or if not, then even though he may wish without consummation to waive his right to her altogether, he must pay half of the mahr.

[11] Bail. II. 41-44 ; *Shoharat S.* v. (*Mt.*) *Jafri*, (1914) 17 Bom. L. R. 13 = 13 All. L. J. 113 = 21 Cal. L. J. 4 = 1 L. W. 965 (P.C.) = [1933] AIR (P.C.) 164 : "About 1894 Abida Begum married Abid Husain K. by a mut'a marriage as her second husband."

[12] Bail. II. 345, *ll.* 1-6.

[13] *Res fungibiles* : Hunter, *Rom. Law*, 930.

[14] Bail. II. 41.

[15] Bail. II. 41 (*third*) : other details given : which seem unlikely to arise, *Mohomed Abid Ali* v. *Ludden*, (1887) 14 Cal. 276, 284-285.

SECTION 25.

(5) The term for which mut'a is contracted must be specified : otherwise a permanent marriage will be effected.[16] Term.

(6) The term for which mut'a is contracted need not commence immediately from the contract.[17] Commencement of.

(7) The child of mut'a is legitimate and capable of inheriting from the father.[18] Its paternity may (apparently) be disclaimed in some cases without li'an.[19] Disclaimer of children.

(8) A mut'a husband can (according to those whose opinion is stated in the Sharaiul-Islam to be best founded on traditional authority) determine the period of the contract only by zihar :[20] the contract it has been held can also be terminated by the mut'a husband releasing the wife from the unexpired term : the wife's consent to the release being held unnecessary.[21] Divorce.

(9) In the absence of express agreement, neither party to a mut'a is entitled to inherit from the other.[18] The more approved doctrine is, that a stipulation that they shall inherit from each other is lawful and effectual.[22] Inheritance.

(10) All stipulations must be entered into at the time when the contract of mut'a is made, and none may be added thereafter ; nor does any stipulation though agreed upon previously, but not expressly mentioned in the contract of mut'a have any effect.[19] Subsequent conditions.

(11) The relation established by mut'a is dissolved on the expiration of its term, or on the death of either party, or on the husband releasing the wife from the unexpired term.[21] Expiration of terms.

(12) On the contract of mut'a being determined by the expiration of its term, 'iddat is not incumbent unless there has 'Iddat on expiration after consummation.

[16] Bail. II. 42, 43 ; *Shoharat* v. (*Mt.*) *Jafri*, (1914) 17 Bom. L. R. 13 (P. C.); if once proved that cohabitation originated in *mut'a*, inference (in default of evidence to contrary) that *mut'a* continued during whole period of cohabitation ; *Sarwar Ara* v. *Nawab Bahadur Ali K.*, (1934) 10 Luck. 577 ; *Official Assignee* v. *Ma Hla Htwe*, [1929] AIR (RANG.), 35.

[17] Bail. II. 42.

[18] *Shoharat* v. *Jafri*, (1914) 17 Bom. L. R. 13, 16 (par. 3) (P. C.) = [1914] AIR (P. C.) 63 = 24 I. C. 49 = 21 C. W. N. 225.

[19] Bail. II. 43.

[20] Bail. II. 43, 148. *In matter of Petition of Luddan* ; *Luddan* v. *Kamar*, (1882) 8 Cal. 736 (where doubt whether divorce even by *zihar* is valid, left unsolved).

[21] *Mahomed Abid Ali Kumar Kadar* v. *Ludden Sahiba*, (1886) 14 Cal. 276 (under Muhammadan law generally consent not necessary to a release).

[22] Bail. II. 44. But see II. 345.

SECTION 25.

been sexual intercourse : and in that case it must be observed for two menstrual courses, or, if the wife has no courses, for forty-five days.[23]

'Iddat of mut'a widow.

(13) On the contract of mut'a being dissolved by the death of the husband, iddat must be observed for four months and ten days ; provided, that if the wife is pregnant at the expiration of that period, iddat is prolonged until delivery.[23]

Maintenance.

(14) Maintenance is not due to the mut'a wife unless it has been expressly stipulated for in the mut'a contract.[24]

For a comparison of some of the incidents of mut'a with those of a permanent marriage, see s. 51, com.

No mut'a marriages amongst Ismailis, Usulis and Mu'tazalas.

Mut'a is not recognized by Ismaili Shia Muslims including Khojas and Bohoras [25] of Bombay.[26]

Syed Sahib Ameer Ali mentions that the Usuli [27] and Mu'tazala Shias [28] agree with the Sunnis in permitting a "permanent" marriage with a non-Muslim—is it implied that those schools of Shia law recognize mut'a marriages ? [29] See s. 51. No cases seem to have been decided by the Courts with reference to the Usulis and Mu'tazalas in which their own texts have been produced.

Origin of mut'a

Amongst the pre-Islamic Arabs certain women entertained men in their own tents : neither party acquiring any right over the other : the woman could dismiss the man at any time she chose : there being on either side entire freedom to terminate the relation at any time, the children belonged to her.[30] Mut'a differs from this pre-Islamic institution in that ; (1) the period of time

[23] Bail. II. 44.

[24] Bail. II. 97. See *In matter of Petition of Ludden Sahiba*, (1882) 8 Cal. 736 ; *Mahomed Abid A. K. K.* v. *Ludden S.*, (1886) 14 Cal. 276 (husband may be ordered, under Crim. Pro. Code, s. 488, to give maintenance to *mut'a* wife, unless he had validly released her of term by *hiba-i-muddat*, i.e. gift of term). See s. 288, MUT'A set up in *Agha Muhammat ibn Ali* v. *Zohra Begam*, (1927) 3 Luck. 199 ; (*Mt.*) *Sarwar Ara Begam* v. *Nawab Bahadur Ali Khan*, (1934) 10 Luck. 577.

[25] On word *bohora*, see Index.

[26] *Daaimul-Islam* characterizes *mut'a* as *zina* ; (1931) 33 Bom. L. R. *Journ.* 30.

[27] USULI = one concerning himself with *usul* = roots, fundamental principles.

[28] MUTAZILAH (= secession, schism) was school of rationalism founded in 8th century of Christian era by Wasil ibn Ata d. 748, a pupil of Hasan al Basri who died in 728, famous as traditionist, of saintly character & deep philosophic learning : free will is cardinal point of *mu'tazilite* belief. The movement became important through its espousal by Khalif Mamun (813-33) in whose reign influence of Greek literature became very strong, mainly through the translations made by Jews & Christians, especially Syrian Nestorians. See (*Bibi*) *Khaver Sultan* v. (*Bibi*) *Rukhia*, (1905) 29 Bom. 468, 474 (parties said to have been Usuli Shias : but existence of MU'TAZALAS or USULIS as a community does not seem to have been proved in any case, nor special texts applicable to them produced).

[29] Ameer Ali, *Mahom. Law*, II. 328 (281-282).

[30] Prof. W. Robertson Smith, *Kinship & Marriage in Early Arabia*, (*New Ed.* 1907), 83. Amongst ancient Egyptians (who were strictly monogamous) woman seems regularly to have been taken on probation for a year : after which she was "established as wife." Holland, *Jurispr.* 155, citing Revillout Chrestomathie Demotique, (1880) CXXXII. *Mut'a* is not in nature of marriage on approval.

having to be fixed when mut'a is contracted, the dissolution of the tie within the period is originally not contemplated ; [31] (2) mahr must be fixed in the contract. The features of the old relation are preserved in that (1) no rights of inheritance ordinarily arise from mut'a ; (2) little formality is required for disclaiming the parentage of the child ; (3) originally the woman entertained the man in her own tent, in the midst of her own tribe, and did not go to live with the man : so, the woman contracting mut'a cannot claim maintenance ; (4) the original restriction in the man's power to terminate the relation is, no doubt, a survival of the fact that he had less power over a woman whom he could not bring to his own tent : see s. 139, com. SECTION 25.

§ 5.—PERSONS PROHIBITED FROM INTERMARRYING.

26. Muslims are prohibited from intermarrying with each other on grounds stated in ss. 17-54 [1] viz. of (1) relation by blood,[2] (2) affinity, (3) unlawful conjunction, (4) fosterage, (5) 'iddat and pregnancy, (6) divorce, (7) difference of religion [3] (8) supervening illegality, and (9) pilgrimage.[1] Prohibitions to intermarry.

27. It is unlawful for a Muslim [4] to marry the following blood [5] relations : [2] (i) PROHIBITION BY CONSANGUINITY.

(1) his [4] own ascendants, or descendants ;
(2) his [4] father's or mother's descendants [6] ;
(3) the sisters or brothers of any ascendant.[7]

28. It is unlawful for a Muslim [4] to marry persons related to him by affinity in the manner stated below :— (ii) PROHIBITION BY AFFINITY.

(1) ascendants [9] or descendants [10] of his [4] wife,[8]—

31 But see s. 25(8).

1 See also ss. 58, 79 : qualified restrictions : agents : & unequal marriages.

2 "Relation by blood" is preferable to the alternative "consanguinity" which has acquired in Muhammadan law of Succession, the restricted meaning of relation through males. Parsi Marr. & Div. Act, III. of 1936, s. 3, & Marr. Act III. of 1872, s. 2, both speak of consanguinity as synonymous with blood relation.

3 Though these are not cases of Muslims intermarrying with each other, they have been included here for convenience.

4 (i) Masculine includes feminine & singular plural in this context. Where the person concerned is a woman, "husband" should be read instead of "wife" in s. 28 : see s. 28, com. (ii) To add "howsoever high" after "ascendants" and "howsoever low" after "descendants" (as is occasionally done) seems tautological.

5 (*Mt.*) *Ruro* v. *Bagh Singh*, [1935] AIR (LAH.) 23 (marriage with former *chachi* or father's brother's widow or divorced wife, not prohibited).

6 I.e. brothers, sisters, nephews & nieces & their descendants. See *n.* 4(ii).

7 I.e. uncles or aunts, grand-uncles or grand-aunts. See *n.* 4(ii).

8 Hed. 27 ; Bail. I. 23, 24 ; II. 13, 14.

9 I.e. father-in-law & mother-in-law & their ancestors. See *n.* 4(ii).

10 I.e. step-children & their descendants. See *n.* 4(ii).

SECTION 28.

(2) the wife [8] of any ascendant [11] or descendant : [12] except that a man may marry the descendant of a wife, with whom the marriage has not been actually consummated.[13]

Exception. Under Hanafi law an unconsummated irregular marriage, does not, for establishing prohibition by affinity, make the parties husband and wife.

1. illicit intercourse.

29. (1) Under Hanafi Hanbali and Shia (but not Shafii) law illicit intercourse has the same effect in establishing prohibition by affinity as the consummation of a lawful marriage.[14]

2. undue familiarity.

(2) Under Hanafi and Hanbali law, but not Maliki, Shafii or Shia [15] law, acts of undue familiarity [16] have also the same effect.

(3) The Shia authorities are divided as to the effects of such acts [16] : (*a*) the majority hold that such acts render marriage abominable, but not (like the consummation of a valid marriage) prohibited ; (*b*) a minority hold that such acts establish (i) prohibition to marry (and not mere abomination) between the woman and the father or the son of the man ; but (ii) only abomination (and not prohibition) between all the relatives of the woman, and all the relatives of the man, other than the son and father.[17]

3. Statement

(4) [A statement—even though subsequently retracted—that the speaker has done an act establishing prohibition by

[11] I.e. step-parents & their ancestors & the husbands or wives of step-children of descendants of step-children. See *n.* 4(ii).

[12] Bail. I. 24 ; II. 22| Marriage with mother of former wife is prohibited though first marriage (with daughter) be dissolved without consummation : *Karim Bakhsh* v. (*Mt.*) *Mukabar*, (1917) 52 Punj. Rec. 58 (No. 16). Marriage not lawful with ascendants of husband or wife : Bail. I. 24 (where only daughter mentioned) ; Bail. I. 322, (*ll.* 22-24) (324). Shia law more explicit on the point. Marriage prohibited with former wife of son, though son's marriage not consummated.

[13] Bail. I. 24, 322 (324). For this purpose "valid retirement" not equivalent to consummation ; see s. 82, com. (*a*) he may not marry her ascendants, *nor* (*b*) may she marry either his descendants or ascendants. See *n.* 4(ii).

[14] Bail. II. 23 : see s. 52. Perhaps more correct to say that in Hanafi law unlawful conjunction establishes irregularity of marriage, not prohibition to marry : s. 83. Malik & Shafii do not give to illicit intercourse any effect in establishing prohibition : *Sharh Viqaya* Book on *Nikah*, ch. II. (*ad init.*)

[15] As to Shia law see s. 29(3).

[16] UNDUE FAMILIARITY = touching,—there being no cloth or other substance between parties of sufficient thickness to prevent warmth of body being felt—with hand, any part of person of one of opposite sex, even inadvertently, or kissing, or looking on his or her nakedness, or lying together, or embracing,—provided (i) that neither of the parties is below age when desire first arises, (ii) act done with desire on part at least of one of parties : Bail. I. 25, 26 ; II. 24.

[17] Bail. II. 24 : *Daaimu'l-Islam* is silent.

affinity has the same effect as illicit intercourse : s. 29(1).][18] SECTION 29.

(5) Under Hanafi law valid retirement[19] and under Shia law an unnatural offence between two males, has also the same effect.[20] 4. Valid retirement 5. Unnatural offence.

30. Prohibition by unlawful conjunction is established in accordance with the following rules : (iii) PROHIBITION BY UNLAWFUL CONJUNCTION.

(1) A Muslim may not at the same time, be lawfully the husband of more wives[21] than four,[22] or the wife of more husbands than one,[23] *Quaere,* whether the Mu'tazala Shia law prohibits a man, from having at the same time more wives than one.[24] 1. Number.

(2) Under Hanafi law, a man may not lawfully be the husband, at the same time, of sisters[25] or other women who are so related to each other by consanguinity, affinity[26] or fosterage, that they could not lawfully have intermarried with each other, if they had been of different sexes.[27] 2. Relationship between co-wives.

(3) Under Shia law (*a*) a man may not lawfully have at the same time[28] two sisters as wives ; (*b*) a man's marriage with his wife's niece without his wife's permission is according to the better Shia opinion void, though some Shia Wife's sister. Wife's niece. Wife's aunt.

[18] *Quaere* whether this is rule merely of evidence : s. 5B com. Statements of this nature, even in jest, given same consequences as if true : Bail. I. 26. Cf. ss. 22, 124 (marriage & divorce in jest or under coercion).

[19] See s. 82 : " Valid retirement " pre-supposes marriage between parties retiring.

[20] Bail. II. 27.

[21] For purposes of unlawful conjunction (i) deceased wives are not taken into consideration ; nor (ii) wives who have been divorced, & whose iddat for divorce has elapsed ; see ss. 36, 38 ; Bail. I. 32, 34, 154 ; nor (iii) (under Shafii & Shia law) wives who have been divorced irrevocably, notwithstanding that period of *iddat* has not elapsed : Hed. 30 ; Bail. II. 28 ; (iv) see Bail. II. 121 : " When a man absent from his wife has repudiated her & desires to marry her sister, or fourth wife, he must wait for 9 months, for possibility of her being pregnant." (Some doctors recommend waiting for full year). " But if he knew that she was not pregnant at time of repudiation, 3 courses & 3 months are sufficient." Cf. Bail. II. 162 (par. 1).

[22] Hed. 31 ; Bail. I. 30-31 ; II. 27, 28. For curious position in which eight wives inherit from one man, see s. 137, *ill.* (*a*). Bail. I. 86 (curious illustration).

[23] *Liaqat Ali* v. *Karamunnissa,* (1893) 15 All. 396 ; *Ram Kumari in re,* (1891) 18 Cal. 264 ; *Habib-ur-Rahman* v. *Altaf Ali,* (1924) 48 I. A. 114, 121 (CAL.) ; *Government of Bom.* v. *Ganga,* (1880) 4 Bom. 330 ; *Nandi* v. *Crown,* (1920) 1 Lah. 440 ; Cf. *Fatawa 'Alamgiri,* Vol. II. Book on *Nikah,* Ch. III. on 4th class of prohibitions, citing *Muhit-i-Surukhsi,* adds that if woman marries two men in one contract, & one of the men has already four wives, then marriage valid as to other husband. Cf. *Budansa* v. *Fatima,* (1914) 26 Mad. L. J. 260.

[24] Ameer Ali, *Mahomm. Law* II. 24, 193 (160) see s. 25, com. *n.* 28.

[25] *Abdul Halim* v. *Saadat Ali,* (1932) 59 I. A. 202, 203 (OUDH).

[26] Bail. I. 31 does not mention affinity ; but Hed. 29 does.

[27] Hed. 28, 29 , Bail. I. 31.

[28] At same time—so that he may marry his deceased or divorced wife's sister.

SECTION 30.

authorities hold it not void but voidable at the option of the first wife ;[29] but (c) he may lawfully marry without such permission his wife's aunt.[29]

(4) Under Hanafi law disregard of a prohibition by unlawful conjunction makes the marriage irregular and not void : s. 83(1).

(5) Marriages prohibited by law because of an existing marriage are punishable under the Indian Penal Code, s. 444.[30]

Illustrations.

(1) H, having one wife, purports to marry four more by one contract. The whole of the latter contract is void.[31]

(2) H, may not lawfully be the husband, at the same time, of *W*, and of *W's* sister, or (where H is a Hanafi) *W's* paternal or maternal aunt.[32]

(3) A Shia may lawfully be the husband, at the same time, of *W*, and of *D*, the daughter of *W's* former husband (as the prohibition between *D* and *W* is by affinity, and not consanguinity or fosterage).[32]

Effect of contract establishing unlawful conjunction.

31. The whole of a contract infringing the rules against unlawful conjunction[1] is void,[2] but a marriage contracted prior to such a void contract remains valid. Two contracts of marriage conjointly having the effect of establishing unlawful conjunction, if it cannot be determined which of the two is earlier, are both void.[4]

It is unusual, nowadays, to come across a person with more wives than one, unless there are special reasons for marrying a second wife, such as the illness, or barrenness of the first. It is still rarer for a man to marry more wives than one by the same contract. A contract by which more wives than one are simultaneously married, (it is a point of academic interest) does not become wholly invalid where the man is prohibited from marrying one of the women for a cause other than unlawful conjunction ; as, for instance, if one of the women has a husband.[4]

(iv) PROHIBITION BY FOSTERAGE.

32. A child is called the " foster-child " of the woman, who, not being the child's mother, has in accordance with

29 Bail. II. 23, 40 (par. 3).

30 *In matter of Ram Kumari*, (1891) 18 Cal. 264 ; *Nandi* v. *Crown*, (1920) 1 Lah. 440 ; *Hamad* v. *Emp.*, [1931] AIR (LAH.) 194.

31 Bail. I. 31.

32 *Shureefoonissa* v. *Khizooroonissa*, (1823) 3 S. D. A. 210 ; *Azizunnissa* v. *Karimunnissa*, (1895) 23 Cal. 130 ; *Tajbi* v. *Mowla*, (1917) 41 Bom. 485 ; Hed. 28, 29 ; Bail. I. 31.

1 Bail. I. 31, 86.

2 Under Hanafi law " irregular " rather than void : see s. 83.

3 Hed. 28, 29 ; Bail. I. 35-37 ; II. 24-25, 28 (par. 3).

4 Bail. I. 35, 36.

s. 33, nursed the child whilst it was under two years of age : the woman is called its " foster-mother " ; [5] and the husband of the foster-mother the " foster-father " of the foster-child.[6] On [7] a divorced woman [or *quaere* a widow] [8] so nursing a child, her former husband becomes in law its foster-father, unless she has after the dissolution of her former marriage borne a child to a second husband.[9]

SECTION 32. Definitions.

33. For establishing the foster relations mentioned in s. 32 it is necessary :

What constitutes fosterage in :

(1) under Hanafi law that the milk from the breast of the woman reaches the stomach [10] of the child : the quantity of the milk, makes no difference, nor, whether it is taken by the child direct from the breast, or it is poured down its throat, or administered medicinally, nor whether the woman is living or dead at the time that milk is taken from her breast ; [6]

(1) Hanafi law.

(2) under Shafii law that the child is suckled not less than five times from the breast of a living woman ; [11]

(2) Shafii law.

(3) under Shia law that (*a*) the milk has not proceeded from illicit intercourse,[12] (*b*) the child is nursed direct from the breast of the same woman, either fifteen times [13] or during one whole day and night : in either case without being suckled during the same period by any other woman ; (*c*) all the acts of suckling are completed before the child has attained two years, and during the lifetime of the woman ; and (*d*) the milk was in its natural state, and not diluted, even in the mouth of the child.[14]

(3) Shia law.

Child to be under two years when nursed.

Whether or not the foster relation is established, depends upon two main circumstances : (1) the age of the child [14] during which the relation can arise

[5] Muslim text-writers consider it possible (i) for an unmarried virgin to have enough milk in chest to suckle : (ii) for a woman to have milk by intercourse, without bearing child. Rule stated in strict accordance with authorities, would be : " Where milk is produced in the breast of the foster-mother by intercourse with a man, and she has borne a child to that man, he is called the foster-father."

[6] Bail. I. 193, 195, (par. 3), 196 (par. 2); Bail. II. 17. See s. 34.

[7] The last sentence of s. 32 = s. 34 in earlier editions.

[8] Only divorced wife referred to. [9] Bail. I. 195 (par. 2); II. 15.

[10] If it is poured through ear, or other cavities, it does not establish nursing ; nor (Imam Muhammad *dissentiente*) if administered through a clyster : Bail. I. 169.

[11] Hed. 67, 70. [12] Bail. II. 15.

[13] Some Shia authorities, hold ten times is enough ; Bail. II. 15. The view followed by *Daaimul-Islam* is that suckling ten times successively, or though one whole day, suffices. [14] Bail. II. 15-17.

SECTION 33.

this is fixed at 2 years ;[15] (2) the mode in, and period during, which the child is nourished by the milk of the woman.

"The Prophet said, in the presence of all his women, 'the rules of sucking the same women are in infancy, and not in those of riper years.'"[16] The reason, is thus referred to : "prohibition is not established by any fosterage except such as is the cause of growth and increase which are obtained only by the fosterage within its proper period ; since a grown-up person would not find any effectual nourishment from suckling."[17]

Prohibition by fosterage fosterage between whom.

35. Prohibition by fosterage makes it unlawful for a Muslim to marry any person bearing the following relation to him or her :

(1) his[18] foster-mother[19] or foster-father ;[20]

(2) the foster descendants of his (*a*) mother,[19] or (*b*) father,[20] or (*c*) stepfather,[19] or (*d*) stepmother ;[21]

(3) his[18] foster-father's *or* foster-mother's ascendants[18] *or* descendants :[18] *except* that in Shia law foster-children of the same foster-mother may inter-marry unless their foster-father is also the same person ;[22]

[*Explanation.*—Neither under Sunni nor Shia law is it lawful for a person to marry his[18] foster-mother's child ;[23]]

(4) The sister[18] *or* brother[18] of any foster-ascendant :[24] *except* that where the milk is ascribed to the foster-mother as the result of illicit intercourse, the foster-child may lawfully

[15] Hed. 68 ; Bail. I. 193 ; II. 17 ; Abu Yusuf, Imam Muhammad, Shafii & Shia lawyers fix the age at 2 years ; Abu Hanifa, however, at 30 months.

[16] *Mishcat-ul-Masabih*, XIII. v. I. (Matthew, I. 92).

[17] Bail. I. 195 (par. 2) ; II. 15.

[18] (i) After the word "his" read "or her" throughout s. 35 (except in s. 35(5)); (ii) some writers on Muhammadan law in English add "how high soever" "how low soever" after mention of ascendants & descendants : this practice was followed in earlier editions of present work ; but it seems tautological ; (iii) in s. 35 relation by blood must be understood, unless "foster" qualifies the term.

[19] Bail. I. 193 : not lawful for a man to marry his foster-mother or foster-sister.

[20] "As the illegality by fosterage is established on part of mother so also it is established on part of father, that is person by connection with whom milk has been induced." Bail. I. 194.

[21] Bail. II. 18-19.

[22] Bail. II. 17, 18. Reason for this *exception* : Shia authorities ascribe milk entirely to the man intercourse with whom causes it to secrete : see s. 35, com. "Reason for prohibition by fosterage."

[23] Bail. II. 17. In accordance with Shia theory, prohibition should be restricted to intermarriage between A & B when B is a natural born child of A's foster-mother, as well as A's foster-father.

[24] I.e. (*a*) ascendant by blood of foster-father or foster-mother, *or* (*b*) foster-father or foster-mother of ascendant by blood. The brother & sister of the foster-father would be his paternal uncle and aunt : the brother & sister of the nurse would be his maternal uncle & aunt : & in like manner as to his grandfather & grandmother. Bail. I. 194. "It is not lawful for a man to marry the sister of his son by consanguinity, while it is lawful in the case of fosterage ; for the former must be either his own daughter or his step-daughter while the latter is neither." Bail. I. 194.

marry the paternal *or* maternal uncles [18] *or* aunts [18] of his [18] (illegitimate) foster-father ; [25] SECTION 35.

(5) The foster-ascendants [18] *or* foster-descendants [18] of his wife or of her husband ; [26]

(6) The wife or husband of foster-parent *or* foster-child ; [27]

(7) Under Shia law,[28]—(*a*) the child *or* foster-child of his [18] own child's [29] foster-father ; [30] and (*b*) the child *or* foster-child of the foster-mother of his [18] mother.[18]

Foster-relations [27] who are not prohibited from intermarrying ; but would be prohibited had they borne a similar relation through blood or affinity :—	Sections & clauses of this work under which prohibition would be established if the relation were by blood or affinity, instead of fosterage :—
1. Sister's foster-mother	s. 27 (1), *or* s. 28 (2).
2. Foster-sister's mother	
3. Foster-mother's foster-sister	s. 27 (1), *or* s. 28 (1).
4. Foster-son's sister	s. 27 (1), *or* s. 28 (2).
5. Brother's foster-mother ;	s. 27 (1), *or* s. 28 (2).
6. Foster-brother's mother ;	
7. Foster-brother's foster-mother	
8. Mother of paternal foster-uncle	s. 27 (1), *or* s. 28 (2).
9. Mother of maternal foster-uncle.	
10. Nephew's foster-mother	[Not prohibited].
11. Foster-child's grandmother	s. 27 (1), *or* s. 28 (2).
12. Foster-child's aunt	s. 27 (3).
13. Son's foster-sister's mother	[This would be his own wife.]
14. Of child's foster-brother's daughter	s. 27 (1), *or* s. 28 (1).
15. Sister's foster-father	s. 27 (1), *or* s. 28 (2).
16. Son's foster-father	s. 27 (1), *or* s. 28 (1).
17. Niece's foster-father	s. 27 (2), *or* if he is either brother or sister's husband, not prohibited.
18. Child's foster-grandfather	s. 27 (1), *or* s. 28(1).
19. Child's maternal uncle	s. 27 (1).

[25] In Shia law fosterage is not established when milk proceeds from illicit intercourse : s. 33 (3) (*a*).

[26] Hed. 70. " The illegality of affinity is also established by fosterage : " so that foster-father's wife would be unlawful to the suckling, & the wife of foster-child would be unlawful to the foster-father : & by same analogy, in all cases except two : these two exceptions consist of cases 1-4 tabulated on p. 129.

[27] Hed. 69 ; Bail. I. 194-195.

[28] This the only case where prohibition by fosterage established between persons neither of whom is the foster-child, nor lineal ascendant or descendant, of foster-child.

[29] Bail. II. 18.

[30] To the suckling, (i) his foster-parents, & (ii) their ascendants & descendants, either by natural descent or fosterage are all prohibited. Bail. I. 194 : after this follow instances showing that (1) foster-mother's real children become that child's foster-sisters, & foster-brothers : (2) all real or foster-children of foster-father become child's foster-brothers, & foster-sisters & are therefore prohibited. No instances mentioned of foster-children of foster-mother, but these included in statement immediately preceding " descendants of foster-parents by fosterage are prohibited to foster-child." Observe that, under Shia law, foster-children of foster-mother (by another foster-father) are not prohibited.

SECTION 35. Illustrations. Explanation of genealogical table.

N.B. In the table below letters with asterisks refer to females. Letters in parentheses refer to persons who are prohibited from marrying C. Foster relation is shown by dotted line : thus

(1) C & K* are natural-born son & daughter of A & B.*

(2) C & M* have been nursed by E,* on milk produced by intercourse between E & D ; therefore E* is foster-mother, and D is foster-father, of C & M.*

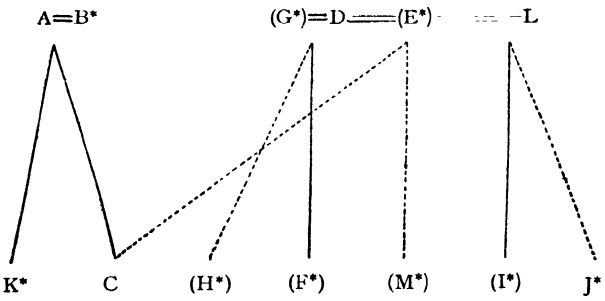
(3) D has another wife G,* who has borne to him a daughter, F.*

(4) G* has nursed a girl H* on milk produced by intercourse between G* & D.

(5) E* has married also another husband, L,—

(6) E* has borne to L a girl, I,* and,—

(7) has nursed a girl J* on milk produced by intercourse between E* & L.



C cannot marry any of the following :—

(1) E* = C's foster-mother : [s. 35(1)]

(2) D's mother = C's foster-father's mother : [s. 35(3)]

(3) E*'s mother = C's foster-mother's mother : [s. 15(3)]

(4) F* = C's foster-father's real child : [s. 35 (3)]

(5) I* = C's foster-mother's real child : [s. 35 (3)]

(6) H* = C's foster-father's foster-child by a wife who is not C's foster-mother : [s. 35(3)]

(7) M* = foster-child of C's foster-father & foster-mother : [s. 35(3)] [s. 35 (3)]

Under Shia (but not Hanafi) law,—C may marry J* = C's foster-mother's foster-child by a husband, who is not C's foster-father : [s. 35 (3), *exception*]

(8) D's sister = C's foster-father's sister : [s. 35(4)]

(9) E*'s sister = C's foster-mother's sister : [s. 35(4)]

But C may marry the sister of L or G* = sister of husband or wife of C's foster-parents :

(10) C's wife's foster-mother, or foster-daughter : [s. 35(6)]

SECTION 35.

(11) G* = C's foster-father's wife : [s. 35 (6)]
(12) C's own foster-child : [s. 35 (5)]
(13) C's wife's foster-child : [s. 35 (5)]
(14) C's foster-son's wife : [s. 35(6)]
(15) C's wife's foster-son's wife : [s. 35(6)]

In addition to the above, under Shia law—A,[32] the foster-child's father cannot marry the real or foster-children of C's foster-father.

Under Hanafi law—A [32] may marry H,* F,* M,* I* or J.* [33]

A [32] may marry J* under either school of law.

See also s. 52, *ill.*

Jewish law seems to be origin.

The Muhammadan law differs from most other systems in the prominence it gives to fosterage as a cause establishing prohibition to marry.[34]

REASON for prohibition by fosterage.

"Prohibition by fosterage is founded" according to the Hidaya "solely in an apprehension of a participation of blood (or rather of bodily substance, causing two persons to partake of one nature) on account of the growth and increasing bulk of the body ; moreover, it occurs in traditions that fosterage is the source of a child's growth." [35] The same reasons are referred to in the Hidaya and the Fatawa 'Alamgiri for elucidating the prohibitions, and for weighing dissenting opinions.

Koranic foundation of prohibition by fosterage.

The rules of foster prohibition are based on the effect given to a verse of the Koran [36] which so far as material, is as follows :

"Forbidden unto you are your mothers...and your foster-mothers, and your foster-sisters and your wives' mothers, and your step-daughters."

Koran, iv. 23.

In interpreting Koran IV. 23 three steps are taken : (i) the expression "foster-mothers" is generalized, and construed to include all foster-ascendants, so that foster-parents of all degrees are included : leading to s. 35(1), & part of s. 35(3). (ii) "Foster-sister" includes the foster-brother, leading to the rest of s. 35(3), & to clause (4). (iii) In "Your wives' mothers," "mothers" is interpreted to mean both real and foster-mothers : hence arises clause (5); and, by analogy from clause (5), clause (6).

There is a tradition [36] that the Prophet said that if the child has sucked

[32] Note that we are now referring to C's father, & not to C himself.

[33] Bail. I. 194 ; II. 18.

[34] Fosterage, not amounting to adoption, does not seem to be known to Hindu law : Mayne, *Hindu law*, (7th ed., 1907) 233-237. Roman law : fosterage one ground of manumission (Justin., I., vi, 1, 5. Gai. I. 19); but it had apparently no other legal effects. The origin of fosterage as a cause for a prohibition to intermarry seems to be Jewish: see s. 18, com.

[35] Hed. 68 ; Bail. II. 15 ; reasons : (*a*) fosterage "gives increase to flesh & bones" (Bail. II. 15): (*b*) persons who have participated in such increase from same source, bear to each other physical relation analogous to that of common descent : (*c*) secretion of milk is to be ascribed entirely to man intercourse with whom has caused its secretion.

[36] Tradition on the subject (*Mishcat-ul-Masabih*, XIII. ch. v., Matthew's transl. I. 92) according to Hanafis, superseded by, or inconsistent with Koran. Cf. also Bail. II. 17 : "There is no fosterage after the age of weaning."

SECTION 35. once or twice, it is not thereby prohibited to the nurse. This tradition (in so far as it refers to the quantity of the milk required to establish fosterage) is held by Abu Hanifa to be superseded by the verse of the Koran (iv. 27) which speaks of "the mother that has given you suck," without any reference to the quantity of the milk. Shafii and the Shias, on the other hand, give effect to the tradition. Hence arises the difference between the schools as to that which the law requires to establish fosterage.

(5) PROHIBITION BY IDDAT.

36. A widow, a divorced woman or a woman who is pregnant by illicit intercourse is prohibited from re-marrying or marrying [1] (as the case may be) during the periods mentioned in ss. 39 or 40. The said periods are known as the periods of iddat.[2] "To observe iddat" means to refrain from re-marrying or marrying during the period of iddat.

IDDAT explained.

Iddat may generally be described, according to the Hidaya, as "the term by the completion of which a new marriage is rendered lawful," [3] or as the period during which a woman is prohibited from marrying again after dissolution of her marriage, or during which a previously existing marriage is for certain purposes, considered to be undissolved notwithstanding that the husband has died or pronounced a divorce. This is subject to s. 40. The incidents for which the marriage is considered to subsist during iddat refer mainly to : (1) the woman remarrying : ss. 38-40); (2) her maintenance : s. 300 ; (3) rights of inheritance : s. 154 ; (4) prohibition (by unlawful conjunction) against marriage : s. 36 ; (5) the woman is also required during iddat to observe hidad, i.e. mourning, by abstinence from rich clothes, perfumes, and other objects for beautifying her person : [4] Shafii and Shia authorities do not make hidad incumbent : [5] no legal results follow from the observance or breach of the rules as to hidad : [6] they are, therefore, not stated in any of the sections of this work ; (6) it is expected that the wife should reside

Its legal effects.

Residence during iddat.

1 Bail. I. 37-38, II. 27 ; see ss. 38, 39. Under Hanafi law more accurate to say that *iddat* makes marrying IRREGULAR (not PROHIBITED). See s. 83 ; *Mohammad Hayat* v. *Mohammad Nawaz*, (1935) 17 Lah. 48 (CHILDREN LEGITIMATE : cases reviewed); *Abdul Ghani* v. *Aziz-ul-Huq*, (1911) 39 Cal. 409-412 ("uncertain status during *iddat*" : application of penal law, 414 ; marriage tie does not absolutely break until *iddat* completed : a husband apostatized & wife married another Muslim : then first husband—during period of *iddat*—reverted to Islam & prosecuted wife for bigamy); *Jhandu* v. (*Mst.*) *Husain Bibi*, (1923) 4 Lah. 192 (marriage during *iddat* called illegal : but apparently not necessary to distinguish illegality from irregularity : that question not considered); (*Mt.*) *Ruro* v. *Bagh Singh*, [1935] AIR (LAH.), 23 (question left open : but 17 Lah. 48 does not seem to have been cited).

2 *'Iddat* means counting, from *'ad*=number. *Iddat* primarily affects right of woman to marry ; but husband having four wives may not marry fifth, while one of his four wives is observing *iddat* for divorce, nor may he, during said period, marry that wife's sister : *Syed Saib* v. *Muran B.*, (1910) 20 M. L. J. 12.

3 Hed. 128 : though this description does not cover case of illicit pregnancy.

4 Bail. I. 357 (359); II. 165 ; Hed. 132. *Ilahia* v. *Imam Din*, [1909] 44 Punj. Rec. 77 (No. 29) (*hidad* referred to).

5 Hed. 132 ; Bail. II. 165.

6 These rules might help in deciding if articles supplied to minor or lunatic observing *iddat* are necessaries suited to her condition : Ind. Contr. Act, s. 68.

during iddat where she was at the time of the divorce : she need not reside in the husband's house.[7] SECTION 36.

IDDAT : origin :

Iddat is a neutral word, derived from a root meaning count. Prohibition by iddat is a temporary prohibition : lasting only during the period that iddat lasts. The original object of iddat is to "ascertain the state of the womb,"[8] i.e. to ascertain whether the woman be pregnant,[9] so that remarriage during pregnancy may be prevented. These objects and the real significance of the rules in ss. 36, 40 are occasionally lost sight of when the prohibition of iddat is considered.[10] Abu Yusuf said that this prohibition originated purely in a principle of tenderness towards the foetus, and argued that the same tenderness ought to be present although it be begot in adultery, since it is innocent of any offence. But Abu Hanifa and Imam Muhammad refer to the Koran (IV. 26-30) which in terms forbids marriage with women within the prohibited degrees, and they hold that "the prohibition of cohabitation until after delivery"—"a prohibition which occurs in the traditions"—"is merely on account of the impropriety of sowing seed in a soil already impregnated by another" ; and that "the illegality of the marriage in cases where the parentage of the foetus is established...originates in a regard for the right not of the foetus, but of the father."[11] The Fatawa Alamgiri entitles the subject : "Women prohibited by being involved in the rights of others."

Marriage during pregnancy prevented.

Women involved in rights of others.

The Civil Law ordained that no widow should marry inter annum luctus.[12] The rule was established in England under the Saxon and Danish Governments[13] but seems to have fallen into desuetude by the time of Coke.[14]

Parallel.

37. Under Shia law, the marriage of a man with a woman whom he knows to be under an obligation to observe iddat, is void ; if marriage in such circumstances is followed by sexual intercourse, the parties can never lawfully intermarry ; but otherwise they may lawfully intermarry after the woman has completed her iddat.[15]

Perpetual prohibition in Shia law.

38. Iddat is incumbent on a woman[16] after the dissolution of a rightful or a semblable[17] marriage followed by consummation, or the death of the husband.[18] Pregnant

Who must observe 'iddat.

[7] Bail. I. 359 ; *Usmanbhai* v. *Bai Sakina*, (1926) 29 Bom. L. R. 106.

[8] Bail. I. 350 (352). [9] Hed. 128.

[10] The rules in ss. 36, 40 were entirely overlooked in *Kulsumbi* v. *Abdul Kader*, (1920) 45 Bom. 151 = s. 38, *ill.* (7) : see s. 101(1).

[11] Hed. 32. [12] Cod. V. ix. 2.

[13] *Sit omnis vidua sine marito duodecim menses.* Wilk. *Leg. Anglo-Sax.* LI. Ethel A. D. 1008 : Ll. Canut. c. 71 : Stephen, *Comment*, (10th Ed. 1885) II. 308.

[14] Co. Litt. 8a.—*ibid.*

[15] Bail. II. 26 (first), 27 (third) : *Daaimu'l-Islam.*

[16] I.e. she is under obligation to refrain from marrying—see s. 36.

[17] See s. 14 : ILLICIT INTERCOURSE without even semblance of marriage causes the woman to be "involved in the rights of others," provided she is PREGNANT : see s. 36, com.

[18] Hed. 128 ; Bail. I. 37-38, 350-351 (352-353) ; Bail. II. 164 (par. 2), 165,

SECTION 38. Illustrations.

women are subject to the prohibitions contained in s. 40.[17]

(1) H marries *W* and divorces her without consummation : *W* need not observe iddat whether the marriage was regular or irregular.[19]

(2) On the death of H, iddat for 4 months and 10 days is incumbent on a widow who was regularly [20] married to him whether or not the marriage has been consummated. If, at the expiration of the said period of iddat she is found to be pregnant, the iddat is prolonged till delivery.[21]

(3) H contracts a regular marriage with *W* : and they consummate (or the parties being governed by Hanafi law, validly retire) : then H dies,[22] or divorces *W* : *W* must observe iddat.

(4) H irregularly marries *W*, the parties being Hanafis,—

(*a*) they validly retire but do not consummate ; then the Court orders them to separate : [23] *W* need not observe iddat ; [24]

(*b*) they consummate marriage, and are then separated by an order of the Court : *W* must observe iddat.[24]

(5) A person purports to marry a woman knowing her to be the wife of another person, and has intercourse with her. There is no semblance of marriage.[25] Then he dies or purports to divorce *W* : no iddat is necessary.[26] The explanation seems to be that where there is a semblance of marriage the paternity of the child is established : ss. 14, 215.

(6) Under Hanafi law a woman who is lawfully pregnant must observe iddat at least until she is delivered. As to a woman pregnant by illicit intercourse (*a*) according to Abu Yusuf her marriage is not void but "irregular," and she must observe iddat, (*b*) according to Abu Hanifa and Imam Muhammad (whose view is accepted) she need not observe iddat (s. 36) and may validly marry, but must not have intercourse until delivery.[27]

Illicit pregnancy : Kulsumbi *v.* Abdul Kadir, 45 Bom. 151.

(7) The plaintiff at the time of her marriage with the defendant concealed her illicit pregnancy : the parties lived together for some time and presumably the marriage was consummated. A fully developed child was born within 5 months. "The child was begotten by an unknown father." Then the husband turned the wife out of his house but did not divorce her. At her suit the husband was *held* liable for her prompt mahr. *Submitted* that on the points argued the decision was not erroneous, but that the real points were not taken or decided : ss. 36, 38, *ill.* (6), s. 40 were entirely overlooked by the husband's (defendant's) advisers : it was not argued that the wife being "pregnant by whoredom," marriage was prohibited during pregnancy ; that there was no

(par. 3). *Sharhi-Viqaya* (Hanafi authority) : Abu Yusuf permits persons guilty of illicit intercourse to intermarry during woman's pregnancy. Shia authorities do not permit it if woman observing *iddat* of divorce or widowhood : Bail II. 164-165.

19 Bail. I. 350, 351 (352, 353).

20 Shia law does not recognize irregular marriage. There is under Shia law either a lawful marriage, or no marriage at all.

21 Bail. I. 353 (355).

22 On valid retirement see s. 82.

23 See ss. 84-86. Not having been consummated, the marriage can be put an end to without order of Court, at mere desire of either party.

24 Bail. I. 350 (352).

25 See s. 14, *n.*

26 Bail. I. 37, & *n.* 1.

valid marriage at all ; that the marriage was from the start illegal and of no effect ; that no cancellation was necessary,[27] or in fact possible as there was no marriage to cancel. The only argument put forward was that the marriage could be cancelled by the husband on some ground similar to those in ss. 201-209, an argument that was quite untenable and had to be rejected by the Court, in spite of its great anxiety (of which no secret had been made) to decide if possible against the wife.[28] SECTION 38.

39. The periods during which iddat must be observed are mentioned in ss. 39A, 40 : the said periods (*a*) must be reckoned from the date of the husband's death or divorce as the case may be :[1] (*b*) they must be reckoned either by months or by courses ; the two may not be combined ; nor may a period during which there has been menstruation, be reckoned as part of the three months ;[2] and (*c*) where the marriage was irregular, from the separation (s. 86) or the time when the husband has determined on abandoning or cancelling the connection : ss. 84, 85. DURATION OF IDDAT.

39A. (1) The period of the iddat of a regularly married widow is 4 months and 10 days from the death of her husband ;[3] and if on expiration of the 4 months and 10 days, she be pregnant, until she is delivered of the child.[3] 1. for a widow.

(2) In the following cases, viz. where

(*a*) the marriage between the parties was regular, and it had been consummated, or if (Hanafi law being applicable) valid retirement had taken 2. for divorced wife or widow by irregular marriage.

27 Bail. I. 37-38, (38, 39) 353 (355).

28 *Kulsumbi* v. *Abdul Kader*, (1920) 45 Bom. 151. (i) Even apart from *Haji Ahmed K.* v. *Abdul Ghani K.*, [1937] Nag. 299, (laying down that marriage contract is *uberrimate fidei* & casts duty to disclose all defects, which is perhaps introducing new notion into Muslim law), (ii) it was duty of plaintiff to inform her husband of her pregnancy, since pregnancy at any rate rendered intercourse unlawful : Hed. 32 ; Bail. I. 37 (38) ; (iii) marriage during pregnancy with man other than begetter is not lawful : Bail. I. 38 ; (iv) but even if the marriage was put on level of an irregular (& not illegal) marriage, divorce was not necessary : ss. 84, 85 ; (v) consummation brought about by fraud cannot (*submitted*) have effect of confirming *mahr* against defrauded husband (see ss. 101(1), 103). *Kshitish Chandra* v. *Emp.*, [1937] 41 Cal. W. N. 540 (charge for misrepresentation may lie : Ind. Pen. Code, ss. 491, 434).

1 Hed. 131 ; Bail. I. 355 (357). Wife's ignorance of divorce or death of husband does not affect duration of *iddat* : as all that she has to do is to refrain from marrying : s. 36 : if she refrains from marrying it is enough, though she may think that her husband is living or that she is still married, when in fact he is dead or she has been divorced.

2 Bail. I. 27, 350-353 (352-357) ; Hed. 128, 129.

3 Hed. 128-129 ; Bail. I. 157, 350-355 (352-357), II. 164-165. Delivery by pregnant widow does not terminate *iddat* before 4 months & 10 days are over : *Jhandu* v. (*Mt.*) *Husain Bibi*, (1923) 4 Lah. 192 ; *Ilahia* v. *Imam Din*, [1909] 44 Punj. Rec. 77, (No. 29) ; *Natha* v. *Musst. Bibo*, (1887) 22 Punj. Rec. 81, (No. 38).

SECTION 39A. PERIOD OF IDDAT.

place ; [4] and the marriage has been dissolved by a divorce ; or

(*b*) where an irregular marriage has been dissolved by the death of the husband,—

the period of the iddat, is as follows :

(i) if she is subject to menstruation, (*a*) under Hanafi law, until the expiration of three monthly courses ; [6] (*b*) under Shia law, until the expiration of three tuhrs, or periods of purity after menstruation) ; [7]

(ii) if she is pregnant, until she is delivered ;

(iii) if she is not subject to menstruation for some reason other than pregnancy, then, (*a*) under Hanafi law, three lunar months ; (*b*) under Shia law, subject to s. 39A(4), seventy-eight complete days.

3. If husband dies during iddat or divorce.

(3)[8] Under Hanafi law, where the husband (*a*) divorces his wife, and (*b*) dies before her iddat expires, a fresh iddat from the husband's death, becomes obligatory for the period obligatory on an undivorced widow,[9]—but subject as follows,—

(i) if the divorce was irrevocable or triple, the fresh iddat must, according to Abu Hanifa and Imam Muhammad include three menstrual courses (if she is liable to them), and if necessary, the fresh iddat must be prolonged so as to include them ; according to Abu Yusuf, it must consist of three courses but has not to be prolonged beyond them ;

(ii) if the divorce was revocable or pronounced by the husband in his death illness, the fresh iddat need not include these menstrual courses.[10]

4. Woman past child-bearing.

(4) Under the more generally received Shia tradition, a woman who is past the age of child bearing, or has not attained puberty, and whose menstruation is irregular or absent, need not observe iddat.[11]

[4] Bail. I. 101. Shia law does not recognize "valid retirement" as equivalent to consummation ; but where retirement has taken place, if husband states on oath that marriage was consummated, his statement presumed to be true. Bail. II. 160, cf. s. 5B.

[5] Dissolution of irregular marriage, though brought about by death of husband, is put upon same level as separation caused by divorce, or by Court.

[6] Bail. I. 351 (353); Hed. 128.

[7] Bail. II. 161 ; *Daaimu'l-Islam* : cf. s. 31.

[8] Sect. 39A (3) = s. 40 in first ed.

[9] See s. 39A(1), (2)(*b*).

[10] Bail. I. 351 (353), 252 (354).

[11] Bail. II. 162.

(5) Where the parties, being governed by Shia Ithna Ashari law, have contracted mut'a, iddat must be observed in accordance with s. 25. SECTION 39A. 5. Mut'a.

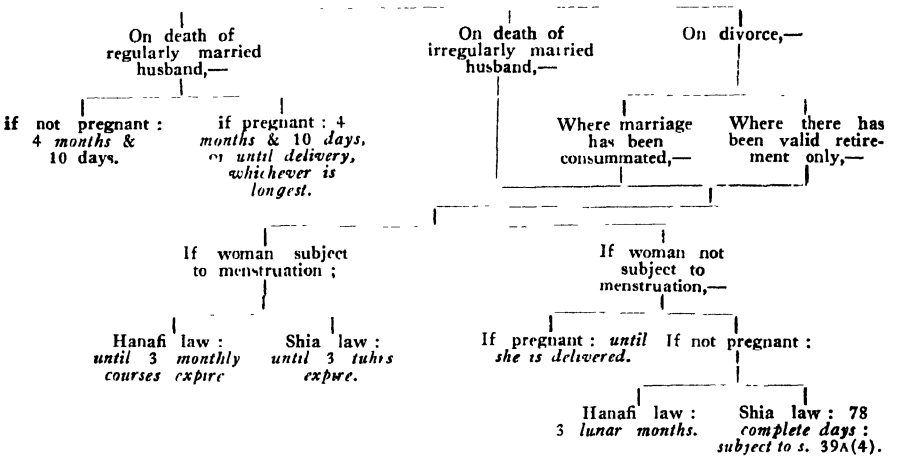
Illustrations.

(1) H divorces his wife *W*, before she reaches puberty. One day before the three months elapse, *W* begins to menstruate. The iddat will require three menstrual courses for its completion.[12]

(2) H revocably divorces his wife who observes iddat for three courses except one day. Then H dies. The iddat is prolonged to 4 months and 10 days from the death of H.[12]

(3) H divorces his wife, who observes iddat for two courses and then they absolutely cease. She must observe a fresh iddat for three months.[12]

DURATION OF IDDAT.[13]



40. (1) The marriage of a woman pregnant of a child whose descent or paternity is established is unlawful.[14] 5. Iddat after illicit intercourse.

(2) Under Hanafi law (*a*) when a man marries a woman with whom he has had illicit intercourse and it appears that she is pregnant by such intercourse, the marriage is lawful and he may have connection with her and she is entitled to maintenance,[15] (*b*) a woman pregnant by whoredom may

[12] Bail. I. 355 (357).

[13] This table cited & applied : *Jhandu* v. (*Mt.*) *Husain B.*, (1923) 4 Lah. 192.

[14] Hed. 32. Bail. I. 38, *ll.* 14-16. Hed. 32, par. I. 3, *ll.* 8-10. See s. 215 ; paternity can only be established if parties are married : s. 40 ; therefore a woman who is legitimately pregnant cannot lawfully marry till delivery. This proposition is included in s. 38, & repeated in s. 40(1) to give completeness to s. 40.

[15] Bail. I. 38 (*ll.* 4-9) (marriage during illicit pregnancy). Hed. 32, col. i ; Bail. I. 37 last *ll.* (38, par. 2) 353 par. 2, (355) speaks of "*iddat* of pregnant women ;" pregnancy by *zina* is expressly included. See "on women involved in rights of others" s. 36, com., p. 133.

SECTION 40.

(i) according to Abu Hanifa and Imam Muhammad marry, but must refrain from matrimonial intercourse till delivery : (ii) Abu Yusuf holds such marriage to be illegal.[15]

(3) Under Shia law a pregnant woman cannot lawfully marry. Marriage is lawful so long as there is no certainty of pregnancy, but if she should subsequently prove to have been pregnant the second marriage would be void by reason of iddat being still subsisting at the time of the marriage.[16]

Sect. 40 contemplates three positions : first, sub-s. (1) deals with the case of pregnancy by lawful intercourse ; secondly, sub-s. (2) with illicit pregnancy under two heads (*a*) marriage between father and mother of the child, (*b*) pregnancy by whoredom, where presumably it is not known who the father is : in any case the marriage is not between the father and mother of the child.

6. Prohibition by divorce. Thrice divorced wife.

PROHIBITION HOW REMOVED.

41. (1) After the husband has pronounced three talaqs[17] against his wife, their marriage is irrevocably dissolved,[18] marital co-habitation by them becomes illegal, [19] and they are prohibited from re-marrying each other unless and until (*a*) the woman has been lawfully married to[20] a second husband,[21] (*b*) her marriage with her second husband is actually[22] consummated,[23] and (*c*) it has, after such consummation, been lawfully dissolved.[24]

(Shia law) if second marriage only for legalizing remarriage.

(2)[25] Under Shia law, a marriage with the second husband, contracted on the express stipulation that it is contracted merely for the purpose of legalizing the remarriage of the wife with her first husband, (who had divorced her three times) and that the said second marriage shall be effectual only for the said purpose, is void.[26]

16 Bail. II. 27, 163.

17 First seven words of s. 41 might be replaced by : " After the husband has uttered 3 pronouncements of divorce against his wife : " see com. ; *Abdul Ghani* v. *Azizul Haq*, (1911) 39 Cal. 409.

18 Irrevocable dissolution would result even if first two pronouncements of divorce have not been followed by cessation of marital life : s. 121.

19 See ss. 13, 153.

20 Bail. II. 162.

21 Permanently, not by *mut'a*, Bail. II. 124.

22 I.e. not by mere valid retirement ; & lawfully, e.g. not during pilgrimage or obligatory fast : Bail. II. 126. As husband must be adult to be able to divorce, where second marriage has taken place with boy over ten years old, but under puberty, it must await his puberty before it can be dissolved ; see s. 124.

23 Bail. I. 43, 44, 205, 290 (292); II. 124 ; *Barkat Bibi* v. *Jalal Din*, (1908) 43 Punj. Rec. 459 (No. 97). Cf. *Akhtaroonnissa* v. *Shariutoollah Chowdhry*, (1867) 7 W. R. 268 (noted in *n.* 28).

24 I.e. either her second husband dies, or divorces her.

25 Sect. 41(2) = s. 47 in the earlier editions ; s. 41(3) = s. 48 ; s. 41(4) = s. 49.

26 Bail. II. 36 (*fifth*). Neither will mere *mut'a* do : Bail. II. 124 ; *Daaimu'l-Islam.*

(3)[25] Under Hanafi law the second husband must be at least ten years old. Under Shia law before the marriage with him can be dissolved, he must have attained puberty. He need not be of sound mind.[27] SECTION 41. Age of second husband.

(4)[25] The assertion or denial of the wife with reference to the second marriage having been consummated, will be presumed to be true.[28] Presumption.

(1) In 1900 H divorces his wife, *W*, twice. In 1901, *W* marries a second husband, and is divorced by him. In 1902 *W* re-marries H her first husband, and is again divorced by him twice in 1903. The two divorces pronounced by H in 1900, (before *W* had married her second husband) are not, for the purposes of s. 41, to be added to the divorces by H in 1903, and so after the two divorces of 1903, H and *W* may remarry, without *W* marrying another husband.[29] *Illustrations.*

(2) H divorces his wife, *W*, (*first* divorce): then either resumes cohabitation, thus revoking the divorce, or remarries her : then divorces her a *second* time : again revokes the second divorce, or re-marries her ; then divorces her a *third* time. The third divorce cannot be revoked ; and there can be no fresh re-marriage between H and *W*, till ((i) *W* has married another husband, X, and (ii) that marriage (between *W* and X) has been consummated and then (iii) dissolved by divorce or by X's death.[30] If the same process goes on till there are nine divorces (of which the 1st, 2nd, 4th, 5th, 7th and 8th, have been revoked by A's resuming cohabitation) then H and *W* are, in Shia law, perpetually prohibited from remarrying. But such perpetual prohibition does not take place where after each of the last mentioned six divorces, *W's* periods of iddat have been allowed to expire, and H and *W* have been re-married each time.[31]

The word "divorce" is ambiguous.[32] It is used to denote sometimes the dissolution of marriage,[33] at other times the formula in which the pronouncement of talaq is made, viz. the words that are uttered, or written, for the "Three divorces" i.e. three (or triple)

This rule applies only to express stipulation : If no express condition in contract, mere intention of parties or of wife or her guardian that she shall be immediately repudiated, does not avoid contract : Bail. II. 36. When, however, there is express stipulation it is clearly laid down that marriage is altogether void : invalid condition will not be considered as surplusage & void.

[27] Bail. I. 290 (292); II. 124 ; *Daaimu'l-Islam.*

[28] Bail. I. 291 ; see s. 5B ; cf. *Akhtaroonnissa* v. *Shariutoollah C.*, (1887) 7 W. R. 268 (restitution of conjugal rights at suit of husband refused : he merely proved second marriage with himself after three divorces : no evidence of intermediate marriage with another husband : Court refused to presume intermediate marriage.

[29] Bail. II. 124. [30] Bail. II. 119.

[31] Bail. II. 120 (first). See table : s. 119.

[32] In this work TALAQ = (translated "divorce") = one particular mode of dissolving marriage ; "PRONOUNCEMENT OF DIVORCE" = formula of talaq ; "DISSOLUTION OF MARRIAGE" = comprehensively all dissolutions.

[33] "Divorce" also used to denote (*a*) one special method of dissolving marriage, viz. *talaq*, or (*b*) all dissolutions of marriage, viz. including, e.g. *zihar*, *lian*, etc.

SECTION 41. pronouncements: not three effective dissolutions of marriage.

purpose of effecting a dissolution of marriage. Such words may be validly uttered (so as to be effective); or their utterance may be ineffectual for want of some legal requirement; or, thirdly they may be recalled before the dissolution of marriage is effectuated,—by such recalling the divorce is "revoked," and hence no actual dissolution of marriage takes place, notwithstanding that the pronouncement has been made. When however, it is said that a man is not permitted,[34] to remarry his thrice divorced wife, what is meant is that after he has uttered three pronouncements of talaq, re-marriage is not permissible. It is not meant that there should be three actual dissolutions of marriage, nor three occasions when the marital tie is in fact severed and the wife has left the husband's society: but merely that three talaqs have been pronounced: three occasions on which the husband has uttered words which constitute a pronouncement of divorce. For instance, the husband may (under Hanafi law) utter the three pronouncements in one breath,[35] in which case between the first and subsequent pronouncements, there is no time for any separation to take place. In such circumstances the moment after the three pronouncements have been made,[35] the bar against the parties re-marrying comes into effect. While again, there may be two single pronouncements of divorce, each allowed to remain unrevoked, so as to cause a dissolution of marriage, and each followed by a complete severance of the relation of husband and wife: so that the husband and wife cease to be and to live as such, on both occasions,—however prolonged each occasion may have been: and still if the parties choose, they may re-marry immediately after the second dissolution of marriage.

Object of rule in s. 41.

The rule in s. 41 did away with a great engine of oppression in the hands of the pre-Islamic Arabs, who could keep their wives in a species of perpetual bondage, pretending to take them back after repeated divorces, merely for the purpose of preventing the wives from re-marrying and from seeking the then much needed protection of a husband. Courts have however pointed out the necessity for caution in regard to the interpretation of the formula and for distinguishing the different forms of talaq.[36]

[34] Viz. unless wife marries second husband intermediately.

[35] He is even allowed to pronounce it in triple form without actually pronouncing it 3 times.

[36] See *Abdul Ghani* v. *Azizul Haq*, (1911) 39 Cal. 409 (for determining kind of *talaq* that has been effected). "ILLUSTRATION of this subject," viz. INCIDENTS OF DIVORCE: "I may mention a case in which an acquaintance of mine was concerned as a witness of sentence of divorce. He was sitting in a coffee-shop with two other men, one of whom had just been irritated by something that his wife had said or done. After a short conversation on this affair, the angry husband sent for his wife, & as soon as she came, said to her, 'Thou art triply divorced:' then addressing his two companions, he added 'You my brothers, are witnesses.' Shortly after, however, he repented of this act, & wished to take back his divorced wife; but she refused to return to him & appealed to the Shara Allah (or Law of God). The case was tried at Mahkemeh. The woman, who was plaintiff, stated that defendant was her husband; that he had pronounced against her the sentence of a triple divorce; that he now wished her to return to him, & live with him as his wife, contrary to law, and consequently in a state of sin. Defendant denied that he had divorced her. 'Have you witnesses' said the judge to plaintiff. She answered, 'I have here two witnesses.' These were the men who were present

SECTION 42. Is khul within s. 41.

42. Under Shafi'i law a khul or mubaraat does not count as a pronouncement of divorce, for prohibition under s. 41.[1] The Shia authorities are divided on the question.[2]

(Shia law) cancellation of marriage and s. 41.

43. Under Shia law the cancellation of a marriage for a physical blemish (under ss. 191-199) does not count as a pronouncement of divorce for prohibition under s. 41.[3]

Zihar : expiation.

44. A man who has made zihar (ss. 178-181) may not, until he has made expiation, have conjugal intercourse with his wife, though he were to divorce her irrevocably and then marry her.[4]

(Shia law) lian : re-marriage prohibited.

45. Under Shia law if a man has made lian[5] against his wife (ss. 182-184) and they have thereupon been separated, perpetual prohibition is established against their re-marrying each other.[6]

(Shia law) nine divorces.

46. Under Shia law, if a woman is divorced nine times by one husband (being twice intermediately married to another, or others) the prohibition to remarry the husband who has divorced her nine times, becomes absolute, and incapable of being ever removed.[7]

Sections 47-49 are now incorporated in s. 41.

in the coffee-shop when sentence of divorce was pronounced. They were desired to give their evidence, & they stated that defendant divorced his wife by a triple sentence, in their presence. Defendant averred that she whom he had divorced in coffee-shop was another wife of his. Plaintiff declared that he had no other wife; but judge observed to her that it was impossible she could know that; & asked witnesses what was name of the woman whom defendant divorced in their presence. They answered that they were ignorant of her name. They were then asked if they could swear that plaintiff was the woman who was divorced before them. Their reply was that they could not swear to a woman whom they had never seen unveiled. Under these circumstances judge thought it advisable to dismiss case, and woman obliged to return to her husband. She might have demanded that he should produce woman whom he deposed to have divorced in the coffee-shop, but he could easily have found a woman to play part he required, as it would not have been necessary for her to show a marriage certificate; marriage being almost always performed in Egypt without any written contract, & sometimes even without witnesses. It not infrequently happens that, when a man who has divorced his wife the third time wishes to take her again, she herself consenting to their re-union, and there being no witnesses to sentence of divorce, he does so without conforming with offensive law before mentioned." Edward William Lane, *Account of Manners & Customs of Modern Egyptians*, (1890) Ch. VI., p. 164.

[1] *Sharh Viqaya, Nikah* : *khul*. [2] Bail. II. 129.

[3] Bail. II. 61 ; *Daaimu'l-Islam*. [4] Bail. I. 323 ; Hed. 117.

[5] *Lian* is accusation of adultery in special form : ss. 182-184 : Bail. II. 28, 35-36, 119, 120 ; *Daaimu'l-Islam*.

[6] Bail. II. 20, *Daaimu'l-Islam*.

[7] Bail. II. 28, 35, 36, 119, 120; s. 41, *ill.* (2); *Daaimu'l-Islam*.

SECTION 50.
7. PROHIBITION BY DIFFERENCE OF RELIGION.

50. (1) A Kitabi is a man, and a kitabia [8] a woman, who believes in a heavenly or revealed religion with a kitab, or a book that has come down to the followers of that religion : [8] A woman one of whose parents is a kitabi or kitabia, if she does not herself profess to be a fire-worshipper or idolatress, will be considered a kitabia, notwithstanding that her other parent is a fire-worshipper or idolator.[9]

Male may not marry fire-worshipper nor idolatress.

(2) Under Hanafi law, (*a*) a man may lawfully [10] marry a kitabia [11] but not a fire-worshipping or idolatrous woman ; [12] (*b*) a woman [13] may not lawfully [10] marry a non-Muslim even though he is a kitabi.[14]

Apostasy :

The use of blasphemous language against the Prophet by a Muslim husband amounts to apostasy, and dissolves the marriage.[15] "It would be extreme violence to the religious opinions and social feelings of a wife" to live in the society of a husband who had renounced her religion : in such cases the Court may refuse to order restitution of conjugal rights.[16]

Nowroz Ali v. *Aziz Bibi.*

(Shia law) Marriage with kitabia wife.

51. Under Shia law marriage with the follower of a religion other than Islam is unlawful. The majority of the Ithna Ashari authorities hold that a male Muslim may contract mut'a with a kitabia.[17]

[8] Bail. I. 41 : believing in Book of Abraham, or of Seth, or Psalms of David, makes person KITABI, hence Jew or Christian is *kitabi* : a MAJOOSIA is reckoned *kitabia* in Shia law : Bail. II. 29, 40.

[9] Bail. I. 41 : seems to assume that *kitabi* may be married to *majoosi.* Is a BUDDHIST A KITABI ? *Abdul Razak* v. *Abu Mahomed,* (1893) 21 I. A. 56 = 21 Cal. 666 (question taken too late : not decided by P. C.) : cf. s. 51 *n.* as to Zoroastrians.

[10] In Hanafi law it would be more accurate to say "regularly" rather than "lawfully" : ss. 83 ff.

[11] In (*Syeed*) *Gholam Hossein* v. (*Mt.*) *Sitabah Begum,* (1866) 6 W. R. (C. R.) 88, actually argued that Sunni could not marry Shia woman. *Aziz Bano* v. *Md. Ibrahim Husain,* (1925) 47 All. 823 (Shia husband, Sunni wife) ; *Nasrat* v. *Hamidan,* (1882) 4 All. 205 (Sunni wife retains her law) ; *Delrus Banoo B.* v. *Kazee Abdur Ruhman,* (1875) 23 W. R. 452, 455 (Shia wife, Sunni husband).

[12] Hed. 30 ; Bail. I. 40 ; *Official Assignee* v. *Ma Hla Htwe,* [1929] AIR (RANG.) 35 (Burmese Buddhist woman may not be married to Muslim).

[13] Cf. law by which women governed in Brit. India : e.g. Act XV. of 1872, requires that when either party is Christian, marriage shall be solemnized in accordance with s. 5 of said Act, otherwise it is void, cf. *Re Ulli,* (1885) 35 L. T. 711 (see s. 18 *n.*) renunciation of Islam required before marriage can take place in accordance with Special Marriage Act, III. of 1872.

[14] Bail I. 41, 42 ; *Himmut Bahadur* v. *Shaheb Zadi B.,* (1870) 14 W. R. 125 ; affirming on Review, S. C. (1869) 12 W. R. 512 = 4 Beng. L. R., A. C., 103 ; *Bakhshi Kishen P.* v. *Thakur D.,* (1903) 19 All. 375 (Christian may not marry Shia woman).

[15] *Nowroz Ali* v. (*Mt.*) *Aziz Bibi,* (1876) 11 P. R. 258, (No. 124) (apostasy cancels marriage of its own force, pp. 253-257, 263, 264) ; cf. (*Bai*) *Jina* v. *Kharwa Jina,* (1907) 31 Bom. 366 (excommunication of husband sufficient defence to husband's suit against wife for restitution of conjugal rights).

[16] *Muchoo* v. *Arzoon Sahoo,* (1866) 5 W. R. 235 (Hindu parties).

[17] Bail. II. 29 : *mut'a* may under Shia Ithna Ashari law be contracted with a *majoosiah* (Zoroastrian woman) : Bail. II. 29, 40.

SECTION 51.

The Ismaili Shias do not recognize mut'a and their law agrees in this respect with that of the Sunnis ; see ss. 25, 50.

Ismaili Shias.

Syed Saheb Ameer Ali[18] mentions that the Usuli Shias and Mutazalas agree with the Sunnis in permitting a Muslim to marry permanently a wife who is not a Muslim but a kitabia : see s. 25.

Usuli and Mutazala Shias permit permanent marriage with kitabia.

The Sharaiu'l-Islam[19] states that the most notorious, or generally received opinion, is that a male Muslim may contract a mut'a with a kitabia. A marriage "even though the contract were a permanent one" can be cancelled (subject to certain conditions) if the husband learns that the wife is not a Muslim but only a kitabia.[20]

Quaere even about Ithna Asharis.

The question does not seem to have arisen before the Courts. But if it does, it will not be easy to decide. Nor may it depend on the Shia law taken by itself. The law of the other party to the marriage must naturally have effect, since no religious law has preference in British India[21] s. 50(2)(*b*), *n.* The present conditions of life conduce to marriages between persons of different religions, and it is not unlikely that the legislature may step in and validate such marriages. See the Baroda Special Marriage Act : s. 17, p. 95, *n.* 11.

8. Prohibition by supervenient illegality.

52. If the parties to a marriage come to acquire a foster relation[1] within the prohibited degrees, or one of them becomes a fire-worshipper,[2] or an idolator,[3] or the husband becomes a Christian,[2] then the marriage becomes invalid by what is known as supervenient prohibition ;[4] provided that in British India no person forfeits any rights or property, or has his right to inheritance impaired, or affected, by reason of his or her renouncing, or having been excluded from, the communion of any religion.[5]

Prohibition supervening by fosterage apostasy.

[18] *Mah. Law*, II. 328 (281, 282). *Mutazalas & Usulis* : see s. 30(1) *n.*

[19] Bail. II. 99.

[20] Bail. II. 65, (par. 3).

[21] See ss. 6, 50(2) *nn.*

[1] This can only happen, if one of parties is within period of suckling, i.e. less than 2 or 2½ years old : ss. 32-33.

[2] Bail II. 18; *Abdul Ghani* v. *Azizul Haq*, (1911) 39 Cal. 409 (conversion to Christianity); *Amir Beg* v. *Saman*, (1910) 7 All. L. J. 956 (conversion to Christianity held to sever marriage tie); *Imam Din* v. *Hasan Bibi*, [1906] 41 Punj. Rec. 309 (No. 85) (distinction between husband & wife's conversion to Christianity pointed out : male Muslim may marry Christian woman : not *vice versa*).

[3] Bail I. 41 ; II. 30.

[4] Illegality may supervene in England, after contract made : *Baily* v. *De Crespigny*, (1869) L. R. 4 Q. B. 180 ; *Newby* v. *Sharpe*, (1878) 8 Ch. D. 39, 49, 52. Persons have been convicted in England of what was made an offence only after the act was done, by a subsequent Act of Parliament ; as Acts of Parliament used to have effect from first day of Sessions in which passed—that rule altered now ; *Latless* v. *Holmes*, (1792) 4 T. R. 660 ; *R.* v. *Thurston*, (1663) Lev. 91. Cf. *R.* v. *Bailey*, (1800) Russ. & Ryan's Cr. Ca., 1.

[5] Caste Disab. Rem. Act, XXI. of 1850, s. 1, com. : Bail. I. 41 ; II. 18, 30, 41 ; *Nowroz Ali* v. (*Mt.*) *Aziz B.*, (1876) 11 P. R. 253 (No. 124); (*Bai*) *Jina* v. *Kharwa Jina*, (1907) 31 Bom. 366.

SECTION 52. Illustrations.

(1) The infant children of two brothers are married to each other. Then the boy is suckled by the mother of the two brothers (being paternal grandmother of the boy) on which he becomes the foster-son of his grandmother : consequently prohibition supervenes between the two infants under s. 35(3), since the girl is the descendant of the boy's foster-mother.[6]

(2) In *ill.* (1) if the boy had been suckled by the girl's mother, or sister, or by the wife of one of the brothers, or by the wife of the girl's brother, prohibition would have equally supervened.[7]

(3) A person has two wives : one of the wives who is an infant, is suckled by the other wife : [8] prohibition supervenes between the husband and both wives [9] if the marriage has been consummated ; otherwise only between him and the adult wife.

(4) H marries two infant wives, and they are both suckled by a stranger. Unlawful conjunction prohibits H from being the husband of both the infants, but he may remarry either of them at pleasure.[10]

Illicit intercourse

Illicit intercourse with a relation of the husband or wife does not render the existing marriage unlawful, though where such illicit intercourse has already taken place before the marriage, it has for establishing prohibition by consanguinity the same effect as consummation of a marriage.[11]

When a Hindu woman embraces Islam, this rule of law can have no application, though apparently the Court on an application would dissolve her marriage.[12]

9. PROHIBITION DURING PILGRIMAGE.

53. Under Shia and Shafi'i law a man who has come within the sacred territory on a pilgrimage to Mecca and put on the pilgrim's dress,[13] may not enter into a contract of marriage.[14] Under Shia law, absolute prohibition is established between a man and woman who, knowing[14] that it is unlawful to enter into a contract of inter-marriage in such circumstances, do so : and the two may never lawfully become husband and wife.[15]

[6] Bail. II. 19.

[7] Bail. I. 198 ; II. 18, 19.

[8] Even though adult wife has been divorced, provided that under Shia law, milk on which she has nursed other wife proceeds from first husband ; Bail. II. 15, 20. Under Hanafi law, it does not matter from whom milk proceeds : Bail. I. 200.

[9] Bail. I. 198 ; II. 19.

[10] Bail. I. 198 *(ll.* 10-12).

[11] Bail. II. 23 : cf. s. 29.

[12] See s. 194A. (*Mt.*) *Nandi alias Zainab* v. *The Crown*, (1919) 1 Lah. 440. See also *Re Ram Kumari*, (1891) 18 Cal. 264.

[13] Pilgrim's dress = *ihram*, in Arabic : pilgrim dressed in it = *muhrim.*

[14] Contract of marriage void though he may not be aware that it is unlawful : but prohibition between parties not established unless he is aware. Under Hanafi law marriage during pilgrimage is valid : Bail. I. 213.

[15] Bail. II. 27 ; *Sharh-i-Viqaya.* Bk. on *Nikah*, Ch. 2, *Maharimat* ; cf. perpetual prohibition under Shia law on persons who marry when woman is known by husband to be in *iddat*, & after nine divorces : ss. 37, 41.

§ 6.—Agents or Proxies for Marriage.

54. A person who has not attained puberty, or is of unsound mind, may not validly act as agent or proxy for marriage ; and in Shafii and Maliki law, no woman may validly act as such agent or proxy.[16] Who may be agents or proxies.

The age of competence for this kind of agency is not affected by the Indian Majority Act, by reason of s. 2 thereof, under which "nothing herein contained shall affect (*a*) the capacity of any person to act in the following matters (namely), marriage, divorce, dower, and adoption..." See s. 5A, com., see also Indian Contract Act, s. 184.

55. An agent or proxy may be authorized to contract a marriage, with a specified person only ; or with a person answering to a specified description ; or generally, with any person whatever.[16] Nature of authority.

An agent for marriage must be authorized before he acts as such. Sect. 55 does not apply to a fuzuli,[17] i.e. an unauthorized person purporting to act on behalf of another without the knowledge or authority of that other : s. 57 and *ill.* Fuzuli or unauthorized person.

56. The same person may (subject to s. 58) be authorized or may by law have authority to act in a marriage contract as guardian or proxy for both parties ; or as guardian or proxy for one party, and principal on his own behalf ; or guardian for one party, and proxy for the other.[18] One person representing both sides.

57. Under Hanafi and Shia (but not Shafii) law where a marriage is purported to be contracted by one person on behalf of another, without the knowledge or authority of the latter, he may elect either to ratify or to disown the marriage.[19] Ratification of marriage by unauthorized person.

58. An agent or proxy for marriage may not, unless he[20] is expressly authorized so to do, contract his[20] principal in marriage either to himself or to any person who is his ward Agent must be expressly authorized to marry principal to himself or his ward.

[16] Bail. I. 75 ff. ; II. 4 ; Hed. 43 (col. i) : see s. 60.

[17] Bail. I. 76, 78, 85 ; Hed. 43. *Fuzuli* = busybody, meddler, impertinent fellow.

[18] Bail. I. 84 (par. 3) ; Hed. 42-44 ; cf. Bail. I. 75-77 ; 83-88 ; 45-49 ; 68-70.

[19] Hed. 42 : Shafii holds such marriages void. Bail. II. 8 : Shia authorities not unanimous. Cf. *Hassan Kutti* v. *Jainabha*, (1928) 52 Mad. 39. Many details given in Hanafi texts, which unlikely to come into operation in modern conditions : Bail. I. 60, 76, 85, 87. (*Newab*) *Mulka Jehan* v. *Mahomed Ushkerree K.*, (1873) L. R. I. A. SUPP. VOL. 192 ; *Sibt Ahmad* v. *Amina*, (1928) 50 All. 733 (marriage in 1917, decree in suit on 12 July, 1926 ; Court held delay and not prove agreement).

[20] Masculine includes feminine in s. 58.

SECTION 58. for marriage ; nor, where the principal is a woman, with a person not her equal in accordance with s. 79.[21]

The Daaim'ul-Islam (Shia Ismaili text) requires the authorization to be in the presence of two witnesses. *Quaere,*—Is this a rule of evidence, or is it attracted by s. 23, into substantive law ?

§ 7.—GUARDIANS FOR MARRIAGE.

Qualifications for guardianship for Marriage.

59. A guardian for marriage is a person authorized by law [22] to make a valid contract for effecting the marriage [23] of a minor or person of unsound mind.[24]

Wali.

"Guardian for marriage" is the usual translation of the Arabic word wali, which seems to have a wide connotation, ranging between, and including, the notions partly of guardianship and partly of agency.[25] The Hidaya [26] contains an interesting reference to the distinction between the executor and the wali, in the course of which it is said (as from Abu Hanifa with whom Imam Muhammad agrees) : "The contracting in marriage moreover is a right of the infant resting upon its guardian (in so much that if the infant require her guardian to contract her to any person, being her equal, for whom she has a liking, he must comply)." [26] "Guardians for marriage" would be what Prof. Sohn calls "tutelary representatives" in Roman law, i.e. where the principal himself is incapable of performing the juristic act in question.[27]

Tutelary representation.

As to the powers of a guardian of the person or of property, with reference to marriage, see ss. 230, 232A, comm.

A suit may be brought by a minor wife on an agreement between her father and her husband's father, that she would be paid a specified sum as soon as she enters her husband's house : the principle that one who is not a party to an agreement [23] cannot sue on it [28] has no application to such a case.

Tweddle *v.* Atkinson.

Who may be guardian for marriage.

60. No person under the age of puberty, or who is of unsound mind, or who does not profess Islam as a religion,[1]

[21] Hed. 388 (col. i.); Bail. I. 76, 77 ; II. 9 ; Shia authorities differ : *Sharaia'ul-Islam* holds the more approved doctrine to agree with Hanafi law.

[22] Guardians for marriage cannot be appointed by will : s. 68. *Quaere,* does appointment of guardians by Court under Guardians & Wards Act affect right of guardian for marriage ? See ss. 251, 254.

[23] (*Nawab*) *Khwaja M.* v. (*Nawab*) *Husaini B.*, (1910) 37 I. A. 152 = 32 All. 410 ; *Salubai Ganesh* v. *Keshavrao Vasudeo*, (1931) 56 Bom. 71 (see s. 294 on other similar cases & KHARCH-I-PANDAN)[1]; *Kullan* v. (*Mt.*) *Piari*, (1879) 14 Punj. Rec. 446, (No. 157) authorities collected : much stricter view of law taken than in more recent cases.

[24] Minors & persons of unsound mind not competent to contract marriage : s. 17B.

[25] Ind. Limit. Act, s. 21(1) : a guardian, committee, or manager of a person, included in terms "agent duly authorized."

[26] Hed. 699 (col. i) ; cf. s. 60, com.

[27] *Institutionen*, s. 32, Transl. p. 145, referred to in Holland, *Jurispr.*, 108.

[28] *Tweddle* v. *Atkinson*, (1861) 1 B. & S., 292.

[1] Cf. *Monijan B.* v. *Dist. Judge of Birbhum*, (1914) 42 Cal. 351.

may be a guardian for the marriage of a Muslim.[2] It is doubtful whether the Caste Disabilities Removal Act, 1850, applies to this rule and if so with what effect. SECTION 60.

Durru'l-Mukhtar : guardians for marriage.

"From the definition of a guardian," says the Durru'l-Mukhtar, a Hanafi authority : "it follows that a minor, an insane person and an executor [3] are absolutely excluded. Unless a minor or insane person ceases to be under the disqualification of minority or insanity, and unless an executor is also an heir, he may not be a guardian for marriage, whether or not the father has appointed him guardian by his will. And, since it is necessary for the guardian to be an heir, so a non-Muslim and a slave also may not be guardians for marriage.....Guardianship for marriage may arise in four ways : (1) by qarabat (i.e. blood relationship) : as a father may contract his daughter in marriage ; (2) by ownership : as a man may contract his slave in marriage ; (3) by the wila of emancipation ; (4) by imamat : as the ruler or the Kazi may contract one who has no heirs for marriage." [4] "The general rule is that the person who may deal with his own property, may deal with his person ; and one that may not deal with his own property, may not deal with his person ; hence, as a sane woman, who is of age, may deal with her property, she may also deal with her person by way of marriage." [4] "Bukhari and Yahya ibn Muayyan have said that on this point, that is, on the conditions of guardianship, not a single tradition is correct." [4] See ss. 61, 64, 65, 66.

General rule.

Absence of genuine traditions.

Effect of Caste Disabilities Removal Act—

The Caste Disabilities Removal Act, XXI. of 1850 has been considered in detail in s. 1, com. (to which the reader is referred). The Act protects a person who has "renounced or has been excluded from the communion of any religion" against "forfeiture of any right." [5]

on claim to act as guardian for marriage by :

1. convert from Islam.
2. one who is not, and has never been, a Muslim.

The question whether the Act abrogates the rule of Islamic law in s. 60 or modifies its effect, involves consequently a consideration of three preliminary matters : (1) whether competence to act as a guardian for marriage is a "right" within the meaning of the Act ; (2) whether the rule in s. 60 inflicts a forfeiture of that right and if it does, whether (3) the forfeiture arises from a renunciation of or exclusion from the communion of Islam.

With reference to (1) it was said by Imam Abu Hanifa that the "authority to contract minors in marriage is instituted, out of regard to their interest," "the contracting in marriage is a right of the infant resting upon her guardian," [6]

[2] Bail. I. 47, 49 ; II. 10. Cf. s. 54. *In the matter of Mahin Bibi*, (1874) 13 Beng. L. R. 160 (minor girl married by her mother, against consent of father, who turned Jew ; marriage held valid, and husband entitled to sue for restitution of conjugal rights. Cf. *Baksha* v. *Mirbaz*, [1888] 23 Punj. Rec. 126 (No. 51) (father turned *faqir* divorced his wife & "in lieu of dower" made his daughter over to her : from this extraordinary "dower," the Court inferred that guardianship of daughter was committed to her mother). See com.

[3] Executor has no right by virtue of executorship. Arabic idiom expresses that sense, which is made clear, by the next sentence.

[4] *Durru'l-Mukhtar*, Bk. on *Nikah*, Ch. on *Wali, ad init.*

[5] *Srimati Matangini* v. *Sr. Jaykali*, (1869) 5 Beng. L. R. 466, 494 (Sir B. Peacock, C. J.).

[6] Hed. 39 (col. ii.) 699 (col. i.), s. 59, com.

SECTION 60.

words that might almost have been uttered in a modern English Court. In consonance with this principle, the appointment of a guardian of the person of a minor has been held not to be a matter of such a private right as can be the subject of arbitration.[7] That "the duty of acting as a guardian for marriage requires intimate knowledge of what would be deemed suitable in Muslim society," and that a Hindu would not have such knowledge, was observed by Sir Asutosh Mookerjee.[8] Again, as being "a rule of law which directly determines the status of a person, the personal relations between him and another or others," it has been pronounced to be "to that extent scarcely within the purview of the Act."[9] That "the question involves the fitness of an infidel for the discharge of an important *duty* affecting the welfare of a third party who is a Muslim, and of the family who are also Muslims,"[10] was recognised by Robertson J. who held that the Act nevertheless abrogated the rule. (On the other hand, a Hindu father[11] and (following that decision) a Muslim father[10] have been held not to have by change of religion forfeited their "right" to the custody and education of their children, on the ground that there is such a "right" to custody within the meaning of the Act.[12] These cases do not deal with the question whether the power of acting in respect of the marriage of the minor stands on the same footing.)

Is acting as guardian exercising a right?

Taking all these pronouncements together, it cannot be said that the decisions establish the existence of such a "right" to act in regard to the marriage of a minor as must be deemed to be safe-guarded by the Caste Disabilities Removal Act.

Does s. 60 cause forfeiture of a right? it is not caused by renunciation or exclusion.

Leaving this first preliminary in a state of doubt, it is submitted that a consideration of the second and third preliminaries above referred to, greatly enhances the doubt as to the applicability of the Caste Disabilities Removal Act. That Act strikes against only such rules as inflict any forfeiture of rights on any person on account of his renouncing his religion or being excluded from its communion. The rule of Islamic law in question does not however inflict forfeiture of competence for guardianship, as a penalty for apostasy. What the texts lay down is that "an infidel"—not an apostate, nor one who is excommunicated—"cannot be guardian to a Muslim, whether male or female; nor a Muslim to an infidel, whether male or female :"[13] "upon the

But by difference of religion.

[7] *Mahadeo* v. *Bindeshri*, (1908) 30 All. 137.

[8] *Monijan* v. *Dist. Judge*, (1914) 42 Cal. 351, 360; cf. *Salubai* v. *Keshavrao*, (1931) 56 Bom. 71.

[9] (*Mt.*) *Khan* v. *Pir Shah*, [1884] 19 Punj. Rec., p. 353, (No. 182).

[10] *Gul. Md.* v. (*Mt.*) *Wazir B.*, [1901] 36 Punj. Rec., p. 191, (No. 60).

[11] *Muchoo* v. *Arzoon*, (1866) 5 W. R. 235.

[12] In cases where one of child's parents has been converted to another religion, difficult question is involved by reason of principle of FREEDOM OF RELIGION, as to religion in which child should be brought up. E.g. *Re Saithri, Jamoo* v. *Abram*, (1891) 16 Bom. 306; *Re Joshy Arsam*, (1895) 23 Cal. 290; *Mokoond L. S.* v. *Nobodip C. S.*, (1893) 25 Cal. 881. In *Shamsingh* v. *Santabi*, (1901) 25 Bom. 551, 554 (convert to Islam from Hinduism held not to have lost authority to give son in adoption to Hindu : assumed that authority to give in adoption was a right within Act XXI. of 1850).

[13] Bail. I. 48, *ll.* 1-2; Hed. 38; cf. *Monijan* v. *Distr. Judge*, (1914) 42 Cal. 351.

same principle that Musulmans and infidel cannot inherit of each other." [13] The rule of Islamic law rests on the basis to which Sir Asutosh Mookerjee, J.'s observation cited above refers,[5]—on the difficulties arising from different religious persuasions leading to different states of knowledge and qualifications. The distinction between (i) forfeiture as a penalty for apostasy, or for incurring excommunication,[14] and (ii) the natural effect of a difference of religion, is recognized and illustrated by the law of marriage.[15] SECTION 60.

Summing up, the Act in its terms is restricted to forfeiture for renunciation of or exclusion from a religion. A person who is not and has never been a Muslim, cannot under the law of Islam (apart from the Act) be guardian for the marriage of a Muslim. That rule would seem to be immune from the operation of the Act. Secondly as regards an apostate's competence, it is very doubtful whether, considering the nature of the rule of Islamic law, the protection of the Act would be extended to a person who renounces Islam : for the result of such protection would be that the apostate would have a right conferred upon him while he professes his newly adopted religion, which right other members of that religion (who had always adhered to it) do not possess.

It is consequently submitted that either the Act may be held to be inapplicable to the rule in s. 60 altogether ; or it may be so interpreted that (i) no disability or forfeiture is inflicted on a person in whom the right to act as guardian has become vested and who subsequently renounces Islam ; but so (ii) as to confer no competence on one who, never having been a Muslim, never was competent ; and never having changed his religion, never has suffered any forfeiture ; nor on one (iii) who changes his religion before the right accrues, so that when his competence is first in question, he has already rendered himself incapable of acquiring the right. Conclusion.

On the guardian's neglect of his duty wilfully or otherwise, and refusal of a good offer of marriage,[16] the texts seem to indicate proceedings similar to an application, under the Guardians and Wards Act, s. 7 for the appointment of a guardian to the minor, : [17] or proceedings to remove the existing guardian on the ground of his refusal to accept the offer of marriage. Neglect by guardian for marriage.

61. Under Hanafi law male agnates are entitled, in the order of precedence in which they are mentioned in ss. 622, 627 and 640, to act as guardians for marriage of a minor or a person of unsound mind ; [1] provided, that (in the absence of

(2) GUARDIANS FOR MARRIAGE : PERSONS ENTITLED

(*a*) Hanafi Law.

1. male agnatic descendants,
2. ascendants,
3. collaterals,
4. cognates, females agnates.

[14] Cf. *Nelawa* v. *Gurshiddappa*, (1936) 39 Bom. L. R. 211, 214 ; s.10, *n.*

[15] Though marriage permitted with certain non-Muslims, yet marriage between two Muslims would be dissolved if one of them apostatized from Islam : compare s. 50 with s. 195. But see s. 212A, com. on DISSOLUTION OF MUSLIM MARRIAGES BILL, 1939 (Select Committee has reported on it. See s. 70 *n.* 13, p. 155 f.).

[16] *Salubai Ganesh* v. *Keshavrao Vasudeo*, (1931) 56 Bom. 71. (Court has no power to force marriage on minor).

[17] See s. 61, com.

[1] List is given in comment in detail. But Court regards marriage of minors & authority of guardian for marriage, with jealousy : early marriages in themselves are not favoured : it is recognized that parties to marriage should exercise

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anything indicating otherwise,) where more persons than one are included in a group, the nearer excludes the remoter : proximity for this purpose being reckoned in the same manner as for inheritance.[2] According to Imam Muhammad, in the absence of male agnates, and according to Abu Hanifa

5. Maula.

in the absence of all relations by blood, the maula,[3] or successor by contract, as defined in s. 634(2), is the person entitled to be such guardian.[4] The person next entitled as

6. Court.

such guardian is the Sultan or ruler, and then the judge,[5] and a person appointed by him.[6]

Guardians for marriage :

The following persons are mentioned in the texts as being entitled to be guardians for marriage under Hanafi law : [7]

their own judgments : this is not new law : cf. Hed. 699 : " Contracting in marriage moreover is a right of the infant resting upon her guardian (insomuch that if the infant require her guardian to contract her to any person, being her equal, for whom she has a liking, he must comply)." Thus the right is said to be of the infant, viz. belonging to her,—though exercised, on the infant's behalf, by the guardian : it is not the right of the guardian : cf. e.g. *Hassan Kutti* v. *Jainabha*, (1928) 52 Mad. 39 ; *Salubai G.* v. *Keshavrao V.*, (1931) 56 Bom. 71.

[2] I.e. (i) descendants, (ii) ascendants, (iii) collaterals : see ss. 622, 627, 640 [for Hindu Law, Mayne, s. 84]. Precedence is as follows : (1) MALE AGNATES, [see s. 605(5-6)]. (2) Abu Hanifa holds (contrary to Imam Muhammad : some confusion as to whether Abu Yusuf agreed with Abu Hanifa or Imam Muhammad : generally believed that he agreed with Abu Hanifa : Hed. 39 Bail. I. 46) COGNATES (see s. 605(6)) & FEMALE AGNATES in the following order, viz. (*a*) MOTHER ; (*b*) *semble*, ascendants, descendants & collaterals respectively, other than male agnates ; but so that (i) female agnate is preferred to female cognate in same line ; & (ii) amongst collaterals, male is preferred to female ; (Bail. I. 45-46 ; *Sharh-i-Viqaya*, Ch. II. *ad. fin.*) : but provided that (iii) no collateral entitled to be such guardian, who is not within degrees of relation establishing prohibition to marry. So in Hed. 38. This prudent limitation seems to be absent from *Fatawa 'Alamgiri*, *Durr-ul-Mukhtar*, *Sharh-i-Vaqaya*, nor does it seem to apply to agnates : see s. 251. Hed. 37 : *Durr-ul-Mukhtar*, Vol. II. Book on Marr. ch. on Guard. opening lines, mentions that being an heir of minor or insane person, is one qualification for being guardian, from which deduced that executor is not guardian. See Bail. I. 47, 48. *Sharh-i-Viqaya*, Vol. II. *Nikah*, ch. II. (*ad. med.*) : a " guardian is he alone who is an *asaba* in his own right, that is, a male who is related to the deceased without intervention of a female." Then follows list of *asaba* (agnates) in order of precedence. See s. 622. Where there is competition between descendant & ascendant (which cannot arise in case of minors, who can have no descendants), Imam Muhammad prefers ascendant to descendant, contrary to Abu Hanifa & Abu Yusuf. *Fatawa 'Alamgiri* suggests that both should exercise power jointly ; Bail. I. 45, 49 ; Hed. 39. Cf. " A son is the guardian of his insane father for marriage but not of his property."

[3] See s. 634(2) ; also called more explicitly " *maula* of friendship," to distinguish him from " *maula* of emancipation." i.e. emancipator of slave.

[4] Hed. 39.

[5] Bail. I. 47, and *Sharh-i-Viqaya* say that judge has no authority, unless specially authorised in that behalf ; but " sultan's " authority would probably come within inherent jurisdiction of Courts in British India, even without any such provision of Muslim law. Cf. s. 11B com. as to powers of *Kazi* (judge) ; *Mahadeo Prasad* v. *Bindeshri Prasad*, (1908) 30 All. 137, 139 *per* Karamat Husain, J. See also *Gurdeo Singh* v. *Chandrikah Singh*, (1907) 26 Cal. 193, 203, ff. ; *Hukumchand Boid* v. *Kamalanad Singh*, (1905) 33 Cal. 927, 931 ; *Re H.'s Settlement*, *H.* v. *H.*, [1909] 2 Ch. 260.

[6] Bail. I. 46-7 ; Hed. 39.

[7] See *n.* 1. Same list applies to persons of unsound mind as to minors.

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(1) (i) Son,[7] (ii) Son's son; (iii) Son's son's son; (iv) *Other male agnatic descendants*;

(2) (i) Father;[8] (ii) Father's father; (iii) Father's father's father; (iv) *Other male agnatic ascendants*;

(3) (i) Full brother; (ii) Consanguine[9] half-brother; (iii) Son of full brother; (iv) Son of consanguine half-brother; and (v) *In the same order how-low-soever;*[10] (vi) Full uncle;[11] (vii) Father's consanguine half-brother; (viii) Son of full uncle; (ix) Son of father's consanguine brother, and (x) *Their descendants*; (xi) Father's full paternal uncle; (xii) Father's paternal consanguine uncle; (xiii) and (xiv) Sons of (xi) and (xii) *in the same order*; (xv) Grandfather's full paternal uncle; (xvi) Grandfather's consanguine paternal uncle; (xvii) and (xviii) the sons of (xv) and (xvi), *in the same order.*

Guardians for marriage.

(4) According to Imam Abu Hanifa but not Imam Abu Yusuf,—

(*a*) Mother;

(*b*) (i) Mother's father; Father's mother; *and* Mother's mother; &c., (see table under s. 616, omitting F, FF, FFF and FFFF); *and* (ii) *Other cognate ascendants*;

(*c*) (i) Daughter; (ii) Son's daughter; (iii) Daughter's daughter; *and* Daughter's son; (iv) Son's son's daughter; (v) Son's daughter's daughter, daughter's son's daughter, daughter's daughter's daughter, son's daughter's son, daughter's son's son *and* daughter's daughter's son; (vi) *and Other cognates & female agnate from descendants*;

(*d*) FIRST, *descendants of father & mother*: (i) Full sister, (ii) Consanguine sister; (iii) Uterine sister; (iv) Son of full sister; (v) Daughter of full brother, *and* daughter of full sister; (vi) Son of consanguine sister; (vii) Daughter of consanguine mother *and* daughter of consanguine sister; (viii) Son of uterine brother; (ix) Daughter of uterine brother, son of uterine sister, *and* daughter of uterine sister, *and so on.* SECONDLY *descendants of grand parents* [*in same order as above, adding the words "of the father or mother" (e.g. "full sister of the father" or "full sister of the mother": the father's relations apparently having priority in each grade.*]

(5) The "successor by contract," as defined in s. 634(2);

(6) The Court, or any person appointed by the Court.

All the three chief exponents of Hanafi law are of opinion that male agnates are entitled in the first instance to be the guardians of minors.

Male agnates first entitled.

When, however, there are no male agnates, and the question is who are

[8] *Baksha* v. *Mirbaz*, [1888] 23 Punj. Rec. 162, (No. 51), (father is preferable guardian in marriage to mother, whose claims follow next after male residuaries' in same order as in regard to inheritance).

[9] "Consanguine" = "related as children of same father: opposed to "uterine" = (of the same mother), pertaining to those so related."—Oxford Dict.

[10] Thus (*a*) full brother is preferred to half-brother; and (*b*) son of father's full brother, to son of father's half-brother.

[11] (*Mt.*) *Atkia B.* v. *Muhammad Ibrahim*, [1916] AIR (P. C.) 250 = 21 C. W. N. 345, 353, col. ii.

SECTION 61.
Abu Hanifa and Imam Muhammad differ as to females and cognates.

next entitled, then the view of one is not clearly known and the other two differ from one another. Abu Hanifa's view is, that, in the absence of the male agnates, the right to guardianship is in "cognates and female agnates." The expression used in the texts (e.g. in the Fatawa 'Alamgiri) which is translated "cognates," is zavil arham, which means "persons connected through the womb," or "through females." In the law of inheritance the term zavil arham is used to denote the group of persons designated "distant kindred" in English books, and includes all cognates (except "true grandmothers") together with all female agnates remoter than the sister. It is a wrong use of the term to include any agnates in zavil arham. In the law of inheritance, however, such use of it is justified by convenience. But zavil arham is used more accurately in connection with guardianship for marriage, and not in the same sense as in the law of inheritance. This is obvious from the examples given in Bail. I. 46, which include the mother, daughter and son's daughter, none of whom fall within the class inaccurately designated zavil arham or "distant kindred" in regard to inheritance. The nearest male cognate mentioned in Bail. I. 46 is the maternal uncle. But it must be a mere accident that a daughter's son, or other male cognate, nearer than a maternal uncle, is not mentioned, since it is expressly mentioned that a daughter's daughter (i.e. a female cognate from amongst the descendants) may be a guardian. The Sharh'i-Viqaya instances both the daughter's son and grand-daughter's son, as eligible for guardianship.[12]

(Hanafi law.) one of several joint guardians acting.

62. Where more persons than one are equally entitled to be guardians for marriage, any one of them may under Hanafi law contract the minor or insane person in marriage.[13]

[12] MISTAKEN CRITICISM OF TEXTS. Priority amongst those entitled to be guardians, is perfectly clear. Sir R. Wilson, had however referred to passage in *Fatawa 'Alamgiri*, translated in Bail. I. 46 as "very strange," & as containing "numerous unexplained gaps:" *Anglo-Muham. Law*, (2nd edition), p. 171. This erroneous criticism was omitted in later editions. But reference to it is retained in this work to prevent similar misunderstandings. There are no gaps, unless the failure to mention any cognate from amongst descendants (nearest male cognate mentioned in examples being maternal uncle) be considered gap. List is illustrative & hypothetical: given for explaining order in which right accrues. Possibility of existence of all or any of persons mentioned as being entitled to be guardians not suggested. Necessary to include descendants in it, as it is list of those who are guardians of insane persons as well as of minors. This point seems to have been overlooked by Sir R. Wilson in his earlier edition who seems to have thought that Arabic texts inadvertently proceeded on basis that a minor could have children. The extreme improbability of such an error ought to have been recognized. The improbability is enhanced by fact that minority, in Muhammadan law, means age under puberty. The old text writers had to carry their law in their heads, & they were not apt to overlook points, or to make mistakes of this nature, as the aid of books & libraries at every step was neither available nor needed by them. In no case is caution more advisable than in finding fault with the accuracy of such text writers.

[13] Bail. I. 49; Hed. 698: or, to adopt words of *Zahir Riwayat*, if one of guardians agrees to the marriage before it is contracted, it is as efficacious as if all consented after the marriage. *Durr-ul-Mukhtar*: *Nikah*, on Guardianship (*Bab-ul-wila*).

[14] (*Sheik*) *Kaloo* v. (*Sheik*) *Guribollah*, (1868) 13 Beng. L. R. 63 = 10 W. R. 12; *Baksha* v. *Mirbaz*, [1888] 23 Punj. Rec. 126, (No. 51) (mother held entitled by delegation of power, father having turned *faqir* & made over daughter to mother, whom he divorced, "in lieu of dower"); see s. 94 what may be subject of *mahr*.

SECTION 63. (Hanafi law.) In absence of primary guardian, next in order may act.

63. Where the person primarily entitled to be guardian for marriage is precluded [14] from acting as such guardian, or is at such a distance, or in such a place, that there is danger of a good offer of marriage being lost if his approval has to be obtained,[15] the person next entitled may under Hanafi law act in that capacity.

(Shiah and Shafii law.) Father and "true grandfather" alone guardians. (Maliki law.) Father alone guardian.

64.[16] Under Shia and Shafii law no person other than the father and father's father, and under Maliki law no person other than the father, is entitled to act as guardian for marriage.[17] Under Shia and Shafii law, either the father or father's father may contract the minor [18] or lunatic [19] in marriage, the authority of the father's father having precedence over the father's.[20]

Illustration.

Two minors, are contracted in marriage to each other by their fathers or grandfathers : then on the death of either, the other is entitled to inherit as husband or wife. If, however, the marriage be contracted by any other person on behalf of the minors, the contract would, in Shia law, be in suspense, and if either spouse died during minority, the other would not be entitled to inherit, unless on reaching puberty, he or she ratified the marriage.[21]

(Shia law.) Guardian for marriage of lunatic.

65. Under Shia law if it becomes necessary that an adult of unsound mind should marry, he may be contracted in

15 Bail. I. 49. Hed. 39.

16 Sect. 66 is now included in s. 64.

17 Hed. 36 (col. ii). Maliki law stated in s. 66 in earlier editions.

18 Bail. II. 9, 12.

19 See s. 234.

20 Bail. II. 7, 10 (5th, 8th); Hed. 36. *Badal Aurat* v. *Q.-E.*, (1891) 19 Cal. 79, 82 (thus by Shia, Shafii & Maliki law, (ss. 65, 76) marriage contracted on behalf of minor, by any person other than father or grandfather, is an unauthorized act, requiring ratification even though it be contracted by MOTHER : Bail. II. 12 or BROTHER, or PATERNAL UNCLE : Bail. II. 9); *Mulka Jehan* v. *Mahomed*, (1873) L. R. I. A., SUPP. 192 = 26 W. R. 26 ISMAILI LAW : See A. A. A. Fyzee, *Marriage of Minors* (April 1936) 38 Bom. L. R. *Journal*, 41-4 : with reference to marriage by person other than father & father's father, it is said in *Al-Yanbu* (an Ismaili authority) "the marriage shall be void ; & there shall be no right of inheritance between them & his pronouncement of *talaq* shall not affect them." *Kitabul Hawashi* (Ismaili collection of glosses attributed to Aminji b. Jalal): "If both parties to such unauthorized marriage become major & he has intercourse with her, she becomes entitled to *mahr*, but they should be separated :" *Majmu'ul-fiqh* ; *Mukhtasar-al Musannif* is in identical terms. All these passages from texts translated by Mr. Fyzee. Ismaili law with reference to relative authority of father & grandfather somewhat obscure : Kazi Abu Hanifa an-Nu'man b. Muhammad, (author of the *Daaim'ul-Islam*) in *Al-Yanbu*, II. *Marr., Guardians*, says : "The fathers' giving in marriage is binding on their minor sons & daughters. They have no such authority when they attain puberty. The father's father is in place of father for purpose of giving away a minor girl in marriage & he (grandfather) is preferable for the *aqd* = contract, viz. of marriage. If both (father & grandfather) perform marriages together (that is, at the same time) the marriage by the first of them [? to perform it] is valid." The last sentence is obscure, but seems to = that in case of a competition between two marriages that one which has been performed first in point of time shall prevail.

21 Bail. II. 11.

SECTION 65.

marriage by his father or agnatic grandfather or by the executor, of either.[22] The Court may contract such a person in marriage whenever marriage is for his benefit.[22]

(3) TERMINATION OF AUTHORITY OF GUARDIAN FOR MARRIAGE.

67.[16] The authority of a guardian for marriage ceases when the ward becomes competent to contract himself or herself in marriage.

(4) NO TESTAMENTARY GUARDIANS FOR MARRIAGE.

68. A father [24] has no power to appoint by will a guardian for the marriage of his minor children : the right of the persons entitled by law to be such guardians is not affected by any such appointment.[25]

§ 8.—OPTION OF AVOIDING CERTAIN MARRIAGES.

(1) Option to parties to marriage.

69.[1] (1) Under Hanafi law, a minor or lunatic contracted in marriage by a guardian other than his[2] son,[3] father, or agnatic grandfather, has, on attaining puberty or recovering reason, the option of avoiding the marriage.[4]

[22] Bail. II. 8 (par. 3, 4). Masculine includes feminine in s. 65.

[23] See s. 17B ; *Sobrati* v. *Jungli*, (1898) 2 C. W. N. 245 ; *Muhammad Ibrahim* v. *Gulam Ahmed*, (1864) 1 Bom. H. C. R. 236 ; *Asghur Ali* v. *Muhabbat A.*, (1874) 22 W. R. 403 (restitution of conjugal rights refused as alleged wife, major, had not consented to marriage ; her father having purported to contract her in marriage without being authorized to do so. Cf. Bail. I. 58-59). Cf. *Hassan Kutti* v. *Jainabha*, (1928) 52 Mad. 39.

[24] If father has no such power, *a fortiori* no other person has.

[25] Bail. I. 47 ; II. 8. (*Mt.*) *Atkia* v. *Muhammad Ibrahim*, [1916] AIR (P. C.) 250 = 21 C. W. N. 345, 353, col. ii.

[1] "Option of puberty" (Ar. *khyar-ul-bulugh*) recognized in English books on Muhammadan law, but "options of sanity," or "of inequality" or "of improper dower" are new. See art. on "*Muslim wife's right of dissolving her marriage*" by A. A. A. Fyzee, 38 Bom. L. R. *Journal*, (1936) 113-123. See DISSOLUTION OF MUSLIM MARRIAGES Act, 1939 (as yet at Bill stage) : p. 156 *n.* 13.

[2] Masculine includes feminine.

[3] Only in Hanafi law can son act on behalf of lunatic father ; for (i) in schools of law other than Hanafi, whether Sunni or Shia, son never recognized as guardian for marriage (ss. 64-66) ; (ii) minor cannot have son, minority being synonymous with puberty ; (iii) even if it were possible no minor eligible for guardianship. See ss. 60, 61, & com.

[4] Bail. I. 50, 53 ; *Abdul Rahiman* v. *Aminabai*, (1934) 59 Bom. 426 ; (*Mt.*) *Ummatul Fatima* v. *Ali Akbar*, [1926] AIR (OUDH) 521 ; *Muhammad Sharif* v. *Khuda Bakhsh*, [1936] AIR (LAH.) 683. Under English law binding marriage may be contracted by male of age of 14 years, & female of 12 ; marriage by infant of more tender years not void, but voidable by infant upon attaining age for contracting marriage : Hals., *Laws of Eng.* XVII. § 156 ; XVI. § 194 ; cf. abolished writ *dum fuit intra aetatem* whereby an infant maketh a feoffment in fee of his lands or for life or a gift in tail, when he cometh of age he may have his writ to recover those lands or tenements which were so aliened by him : Fitzherbert, *Natura Brevium* 192 g. *Aziz Bano* v. *Md. Ibrahim Husain*, (1925) 47 All. 823, 838, 839, 847 = 23 All. L. J. 768, 781, 788 (s. 70 cited with approval) ; *Jaygunessa B.* v. *Mahommad Ali Biswas*, [1938] 1 Cal. 139 (minors marriage depends upon consent of guardian : without such consent it is not void but may be ratified by minor on attaining majority ; cf. 42 Cal. W. N. *Journal*, p. xxx).

(2) A marriage contracted by the minor himself [2] is voidable at his option on his attaining puberty, notwithstanding that his guardian had approved of it, provided that such guardian was other than the son, father, or agnatic grandfather. The option is prolonged until the minor is acquainted with the fact that he has such a right.[5] SECTION 69.

Sections 69-80 provide for (*a*) marriages being dissolved,—such dissolution must be distinguished from (*b*) separation under ss. 201-209, in which (i) the parties are incapable of attaining one of the primary objects of marriage, viz., the procreation of children : [7] see s. 17, or (ii) a person has purported to contract the marriage in question (viz. either his own marriage or some one else's) who was not competent or authorized to contract it (s. 17) and from (*c*) the dissolution of a complete and effective marriage either by the pronouncement of one or more talaqs (ss. 119-157), or ila (ss. 158-161), or khul or mubaraat (ss. 162-186), or zihar (ss. 187-192), or lian (ss. 193-194), or apostasy (ss. 149A-200). Avoiding marriages distinguished from having them declared null and void.

70.[7] The marriage of a minor child or grandchild contracted by his [2] father or paternal grandfather [8] is upon the minor attaining puberty,[9] voidable at his [2] option in the following cases, viz. Option ; father or paternal grandfather contracting.

(*a*) under all schools of law if the marriage has been fraudulently or negligently contracted ; [9] and also

(*b*) under Abu Yusuf's and Imam Muhammad's exposition of Hanafi law [10] (i) when an improper dower has been agreed upon,[11] or (ii) the marriage has been contracted with one who in respect of the matters mentioned in s. 79 is not the equal [12] of the minor ; [13]

[5] *Bismillah B.* v. *Nur Md.*, (1921) 44 All. 61—Imam Muhammad's opinion preferred (viz. that duration of option depends on knowledge).

[6] Absence of hope of offspring does not, however, affect validity of marriage : s. 17(1) *n.*, citing *Abdul Kadir* v. *Salima*, (1886) 8 All. 149, 155.

[7] Sect. 70 (= ss. 71, 72 of previous editions) cited & applied : *Aziz Bano* v. *Md. Ibrahim Husain*, (1925) 47 All. 823.

[8] A *fortiori*, if contracted by some other guardian.

[9] Bail. I. 74 ; Bail. II. 63, 66 (cancellation of MARRIAGES for DECEPTION as to party being free or slave) ; Bail. II. 62 ("*sixth law*"). *Abdul Latif K.* v. *Niwaz Ahmed K.*, (1909) 6 All. L. J. 423 (fraud by concealing fact that woman is so ill, that consummation impossible) ; *Sibt Ahmad* v. *Amina K.*, (1928) 50 All. 733, 739 (father deceived into agreeing to marriage on promise of being given ½ of certain property). But see *Kulsumbi* v. *Abd. Kadir*, (1920) 45 Bom. 151 = s. 38 *ill.* (7). See also Hindu case of *Shridhar* v. *Hiralal*, (1887) 12 Bom. 480. Eng. law of effect of FRAUD on marriage : *Swift* v. *Kelly*, (1935) 3 Knapp, 257-293 ; of DURESS : *Scott* v. *Sebright*, (1886) 12 P. D. 21 ; *Hussein* v. *H.*, [1938] P. 159 (PROBATE DIVISION).

[10] See ss. 11A & 11B.

[11] I.e. to pay more, or to receive less, than "proper dower," defined in s. 97.

[12] *Kuf'* = equal (in Arabic). *Kafa'at* = equality.

[13] Bail. I. 73. Abu Hanifa holds such marriage not voidable in said circum-

SECTION 70.

(*c*) under the more approved doctrine of Shia law, if the father or grandfather has agreed to an improper dower ; [14]

(*d*) under a decision of the Allahabad High Court, if a Shia minor has been married to a Sunni husband.[15]

Confirmation by Court.

73.[16] The exercise of an option to avoid a marriage must be confirmed [17] by an order on application to the Court.[18] The marriage continues in force until such confirmation ;[19] but the confirmation dates back to the time when the option was exercised.

Exercise of option how nullified.

75. The exercise by a wife of her option to avoid a marriage becomes void, and cannot be confirmed by the Court, if, before an application is made to the Court for its confirmation, the wife permits[19a] the husband to have sexual intercourse with her.[20]

Illustration.

A female minor, is married through her guardian who is neither her father nor grandfather. After attaining puberty, she permits her husband to consummate,[21] or asks for maintenance. This amounts to assent to the marriage by implication, and she may not afterwards avoid the marriage.[22]

stances ; his opinion stated in *Fatawa 'Alamgiri* to be more sound. But Courts tend to liberalize law in favour of women : *Aziz Bano* v. *Md. Ibrahim*, (1925) 47 All. 823 ; *Hasan* v. *Jainabha*, (1928) 62 Mad. 39 : *Abdul Karim* v. *Aminabai*, (1934) 59 Bom. 426. DISSOLUTION OF MUSLIM MARRIAGES ACT, 1939 (as yet at Bill stage) Bill II. of 1938, *Gaz. of Ind.*, Part V, 12 Mar. 1938, p. 35 ; as amended by Select Com., 11 Feb. 1939, p. 5. So amended, objections pointed out in (1938) XVI. Bom. L. J. 85 are removed. There are now 9 clearly stated grounds for dissolution of marriage ; clause (x) saves other grounds recognized as valid. Cl. (ix) contains six sub-clauses.

[14] *Aziz Bano* v. *Md. Ibrahim Hussain*, (1925) 47 All. 823, 838 = 23 All. L. J. 768, 781, 788 ; Bail. II. 9, (2nd) ; 80 (2nd). Some Shia authorities hold that such marriage valid but that " dower is null, and that she is entitled to proper dower." See s. 97. Under Shia law no person other than father or grandfather is guardian for marriage ; see s. 61.

[15] *Aziz Bano* v. *Muhammad Ibrahim Husain*, (1925) 47 All. 823, 847 = 23 All. L. J. 768, 782 (marriage valid, but voidable as it may affect her religious sentiment & may therefore be said to be to her manifest disadvantage) ; cf. *Sibt Ahmed* v. *Amina K.*, (1928) 50 All. 733.

[16] Sect. 73 = ss. 73, 74 of earlier editions.

[17] (*Mt.*) *Ghulam Fatima* v. *Rahman*, [1919] 54 P. R. 330, (No. 127) (suit commenced by minor : she attained majority pendente lite : suit allowed to proceed).

[18] Application sufficient ; suit not necessary : *Mafizuddin Moudal* v. *Rahima Bibi*, (1933) 37 C. W. N. 1043. See Shariat Act, 1937, s. 5 : District Judge may on petition by Muslim married woman dissolve marriage. (Petition & application may be considered to be the same & distinguished from a suit : See Limitation Act).

[19] Bail. I. 50 : cf. Bail. I. 30 (par. 2). But see *Shafiullah* v. *Emperor*, [1934] 32 All. L. J. 387 (minor on attaining puberty married person other than one to whom she had during minority been married by her father : her action held as exercise of her option : High Court set aside her conviction for bigamy : Indian Penal Code, s. 494).

[19a] Option not lost by consummation without her consent : Bail. I. 59 ; *Abdul Karim* v. *Aminabai*, (1934) 59 Bom. 426.

[20] Bail. I. 52.

[21] Bail. I. 51, 59.

[22] Bail. I. 51.

But if the marriage is consummated without her consent, her option is not determined.[23] SECTION 75.

76. Subject to s. 78 and the decisions of the British Courts (which increasingly tend to liberalize the law, and to make it equitable) the option to avoid a marriage is determined, if the minor, being a virgin, does not exercise it immediately on attaining puberty.[24]

Steps for safeguarding option.

A minor girl owning property yielding about Rs. 150 a month, was married to a tailor's son. Chaudhuri, J., took the very beneficent step of appointing a Muslim lady as governess (on a salary of Rs. 15 a month) to stay with the minor, and to be at hand at the time when the girl would attain puberty so that the girl may, at the very moment, if she so desired, repudiate her marriage : the guardian of the minor girl was made to undertake that her husband would not be allowed to come to her house or to communicate with her, until she attained puberty.[25]

Explicit assent by other than a virgin.

77. If the minor was not a virgin[26] at the time of the marriage, or if she arrives at puberty while living with her husband, her option is not determined unless she assents, explicitly or by implication, to the marriage.[27]

Ignorance of law as to option.

78. When the wife is ignorant of her right[28] to avoid the marriage, her option is not determined at the time and in the manner stated in ss. 76 and 77 ; when she is ignorant of the fact of the marriage, her option is not determined until she has knowledge of that fact.[29]

[23] Bail. I. 59 ; *Abdul Karim* v. *Aminabai*, (1934) 59 Bom. 426 (Court leans in favour of wife : husband being dominant in matters matrimonial) ; *Hassan Kutti* v. *Jainabha*, (1928) 52 Mad. 30 ; *Aziz Bano* v. *Md. Ibrahim*, (1925) 47 All. 823.

[24] Bail. I. 51 ; Hed. 37-38 ; cf. *Baksha* v. *Mirbaz*, (1887) 23 Punj. Rec. 126 (No. 51) ; s. 78. See *n.* 14 as to Dissolution of Muslim Marriage Bill.

[25] *Re* (*Mt.*) *Hurunnessa B.*, (1913) 18 Cal. W. N. 853.

[26] Reason for distinction between virgins & others explained : s. 17B, *nn.*

[27] Bail. I. 50-51 ; Hed. 37. See ss. 76-78.

[28] So held in *Bismillah B.* v. *Nur Md.*, (1921) 44 All. 61 (" if she does not know that she has a right of rescinding marriage she will have power to do so when she is aware of it.") This eminently equitable decision followed *Sugha* v. *Muzaffari*, (1928) 27 All. L. J. 101 ; *Rahmat Ali* v. (*Mt.*) *Allah Ditti*, (1929) 11 Lah. 172, where all cases carefully reviewed. See also *Aziz Bano* v. *Md. Ibrahim Husain*, (1925) 47 All. 823 ; *Abdul Karim* v. *Aminabai*, (1934) 59 Bom. 426. Hed. 37 (col. ii. par. ii.) makes distinction between IGNORANCE OF LAW & OF FACT : " ignorance is no plea with respect to an institute of the law," because the prophet of God has said," *Sharh-i-Viqaya, Nikah*, Ch. II., *Wali* & Equality (*ad. med.*) " seek knowledge even though it be in China : for the seeking of KNOWLEDGE IS OBLIGATORY on every Mussulman," probably taken from maxim of Roman law *regula est juris ignorantiam cuique nocere. Dig.* XXI. vi. 9. *Ata Mohammad Chawdhry* v. *Saiqal B.*, (1910) 8 All. L. J. 952, 956 (on application of this maxim). Exception to this maxim : Hed. 37 : it does not apply to female slave, " who, being employed in the service of her master, has no opportunity to obtain any knowledge of the law."

[29] Bail. I. 50-51 ; Hed. 37.

SECTION 79. (2) OPTION TO QUASI-GUARDIANS; "UNEQUAL" MARRIAGE.

79.[30] Under Hanafi law, where a woman being of age and sound of mind, contracts herself in marriage to a person whom the Court does not consider her equal in respect of the following matters, viz.

the lineage of the husband ;

the husband or his father, or grandfather, belonging to a religion other than Islam, or being a slave (which are exceptionable circumstances) ;

the husband having sufficient means to pay the mahr, and to maintain the wife ;

his being pious and virtuous ; and,—

his exercising a trade or profession, much inferior to that exercised by the members of the woman's family,[31]—

the marriage may be dissolved by the Court [32] on the application of persons who, being agnates,[33] would have been her guardians for marriage if she had been a minor or of unsound mind, (and who may be called quasi-guardians) : Provided that none of the said quasi-guardians [34] has consented to, or acquiesced in, the marriage, nor the woman given birth to a child.[35]

The Shia law requires "equality" only in regard to Islam [36] which point is really covered by s. 51 relating to prohibition by difference of religion.[37]

§ 9.—PROOF AND PRESUMPTION OF MARRIAGE.

Proof of bride's consent.

81.[1] When the question arises whether a marriage has been contracted in due form, the burden of proving that the

[30] Sect. 79 = ss. 79-80 in earlier editions.

[31] Bail. I. 62-66 : Hed. 40. Abdur Rahim, *Muham. Jurip.*, 333. This portion of s. 79 = s. 80 in earlier editions.

[32] In *Jamait Ali* v. *V. Mir Md.*, (1916) 51 Punj. Rec. 371 (No. 119) discretionary nature of jurisdiction seems overlooked.

[33] Agnatic relationship alone deemed to make them members of same family as the woman : a relic of pre-Islamic Arab conceptions.

[34] *Mohumdee* v. *Bairam*, (1866) 1 Agra, 130.

[35] Bail. I. 67-69. If "one of her guardians has given his consent, it is no longer in power of that guardian, or of any other equal to, or below, him to cancel marriage, but one superior to him may still do so :" (Bail. I. 69). So bride's father held entitled to sue for dissolution of marriage though her mother & brother had consented : *Muhamdee* v. *Bairam*, (1866) 1 Agra 130 ; see s. 76, com.

[36] *Aziz Bano* v. *Muhammad Ibrahim Husain*, (1925) 47 All. 823, 826 approving s. 80 (now incorporated in s. 79); (*Syed*) *Gholam Husain* v. (*Mt.*) *Setabah B.*, (1866) 6 W. R. 88 (Sunni married to Shia wife); *Jamait A. S.* v. *Mir M.*, (1916) 51 Punj. Rec. 371, 373 (No. 119).

[37] See Bail. II. 34, and ss. 50, 51 ; *Aziz Bano* v. *Muhammad Ibrahim Hussain*, (1925) 47 All. 825, 826.

[1] Sect. 81 referred to with approval : *Sampatia Bibi* v. *Mir Mahboob Ali*, [1936] 34 All. L. J. 911. See s. 79 *n.* 30.

alleged wife consented to it, is upon the person who affirms it ;[2] provided that unless the parties were prohibited from intermarrying[3] it is in the following cases presumed that they were validly married,[4] and the burden of proving that their cohabitation was illegal, shifts to the person who alleges it to be illegal ;[5] viz. where (1) it is proved that the parties cohabited together continuously and for a long period, as husband and wife,[6] and were treated as such by their friends ;[7] or (2) either party has acknowledged that he or she was married to the other, (and the other party has con-

SECTION 81.

Presumption from,—

cohabitation and repute.

acknowledgment of marriage,

[2] Ind. Evid. Act (including s. 32(5) thereof) applies to proof. *Zaminali* v. *Azizunnissa*, (1932) 55 All. 139 ; *Shabban B.* v. *Khalis Shah*, (1918) 16 All. L. J. 754 ; Bail. I. 58, 59. *Habibur R.* v. *Altaf A.*, (1921) 48 I. A. 114, 120 "as marriage may be constituted without any ceremonial, existence of a marriage may be an open question. Direct proof may be available ; but if there be no such, indirect proof may suffice.")

[3] *Khajooroonissa* v. *Rowshan J.*, (1876) 3 I. A. 291 = 2 Cal. 186 ; (*Mt.*) *Jani B.* v. (*Mt.*) *Munni*, (1877) 12 Punj. Rec. 183 (No. 71); acknowledgment of legitimacy in favour of son INDIRECT PROOF OF MARRIAGE : *Habibul Rahman* v. *Altafali*, (1921) 48 I. A. 114, 120.

[4] CONTINUAL COHABITATION & acknowledgment of parentage, PRESUMPTIVE EVIDENCE OF MARRIAGE & LEGITIMACY : Ind. Evid. Act, s. 50 & *ill.* (*a*); *Hiday-ut-oollah* v. *Rai J. K.*, (1844) 3 Moo. I. A. 295 (marriage held proved); *Habibur Rahman* v. *Altaf Ali*, (1921) 48 I. A. 114, 120 ; *Imambundi* v. *Mutsaddi*, 45 I. A. 73, 81, 82 (evidence considered); *Monowar K.* v. *Abdoollah K.*, (1871) 3 N. W. 177 (alleged wife Hindu : no marriage); *M. Bauker H. K.* v. *Shar-fsa B.*, (1860) 8 Moo. I. A. 136 (held marriage not proved) followed *Ashrafood D. A.* v. *Hyder H. K.*, (1866) 11 Moo. I. A. 94 (marriage not proved); *Ashruffunnissa* v. (*Mt.*) *Azeemun*, (1864) 1 W. R. 17 (marriage presumed); *Mouji Lal* v. (*Mt.*) *Chandrabati K.*, (1911) 38 I. A. 122 (CAL.) (all persons recognized parties as man & wife : so described in important documents : marriage proved); *Irshad A.* v. (*Mt.*) *Kariman*, (1917) 20 Bom. L. R. 790, (P. C.) (OUDH) (Jan. 1869 respondent signed document as prostitute ; 1882 matrimonial proceedings : she was claimed & she acknowledged to be wife : her son treated as lawful issue : these circumstances might not have sufficed : but marriage on 11 June, 1869, asserted in document of 30 July, 1872 : respondent herself disbelieved as witness but on other evidence marriage held proved); *Firoz Din* v. *Nawab K.*, (1927) 9 Lah. 224 ; *Maung Kyi* v. *Ma Shwe Baw*, (1929) 7 Rang. 777 (marriage proved). Similar PRESUMPTION AS TO CONTINUATION OF MUTA : see s. 25(5); *Shoharat* v. *Jafri*, (1914) 17 Bom. L. R. 13 (P. C.) (cohabitation having originated in a *mut'a* : no evidence as to original term of *mut'a* but such term may from time to time have been extended by agreement : "& in their Lordships opinion if it be once proved that cohabitation originated in a *mut'a* marriage, proper inference would, in default of evidence to contrary, be that *mut'a* continued during whole period of cohabitation"); *Habib-ur-Rahman* v. *Altaf A.*, (1921) 48 I. A. 116, 120 ; *Aga Mohammad ibn Ali* v. *Zohra B.*, (1927) 3 Luck. 199 (*mut'a* disproved); *Maung Kyi* v. *Ma Shwe Baw*, (1929) 7 Rang. 777, (law recapitulated); *Hasan Ali Mirja* v. *Nashratali Mirja*, [1935] AIR (CAL.) 572 = 62 C. L. J. 428 (*mut'a* presumed to continue); *Sec. of St.* v. (*Mt.*) *Mariam*, [1937] AIR (SIND) 126 ; *Karamali Shah* v. *Husamali Shah*, [1932] AIR (RANG.) 449 ; *Halim* v. *Saddat Ali*, [1929] AIR (OUDH) 126 (marriage not presumed).

[5] *Noor B.* v. *Naivas K.*, (1866) 1 Ind. Jur., N. S., 221 (Peacock C. J. & Morgan, J.); Bail. I. 421, (424).

[6] *Fateh Muhammad* v. *Abdul Rahman*, (1930) 12 Lah. 396 (must have lived as husband & wife). See (*Mt.*) *Kureemssa* v. *Ataoollah*, (1867) 2 Agra 211 ; (*Mirza*) *Qaim A. B.* v. (*Musst.*) *Hingun*, (1827) S. D. A. 3 Cal. 152.

[7] See s. 20, *ill.* (3); Bail. I. 83-84 : "This case is a precedent that MARRIAGE is ESTABLISHED BY MUTUAL BELIEF." See s. 14.

SECTION 81. of parentage.

firmed, or acquiesced in, the acknowledgment ;[8] or (3) a man has validly acknowledged the paternity of a child (s. 222).[9]

Muhammadan law of evidence as to marriage.

See the Indian Evidence Act, s. 50, *ill.* (*a*), and s. 222 below. The Muhammadan law of evidence requires that : " testimony must be taken upon his own seeing and perception, not on that of another, except in some special cases, where he may take up his testimony on hearsay. . . . It is not lawful for a witness to testify anything that he has not seen except nasab, (i.e. descent from either parent) death, marriage, consummation, and the authority of a judge ; and it is competent for him to testify to these matters when informed of them by a person in whom he has confidence." [10]

Mere cohabitation is evidence of marriage, and, although it is alleged that all the ceremonies are not performed, their due performance will be presumed.[11] This case was followed in England.[12] The acknowledgment of marriage must be unequivocal [13] but the celebration of the seventh month of pregnancy, and of the birth of the child were held sufficient to prove marriage and legal parentage.[14]

Strict proof required in what cases.

Where, however, a Hindu sued for restitution of conjugal rights, the rites and ceremonies were required to be specifically proved.[15] Where a marriage is an ingredient of an offence, strict proof is required,[16] and evidence of cohabitation and reputation is admissible, but not sufficient, to prove marriage.

[8] Bail. I. 405, (408), 409 (412); II. 5.

[9] *Rook B.* v. (*Shahzadah*) *Walagowhur Shah*, (1865) 3 W. R. 187 (presumption not conclusive). Marriage on subsequent date may exclude presumption of earlier marriage : *Ashrufooddowlah Ahmed H.* v. *Hyder Hossein K.*, (1866) 11 Moo. I. A. 94 ; though possibility of *mut'a* (under s. 25), prior to permanent marriage not excluded : *Shoharat Singh* v. *Jafri B.*, (1914) 17 Bom. L. R. 13 = 965 (P.C.). PRESUMPTION REBUTTED by (i) the ladies, though parties to suit, not coming to give evidence ; (ii) one person called to prove marriage throwing doubt on it ; (iii) no explanation given why ladies not called ; (iv) other witnesses not produced : *Butoolun* v. *Koolsoom, & Butoolun* v. *Lloyd*, (1876) 25 W. R. 444 ; *Khajah Hodayat Oolah* v. *Rai Jan Khanum*, (1844) 3 Moo. I. A. 295, 318 ; *Wise* v. *Sundulloonissa*, (1869) 11 Moo. I. A. 177, 193 (reversing S. D. A. who held marriage not proved) ; (*Ranee*) *Khajooroonissa* v. (*Mt.*) *Rowshan J.*, (1876) 3 I. A. 291 = 2 Cal. 186 ; *Mahatala B.* v. (*Prince*) *Ahmad Haleemoozooman*, (1881) 10 Cal. L. R. 293.

[10] Bail. I. 415 (418), 424-425 (427-428) ; s. 10, com. " custom & public policy."

[11] *Sastry Vilaider Oronegary* v. *Sumbecutty*, (1881) 6 A. C. 364 ; cf. *Monjee L.* v. *Chandrabatti K.*, (1911) 38 I. A. 122 (CAL.).

[12] *In Re Shepherd, George* v. *Thye* [1904] 1 Ch. 456. See also *Deo* d. *Fleming* v. *F.*, (1827) 4 Bing. 266 ; *Collins* v. *Bishop*, (1878) 48 L. J. (CH.) 31 ; *Fox* v. *Bearblock*, (1881) 17 Ch. D. 429 (unofficial entry as EVIDENCE OF REPUTATION) ; *Re Thompson, Langhan* v. *T.*, (1904) 91 L. T. 680.

[13] *Mohatala B.* v. (*Prince*) *Ahmed Haleemoozooman* : *Curreemunnissa B.*, v. *the same*, (1881) 10 Cal. L. R. 293.

[14] *Wise Sundulloonissa Chowdranee*, (1869) 11 Moo. I. A. 177 ; *Haji Saboo S.*, v. *Ayeshabai*, (1913) 30 I. A. 127 (Cutchhi Memon, governed by Hindu law of inheritance, executed will after alleged marriage without mentioning alleged wife or her child : item of evidence against marriage having taken place, more or less cogent : its cogency depending on whether circumstances of marriage made it natural that wife should be object of husband's testamentary bounty and improbable that he should have left her to depend on her legal right of maintenance).

[15] *Surajamoney Dasi* v. *Kali Kanta D.*, (1900) 28 Cal. 37.

[16] BIGAMY cases : *Sobrali* v. *Jungli Singh*, (1897) 2 C. W. N. 245 ; *Empress* v. *Pitambar Singh*, (1879) 5 Cal. 566 (F.B.) ; *Q.-Emp.* v. *Dal Singh*, (1897) 20 All. 166 ; *Akbar K.* v. *Emp.*, [1882] 17 P. R. Crim. judgt. No. 40, p. 66 ; *Shaikh Alimuddin* v. *Emp.*, (1906) 10 Cal. W. N. 982, 984. ENGLISH CASES : *Morris* v. *Müller*, (1767) 4 Burr. 2057, 2359 ; *R.* v. *Simpson*, (1883) 15 C. C. 323 ; *R.* v.

SECTION 81.

Nature of cohabitation which raises the presumption,—

Cohabitation, in this connection, means something more than mere residence in the same house : so that residing as a menial servant in the house of a Muslim, and bearing a child to him, does not raise the presumption of marriage, or, of lawful parentage.[21] Where the relation admittedly began as concubinage, lapse of time, and propriety of conduct and the enjoyment of confidence, with powers of management reposed in the woman, were not held sufficient to raise the presumption of subsequent marriage : [22] nor where the woman lived in a separate dwelling, apart from the one in which an undisputed wife was living : [23] nor though there was cohabitation from 1870 to 1890, the first child being born in 1870, yet the mother, before she was brought to the father's house, was admittedly a prostitute.[24] Where the parties had been divorced, a declaration by the defendant in a mortgage deed, that she was the wife of the plaintiff, was held not to be an acknowledgment, and no presumption [25] was drawn that a lawful remarriage had taken place, after the removal of the impediment to remarry a divorced wife. Marriage being once proved, subsequent divorce was not presumed from the facts that the wife left her husband's house on his taking another woman to live with him, and that he stated in his will that he had no wife.[26]

—must be as wife :

—must not have commenced as concubinage.

Divorce not presumed.

Strength of presumption.

The presumption of marriage is less strong where there is no issue, and the invalidity of the marriage is alleged by the parties.[27] Even casual cohabitation without acknowledgment of marriage or parentage, has been said to raise a rebuttable presumption of marriage and legitimacy.[28] Such presumptions are it is submitted always rebuttable. The presumption was held not to be rebutted by the mere fact that the woman did not observe purdah but the other admitted wives did. The time is coming when the relation between purdah and respectability will be reversed.[29]

Purdah.

Valid retirement defined.

82. The husband and wife being together by themselves in a place where, if they so desire, they are secure from observation, there being nothing in decency, law, or health, to prevent their having sexual intercourse, is called "valid retirement." [30]

Althausen, (1893) 17 Cox C. C. 630 ; *R.* v. *Atkinson*, 1 Russ., *Crimes* (6th ed.) 159 ; *R.* v. *Woodward*, (1838) 8 C. & P. 561. REPUTATION : BIGAMY CASES : *Catherwood* v. *Caslon*, (1844) 13 M. & W. 261, 265 ; *R* v. *Wilson*, (1862) 3 F. & F. 119.

21 *Kureemoonissa* v. *Ataoollah*, (1867) 2 Agra 211.

22 (*Mt.*) *Jariut-ool-Butool* v. *Hoseini B.*, (1867) 11 Moo. I. A. 194.

23 *Masit-un-nissa* v. *Pathani*, (1904) 26 All. 295, following *Ashrufood D. Ahmed H.* v. *Hyder Hossein K.*, (1866) 11 Moo. I. A. 94, 115 ; see also *Abdul Razak* v. *Aga Mahomed Jaffer B.*, (1893) 21 Cal. 666, 678 = 21 I. A. 56.

24 *Akhtaroonnissa* v. *Shariutoolah C.*, (1867) 7 W. R. 268. See s. 41, com.

25 *Ghazanfar Ali K.* v. *Kaniz Fatima*, (1910) 37 I. A. 105 = 32 All. 345.

26 *Noor Bibee* v. *Nawaz Khan*, (1866) 1 Ind. Jur. (N. S.) 221.

27 *Re M'Loughlin's Estate*, (1878) 1 L. R. Ir., 241.

28 *Nawabunnissa* v. *Fuzloonissa* ; *Nawabun* v. *Jumeerun*, (1863) 1 Marsh, 428 = (parties *vice versa*) 2 Hay 479 (marriage not proved : headnote misleading).

29 *Mohabbat Ali* v. *Mahomed Ibrahim*, (1929) 56 I. A. 201, (LAH.).

30 Bail. I. 98-100 ; Hed. 45-46, KHILWAT-É-SAHIH in Arabic.

SECTION 82. *Illustration.*

A husband and wife are together in a closed room, by themselves. This is valid retirement (khilwat-us-sahih in Arabic), unless either has some illness preventing coition, or rendering it injurious, or the wife is an idolatress, or there is present any person (except a little child without understanding), or either is under the age of puberty, or is observing the ordained fast which makes coition unlawful.[30]

Its effects compared to consummation of marriage. Hanafi law.

Under Hanafi law, valid retirement has the same effect as consummation in respect of (1) the confirmation of mahr (s. 102); (2) the establishment of descent, or paternity (s. 215); (3) the necessity for the wife observing iddat (s. 39); (4) the wife's right to maintenance and residence during iddat (ss. 294 ff.); (5) the prohibition by conjunction against the husband marrying the wife's sister or other four women with her (ss. 30-31). But valid retirement without actual consummation, (1) does not prevent the husband marrying the wife's daughter (s. 30); (2) nor, where a man has divorced his wife three times, is it lawful for him to remarry her, if there has been only valid retirement between her and her second husband, without actual consummation.[31]

Shia law.

Under Shia law valid retirement without consummation, has not the same effect as sexual intercourse[32] except,—(1) for establishing the revocation of a divorce;[33] and,—(2) for showing that a thrice divorced wife has had sexual intercourse with the second husband, provided that the wife so asserts.[34]

Shia and Hanafi law compared.

The difference between Hanafi and Shia is that in Hanafi law, in regard to the particulars (1)-(5) above, the mere fact that there are opportunities for consummation (by the parties being in valid retirement) affects the rights of the parties in the same way as actual consummation. In respect of those five matters, the rights of the parties would be the same as though consummation had taken place. Hence, the fact whether consummation actually took place, being irrelevant, is not allowed to be proved. In Shia law, on the other hand, mere valid retirement, as such, (i.e. without actual consummation), does not affect the rights of the parties. But it does not follow that, if the parties are shown to have retired, the court may not draw the inference of consummation : if it is shown that, though the parties retired, they did not, as a matter of fact, consummate the real state of facts would be given effect to.[35]

§ 10.—IRREGULAR[1] MARRIAGES.

(Hanafi law.) Absence of witness and some prohibitions make marriage irregular, and not void.

83. (1) Under Hanafi law a marriage contract entered

[31] Bail. I. 101 ; s. 41.
[32] Bail. II. 74.
[33] Bail. II. 121 (fifth).
[34] Bail. II. 126 (par. 2); see s. 5B, com.
[35] These remarks are necessitated by some observations in *Bismillah B.* v. *Shahi Bano B.*, (1913, Sep.) 18 Ind. L. J., 179, (JUD. COM. OU.).

[1] *Fasid* in Arabic, Bail. & Hamilton translate it " invalid," which is misleading : Bail. I. 150-151 ; *Fasid* = producing harmful results, or mischievous, or irregular. Following the suggestion contained in this work *irregular* has now been generally adopted instead of *invalid*. LEGAL RESULTS OF IRREGULAR MARRIAGES, see s. 24 *n*. See, however, *Budansa Rowther* v. *Fatma B.*, (1914) M. L. J. 260 = [1914] M. W. N. 278 = 15 M. L. T. 107 ; *Liaqat Ali* v. *Karimunnissa*, (1893) 15 All. 395 ; *Ram Kumari, in re*, (1891) 18 Cal. 264.

into (*a*) without the presence of witnesses (s. 23),[2] or (*b*) between persons prohibited from intermarrying by unlawful conjunction (s. 30),[3] or iddat (s. 36),[4] or divorce (s. 41), or religion (s. 50),[5] or supervenient illegality (s. 52),[6] is irregular and not void.[7] SECTION 83.

(2) Marriages that under clause (*b*) of s. 83(1) are merely irregular, are under Shia law void.

The Hanafi law distinguishes perpetual, from other prohibitions : the first cannot be removed by any act of the parties, but the second can (by the husband divorcing one of the wives); all marriages vitiated by unlawful conjunction of whatever kind, are therefore considered by almost all the Hanafi text-writers to be irregular and not void. The prohibition by iddat is also a temporary prohibition, (according to the view taken by the Hanafi school) for the marriage would be valid, if it were celebrated a few months later ; and a marriage during iddat is considered more favourably by the law than one that can never be valid.[8] Analogous reasoning applies to the prohibition by divorce, religion, and supervenient illegality. The absence of witnesses is also considered a mere irregularity in the form of marriage. The Shias and Malikis permit absolute dispensation with witnesses in every case : s. 23(*b*).

Prohibition by unlawful conjunction distinguished.

Prohibition during iddat.

Divorce, religion, supervenient illegality, absence of witnesses.

Contrary to the texts and the decisions of other Courts the Calcutta High

Aizunnissa *v.* Karimunnissa.

[2] See *Aizunnissa* v. *Karimunnissa*, (1895) 23 Cal. 130, 173 trans. from *Tahtawi*.

[3] *Khurshaid Jan* v. *Abdul Hamid K.*, (1908) 43 Punj. Rec. 43 (No. 6) (marriage with 5th wife *fasid* (= irregular) not *batil* (= void) OFFSPRING OF FASID MARRIAGES LEGITIMATE) cited *Muhammad Hayat* v. *Md. Nawaz*, (1935) 17 Lah. 48.

[4] *Muhammad Hayat* v. *Md. Nawaz*, (1935) 17 Lah. 48 (marriage during iddat : CHILDREN LEGITIMATE); *Budansa Rowther* v. *Fatma B.*, (1914) 26 Mad. L. J. 260, 265 ; *Abul Ghani* v. *Aziz-ul-Huq*, (1911) 39 Cal. 409 ; *Jhandu* v. (*Mt.*) *Husaini Bibi*, (1923) 4 Lah. 192 ; *Imam Din* v. *Hasan Bibi*, (1905) 41 Punj. Rec. 309 (No. 85); *Rahiman Bibi Sahiba* v. *Mahboob*, [1937] 2 M. L. J. 753 (marriage with living wife's sister : CHILDREN LEGITIMATE).

[5] *Ihsan Hasan Khan* v. *Panna Lal*, (1927) 7 Pat. 6 ; *Amir Beg* v. *Saman*, (1919) 33 All. 90, seems to overlook distinction between void & irregular.

[6] See s. 52 ; Bail. I. 30 mentions fosterage & affinity also as rendering marriage merely irregular : *Zakhira* cited as authority : probably supervening prohibition by fosterage & affinity is referred to : *Ata Mahammad C.* v. (*Mt.*) *Saiqul Beti*, (1910) 8 All. L. J. 950 = 7 Ind. Cas. 820 ; exhaustive judgment (Karamat Husain, J.) on distinction between void & irregular marriages & STATUS OF ISSUE in each case. Abu Hanifa holds marriages between persons prohibited from intermarrying for other reasons also to be merely irregular, & not void ; but the two disciples of Abu Hanifa, Imam Muhammad & Abu Yusuf hold such marriages to be void, & not merely irregular. Their opinion prevails (see ss. 11A, 11B.). Probably Abu Hanifa merely meant to assert that marriages, however strongly condemned by law, are effectual, *de facto*, so far as the parties are concerned, without intending by this assertion to give any countenance to such marriages ; perhaps he felt injustice of visiting on children sins of parents : Bail. I. 150-151.

[7] *Aizunnissa* v. *Karimunnissa*, (1895) 23 Cal. 130. Vigorously dissented from in *Tajbi* v. *Mowla Khan*, (1917) 41 Bom. 485 ; *Taliamand* v. *Muhammad Din*, (1930) 12 Lah. 52 ; (*Mt.*) *Kaniza* v. *Hasan Ahmad Khan*, (1925) 1 Luck. 71 ; *Muhammad Hayat* v. *Md. Nawaz*, (1935) 17 Lah. 48.

[8] Cited & applied : *Muhammad Shafi* v. *Raunaq A.*, [1928] AIR (OU.) 231, 232 (col. ii) (irregular marriage gives to husband & wife mutual rights of INHERITANCE).

SECTION 83. Court has held [7] that the marriage of a Hanafi with his living and undivorced wife's sister is void,—not merely irregular; and that the issue of such a marriage cannot be legitimated by acknowledgment, nor be ever entitled to inherit from the father.[9]

Cancellation of irregular marriages by either party,—

84. An irregular marriage before it has been consummated may be cancelled by either party either expressly or by implication and even in the absence of the other. *Quaere,* whether it is necessary that the other party should have knowledge of the cancellation.[10]

—If consummated: express cancellation.

85. After an irregular marriage has been consummated, it may be cancelled by the parties, by express words ; but not by implication.[10]

Illustration.

An irregular marriage has been consummated. If the husband says "I have set your way free," or "I have relinquished you," the marriage is cancelled. If, on the other hand, he merely denies the marriage, it does not cancel it, unless he says to his wife at the same time, "Go and marry." [10]

Irregularly married parties must be separated.

86. It is the duty of the Court to separate the parties to an irregular marriage.[11]

Separation when prohibition by fosterage.

87. [It is stated in the Fatawa 'Alamgiri that no separation can be made on account of prohibition established by fosterage, except by an order of the Court, but that when such

[9] *Aizunnissa* v. *Karimunnissa,* (1895) 23 Cal. 142 (par. 2), 144 (2nd sent.): cf. texts cited in report & Abdur Rahim, *Muham. Jurispr.* 330, referring to *Radd-ul-Muhtar* II. 380. Distinction between different kinds of prohibitions to marry in Hanafi texts is disregarded in the judgment on ground that Koran makes no distinction between marriage with two sisters, & other prohibited marriages; & that effect of all prohibited marriages should be same. See s. 11 : *Aga Mahomed Jaffer* v. *Koolsom B.* (1897) 25 Cal. 9, 18. (i) Divorce Act IV. of 1869 distinguishes adultery from incestuous adultery : s. 3(6). (ii) Distinction between void, voidable & illegal contracts : 5 & 6 Will, IV., 41. (iii) Similarly Hanafi religious tenets prohibit irregular marriage; but if contracted it has some legal results : one of them being establishment of PATERNITY which imposes obligations on father : see Bail. I. 32 (4th sent.). Cf. *Lopez* v. *Lopez,* (1885) 12 Cal. 706 (F. B.) (Roman Catholic married sister of woman with whom he had illicit intercourse, & whom he had married when she was on her deathbed, & *in extremis* ; 2nd marriage held valid, & PRESUMED that DISPENSATION necessary by Rom. Cath. religion to remove obstacle to marriage with deceased wife's sister had been obtained): *Abdul Ghani* v. *Azizul-Huq,* (1911) 39 Cal. 409; *Amin Beg* v. *Saman,* (1910) 33 All. 90; *Imam Din* v. *Hasan B.,* (1905) 41 Punj. Rec. 300 (No. 85).

[10] Bail. I. 156 : (*Mt.*) *Bakh Bibi* v. *Qaim Din,* [1934] AIR (LAH.) 907 (consummation does not regularize irregular marriage so as to give right to restitution of conjugal rights); (*Mt.*) *Buro* v. *Bagh Singh,* [1935] AIR (LAH.) 23.

[11] (*Mt.*) *Bakh Bibi* v. *Qaim Din,* [1934] AIR (LAH.) 907 ; Bail. I. 156 substituting "irregular" for "invalid" & "Court" for "Judge" : cf. s. 11B, *nn.*, parties themselves need not apply to Court; but at whose instance, & in what form would applications of this nature be entertained in British India? See Guar. & W. Act, s. 8; Ind. Div. Act IV. of 1869, ss. 10, 19, 22, 24; Bail. I. 30 (*ll.* 3. ff.) intercourse no crime when marriage irregular, "whether he had any doubt on the subject or not," see ss. 13, 14, s. 38 *ill.* (7).

a prohibition becomes established, it is not proper for the woman to live with her husband.[12]] SECTION 87.

Quaere, if an order of Court necessary.

There does not seem to be any corresponding statement either in the Hidaya or the Sharaiu'l-Islam. Sect. 87 is enclosed in brackets, as it seems likely that the exception in question (it is from the Nahr-ul-Faiq) has been introduced into the Fatawa 'Alamgiri by inadvertence.[13] The Nahr-ul-Faiq apparently accepts Abu Hanifa's view (from which his two disciples dissent, and which is not followed in British India), that, though under the strict law, some marriages ought not to be contracted, yet, if contracted, all marriages have force and effect.[6] In this view an order of the Court may possibly be considered necessary for cancelling any marriage whatever, including a marriage that transgresses the prohibition of fosterage. But the same reasoning does not apply in the view taken by the two disciples who hold prohibition by fosterage to be absolute, rendering the marriage not merely irregular, but void. How can it be urged that a marriage already void in its inception, requires to be cancelled at all and that the intervention of the Court is necessary, whereas (according to the disciples) no order of the Court is necessary (see ss. 84, 85) to cancel even a marriage that is merely irregular and not void?

§ 11.—JUDICIAL PROCEEDINGS ARISING OUT OF MARRIAGES.

Restitution of conjugal rights.

88. Where either the husband or wife[14] has, without lawful ground,[15] withdrawn from the society of the other, or neglected to perform the obligations imposed by law or by the contract of marriage,[16] the Court may[17] decree restitution of conjugal rights, and may put either party on terms[18] securing to the other the enjoyment of his or her legal rights.[19]

12 Bail. I. 200.

13 See s. 167, com. for similar inadvertence. When circumstances in which authors of texts acquired their knowledge of law, & devoted themselves to its constant study, are borne in mind, it may seem audacious to suggest that any of them has made any mistake, but the suggested inadvertence consists of allowing excerpts to be included in digest from two authorities, who take opposite views on controversial point. The audacity will therefore it is hoped be forgiven.

14 Wife has corresponding right—Abdur Rahim, *Mdan. Jurispr.* 334, citing *Al-Wajiz*, II. 20.

15 (*Mt.*) *Bakh Bibi* v. *Qaim Din*, [1934] AIR (LAH.) 907 (marriage contracted during *iddat* : therefore irregular : held lawful defence to suit for restitution).

16 Cf. Civ. Pro. Code, O. XXI. rr. 32, 33.

17 COURTS' DISCRETION to make decree on suitable terms : *Anis Begam* v. *Md. Istafa Wali K.*, (1933) 55 All. 743. Courts lean in favour of wife : *Abdul Rahiman* v. *Aminabai*, (1934) 59 Bom. 426.

18 *Buzloor Ruheem* v. *Shamsoonissa*, (1867) 11 Moo. I. A. 551, 615 ; *Hussaini B.* v. *Muhammad Rustom A.*, (1907) 29 All. 222, following *Mackenzie* v. *Mackenzie*, [1895] A. C. 384 ; *Sabed Khan* v. *Bilatunnissa*, (1919) 25 C. W. N. 888 (conjugal rights ordered to be exercised in *bari* of wife's parents) ; cf. *Paigi* v. *Sheonarain*, (1886) 8 All. 78 ; *Purshotamdas* v. *Bai Mani*, (1897) 21 Bom. 610.

19 Bail. I. 188-189 (129-190) ; II. 88 ; DEFENCES TO SUIT FOR RESTITUTION OF CONJUGAL RIGHTS : CRUELTY : (i) *Buzloor Ruheem* v. *Shamsoonnissa*, (1867) 11

SECTION 88.

The order for restitution cannot now be enforced by detention in civil jail.[20] Civil Procedure Code, 1908, O. 21, r. 32 ; Act XXIX of 1923. See also Letters Patent of the High Courts, clause 35.

Husband's dominance in matrimony.

The Muslim husband being dominant in matrimonial matters, the Court leans in favour of the wife and requires strict proof of all allegations necessary for matrimonial relief : the Koran enjoins husbands to keep their wives with kindness or in kindness part from them (sura 65, v. 3). The husband can divorce a wife who is disinclined to live with him, or marry a second wife, leaving his first wife alone and in peace.[21]

Moo. I. A. 551, 611, following *Evans* v. *Evans*, (1790) 1 Haggrd. Consist. 1, remarking "Muhammadan law of what is LEGAL CRUELTY between man & wife would probably not differ materially from our own" ; (ii) actual VIOLENCE of such character as to endanger personal health & safety, or reasonable apprehension of such violence, is good defence : *Asha B.* v. *Kadir Ibrahim*, (1909) 33 Mad. 22, 25 ; *Saiyad Jaffar H.* v. (*Mt.*) *Husain Ara B.* 13 Ind. Cas., 608 ; *Dular Koer* v. *Dwarka Nath Misser*, (1905) 34 Cal. 971 ; (iii) *Rukmin* v. *Peare Lal*, (1889) 11 All. 480 (cruelty falling short of physical violence but such as to jeopardize health or sanity, is sufficient "cruelty" under Crim. Pro. Code, s. 488) : wife refusing to live with husband, yet getting maintenance from him : *Paigi* v. *Sheo Narain*, (1885) 8 All. 78 ; (iv) *Husaini B.* v. *Muhammad Rustom A. K.*, (1906) 29 All. 222, referring to *Mackenzie* v. *Mackenzie*, [1895] A. C. 384 (husband may, by MISCONDUCT, though not amounting to such acts as might justify decree for separation, disentitle himself to decree for restitution of conjugal rights) ; *Meheralli* v. *Shakerbanoobai*, (1905) 7 Bom. L. R. 602 ; *Genu Meah* v. *Begummah B.*, [1933] AIR (RANG.) 322 ; (v) *Abdul* v. *Husainbi*, (1904) 6 Bom. L. R. 728 (gross failure to perform conditions in marriage contract, see s. 25, com.) ; *Buzloor Ruheem* v. *Shumsoonnissa*, (1867) 11 Moo. I. A. 551, 615 (BREACH OF CONDITION as defence to suit for restitution) ; *Imam Ali* v. *Arfatunnissa*, (1913) 18 C. W. N. 693 ; *Fatma B.* v. *Nur Muhammad* ; (1920) 1 Lah. 597 ; (vi) (*Mt.*) *Maqboolan* v. *Ramjan*, (1927) 2 Luck. 482 (unfounded ACCUSATION OF ADULTERY sufficient defence to suit for restitution) ; *Jaun Bibi* v. *Bepari*, (1885) 3 W. R. 93 ; (vii) *Hamid Husain* v. *Kubra B.*, (1918) 40 All. 332 (no satisfactory evidence of actual physical cruelty — but parties on worst possible terms : reasonable presumption that husband's suit was for GETTING HOLD OF WIFE'S PROPERTY : Court of opinion that by return to husband, wife's health & safety would be endangered : suit for restitution dismissed : Court approved of & followed : (viii) *Armour* v. *Armour*, (1904) 1 All. L. J. 318, where (1) charging with adultery (with subsequent apology) ; (2) once striking ; (3) once threatening to flog ; (4) abusive language ; (5) stripping house of furniture ; (6) charging with theft—held cruelty entitling wife to decree for dissolution of marriage under Ind. Div. Act IV. of 1869). *Anis B.* v. *Md. Istafa Wali K.*, (1933) 55 All. 743 ; *Jamiruddin Ahammad* v. *Sahera Khatun*, (1926) 54 Cal. 363 (wife in fact living in adultery : no cruelty to charge her with it : nor is such charge defence to suit for restitution) ; *Kondal Rayal* v. *Ranganayaki*, (1923) 46 Mad. 791 ; (ix) MARRIAGE IRREGULAR : (*Mt.*) *Bakh Bibi* v. *Qaim Din*, [1934] AIR (LAH.) 90 ; (x) MARRIAGE AVOIDED by exercise of OPTION : (*Mt.*) *Bhawan* v. *Gaman*, [1934] AIR (LAH.) 77 ; *Abdul Karim* v. *Amina B.*, (1936) 59 Bom. 426 ; (xi) APOSTASY, &c. : where it would be improper for husband and wife to cohabit (as after *lian*, *zihar*, etc.) suit does not lie for restitution of conjugal rights : husband used blasphemous language against the Prophet, amounting to APOSTASY dissolving marriage : valid defence, *Nowroz Ali* v. (*Mt.*) *Aziz B.*, (1876) P. R. 235, No. 124 ; *Amin Beg* v. *Saman*, (1910) 33 All. 90 ; *Karamsingh* v. *Emperor*, (1933) 31 All. L. J. 733 ; (xii) *Bai Jina* v. *Kharwa Jina*, (1907) 31 Bom. 366 (wife need not stay with OUTCASTED HUSBAND). See DISSOLUTION OF MUSLIM MARRIAGES BILL, 1939 : s. 70, *n.* 13 above ; s. 212, com.

[20] Even before Act XXIX. of 1923, Courts not at all severe in enforcing, against wishes of parties, orders for restitution. Thus on 18 July, 1903 Crowe, J., (Bom. H. Ct.) in *Pirojshah Nusserwanji Barucha* v. *Pirojbai* (Parsi Mar. & Div. Act, 1865, case 3 of 1903) ordered defendant to pay Rs. 5 as penalty for refusing to obey decree directing her to join husband. Defendant paid fine. Then on 13 Feb. 1905 plaintiff's application for restitution came on before Chandavarkar, J., who dismissed it under s. 36 of said Act on ground that decree had already been executed once & could not be executed second time.

[21] *Abdul Rahiman* v. *Aminabai*, (1934) 59 Bom. 426.

On suits for maintenance see ss. 294-311. The cases noted in *n.* 22 may be compared. SECTION 88. Maintenance.

The Indian Limitation Act IX. of 1908 repeals artt. 34-35 of the previous Act (XV. of 1877). The repealed artt. barred suits for "recovery of wives," and for "restitution of conjugal rights," two years after "possession or restitution was demanded and refused." Does art. 120,—six years "for suits for which no period is provided elsewhere"—apply? The affirmative reply has been assumed in one case.[23] On the other hand by s. 23 of the Act (so far as relevant), "in the case of a continuing breach of contract or wrong a fresh period of limitation begins to run at every moment of the time during which the breach or wrong continues;" and actions for restitution of conjugal rights have been held[24] to arise out of a continuing wrong, and, therefore, practically incapable of being barred.[25] Limitation of suits for restitution of conjugal rights.

89. The Court may order the husband to be attentive to his wife; and, if he has more wives than one, to be just and equal between them, notwithstanding any consent having been given by any wife to unequal treatment.[26] Judicial protection to wife.

The husband (unless he has contracted otherwise) can always divorce his wife, and thus get rid of most of his matrimonial liabilities.[27] But he may not be willing to divorce: that might render him liable for the mahr, a circumstance that may not be negligible. The wife, on the other hand, is more in need of protection, as she cannot so release herself. The Sharaiu'l-Islam, indeed, suggests a kind of arbitration where there is discord between them; see s. 24A, com.[28]

90. (1) A person claiming or denying that he or she has been married to another, may bring a suit for a declaration that they are or are not married, as the case may be,[29] Declaratory suits, for jactitation of marriage.

[22] *In re Abdul Ali Ismailji*, (1883) 7 Bom. 180; *Shah Abu Ilyas* v. *Ulfat B.*, 19 All. 50; *Abdur Rahman* v. *Sakina*, (1879) 5 Cal. 558.

[23] *Asirunnissa K.* v. *Buzloo M.*, (1906) 34 Cal. 79.

[24] (*Bai*) *Sari* v. *Sankla Hirachand*, (1879) 16 Bom. 714; *Gizni* v. *Mehran*, (1879) 14 Punj. Rec. 157 (No. 60), followed in *Binda* v. *Kaunsilia*, (1890) 13 All. 126 (Hindu parties).

[25] But see *Dhanjibhai Bomanji* v. *Hiraba*, (1901) 25 Bom. 644 (F.B.), followed *Saravannai Perumal P.* v. *Poovayi*, (1905) 21 Mad. 435; *Asirunnissa Khatun* v. *Buzloo Mia*, (1906) 34 Cal. 179: such suits held barred.

[26] Bail. I. 188-189 (189-190); II. 88. *Quaere*, whether in converse case, e.g., where husband has consented that wife should reside with her parents, he will be prevented from suing her for restitution of conjugal rights, see s. 24, com.

[27] *In re Abdul Ali Ismalji & his wife Husenbi*, (1883) 7 Bom. 180; *Shah Abu Ilyas* v. *Ulfat Bibi*, (1896) 19 All. 50; cf. *Abdur Rohoman* v. *Sakhina*, (1879) 5 Cr. 558; *Abdul Rahiman* v. *Aminabai*, (1934) 59 Bom. 426.

[28] Bail. II. 88-89.

[29] Bail. I. 20; *Mir Azmat Ali* v. *Mahmud-ul Nissa*, (1897) 20 All. 96; *Hassan Kutti* v. *Jainabha*, (1928) 52 Mad. 39; *Sibt Ahmad* v. *Amina*, (1928) 50 All. 734; *Abdul Rahiman* v. *Aminabai*, (1934) 59 Bom. 426. Suit for "jactitation of marriage" = praying for injunction to restrain defendant from falsely claiming to be plaintiff's

SECTION 90.
Option to divorce.

(2) A woman may bring a suit for a declaration that she has validly exercised an option to divorce herself, and that her marriage is dissolved.[30]

Suit for Jactitation of marriage.

In a suit for jactitation of marriage, i.e. to have it declared that a woman who claimed to be the plaintiff's wife was not so in reality,[31] it must be strictly proved : (1) that the defendant seriously claimed to be married to the plaintiff ; (2) that the plaintiff did not acquiesce in the claim or allegation of the defendant ;[32] (3) that, in fact, no marriage had taken place.[31] The question whether a claim that a man is married to a woman may lawfully be compounded is considered in the Hidaya and answered in the affirmative,[33] with some complications (which would hardly be likely to arise) when a woman claims to be the wife of a man.[33] Cf. Dissolution of Marriages Bill, 1939.

Suit for breach of promise to marry.

91. *Semble,* in a suit by a Muslim for breach of promise to marry, no damages will be allowed in British India, beyond compensation for such pecuniary loss as has actually been suffered[34] by the plaintiff :[35] and presumably the same rule applies where a promise to marry is rescinded.[36]

It is laid down that it is unlawful for a man to pay addresses to a woman who is engaged to another, but if she marries a man other than him to whom she was first engaged, the marriage is valid.[37] According to the Minhaj-ut-Talibin " The law forbids asking for the hand of a woman who has already received, and formally accepted, a similar proposition from another, except with the consent of one's rival ; but until a woman has decided as to the first offer there is no objection to making a second. When a woman asks advice, the author continues, " from a third party as to a man who has made her an offer of marriage, this third party is bound to give her sincere and truthful information." [37]

husband or wife ; see Speci. Rel. Act, s. 42, *ill.* (*h*), cf. Matrim. Cases Act, 1857 (20, 21 Vict., c. 85, s. 6) ; *Thompson* v. *Rourke,* [1893] P. 70.

30 Bail. I. 243 ; cf. ss. 128-134 ; *Abdul Rahiman* v. *Aminabai,* (1934) 59 Bom. 426 (exercise of option to avoid marriage as defence to husband's suit).

31 *Mir Azmat Ali* v. *Mahmud-ul-Nissa,* (1897) 20 All. 96 : cf. *Thompson* v. *Rourke,* [1893] P. 70.

32 ACQUIESCENCE may be reason for Court declining to grant relief in suit for JACTITATION : it does not mean that acquiescence constitutes marriage or makes legal contract unnecessary ; Bail. I. 16-17 : see s. 24.

33 Hed. 445, col. i., par. 3, 4.

34 Which would include return of ornaments, &c., given as presents, in anticipation of proposed marriage : cf. Ind. Contr. Act, s. 65 : *Abdul Mahomed Hussen,* (1916) 19 Bom. L. R. 164 ; *Abdul Razak* v. *Mahomed Husein,* (1916) 42 Bom. 499 ; commented upon in *Rose Fernandez* v. *Joseph Gonjales,* (1924) 48 Bom. 673, 682. Cf. *Mahomed Abid Ali* v. *Ludden,* (1886) 14 Cal. 276 (*mut'a*).

35 But not incident expenses : *Haji Ahmed K.* v. *Abdul Jani K.,* [1937] Nag. 249. Cf. Ind. Contr. Act s. 73.

36 *Haji Ahmed K.* v. *Abdul Gani K.,* [1937] Nag. 299 (plaintiff justifiably rescinded marriage engagement : claimed Rs. 217 for expenses on *pan susum* ceremony : claim disallowed) : see Ind. Contr. Act, s. 75.

37 Bail. II. 36 (4th) (Shia text) ; *Minhaj-ut-Talibin,* 282 (Book 33, s. 2) (Shafii

SECTION 91.

Quantum of damages.

Compensation for actual pecuniary loss alone recoverable.

The authorities do not seem to throw much light on the question of damages on a breach of a contract to marry. The rules giving a right to claim a part of the mahr, or a present where the marriage is dissolved without consummation indicate (where the lady is the defendant) one method of making allowance for the husband's power of talaq.[38]

Anomalous nature of action for breach of promise to marry.

The action in England, for a breach of contract to marry is admittedly anomalous, being analogous in some respects to an action for seduction, in others, to one for libel.[39] In such an action the English Courts do not restrict damages to "compensation for loss or damages which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it," [40] which is the compensation that, it is submitted, could alone be claimed in the Courts in India by parties governed by Muhammadan law. The English Courts also allow exemplary and sentimental considerations to affect the assessment of damages. Those considerations would be deemed irrelevant in a suit between parties governed by Muhammadan law.[41]

Damages for enticing wife away.

91A. A person who entices away the wife of a Muslim may be sued by the husband for damages.[41]

text). The Hindu law-giver quaintly observes : "Neither ancients nor moderns who were good men have ever given a damsel in marriage after she had been promised to another man," Manu, ix. 99.

[38] ROMAN LAW : (1) *arrhae sponsalitiae* (earnest for a marriage), consisted of substantial presents given on betrothal ; they could be either forfeited, or claimed back with penalty of the same, or of twice, or four times its value, on marriage being broken off : Justin., V., i., 1-5, 16. (2) *actio ex sponsu*, "giving damages in proportion to value of marriage to the party disappointed" : Hunter, *Rom. Law*, 696. Such actions are "recognized by the Prussian Landrecht, but expressly denied by the Code of Italy." French Code silent : Courts in France have taken different views ; better opinion agrees with Austrian Code, allowing damages for actual loss, but no more. Pruss. Code, Th. II. 1, ss. 75-82 ; Ital., s. 53 ; French, artt. 1382, 11-42 ; Austr., ss. 45, 46 ; Draft Civ. Code of Germ. s. 1228 cited Holland, *Jurispr.*, 238-259.

[39] Mayne, *Damages*, Ch. xiv, p. 8. [40] Ind. Contr. Act, s. 73.

[41] *Abdul Karim*, v. *Aminabai*, (1932) 59 Bom. 426 ; *Muhammad Ibrahim* v. *Gulam Ahmed*, (1864) 1 Bom. H. C. R. 236, 250 ; *Sobha Ram* v. *Tika Ram*, (1936) 58 All. 903 (Hindu parties ; citing Hals., *Laws of Eng.* XVI. par. 957, 958).

CHAPTER IV.

MAHR OR DOWER.

§ 1.—PRELIMINARY.

Mahr or dower.

92. (1) Mahr or dower [1] is a sum that becomes payable by the husband [2] to the wife [3] on marriage, either by agreement [4] between the parties, or by operation of law.[5] It may be either prompt (mu'ajjal) or deferred (muwajjal). s. 98.

(2) Mahr-ul-mithl (or "proper dower") means the mahr of those similar to the bride, i.e. of other women similarly placed, viz. the bride's full or consanguine sisters or female descendants of her male agnatic ancestors.[6]

[1] The English word DOWER means often a different thing: Lord Buckmaster says: "If a daughter had been dowered by her father & this were treated as equivalent to an advancement of her share in his estate ...brother by whom she had never been dowered at all."—*Abdul Hussein* v. *Bibi Sona*, (1917) 45 I. A. 10, 20 (SIND). Dower is in *Oxford Eng. Dict.* = (1) the portion of a deceased husband's estate which the law allows to his widow for her life; (2) money or property which wife brings to her husband.

[2] (*Mt.*) *Fatima Begum* v. *Ahmed Ali*, (1937) 41 C. W. N. 965 (P. C.) (LAH.) (marriage contract will provisions for surety).

[3] MAHR is either a sum of money or other form of property to which wife becomes entitled by marriage: Abdur Rahim, *Mdan. Jurispr.* 334.

[4] The agreement may be made after marriage: *Kamarunnissa* v. *Husaini*, (1884) 3 All. 266; *Zakeri Begum* v. *Sakina B.*, (1892) 19 I. A. 157 (CAL.) (Lord Hannen considers evidence: *mahr* of Rs. 50,000 allowed); agreement of *mahr*, if in writing, is called MAHR-NAMA or KABIN-NAMAH: no writing necessary: *Abd. Karim* v. (*Mt.*) *Fazilatun-nissa*, 5 S. D. A. (BENG.) 75; (*Mt.*) *Muleeka* v. *Jumeela*, (1872) L. R., I. A. SUPP. 135 = 11 Beng. L. R. 375; *Tajoo B.* v. *Noorun B.*, [1864], 1 W. R. 31. Where MAHR VERY LARGE & no writing, "very best description of evidence" necessary to establish it: *Huseina* v. *Husmatoonissa*, (1867) 7 W. R. 495; *Abd. Jubbar C.* v. *Collr. of Mymensingh*, (1868) 11 W. R. 65; *Nujeemoodeen A.* v. *Hosseinee*, (1865) 4 W. R. 110; (*Nuwab*) *Hoosein A.* v. *Zumaniya Begum*, (1861) 6 S. D. A. (N.W.P.) 350 (5½ lakhs *mahr* claimed not proved).

[5] Bail. I. 91; II. 72; *Abi Dhunissa* v. *Md. Fathiuddin*, (1917) 41 Mad. 1026; *Syed Sabir Husain* v. *Farzand Hasan*, (1937) 65 I. A. 119 (*mahr* is fundamental feature of marriage contract). Fact that if mahr unspecified at time marriage is contracted, the law declares that it must be adjudged on definite principles is instanced as showing that mahr is an essential element under Mussulman law to status of marriage: *Hamira B.* v. *Zubaida B.*, (1916) 43 I. A. 294, 300 (ALL.).

[6] MAHR not CONSIDERATION (cf. s. 99), Bail. I. 91; Abdur Rahim, *Mdan. Jurispr.* 334 citing *Hidaya* III. 204 *Kifaya* III. 204: & Bail. I. 91 cited (*Md.*) *Fatima B.* v. *Lall Dui*, [1937] AIR (LAH.) 345. Observations unnecessary for the decision, made (in oversight of this principle) in *Saburannessa* v. *Sabder Shaikh*, (1934) 38 C. W. N. 747, 751. *Abdul Kadir* v. *Salima*, (1886) 8 All. 149, 157, 158. In *Hamira B.* v. *Zubaida B.*, (1916) 43 I. A. 294, 301: *mahr* is mentioned as being consideration for marriage but probably this is reminiscent of English maxim that marriage is highest consideration. Muslim texts are insistent on this head as

(3) Mahr-nama is the instrument containing the agreement to pay mahr. Unless anything indicates a different intention, the expression mahr-nama in this chapter includes an oral agreement for the payment of mahr. SECTION 92.

Mahr has to be distinguished from (1) dower as understood in European countries as well as from (2) other presents given at the time of the marriage by (*a*) strangers, (*b*) the husband to the bride, or (*c*) to the bride from her father as jahez : see s. 364A. Mahr : dower : Jahez.

"Dower is not the exchange or consideration given by the man to the woman for entering into the contract ; but an effect of the contract, imposed by the law on the husband as a token of respect for its subject, the woman." [7] Mahmood, J. has explained the significance of the comparison between mahr and price, which is occasionally encountered in the texts, viz. marriage being a civil contract, and sale a typical civil contract of the most common occurrence, analogical reference to the contract of sale is natural.[7] Mahr not consideration for marriage.

93. (1) Under Hanafi and Shia Ismaili law the wife is entitled to claim mahr from her husband, even though she has expressly contracted not to claim it.[9] Agreement to marry without mahr ; when valid Sunni law.

(2) Under Shia Ithna Ashari law (*a*) a woman who is adult "and not of a weak or facile disposition" [10] may validly agree not to receive any mahr ; [11] (*b*) it is doubtful whether a female ward's guardian for marriage may validly contract her in marriage without mahr : [12] the Sharaiu'l-Islam favours the view that he can ; [12] (*c*) an option may be lawfully reserved to cancel the mahr.[13] Shia law : by adult woman by guardian option to cancel mahr.

in pre-Islamic times Arab women were sold in marriage by their parents or guardians : then there was real consideration : but Prophet prohibited such sales ordering that money should be given to the bride : odium connected with price or consideration for sale of bride ought not to be attached to *mahr*, which not only prevented sale but provided for the woman who had before been treated as chattel. See also s. 95, *ill.* "In regard to marriage" says Grote, speaking of prehistoric Greece, "we find the wife occupying a station of great dignity & influence, though it was the practice for the husband to purchase her by valuable presents to her parents, a practice extensively prevalent among early communities, & treated by Aristotle as an evidence of barbarism." *Hist. of Greece*, Part I. Ch. xx. (Vol. II. p. 112). Amongst Teutonic races betrothal (*verlobung*) seems to have been = sale of woman by her guardian for *pretium puellae* (*mundschatz* or *witthum*), payable after marriage to guardian, & later on, to girl herself : Holland, *Jurispr.* (7th Ed. 257 ; citing Baring-Gould's *Germ. Past & Present*, 98.)

[7] *Abdul Kadir* v. *Salima*, (1886) 8 All. 149, 157.

[9] Bail. I. 91 : *Daaim'ul-Islam* : *Hamira* v. *Zubaida*, (1916) 43 I. A. 294, 300 (ALL.); (*Mt.*) *Fatima Begum* v. *Ahmed Ali*, (1937) 41 C. W. N. 965 (P. C.) (LAH.) (marriage contract with provisions for surety undertaking liability to pay Rs. 60 a month).

[10] Cf. rules as to *pardanishin* women in India.

[11] Such contract called *tafwiz* or voluntary surrender, Bail. II. 72.

[12] Bail. II. 72, 80 (second). [13] Bail. II. 5 (fourth), 77 (twelfth).

SECTION 94.

Subject of mahr.

94.[14] (1) The subject of mahr may consist of (*a*) any specified thing having value,[15] and existence, except hogs and wine,[16] or (*b*) manafi or the rents and profits of property,[15] or (*c*) a promise on the part of the husband to do or abstain from doing something ; provided that under Hanafi law an agreement by the husband to render personally some specified or unspecified services to the bride may not be the subject of mahr.[17] Under Shia law an agreement to render during a specified period of time services specified in such a manner as to remove all doubt and uncertainty may be the subject of mahr, provided that if the husband is unable to perform the services promised, he may hire some one else to perform them.[18]

Agreement to do something.

when subject of mahr unlawful.

(2) Where the mahr agreed upon consists of hogs or wine,[16] (*a*) the approved Shia opinion is that the marriage is valid but the agreement for mahr is void, and the mahr ul-mithl is due ;[19] (*b*) some Shia authorities hold that the price of the hogs or wine has to be given in lieu of the mahr ; (*c*) others that the marriage is absolutely null and void.[19]

Illustrations.

(1) The rents and profits[20] of property or the services of a person other than the husband may validly be the subject of mahr.[20]

(1A) The mahr of "a cloth," or "a beast," or a "mansion" is void for uncertainty, and the wife is entitled to her "proper dower" ;[21] but if the species of the cloth or beast is mentioned, then the mahr is valid, and an article of medium quality belonging to that species becomes due.[22]

(2) H stipulates with his bride, that he will not take her out of her native place, or will divorce his existing wife, or will perform the haj with her, or will not press the claim of a debt which he has against her ; none of these promises can validly form the subject of mahr.[23]

(3) The condition that the husband is to give the bride's father 1,000 dirhams, is no mahr and she becomes entitled to the "proper dower."[24]

[14] See s. 347,'*n*. as to gift in satisfaction of *mahr*, where immoveable property is transferred.

[15] *Wahidan* v. *Nasir K.*, [1930] 28 All. L. J. 1012 (undivided half house sold to bride by bridegroom's mother). Usufruct distinct from corpus : s. 94, *ill.* (1), s. 366A.

[16] Hogs & wine are *extra commercium* in Muhammadan law : Bail. I. 94 ; II. 7 ; case not likely to arise in India ; s. 94(2) shows scope & effect of law.

[17] Bail. I. 93 ; II. 76, 69.

[18] Bail. II. 67, 69, 79.

[19] Bail. II. 67-68 : *Daaim'ul-Islam* seems to support view (*c*) : see s. 97.

[20] MANAFI spelt *moonafia* : Bail. I. 93 *n*. "profits are of two kinds according as they are derived from use of corporeal things such as houses, land & cattle, or labour of artisans, such as tailors, &c. : *Inayah* IV. 43." See s. 366A.

[21] Bail. I. 106.

[22] Bail. I. 106, 109 : see Bail. II. 68 (par. 3).

[23] Bail. I. 94.

[24] Bail. I. 105 : *Kalavagunta Venkata* v. *Lakshmi*, (1908) 32 Mad. 185 (F. B.)

(4) F gives his daughter, or sister, in marriage "on condition that the husband will give to F his daughter, or sister, in return, the right to the person of each woman being the dower of the other"; the condition would not supply the place of mahr. "The contracts are effected, but the condition is void, and each woman is entitled to her own proper dower."[25] Under Shia law such marriages are void;[26] and, *quaere*, whether in India they are void as being against public policy. SECTION 94.

(5) The guardian of a woman, arranges for her marriage on the terms that 1,000 dirhams are to be paid to her and 50 dinars to him (the guardian). The wife is entitled under Hanafi law to both sums.[27] Under Shia law the agreement to pay 50 dinars to the guardian is void; and the wife is entitled to receive only 1,000 dirhams.[28]

95. (1) Under Hanafi law, the wife is entitled to claim as her mahr not less than ten dirhams,[29] notwithstanding any agreement to accept a smaller mahr.[30] Mahr: amount of

(2) Under the Oudh Laws Act[31] the Court will not, either in a decree, or by way of set-off, lien, or otherwise, award mahr in excess of an amount that shall be reasonable with reference to the means to the husband and the status of the wife.[32] Reasonable dower in Oudh.

(3) Under Shia and Shafii law, the wife who has agreed to accept less than ten dirhams as her mahr, is not entitled to (Shia and Shafii law) no minimum.

see on *Istidal* pp. 24-25; *Ghasiti* v. *Umrao*, (1893) 21 Cal. 149, (P.C.).

[25] Bail. I. 94 (par. 2). Such contracts common before advent of Prophet, who prohibited them: in Arabic such contracts are called *shighar* = "two persons combining to oppress a third": derived from root-word *shaghara* = "*lever un pied de derriere en l'aire* (*un dit d'un chien qui le fait quand it urine*" Kasimirski). Bail. I. 94, *n.* 1, applies meaning of *shaghara* to *shighar*.

[26] Bail. II. 37, and see p. 172, *n.* 2.

[27] Bail. I. 106; see principles applicable to secret commissions by agents.

[28] Bail. II. 68-69. Under Shia law no promise by husband to pay something to bride's father has binding effect, though parties may agree amongst themselves to give part of *mahr* to him: Bail. II. 68. This implies that bride is party to agreement: it would have to be strictly proved. Ind. Contr. Act, s. 16: cf. *London & West. Iron & Dis. Co.* v. *Bilton*, (1911) 27 L. T. R. 184.

[29] I.e. between Rs. 3 & 4: *Asma B.* v. *Abdul Samad K.*, (1909) 32 All. 167: *Sughra B.* v. *Masuma B.*, (1877) 2 All. 573 (10 dirhams valued at Rs. 107; no grounds assigned); cf. Bail. I. 108: *dirham* is coin of uncertain value. DIRHAM = silver coin of 2·97 grammes; DINAR = gold coin of 4·25 grammes. This would furnish exact basis of value if necessary; *Encycl. of Isl.*

[30] Bail. I. 93, (par. 4). According to Shafiites & Hanbalis, "desirable that dower should not be less than ten *dirhams*": *Asma B.* v. *Abdul Samad K.*, (1909) 32 All. 167, 168, *per* Karamat Husain, J., citing *Qustalani*, VIII. 48, 49, commenting on *Sahih-i-Bukhari*.

[31] Act held not to apply in *Zakeri Begum* v. *Sakina B.*, (1892) 19 Cal. 689 = 19 I. A. 157, in which Muslim of Patna was for time in Lucknow, & there married plaintiff, who lived in that city.

[32] Oudh Laws Act, 1876, s. 5. See *Sulaiman Kadr* v. *Mehdi Begum Surrena Banu*, (1893) 21 Cal. 135; *Collr. of Mooradabad* v. *Harbans S.*, (1898) 21 All. 17.

SECTION 95.

claim a larger sum ; provided that the agreed mahr is not totally destitute of value.[33]

Illustrations.

A wife is divorced by her husband. He then offers to remarry her on condition that she should make a gift to him of the mahr due on their first marriage. The wife's consent to the offer does not affect her right to her first mahr whether they remarry or not ; " because she has made the property due to herself as an exchange for marriage ; and in marriage no exchange is incumbent on a wife." [34]

Mahr never invalid as excessive.

96. Mahr is never invalid [1] by reason of its being excessive,[2] except as provided in the Oudh Laws Act.[3]

Nominal mahr.

The Fatawa 'Alamgiri contains a section (based on the Zakhira) dealing with mahr, never intended to be demanded or paid [4] but nominally stated in public at a high figure, for the purpose of " reputation." Nominal dowers are frequently agreed to as a mere form in India, by persons who have no means of paying it.[5] The question whether an alleged mahr was promised is of course one of fact. In particular where the agreement in view of the means and position of the parties is for an absurdly high figure the principle involved in ss. 97(1), 116, has an important bearing. The Court may well consider whether, on such facts, it can come to the conclusion that there was a real agreement to pay the mahr, which, ex concessis, the husband could not pay, or whether it was a mere sham. It is true that a high mahr may prevent the husband from divorcing his wife,[6] but excessive mahrs are often oppressive to creditors and unfair to heirs, especially to children of predeceased wives.

Mahr-ul-mithl, or proper dower.

97. (1) Where the amount of the mahr has not been

[33] Bail. II. 68 ; Hed. 44 ; *Daaim'ul-Islam* : agreement to pay less than 10 dirhams not void, but abominable.

[34] *Fatawa Kazi Khan*, cited in *'Alamgiri* : *Hiba*. Ch. VIII. (*ad. fin.*) : Bail. I. 540-541 : consideration for remission of *mahr* is illusory. But see s. 100.

[1] Though Shafii & Shia authorities consider it abominable that it should exceed *mahr-ul-sunnat* = *mahr* that Prophet gave to his wives, viz. 500 *dirhams*. Bail. II. 68 (par. 2), 70 (par. 4).

[2] Bail. I. 93 ; II. 68 ; *Omdutun Nisa B.* v. (*Mirza*) *Asud Ali*, (1809) S. D. A., Cal. I. 276 (Shia case) ; *Gholam Husun Ali* v. *Zeinub B.*, (1801), *ib.* p. 48, (*mahr* of 300,000 gold mohurs) ; *Wajih On Nissa Khanum* v. *Mirza Husun Ali*, (1808) *ib.* p. 266 (*mahr* of Rs. 1,14,000 and 355 gold mohurs upheld) ; *Zakira Begum* v. *Sakina B.*, (1892) 19 I. A. 157 (evidence of mahr considered : Rs. 50,000). Bom. High Court upheld decree for Rs. 18,00,000 for *mahr* : *Mir Aun Ali* v. *Banoo Begum*, (Sep. 1907 ; O. O. C. J. Appl. No. 1472, from Suit 577 of 1906, *unrep.*) ; cf. *Asha B.* v. *Kadir Ibrahim*, (1909) 33 Mad. 22, 26 ; *Sugra B.* v. *Masuma B.*, (1877) 2 All. 573. Question fully considered : (*Mt.*) *Sahibzadi B.* v. (*Mt.*) *Saidulnissa B.*, (1880) 15 Punj. Rec. 297 (No. 123).

[3] See s. 95(2) : *Mulkah do Alum Nawab Tajdur* v. *Mirza Jehan Kudr*, (1855) 10 Moo I. A. 252 (one crore of rupees *mahr* : cut down to moiety of net estate).

[4] Section headed *sam'at* ; the word is spelt *sumut* by Baillie (I. 116). See s. 162, *khul, n.*

[5] See also Bail. II. 70, *ll.* 2-4 : *Mirza Muhammad Sharafat Bahadur* v. *Shahzadi Wahida Sultan Begum*, (1914) 19 Cal. W. N. 502 = 21 C. L. J. 319 = 28 I. C. 191.

[6] *Zakeri B.* v. *Sakina B.*, (1892) 19 I. A. 157, 165 (CAL.) (dower often high to prevent husband divorcing wife).

agreed upon at the time of the marriage,[7] or there is no satisfactory evidence showing what the amount agreed upon was,[7] or where the parties being governed by Hanafi law, have agreed that no mahr shall be paid, the husband is bound to give, and the wife to accept [8] the mahr-u-mithl [9] or proper dower.[8] SECTION 97.

(2) Under Hanafi law where the mahr is fixed at less than ten dirhams in value, the bride is entitled only to ten dirhams.[10]

(3) Under Shia law (*a*) the mahr-ul-mithl can never exceed 500 dirhams ; [11] (*b*) where either party dies without consummation, and before the mahr is agreed upon, neither mahr nor a present (mit'at) is due to the wife ; [12] (*c*) where the amount of the mahr is left to be fixed by the husband at his discretion, he may fix it at any amount, but where it is left to the discretion of the wife, she may not fix it at more than 500 dirhams.[13] (Shia law). Maximum of proper dower.

Under Hanafi law mahr cannot be so fixed after the contract. And if it is left unfixed till then, the effect in the absence of a subsequent agreement is the same as if no mahr had been fixed,[14] though the parties may, if they choose, agree on an amount after marriage.[15]

See s. 364A as to jahez, presents, &c., given on the occasion of the marriage to the bride or bridegroom by one another or by the parents or near relations. Jahez.

§ 2.—MAHR WHEN DUE AND IN WHAT PORTIONS.

98. Mahr may be (*a*) either prompt, or exigible, (in Arabic mu'ajjal) i.e., payable immediately on marriage if demanded by the wife [16] or (*b*) deferred (in Arabic muwajjal) i.e., payable on the dissolution of marriage, or the happening of some specified event.[17] Muajjal (or prompt) and muwajjal (or deferred) dower.

[7] (*Mt.*) *Bibee Bachun* v. *Sheikh Hamid H.*, (1871) 14 Moo. I. A. 377, 385-286, 388 (par. 3) (if no evidence of agreed amount, necessary to enquire into usual amount in family).

[8] But husband may agree to give more, or wife to accept less : *Kamarunnissa* v. *Husaini*, (1884) 3 All. 266 ; Bail. I. 130-134.

[9] See s. 92(2).

[10] Bail. I. 92, 93 ; Hed. 44.

[11] Bail. II. 21.

[12] Bail. II. 71. See s. 102(*b*).

[13] Bail. II. 73.

[14] Bail. I. 95 : s. 97(1).

[15] *Kamarunnissa* v. *Husain*, (1884) 3 All. 266.

[16] *Mahadeo Lal* v. (*Mt.*) *Bibi Maniran*, (1933) 12 Pat. 297.

[17] LIMITATION for suit for *mahr* is 3 years. Time begins to run for exigible dower, when demanded & refused [(*Mt.*) *Amtul Rasul* v. *Karim Bukhsh*, [1933] AIR (PESH.) 31 : both demand & refusal must be unambiguous] or, where, during continuance of

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Mahr is "an essential incident to the status of marriage. Regarded as a consideration for the marriage it is in theory payable before consummation; but the law allows its division in two parts, one of which is called 'prompt' payable before the wife can be called upon to enter the conjugal domicile, the other 'deferred' payable on the dissolution of the contract by the death of either of the parties or by divorce." [18]

Whether deferred dower becomes due on death of wife.

The death of the wife is a sufficient dissolution of the marriage, in order to entitle her heirs to claim the deferred dower.[19] The Fatawa 'Alamgiri states that death dissolves the marriage,[20] which naturally means death of either party.[21]

Addition to mahr subsequent to marriage.

99. At any time during the continuance of the marriage an addition [22] may be made to the mahr : [23] the husband's[24] promise to add to the mahr if accepted by the wife, becomes incorporated into the marriage contract, and binds him : [25]

marriage, no such demand made, time begins to run when marriage dissolved by death, or divorce (Ind. Limit. Act, x. 1908, art. 103): for deferred dower, "when marriage dissolved by death or divorce" (art. 104). *Soorma K.* v. *Ataffoonisa K.*, (1863) 2 Hay, 210 (widow ejected by order of court from possession of husband's property, which she held as security for *mahr* : Limit. held to run from time of such ejectment : not from death of husband. When ejection not by Court's order her lien subsists : heir or purchaser takes property subject to it); *Hamidullah K.* v. *Najjo*, (1911) 53 All. 568 : see s. 113 ; *Umed Ali* v. *Saffihan*, (1869) 3 Beng. L. R. (A. C.) 175 ; *Bunday Ali K.* v. *Chotu B.*, (1866) 1 Agra 273 (undecided whether in case of revocable divorce, limitation for deferred dower begins to run from time of pronouncement or at expiration of *iddat*). For cases before Ind. Limit. Act, 1872, see *Omdatan Nisa B.* v. (*Meer*) *Asud A.*, (1809) 1 S. D. A. (CAL.) 278, (*Meer*) *Nujibollah* v. (*Mt.*) *Doordana K.*, (1805) *ib.* 103 ; *Nooroonnissa B.* v. *Nawaub Syed Mohsin, A. K. B. ib.* VII. 40, all over-ruled by *Ameeroonnissa* v. *Moorad-unnissa*, (1855) 6 Moo. I. A. 211, according to that decision, Ind. Limit. Act, 1877, artt. 103, 104, framed ; & retained in Act IX. of 1908. See also *Khajarunnissa B.* v. *Rissannissa B.*, (1875) 2 I. A. 235.

[18] *Hamira B.* v. *Zubaida B.*, (1916) 43 I. A. 294, 300, 301 (ALL.); *Syed Sabir Husain* v. *Farzand Hasan*, (1937) 45 I. A. 119, 127 (ALL.).

[19] *Jehangir Khan* v. *Syed Abdur Rehman*, (1921) 20 All. L. J. 56 ; (*Mirza*) *Bedar Bukht Yahya Md. Ali K. B.* v. (*Mirza*) *Khurrum B. Y. Ali K. B.*, (1873) 19 W. R. 315 (P. C.) (question left undecided).

[20] Bail. I. 350 (352) contains one of few inaccuracies in translation. From *l.* 3 it would appear that "marriage" is said to be "confirmed by" consummation or "death." In original *iddat* not marriage said to be so confirmed.

[21] So held : *Mahar Ali* v. *Amani*, (1869) 2 Beng. L. R. (A. C.), 306 S. C. *Khyratun* v. *Amani*, 11 W. R. 212 ; *Hooseinboddeen Chowdry* v. *Tajunnissa K.*, [Jan.-July 1864] W. R. (GAP. NO.) 199. Cf. French Civ. Code, art. 227 : "Marriages are dissolved : 1. by the death of the husband or wife ; 2. by a divorce lawfully decreed, 3. by a final sentence against the husband or wife to a punishment occasioning civil death." Civil death abolished by law of 31 May, 1854.

[22] So if the marriage is contracted without any *mahr* being specified, *mahr* may be specified for first time after marriage : s. 93(1).

[23] Bail. I. 111 (sec. vii); *Abdul Kadir* v. *Salima*, (1886) 8 All. 149, 158. This *mahr* is not bride price, nor consideration for marriage : see s. 92, com.; if it were bride price, post-nuptial enhancement would be void as an agreement without consideration : (*Mt.*) *Fatma B.* v. *Lal Din*, [1937] AIR (LAH.) 345 ; *Jahuran B.* v. *Soleman K.*, (1934) 58 C. L. J. 251.

[24] Or when husband is minor by his father as his guardian : *Basir Ali* v. *Hafiz* (1909) 13 C. W. N. 153.

[25] Bail. I. 111 ; *Kamarunnissa* v. *Husain*, (1884) 3 All. 266 ; *Ibrahim Bhura* v. *Isa Rasul*, (1916) 41 Bom. 5, 10 ; *Jahuran Bibi* v. *Soleman Khan*, (1932) 58 C. L. J. 251, 257, 258 ; (*Mt.*) *Amina B.* v. *Shaikh Md. Ibrahim*, (1928) 4 Luck. 343 ;

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provided that where without consummation or valid retirement, the marriage is dissolved otherwise than by the death of either party, additions made to the mahr after the marriage contract, become void : in such circumstances, where the wife becomes entitled to half of her mahr,[26] she is entitled to half of her original mahr, and to no part of the addition.[27]

Remission or gift of dower by wife to husband,—

1. during his lifetime.
2. after his death.

100. The wife[28] may validly agree[29] to a reduction of her mahr,[30] or make a gift[31] (or remission) of the whole of it to her husband, or after his death to his heirs ;[32] provided that she voluntarily and deliberately gives up her right.[31] Such remission may be made conditionally,[33] e.g. in lieu of an annuity,[34] and if purported to be made by a widow to a deceased husband or his heirs, consists of a release[35] of the claim, which under Muhammadan law does not require to be accepted by the heirs of the husband.[36]

To RELINQUISH MAHR is, according to one view, to act in the matter of dower, within the Indian Majority Act, s. 2 : consequently mahr may be

Bashir Ahmad v. (*Mt.*) *Zubaida K.*, (1925) 1 Luck. 87 ; (*Mt.*) *Nasiban* v. (*Mt.*) *Iqbal Begum* [1935] AIR (LAH.) 816.

[26] See s. 102.

[27] Bail. I. 111 ; II. 78-79.

[28] She must be major, i.e. have attained puberty : *Qasim Husain* v. *Bibi Kaniz* (1932) 54 All. 806, dissenting from *Abi Dhunimsa* v. *Mahammad Fathi Uddin*, (1918) 41 Mad. 1026, which held (*submitted* wrongly) that majority for this purpose governed by Ind. Majority Act, 1875.

[29] *Nurannessa K.* v. *Khaje Md. Sakroo*, (1919) 47 Cal. 537 (relinquishment on suggestion of her mother & sister when widow overwhelmed with grief at death of husband : no EXERCISE OF FREE & DELIBERATE JUDGMENT & relinquishment held not binding) ; (*Mt.*) *Khadija B.* v. *Nisar Ahmad*, [1936] AIR (LAH.) 887 (*nikahnama* may stipulate that wife shall not be competent to remit or reduce her *mahr* without written consent of wife's relations).

[30] Bail. I. 112, 544 (last line) (553) ; *Baksha* v. *Mirbaz*, [1888] 23 Punj. Rec. 126 (No. 51) (father turned *faqir*, divorced wife & made over daughter to divorced wife " in lieu of dower," relinquishing all claims to her as her father) ; *Nurannessa K.* v. *Khaje Md. Sakroo*, (1919) 47 Cal. 537.

[31] *Nurannessa Khanum* v. *Khaje Mahomed Sakroo*, (1919) 47 Cal. 537 (remission at corpse of her husband, when she is overwhelmed with grief, not binding).

[32] Husband may make GIFT to wife which she may accept IN LIEU OF MAHR : see s. 347. Release of *mahr* cannot be called *hiba* to husband : see s. 345, com.

[33] Bail. I. 119 & 120. (*Mirza*) *Bedar Bukht M. A. K. B.* v. (*Mirza*) *Khurrum Bukht Yahya A. K. B.*, (1873) 19 W. R. 315 (P. C.) (*mahr* alleged to be originally fixed at Rs. 9,00,000 & that Rs. 7,000 & two armlets worth Rs. 3,000 were sent by husband (King of Oudh), & accepted in satisfaction of *mahr*, & that rest released. Evidence appeared both to trial Court & to P. C. "too weak to establish plea of satisfaction" (p. 317, col. ii.).)

[34] *Ghulam Mohammad* v. *Ghulam Husain*, (1931) 59 I. A. 74, 87 (ALL.) (mother gave up in favour of her son a claim to *mahr*, Rs. 1,00,000, taking only a life annuity of Rs. 600, sister accepting Rs. 400, charged on specified immoveable properties).

[35] GIFT has to be accepted for completion ; but RELEASE effective without acceptance ; ordinarily, *hiba* cannot be made subject to condition : see *n.* 32.

[36] Bail. I. 544 (553) : *Jyani B. Fakirooddin* v. *Umrao B.*, (1908) 32 Bom. 612 ; but see *Nurannessa K.* v. *Khaje Md. Sakroo*, (1919) 47 Cal. 537.

SECTION 100. relinquished by a woman, who is of full age under Muhammadan law,[37] (s. 17B), though under the Indian Majority Act she is still a minor. But the view has also been taken that once a marriage has been performed and mahr settled, a wife who is a minor under the Indian Majority Act, 1875, is not competent to relinquish the whole or part of it, or to change its character.[38]

Whole of mahr due : (1) on consummation, or (2) death of either party.

101. (1) Where the amount of the mahr has been fixed by agreement, and the marriage has been consummated [39] or either party has died,[40] the whole of the mahr is payable to the wife.[41]

(2) Where the amount of the mahr has not been fixed by agreement, (*a*) under Hanafi law, if the marriage has been consummated, or either party has died, the wife (or her heir) is entitled to the mahr-ul-mithl ; (*b*) under Shia law, mahr-ul-mithl is payable if the marriage has been consummated, but where death takes place without consummation,[42] neither mahr nor anything in lieu of it [43] is payable.

For summary of ss. 101-103, see s. 103, com., p. 180.

Marriage dissolved by act of husband before consummation. (1) If mahr is agreed upon,—half of it is due ;

102. Where the wife is divorced by the husband without consummation or valid retirement, or where, by any act on the part of the husband [45] (other than his exercising the option of puberty)[46] the marriage is dissolved before consummation [47] or valid retirement, the wife becomes entitled either (*a*) to

[37] *Qasim* v. *Kaniz*, [1932] A. L. J. 781 ; *Mazharul I.* v. *Abd. Ghani*, [1925] AIR (CAL.) 322, dissenting from *Abi Dhunimsa*, v. *Md. Fathi*, (1917) 41 Mad. 1026.

[38] *Abi Dhunimsa* v. *Md. Fathi*, (1917) 41 Mad. 1026 ; *Najmunnissa B.* v. *Maulavi Sirajuddin Ahmad K.*, (1937) 17 Pat. 303. See s. 100, *n.* 28, p. 177.

[39] Bail. I. 96, 544 (553); II. 29, 73, 65 (par. 4).

[40] Bail. I. 96. Shia law : *Bismillah B.* v. *Shahi Banoo B.*, (1913) 18 Ind. L. J. 179), (JUD. COMMR., OU.) citing *Sharh-i-Luma*, *Kashaf-ul-Lisan & Tahrir-ul-Ahkam* : whole *mahr* becomes due on death of either party.

[41] And her right to either not affected by any subsequent event : Bail. I. 101 ; II. 29 (par. 3) 62, 63, 64, 71 ; *Kulsumbi* v. *Abdul Kadir*, (1920) 45 Bom. 151, (see s. 38A) : not argued (as was the case) that marriage altogether void by reason of wife's pregnancy & that consummation brought about by deceit could not deleteriously affect husband, or enhance his liability : s. 38, *ill.* (7).

[42] Where there has been consummation s. 101(1) or s. 101(2)(*b*) applies.

[43] Bail. II. 71 ; e.g. *mit'at* : s. 102(*b*).

[44] The exception to clause (*b*) is to be distinguished from s. 641, *ill.* (3), by which marriage contract made in *marz-ul-maut* & never consummated, is null and void. Latter rule is *ill.* of general rule in s. 600.

[45] Case where husband dies, provided for by s. 101.

[46] Bail. I. 53.

[47] *Abdul Latif K.* v. *Niyaz Ahmed K.*, (1909) 6 All. L. J. 423 ; (*submitted*) consummation brought about by fraudulent concealment of wife's ante-nuptial pregnancy by illicit intercourse cannot count as consummation in this connection ; cf. s. 38A, *ill.* (7).

receive half of the mahr agreed upon ; or (*b*) if in the contract of marriage there is no mahr agreed upon or there is an invalid [48] stipulation that she is not to receive any mahr, she is entitled to a mit'at,[49] or present, consisting under Hanafi law, of three articles of dress, or of their value. Under Shia law mit'at is regulated by the condition and circumstances of the husband.[50]

SECTION 102. (2) if (*a*) no mahr agreed upon, or (*b*) invalidly stipulated that no mahr is to be paid,— a present due.

Illustrations :

(1) H marries *W*, agreeing to pay Rs. 1,000 as mahr. Before consummation, or valid retirement, he divorces her, or states a fact by which prohibition by fosterage is established between him and her (of which fact she had no knowledge) : she is entitled to half of Rs. 1,000 as her mahr.

(2) In *ill.* (1) if there had been no agreement to pay any mahr, or an express stipulation that no mahr should be paid, the wife would, if governed by Hanafi law, have been entitled to receive a present.

(3) If the marriage had been consummated, or either party had died, then the wife or her heirs would have been entitled, in *ill.* (1), to the whole of the Rs. 1,000, and, in *ill.* (2) to the mahr-ul-mithl (proper dower).

Possession does not affect portion of mahr due.

The fact that possession of the mahr, or of any part thereof, has been given to the wife does not affect the amount or portion to which she becomes entitled, except in so far as it may furnish evidence of its amount.[51]

Services already rendered as mahr.

Where the mahr consists of a stipulation on the part of the husband to render, or cause to be rendered, some service to the wife, which has already been rendered, and she becomes entitled to only half the mahr, she must pay him half of the hire for such service.[52]

Release of mahr.

Where the wife has released [53] the mahr or any portion of it, or has taken anything in lieu of it, and then without consummation the husband has divorced her, he is entitled to claim from her half of the mahr originally agreed upon.[54]

For a summary of ss. 101-103, see s. 103, com., p. 180.

(Shia law) When void or cancelled.

103. Under Shia law,—(*a*) where a void marriage has been consummated, the proper dower, and not the mahr agreed upon, is due ; (*b*) where a valid marriage is cancelled after consummation, the mahr agreed upon, is due.[55]

[48] In Shia law stipulation to receive no *mahr* valid in circumstances mentioned in s. 93. Under Hanafi law they are always invalid.

[49] Cf. s. 97(3)(*b*). The word is also pronounced *mut'at* : according, in Bail. I. 97 spelt *mootut*. See s. 162(2), *khul, n.*

[50] Bail. I. 97 : II. 71.

[51] Bail. I. 112, 113 : II. 74. *Fatawa 'Alamgiri* contains many rules as to effect of ACCESSION or DAMAGE TO SUBJECT OF MAHR in case wife has to return it wholly, or in part (Bail. I. 112-116); unlikely that the question should arise in India ; if it does probably general law of contract would apply.

[52] Bail. II. 75.

[53] See s. 100.

[54] Bail. II. 75 (4th & 5th).

[55] Bail. II. 65-66.

SECTION 103. PROPORTIONS OF MAHR THAT BECOME PAYABLE.[56]

Where marriage consummated or either party dies.

I. Where there has been consummation[57] of the marriage, or valid retirement, or either party has died,[58]—

(1) if the marriage is regular, and,—

(*a*) the mahr is specifically agreed upon, *the whole mahr is due* ;[59]

(*b*) if the mahr is not specified, or it is invalidly agreed that no mahr is payable, *the mahr-ul-mithl* or *proper dower is due.*[59]

Provided that, under Shia law, if one of the parties dies before the marriage is consummated, and before the mahr is settled, *nothing is due* ;[60] unless it had been agreed that the amount should be fixed subsequently, in which case *half of the amount so fixed is due* ;[61]

(2) if the marriage is irregular, and,—

(*a*) if the mahr is agreed upon,—

the mahr-ul-mithl or *the specified mahr* } *whichever is less,—is due* ;[62]

(*b*) if the mahr is not specified or it is invalidly agreed that no mahr is payable, *the mahr-ul-mithl* or *proper dower is due.*[63]

(*c*) Under Shia law in all cases where the marriage is void, *the proper dower, and not the specified mahr, is payable.*

Where marriage not consummated nor dissolved by death.

II. Where there has been neither consummation, nor valid retirement, nor the death of either party,—

(1) if the marriage is regular, and,—

(*a*) it is dissolved by any act of the husband,[64] other than the exercise by him of the option of puberty,[65] and,—

(i) if the mahr is specifically agreed upon, then *half* the *specified mahr is due* ;[66]

(ii) if the mahr is not specified, or it is invalidly agreed that no mahr is payable, *a present is due* ;[67]

(*b*) if it is dissolved by the act of the wife,[64] or by either the husband or wife exercising the option of puberty, *nothing is due.*

(2) if the marriage is irregular, *nothing is due.*[68]

[56] See ss. 101-103. This table does not deal with matter exhaustively, but represents points laid down in Texts.

[57] See s. 102, *n.* 4.

[58] Ss. 196-200 : APOSTASY ; s. 204 (IMPOTENCE); s. 206 (LEPROSY, &c.).

[59] Bail. I. 96.

[60] Not even present (*mit'at*). Bail. II. 71 (*first*).

[61] Bail. II. 73, *ll.* 16-27. These rules postulate existence of valid marriage : where there is no marriage they cannot apply. Validity of marriage itself depends, in one case, upon consummation : see 641, *ill.* (3).

[62] Bail. I. 156, (par. 1), 32, *ill.* (1-3).

[63] Bail. I. 156.

[64] Bail. I. 96.

[65] Bail. I. 53.

[66] Bail. I. 96, 53.

[67] Bail. I. 96 : II. 71.

[68] Bail. I. 31, 156.

103A. On breach by the husband of a stipulation in the marriage contract, the wife may become entitled to claim not merely the mahr contracted for, but her mahr-ul-mithl or proper dower. SECTION 103A. Breach of terms of marriage.

§ 3.—MAHR : LIABILITY : DISCHARGE.

103B.[1] The wife's or widow's claim for the unpaid portion[2] (if any) of the mahr[3] is an unsecured debt[3] due to her from her husband,[4] or on his death from his estate,[5] and ranks[6] equally and rateably[7] with other unsecured debts.[8] It is an actionable claim.[9] Mahr claim : other creditors' claims : rank paid passer.

A lady[10] whose mahr was Rs. 50,000 received from her husband during his *Illustration.*

[1] Sect. 103B = s. 112 in earlier editions.

[2] Of course she may remit or commute it : s. 100 : e.g. for an annuity : *Ghulam Muhammad* v. *Ghulam Husein*, (1931) 59 I. A. 74, 87 : see *Mohammad Sadiq A. K. Fakhr J. B.*, (1931) 59 I. A. I. 19, 20 (OUDH) = s. 103B, *ill.* ; *Nuranessa Khanum* v. *Khaje Mahomed Sakoor*, (1919) 47 Cal. 537 (oral relinquishment of *mahr* by widow when she was overwhelmed with grief at the husband's death, held not binding) ; *Latafat Husain* v. *Hidayat H.* (1936) 58 All. 834, 841 (in lieu of *mahr*, *wakf-nama* executed : wife bound by transaction) : see s. 347.

[3] *Mahr* is fundamental feature of marriage contract : *Syed Sabir Husain* v. *Farzand Hasan*, (1937) 65 I. A. 119 reversing 56 All. 401 same parties.

[4] LIMITATION for suit for mahr : see s. 98 *n.*

[5] Mahr is due from whole estate : *Kazim Ali K.* v. *Sadiq A. K.*, (1938) 65 I. A. 219 (reversing (1934) 9 Luck. 701 : estate consisted partly of partible & partly of impartible property : *mahr* decree satisfied by execution against partible property alone : impartible property held liable to contribute to *mahr* rateably according to value) ; (*Mt.*) *Amina B.* v. *Shaikh Md. Ibrahim*, (1928) 4 Luck. 343 (transfer of small property to wife in lieu of portion of *mahr*, by heavily indebted husband, held valid) ; *Mahadeo Lala Jawala P.* v. (*Mt.*) *Bibi Maniran*, (1933) 12 Pat. 297 ; *Kulsum Bibi* v. *Shyam Sundar Lal*, [1936] 34 A. L. J. 1027 ; *Musahar Sahu* v. *Hakim Lal*, (1916) 43 Cal. 520 (P. C.) ; *Kasturchand* v. *Wazir B.*, [1937] Nag. 291, 296 (see *n.* 8), *Sadiq H. K.* v. *Hashim A. K.*, (1916) 43 I. A. 212 (ALL.).

[6] *Hamira* v. *Zubaida*, (1916) 43 I. A. 294, 301 = 38 All. 581, 588.

[7] She has NO PRIORITY : *Maina B.* v. *Wasi A.*, (1919) 41 All. 538, 547, 548 ; *Ameer Ammal* v. *Sankara N. C.*, (1901) 25 Mad. 658 ; *Beejee B.* v. (*Syed*) *Moorthiya*, (1919) 43 Mad. 214, 237, 238 (F. B.) ; *Imtiaz* v. *Abdul Karim*, (1930) 53 All. 31, 33 ; *Bindeshri Pershad* v. *Afzal K.*, (1921) 19 All. L. J. 706, 710-712. Ind. Succ. Act, XXXIX. of 1925, s. 323 = Act X. of 1865, s. 282 = Prob. Adm. Act, V. of 1881, s. 104.

[8] See s. 571 ; & per Lord Parker, *Hamira B.* v. *Zubaida B.*, (1916) 43 I. A. 294, 301 = 38 All. 581, 588, cited s. 108, com. *Abi Dhunimsa* v. *Md. Fathi U.*, (1917) 41 Mad. 1026 ; (*Meer*) *Meher* v. (*Mt.*) *Amanee*, (1869) 11 W. R. 212, 213 (the widow's claim has no special CHARGE OR PREFERENCE over other creditors) ; (*Syed*) *Imdad H.* v. (*Mt.*) *Hosseini B.*, (1870), 2 N. W. P. 327, 382 ; *Bebee Bachan* v. *Shaikh Hamid*, (1871) 14 Moo. I. A. 377, 383-384 ; *Beejee B.* v. *Syed Moorthiya*, (1919) 43 Mad. 214, 237, 238 ; *Kaniz Fatima B.* v. *Ranandan Dhar Dube*, (1923) 45 All. 384 (*mahr* is NOT a SECURED but a SIMPLE DEBT) ; *Kasturchand* v. *Wazir B.*, [1937] Nag. 291, 295 (seeing her husband in difficulties does not make it dishonest for her to take transfer putting an end to his indebtedness to her) ; *Sadik H. K.* v. *Hashim A. K.*, (1916) 43 I. A. 212 (ALL.). *Ameer A.* v. *Sankara N. C.*, (1901) 25 Mad. 65, (lien with possession " can give her no right as against a purchaser in execution of a decree for sale passed on a mortgage.") See also (*Bibee*) *Salamat* v. *Shaikh M. B.*, (1866) 5 W. R. 194 ; *Zamin* v. *Tasadduq*, [1925] AIR (OU.) 171.

[9] *Amir Hasan K.* v. *Muhammad Nazir Husain*, (1932) 54 All. 499, 504.

[10] *Mohammad Sadiq A. K.* v. *Fakhr J. B.*, (1931) 59 I. A. I. 19, 20 (OU.) (last part of judgt.) ; contrast *Iftikarunnissa B.* v. *Amjad A. K.*, (1871) 7 Beng. L.

SECTION 103B. life time payments of money in the aggregate exceeding the mahr : these payments were made from time to time in varying amounts, the largest of which was Rs. 3,000. There was no evidence that the husband allocated any of these payments to the dower debt, nor that wife accepted them as such : she admitted "presents" received : it was not put to her in cross-examination that these sums were for mahr—no payments were endorsed on mahr-nama (dower deed). *Held*, the maxim debitor non praesumitur donare (a debtor is presumed not to make gifts)[11] was of doubtful application between husband and wife when cordial relations exist : it can hardly be presumed that a man in the husband's position would desire to discharge such an obligation by dribblets : the decision of the Chief Court (reversing the Subordinate Judge) upheld : that mahr was not satisfied by these payments.[10]

Mahr is a debt within the terms of the Succession Certificate Act VII. of 1889 :[12] if property is transferred to a wife in consideration of the mahr due to her, it is not a gift, but a sale or barter.[13]

Preference : fraudulent purpose : distinction.

A claim to be paid mahr is an actionable claim within the Transfer of Property Act, s. 2, and a legal practitioner amongst others is forbidden from buying it.[14] It is a debt for which property may be transferred to her, notwithstanding that there are other unsecured debtors, though the result may be that the rest of the assets are insufficient to satisfy the rest of the husband's debts.[5] One view taken is that after marriage has been performed, remission of mahr is not a matter connected with marriage, dower, divorce or adoption, and so mahr can be remitted by her only on attainment of majority, under the Indian Majority Act.[15] Ordinarily if a debtor makes payments to his creditor, debitor non praesumitur donare, i.e. the debtor is presumed not to make a gift to his creditor but to make the payments towards liquidating his debt. The peculiar relations between husband and wife, and the custom of the husband making presents to his wife, make this maxim inapplicable unless there is something to indicate that payments towards the mahr were made. See s. 103 B, *ill.*

R. (P. C.), 643, (*mahr* 5 lakhs ; husband set aside 4½ lakhs worth of Company's paper ; held, in satisfaction of *mahr*, & not gift).

11 Cf. *Kippin* v. *Darley*, (1858) 3 Macq. 203, 232 (per Lord Wensleydale).

12 (*Sayad*) *Ahmad* v. (*Mt.*) *Bunyadi*, (1891) 26 Punj. Rec. 429 (No. 88). Cf. s. 563.

13 *Bibi Janbi* v. *Hazarath S.*, (1910) 21 Mad. L. J. 958 ; *Mustafa* v. *Hurmat*, (1880) 2 All. 854 ; *Abbas A.* v. *Karim B.*, (1908) 13 Cal. W. N. 160 ; *Esahaq C.* v *Abedunnessa*, (1914) 42 Cal. 361. In some cases, however, (i) transfer by husband & (ii) release of *mahr* by wife, have been considered two independent transactions : each being independent gift : *hiba bil iwaz* : see s. 347 *n.*, com.

14 *Amir Hasan* v. *Md. Nazir*, (1932) 54 All. 499. See also s. 571 : if an heir transfers property of deceased to purchaser in good faith & for consideration, widow's unpaid *mahr* not claimable from property so transferred. CREDITORS have priority over heirs : so *mahr* must be paid before heirs inherit. This priority must be distinguished from charge or mortgage : cf. *Woomatul F.* v. *Meerun-munnissa*, (1868) 9 W. R. 318, 320 ; *Abdul Rehman* v. (*Mt.*) *Inayati*, [1931] AIR (OU.) 36 ; *Beejee B.* v. *Syed Moorthiya*, (1919) 43 Mad. 214, 233 ("The widow does not have a preferential right relatively to the rights of other creditors of the deceased," even if she be in possession under s. 108).

15 *Nujmunnissa B.* v. *Maulavi Sirajuddin*, (1937) 17 Pat. 303.

SECTION 104.

104. (1) When the guardian for marriage of a male minor contracts him in marriage, the minor's property is liable [16] for the mahr ; and if he has no property the guardian is liable to pay it to the wife.[17] Under Hanafi law, the father may become surety, for the mahr, in which case he becomes liable as such ; but does not seem to become liable as such surety by the mere fact of his acting as the guardian for marriage,[18] and by contracting in that capacity for the payment of the mahr.[18] A stranger may contract to stand as surety.[19]

Liability for mahr on marriage of minor husband.

(2) Where the guardian has paid the mahr, and the minor (after attaining puberty) divorces his wife without consummation, *semble,* the wife must refund half of the mahr to the husband,[20] and not to his former guardian.[21]

105. Payment of the mahr to the legal guardian of a woman who is a minor or of unsound mind, or to the father or grandfather of any woman who is a virgin, is a sufficient discharge to the husband, and effectually exonerates him from his liability to pay it to his wife.[22]

Who can give valid discharge for mahr.

§ 4.—MEANS FOR ENFORCING PAYMENT OF MAHR.

106. (1) The wife has, subject to s. 106(3), the option of refusing to the husband his conjugal rights, and of not allowing him to restrain her movements, until the prompt (mu'ajjal) [23] portion of her mahr has been paid to her. The

Refusal of conjugal rights until dower paid. Option in wife.

[16] *Kasturchand* v. *Wazir B.*, [1937] I. L. R. Nag. 291, 295, following *Musaher Saher* v. *Lala Hakim Lal*, 43 I. A. 104. In *Mt. Fatima* v. *Ahmed Ali*, (1937) 41 C. W. N. 965 (P. C.) (LAH.) (there was surety besides husband responsible for certain monthly payments ; see *n.* 19).

[17] Bail. I. 141 ; II. 80-81 ; *Siddiq* v. *Shahabuddin*, [1927] 49 All. 557 (Sunni parties) ; *Syed Sabir Husain* v. *Farzand Husain*, (1937) 65 I. A. 119 reversing (1933) 56 All. 401 (Shia parties : estate of deceased father, in hands of his heirs, liable for *mahr* of minor son's wife, if minor son at time of marriage had no means of his own).

[18] Bail. I. 141.

[19] (*Mt.*) *Fatima B.* v. *Lal Din*, [1937] AIR (LAH.) 345 ; (*Mt.*) *Fatima* v. *Ahmed Ali*, (1937) 41 C. W. N. 965 (P. C.) (LAH.) (In marriage contract husband & surety bound themselves to pay Rs. 60 a month ; surety held responsible for Rs. 60 but not for *mahr* (which was distinct) : though summing up clause " declared that bride was entitled to recover same " from husband & surety.)

[20] There is room for doubt : Bail. II. 81. Bail. II. 80 (husband entitled to REFUND of half of *mahr*, even though he was adult at time of marriage, and *mahr* paid by person purporting to act as his guardian for marriage).

[21] *Syed Sabir Husain* v. *Farzand H.*, (1937) 65 I. A. 119 (ALL.).

[22] Bail. I. 129-130 : cf. (*Nawab*) *Khwaja M.* v. (*Nawab*) *Husaini B.*, (1910) 37 I. A. 152 All.

[23] Or exigible : s. 98.

SECTION 106. rights and liabilities of the wife under the marriage contract, other than those of sexual intercourse and restraint of her movements, are not affected by her exercising the said option.[24]

Her guardian's option.

(2) Where the wife is a minor [25] or of unsound mind,[26] her guardians have the option of refusing to give her into the custody of her husband, and if she is in his custody, the option of taking her back and keeping her in their own custody, until the prompt portion of her mahr is paid up.[27]

Option lost when marriage once consummated.

(3) Where the husband has once had sexual intercourse with his wife, with her consent,[28] (she being then neither a minor, nor of unsound mind) her option is determined,[29] and the husband is entitled to the restitution of his conjugal rights.[30] The Court however exercises a discretion to decree restitution only on the terms that the prompt portion of the mahr be paid up.[31]

(Shia text) option to refuse conjugal rights.

In the Sharh Luma, a Shia text, it is stated : " It is competent for a wife to refuse his conjugal rights (to the husband) before the consummation of marriage, until she receives the mahr ; provided that it has become payable [whether the husband is able to pay or not, and whether the subject of mahr consists of substance or usufruct ; and whether it has been fixed or not]." [32]

Option lost on consummation.

" After consummation of marriage, it is not competent for her to refuse herself,

[24] Hed. 54.

[25] *Re Khatija B.* (1866) 5 Beng. L. R. 557 ; *Mahin B.*, (1874) 13 Beng. L. R. 105.

[26] See s. 234. [27] Bail. I. 124 ; II. 70.

[28] Cf. *Abdul Rahiman* v. *Aminabai*, (1934) 59 Bom. 426, 429.

[29] Bail. I. 125 ; Hed. 54 ; Bail. II. 70 ; *Abdul Kadir* v. *Salima*, (1886) 8 All. 149 (elaborate judgment : Mahmood J.) ; *Kunhi* v. *Moidin*, (1886) 11 Mad. 327 (two cross suits : by husband for conjugal rights : by wife for *mahr* : lower Court dismissed both. H. C. held that both ought to have been decreed : but as there was no appeal by wife, Court could not interfere ; *Hamidunnessa* v. *Zaniruddin*, (1890) 17 Cal. 670 (non-payment of *mahr* no defence once marriage consummated) ; *Bai Hansa* v. *Abdulla*, (1905) 30 Bom. 122 (unconditional decree for husband was confirmed : there being no materials that could be basis for introducing some condition in decree).

[30] Opinion of Abu Hanifa & minority of Shia authorities that wife's option not determined by sexual intercourse. Some of earlier Allahabad decisions followed this view ; Mac., *Mdan. Law*, 281-282 (case 31 ; *Eidan* v. *Mazhar H.*, (1879) 1 All. 483 ; (*Sheikh*) *Abdul Shukkoar* v. *Raheemoonnissa*, (1878) 6 N. W., 94 ; *Wilayat H.* v. *Allah R.*, (1880) 2 All. 821 ; *Abdul Shukkoar's* (6 N. W. 94) & *Wilayat H.'s* (2 All. 821) cases were expressly over-ruled in *Abdul Kadir* v. *Salima*, (1886) 8 All. 149 (F B.) ; in *Abdul Karim* v. *Chhote*, (1906) 3 All. L. J. 432, *Wilayat H.'s* case inadvertently followed.

[31] (*Mt.*) *Anis Begam* v. *Malik Md. Istafa K.*, (1933) 55 All. 743 (Sulaiman C. J.) *Hijaban* v. *Ali Sher Khan*, (1921) 19 All. L. J. 880 ; *Jan Md.* v. *Changa*, (1890) 26 Punj. Rec. 91 (No. 14) ; (*Mt.*) *Saleh B.* v. *Rafi-ud-din*, (1889) 24 Punj. Rec. 573 (No. 164) (F. B.) ; *Eidan* v. *Mazhar H.*, (1875) 1 All. 483. See also Mahmood, J., in *Abdul Kadir* v. *Salima*, (1886) 8 All. 149, 170, 171 (*mahr* brought into court after suit : decree for restitution held obtainable). But see *Nazir Khan* v. *Umrao*, [1882] All. W. N. 96 ; *Bai Hansa* v. *Abdulla*, (1905) 30 Bom. 122 (see *n.* 29).

[32] *Sharh Luma'a* I. 96 ; the *Sharh* (commentary) is enclosed in [ ]. [Cf. s. 366A on the distinction made between substance & usufruct in this passage].

according to the more correct opinion ; [for mahr is confirmed by sexual intercourse, and she has willingly surrendered herself ; the result is that her right is thereafter restricted to making a demand for payment ; but she cannot refuse herself,—nikah being a contract for return, and when one of the parties to such a contract gives the return due from him voluntarily, it is not competent for him to withhold it].[33]

When mahr deferred.

107. Where mahr is deferred, the wife has no right to defer allowing [1] her husband his conjugal rights, until the time for payment of mahr arrives and until it is paid.[2]

Widow's lien for unpaid mahr

108. (1) The widow [3] becomes a creditor of the estate of her deceased husband for her unpaid mahr. Until it is paid,[4] she has (subject to the provisions of ss. 108, 103B) the right,[5] as such creditor, to retain possession of the property

[33] *Ib.* p. 97 : So *Jami'-ush-Shittat*, 443 : "In contracts which involve exchange, refusal of possession is allowed on both sides till payment of return"—*hiba-bil-iwaz.* Cf. ss. 406, 407.

[1] But see ss. 103 B, 106(3) ; Bail. I. 94-95, 108, 110 ; II. 78. Abu Yusuf's opinion is otherwise ; but reasoning of Mahmood, J. & other judges is against Abu Yusuf's opinion being followed in India.

[2] See s. 106(3) & *nn.*

[3] All these rules stated with reference to right of widow, (not of wife) since *mahr* even if originally deferred becomes exigible by death of husband. Headnote to *Narayan Ayyar* v. *Biyari B.*, (1921) 45 Mad. 105 (submitted) rightly proceeds on construction of particular decree. Wife's lien in lifetime of husband, if any claimed, must be proved by proving contract to give her lien, in lieu of *mahr* : see s. 347 *n.* ; an undivorced wife if in possession of her husband's property would prima facie be taken to hold possession on behalf of her husband : on divorce or widowhood her possession is not explainable unless on some ground such as lien for her *mahr* : 45 Mad. 105, 110 ; *Abdul Rahman K.* v. (*Mt.*) *Inayati B.*, [1931] AIR (OU.) 63.

[4] So widow may be redeemed : she must give over possession on offer by another heir to pay her *mahr* : *Bakreedan* v. *Ummatur H.*, (1906) 3 Cal. L. J. 451. Other heir cannot (it was also held) redeem widow piece meal, she being entitled to retain possession till entire claim for *mahr* satisfied ; if plaint offers only proportionate part of *mahr*, suit must not be dismissed, but plaintiff must be given option of paying whole *mahr*. But see *Saheb Jan B.* v. *Ansaruddin*, (1911) 38 Cal. 475 (only proportionate payments ordered) : REDEMPTION PIECE MEAL cf. s. 569. In *Hamira B.* v. *Zubaida B.*, (1916) 43 I. A. 294, (ALL.) : H. C. allowed plaintiffs to recover their respective shares provided they paid to widow their quota of decree debt proportionate to such shares : P. C. did not disturb this : points really decided by P. C. : (i) must widow account for profits ? (ii) is she entitled to interest on *mahr* ? *Abdulla* v. *Shams-ul-Haq*, (1920) 43 All. 128, 132 (heir entitled to possession of his share on payment of proportionate part of *mahr*).

[5] SPECIAL NATURE OF THE RIGHT in ss. 108-115 : (i) whatever the right may be called, it is founded on power as creditor to hold property of husband until her debt satisfied, with liability to account for profits : *Bebee Bachun* v. *Sheikh Hamid*, (1871) 14 Moo. I. A. 377, 384 ; (ii) it is a right, merely to possess, not to transfer or charge : s. 114 ; (iii) the only creditor's lien of Mussulman law which has received recognition in British Courts : *Hamira B.* v. *Zubaida B.*, (1916) 43 I. A. 294, 301 ; *Beejee B.* v. (*Syed*) *Moorthiya*, (1919) 43 Mad. 214, 233 ; (iv) it arises from possession having been taken without force or fraud ; (v) on ground of claim for *mahr* ; (vi) is express or implied consent to heir taking possession of husband or other heirs necessary ?—see s. 108, *nn.* 8, 13, 14, 21 ; (vii) widow cannot follow property in hands of bona fide alienee : s. 112A ; (viii) questions relating to devolution & transferability of the right full of doubts : ss. 114, 115 ; (ix) right does not devolve upon heirs : s. 108A ; (x) as right is merely of possession, on being dispossessed,

SECTION 108. of her deceased husband [6] of which she has lawfully and without force or fraud obtained possession [7] [even though such possession has not been obtained with the express or implied consent of her husband nor under an agreement with him or his other heirs].[8]

if property immoveable, suit must be brought within 6 months, Limitation Act, art. 3 ; if moveable, within 3 years from date when she learns in whose possession it is, art. 48 ; (xi) widow's position as creditor as well as heir : see s. 571A ; (xii) her right distinguished from that of a mortgagee, usufructuary or otherwise : *Maina B.* v. *Chaudhri Vakil Ahmad,* (1929) 52 I. A. 145, 150, 151 : (*a*) right not conferred by agreement or bounty, but by law ; (*b*) no original & intentional hypothecation as in mortgage [usufructuary distinguished from ordinary mortgage]; (*c*) widow "has no estate or interest in property, as has a mortgagee under an ordinary mortgage" ; (*d*) no real or true analogy between mortgagee under Transfer of Property Act & widow in possession.

[6] Her right is to *retain* possession : *Muhammad Shoaib* v. *Zaib J. B.,* (1927) 50 All. 423. This paragraph is worded in accordance with 14 Moo. I. A. 377 & 52 I. A. 145 : but see *n.* 8 ; (*Mt.*) *Janee K.* v. (*Mt.*) *Amatool Fatima,* (1867) 8 W. R. 51, collects authorities but attention is not directed to whether widow may take possession as of right : similarly *Ahmed Hossein* v. (*Mt.*) *Kodeja,* (1868) 10 W. R. 369 & (*Syed*) *Atahur Ali* v. *Altaf Fatima,* ib. *n.* (1863). *Mashal S.* v. *Ahmed H.,* (1927) 50 All. 86 (there is no right to recover possession apart from Spec. Rel. Act, s. 9); (*Mt.*) *Nawab Begum* v. *Hussain Ali K.,* [1937] Lah. 149 (widow unsecured creditor, but since there was no other outstanding debt or heirs, *mahr* became first charge, p. 152); *Maina B.* v. *Chaudhri Vakil Ahmed,* (1924) 52 I. A. 145, 159, par. 2, *ll.* 18. ("By giving up possession of lands, as in her deeds she alleges she has done, she has undoubtedly lost her right to hold possession of them") ; *Tahirunnessa B.* v. *Nawab Hahan,* (1914) 36 All. 558 ("widow has no legal right to go into possession. Her right is that if she gets peaceably into possession without force or fraud, she is entitled to remain in possession until her dower debt is paid").

[7] E.g., *Amir Hasan K.* v. *Md. Nazir Husain,* (1932) 54 All. 499 (widow entered into possession & obtained mutation of 1/4 of estate as owner & of 3/4 in lieu of *mahr* ; her husband's brother, heir to 3/4 unsuccessfully contested mutation, but acquiesced in revenue court's order upholding widow's right to possession in lieu of *mahr*); (*Mt.*) *Bebee Buchun* v. (*Sheikh*) *Hamid Hossein,* (1871) 14 Moo. I. A. 377, 384 (*neither* possession *nor* right to retain possession conferred on widow by (i) agreement, *or* (ii) bounty of husband, *but* by (iii) Muhammadan law): see *Maina B.* v. *Ch. Vakil Ahmad,* (1924) 52 I. A. 145, 150 (ALL.) (as against heirs 149-150); *Bibi Tajim* v. (*Syed*) *Wahid Ali,* (1873) 22 W. R. 118 ; *Sahebjan Bewa* v. *Ansaruddin,* (1911) 38 Cal. 475. Whatever right may be called, viz. whether or not "it is LIEN in strict sense sense of term"—"it appears to be founded on power of the widow as a CREDITOR FOR HER DOWER to hold property of her husband of which she has lawfully & without force or fraud obtained possession, until her debt is satisfied, with the liability to account to those entitled to property subject to claim for profits received" : 14 Moo. I. A. 377, p. 384). Widows' right DISTINGUISHED FROM LIEN : *Mashal* v. *Ahmad,* (1927) 50 All. 86 ; *Bindeshri* v. *Afzal Khan,* [1921] 19 All. L. J. 706 ; *Imtiaz B.* v. *Abdul Karim,* (1930) 53 All. 30, 33. "This lien arises not by virtue of any agreement but by provision of Muhammadan law relating to administration of a deceased person's estate" : *Beejee B.* v. (*Syed*) *Moorthiya S.,* (1919) 43 Mad. 214, 233, 237, 238 (F. B.). TWOFOLD ASPECT of her right : (i) as against heirs : *Bebee Bachun* v. *Shaikh Hamid,* (1871) 14 Moo. I. A. 377 ; *Maina Bibi* v. *Chaudhri Vakil A.,* (1925) 52 I. A. 145, 149-150 ; *Jahuran B.* v. *Soleman K.,* [1934] AIR (CAL.) 210 ; (*Mt.*) *Nawab Begum* v. *Hussain Ali K.,* (1937) 18 Lah. 649 ; (ii) as against other creditors : (*Mt.*) *Ghafooran* v. *Ram Charana Das,* [1934] AIR (ALL.) 168 ; *Kulsum B.* v. *Shiam Sunder Lal,* [1936] All. L. J. 1027.

[8] Words in [ ] added out of respect to *Beejee Bee* v. (*Syed*) *Moorthiya,* (1919) 43 Mad. 214, 235 (F. B.) (to which A. Rahim O. C. J. was party) : followed, *Imtiaz* v. *Abdul Karim,* (1930) 53 All. 31. Nevertheless *submitted* that once it is held that possession must be obtained without force or fraud, there is little significance in pausing to decide whether other heirs ought to be taken to have consented to her possession, or whether their consent or absence of it, is irrelevant. All authorities agree that widow must take possession lawfully & without force or fraud, & from

SECTION 108. Lawful possession, how obtained. Presumptions : (*a*) it is lawful and in lieu of dower.

(2) *Semble,* such possession must initially be obtained by the widow on the ground of her claim for mahr.[9]

(3) The widow's possession of her husband's property is considered to be lawfully held in lieu of her mahr, where the mahr-nama [10] provides for it, or where she has been put into such possession by her husband in his lifetime, or by his heirs after his death.[11]

(*b*) that possession has been lawfully obtained.

(4) Where the widow has been in possession of her husband's property during his lifetime, and has continued so for some time [12] after his death,[13] it will be presumed that her

that circumstance heirs may well be taken to have impliedly consented : otherwise presumably they would not let her take possession without force : (1) widow by her lien does not have any priority over other *creditors,* (2) *mahr* (as debt) has priority over other *heirs'* claim to have estate distributed among themselves. These two considerations are not affected by fact of her being in (or out of) possession of estate. 43 Mad. 214 was dissented from in *Sabur B.* v. *Ismail S.,* (1925) 51 Cal. 124, 133. In *Zamin Ali* v. *Azizunnissa,* (1932) 55 All. 139, 145 all cases for & against view that consent of heirs necessary considered : *held* that obtaining lawful possession does not involve obtaining possession with consent of heirs : but see per Lord Parker, *n.* 13. (i) Express or implied CONSENT of husband or heirs to widow taking possession held NECESSARY in : *Amanat-un-nissa* v. *Bashirunnissa,* (1894) 17 All. 77 ; *Muhammad Karimullah* v. *Amam B., ib.* 93 ; *Sabur Bibi* v. *Ismail,* (1924) 51 Cal. 124 (Rankin, J. emphasizes necessity for CONSENT OF HEIRS to possession & holds *Hamira* v. *Zubaida* (1916) 43 I. A. 294, adopts this view); (ii) SUCH CONSENT held NOT NECESSARY : *Sahebjan* v. *Ansaruddin,* (1911) 38 Cal. 475 ; *Beejee Bee* v. *Syed Moorthiya,* (1920) 43 Mad. 214 (F. B.); *Ramjan Ali* v. *Asghari B.,* (1910) 32 All. 553 ; *Muhammad Shoaib Zaib Jahan,* (1928) 50 All. 423 ; *Imtiaz B.* v. *Abdul Karim,* (1931) 53 All. 31 ; *Zamin Ali* v. *Azizunnissa,* (1933) 55 All. 139. See *nn.* 9, 18.

9 See remarks in (*Bebee*) *Bachun* v. *Shaik Hamid,* (1871) 14 Moo. I. A. 377 = s. 108, *ill.,* com. ; *Majidmian* v. *Bibi Saheb Jan,* (1915) 40 Bom. 34 = 17 Bom. L. R. 770, (possession obtained (1) with consent of heirs, (2) in lieu of *mahr* ; so question involved in s. 108(2) had not to be considered) 40 Bom. 47-49 (right to hold property in lieu of *mahr* is heritable & devolves on heirs, p. 40). But see *Md. Shoaib K.* v. *Zaib J. B.,* (1927) 50 All. 423, 426 ; (though widow may have taken possession without express assertion that she is taking possession in lieu of *mahr,* she may subsequently raise such plea). See also *Zamin Ali* v. *Azizunnissa,* (1932) 55 All. 139 ; *Sampatia B.* v. *Mir Mahboob Ali* [1936] 34 All. L. J. 911 (mere permissive occupation distinguished from possession creating lien). See *n.* 18.

10 MAHR-NAMA includes oral contract to pay *mahr* : s. 92.

11 (*Nawab*) *Md. Ameenoodeen* v. *Mozuffer H. K.,* (1870) 5 Beng. L. R. 570, 575 (P. C.) (widow put into possession by decree of Court); *cf. Mashal* v. *Ahmad,* (1927) 50 All. 86 ; *Md. Shoail* v. *Zaib J.,* (1927) 50 All. 421.

12 On death of her husband she ordinarily becomes one of his several heirs : all of whom entitled to take possession of estate in proportion to their respective rights of inheritance : s. 561(2); neither she in her capacity of heir, nor any other heir, can take possession of more than her/his proportionate share : she can, however, in her capacity of creditor acquire a lien over whole estate for payment of her *mahr* debt, but that can only be if she lawfully & without force or fraud obtains possession in lieu of her *mahr* : see next *n.*

13 In such cases, to apply Lord Parker's observation in analogous matter : (*Hamira* v. *Zubaida,* (1916) 43 I. A. 294, 301) there are TWO ALTERNATIVES as to circumstances in which widow allowed to take possession : (*a*) on basis of some definite understanding as to conditions on which she should hold property, in which case she must abide by conditions ; or (*b*) no understanding,—in which case conditions must be decided on rules of equity : EQUITABLE CONSIDERATIONS are NOT FOREIGN TO MUSSULMAN SYSTEM, but are in fact often referred to & invoked in adjudication of cases. Alternative (*a*) may be further expanded thus : rights of widow & other

SECTION 108. possession has been lawfully obtained [14] and is in lieu of her mahr.[15]

Lien temporary state.

(5) The Court will endeavour (*submitted*) to put an end to the complications arising out of the widow's possession, by having the estate administered, so that both the heirs and the creditors (including the widow in both capacities) may have their rights and liabilities discharged or adjusted.[16]

Illustrations.

(1) On the death of a Muslim his widow applied (April 1851) to the Collector to have her name put in the register, claiming that she was in possession by right of inheritance, and also on account of her mahr. Her application was granted in spite of opposition by the other heirs. She continued in possession. The other heirs took no steps to disturb her possession for nearly ten years. Then (Dec. 1862) two cross suits were brought : (1) by the widow, to establish her right to mahr and to hold the estate for securing the payment of her deferred mahr ; (2) by the other heirs, to eject her and for possession of their shares. *Held* : (*a*) the claim of the widow to hold the property to satisfy her mahr, cannot be founded upon an original hypothecation of the estate for her mahr, for (i) such a right does not arise by the Muhammadan law, as a consequence of the gift of dower, and (ii) there was no agreement on the part of the husband to pledge his estate for the mahr ; but (*b*) the widow, having obtained actual and lawful possession of the estates, under a claim to hold them as heir and for her mahr, she was entitled to retain possession until her mahr was satisfied.[17]

heirs being as explained in *n.* 12,—widow (in double capacity of heir & creditor), may claim payment of *mahr* in priority to distribution of estate amongst heirs : s. 562(1). She may insist on estate being immediately realized & consequential steps taken. Other heirs may think such steps less beneficial to their interests than allowing widow to be in possession of parts (or whole) of estate, allowing time to arrange for *mahr* being paid off. This is one way in which with the most businesslike heirs widow may lawfully obtain, without force or fraud, possession of her husband's estate : but other heirs may be careless (as they often are) & sleep over their rights ; or perhaps feel that after *mahr* paid, little will be left for them ; then alternative (*b*) comes in.

[14] *Fahiman* v. *Bulaqi*, (1934) 10 Luck. 440, (presumption displaced). But see also *Bindeshri* v. *Afzal K.*, (1921) 19 All. L. J. 706. Where there are MINOR HEIRS, who cannot consent, possession can be lawful if referable to husband's act. See *Md. Shoab* v. *Zaib J. B.*, (1927) 50 All. 421, 424, 427, (on BURDEN OF PROOF) ; *Sabur Bibi* v. *Ismail Sheikh*, (1925) 51 Cal. 230. See s. 108(1), *n.* 8.

[15] (*Bibi*) *Tashliman* v. (*Bibi*) *Kasiman*, (1910) 12 C. L. J. 584 (sons "allowed their mother to take their inheritance in lieu of dower," but daughters "obtained registration in opposition to their mother & were not parties to any arrangement with the mother : daughters were given decree for partition on ground that there was "no evidence that widow obtained possession of the whole of the property in lieu of dower") dissented from in *Sahibjan B.* v. *Ansaruddin*, (1911) 38 Cal. 475 ; see also *Sabur B.* v. *Ismail S.*, (1923) 51 Cal. 121, 132, 133. See *n.* 8.

[16] *Mirza Muhammad Sharafat Bahadur* v. *Shazadi Wahida Sultan Begum*, (1914) 19 C. W. N. 502 = 21 C. L. J. 319 = 28 I. C. 191 ; *Davuthammal* v. *Pasariammal*, [1925] AIR (MAD.) 1035. See s. 111 *n.* If it were recognized that widow's possession is a mere temporary measure, many complications would be saved. See s. 109A, *nn.*

[17] (*Mt.*) *Bebee Bachen* v. (*Shcikh*) *Hamid*, (1871) 14 Moo. I. A. 377, 382-383. "It is not necessary to say WHETHER the right of the widow in possession is a LIEN IN STRICT SENSE of term though so stated in *Ahmad Husein* v. *Khodeja*, (1868) 10 W. R. 369." (Peacock, C. J. & Dwarkanath Mitter, J.). See s. 112, *ill.* (2);

(2) Two widows, who had been living with their husband continued, after his death, in undisturbed possession of his house, for more than a year. A suit brought by the other heirs for possession by partition, was resisted, the widows contending that they were in possession for mahr, which was proved to be due. It was presumed that the widows were let into possession by their husband in lieu of mahr, or that they obtained such possession, after the death of the husband, with the consent, or by the acquiescence, of the heirs.[18] SECTION 108.

(3) The other heirs of a deceased Muslim sued his widows for a declaration of title as heirs and possession, offering to pay a proportionate part of such dower debt as may be found to exist. *Held*, on the evidence, that neither widow was in possession of the property at the husband's death but one of them seized it in order to have a lien on it, there being no evidence that the widow in possession had obtained it either by contract with her husband, or the consent of the other heirs. The widow relied on revenue proceedings, in which, adversely to the other heirs, she had been placed in possession of the properties in lieu of her mahr. *Held*, that she could not give herself a

Abdul Kadir v. *Salima*, (1886) 8 All. 149, 170, 171 (Mahmood, J.); *Beejee Bee* v. *Sayed Moorthiya*, (1919) 43 Mad. 214, 237, 238 (F. B.) (Rahim, O. C. J.); *Mashal* v. *Ahmad* H., (1927) 50 All. 86.

[18] *M. Karim-ullah K.* v. *Amani B.*, (1895) 17 All 93, (upholds *Amani B.* v. *Md. Karimullah*, (1894) 16 All. All. 252, though not agreeing that widow does not require PERMISSION OF HEIRS FOR lawfully entering into possession (p. 227)).—Is there any authority for proposition that widow does not require PERMISSION OF HEIRS FOR lawfully getting into POSSESSION ?—*A.*—*Bibi Bechan's* case, (1871) 14 Moo. I. A. 377 was cited with observation that, though, when widows in that case obtained mutation to their names, they did not, " expressly claim that any dower was due to them," yet, this fact " did not affect the question," nor distinguish it from decision in *Bibi Bachan's* case. The P. C. judgment, however, is at pains to bring out fact that widow entered into " actual & lawful possession " (p. 384, par. 1) under her *mahr* claim & refers to these circumstance on every occasion that her possession is alluded to. See 14 Moo. I. A., p. 382, par. 5 ; p. 383, par. 1 ; p. 384, par. 1. Can it then be supposed that circumstances so referred to did not affect question ?—*B.*—Next Burkitt, J., says (16 All. 252) that consent of heirs could not be necessary for lawful possession, inasmuch as in *Bachan Bibi's* case other heirs had opposed application for mutation of names ; but Bachan Bibi (widow) in her application to Collector had claimed that she was already in possession, & after decision in her favour, 10 years had elapsed before it was questioned : from which circumstance, & from other contentions in case, conclusions may well have been drawn that opposition of other heirs to widow remaining in possession had been withdrawn, & that heirs, having failed before Collector to prove that *mahr* was not due, or that widow was not lawfully in possession in lieu of her *mahr* had acquiesced in a state which perhaps they did not feel themselves in position lawfully to contest (14 Moo. I. A. at pp. 388, 389, par. 1).—*C.*—*Ameer-oon-Nissa* v. *Moorad-oon-Nissa*, (1855) 6 Moo. I. A. 211 is referred to on ground that " there widow did not profess to have been put into possession in her husband's lifetime, & certainly had not consent of her co-heir, who did not even admit that she had been wife of the deceased." But only questions decided in this case, were that marriage & deed of *mahr* were proved, that claim for mahr not barred, & that Sadr Court did not err in dismissing suit as framed ; but that dismissal should be without prejudice to heir's bringing a suit for account & administration of deceased's estate consistent with establishment of marriage & deed of *mahr* : 6 Moo. I. A. 225-226, 230-231. " The lady...entered at his death into possession & was treated as administratrix " : p. 224, Her claim was that the mahr-nama charged whole estate of husband with payment of *mahr* but it did not impignorate his estate to secure sum. See also 14 Moo. I. A. 377, 390.—*D.*—*Beejee Bibi* v. *Syed Moorthiya*, (1919) 43 Mad. 214, 226 refers to 6 Moo. I. A. 211 as important because heirs could not have consented to her obtaining possession or remaining in possession as they denied her status altogether. It is submitted, however, that her possession was derived not from heirs, but from husband. See s. 108(1), *n.* 8.

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lien, by taking possession of the estate, without the consent or authority of the persons entitled, and that, in the circumstances, it was not shown that her possession was lawfully obtained, so as to give her a lien.[19]

Widow's lien for mahr defined.

"The dower ranks as a debt," said Lord Parker, "and the wife is entitled, along with other creditors, to have it satisfied on the death of the husband out of his estate. Her right, however, is no greater than that of any other unsecured creditor,[20] except that if she lawfully, [with the express or implied consent of the husband, or his other heirs] [21] obtains possession of the whole or part of his estate, to satisfy her claim with the rents and issues accruing therefrom, she is entitled to retain such possession until it is satisfied. This is called the widow's lien for dower, and this is the only creditor's lien of the Mussalman law which has received recognition in the British Indian Courts and at this Board."[22]

The second of the three sentences cited above, it is submitted, confirms the view expressed in the first edition of this work.

POSSESSION : CONSENT OF HUSBAND OR HEIRS REQUIRED ?

There has been much difference of judicial opinion whether the express or implied consent of the husband or the other heirs to the possession of the widow is necessary for creating a lien in her favour.[18] When, however, the circumstances connected with her possession and the acquisition of the lien, viz. that (i) the widow must obtain possession lawfully and without force or fraud : (ii) by being in possession she acquires no further or preferential rights over other creditors : (iii) being a creditor (mahr being a debt) she has priority over the other heirs which is not affected by her being in possession or out of it : (iv) the right of the heirs to take the net estate after the debts due from the deceased (mahr being one such debt) are paid is not affected by her possession—when these circumstances are borne in mind, the proper inference (it is submitted) is that the other heirs have impliedly consented to her having taken possession. In any case, taking a broad view, the widow remaining in possession in lieu of unpaid mahr ought to be a temporary state : the proper course is that she should be paid off her mahr or that it should otherwise be satisfied by a transfer of property equivalent in value to her mahr, or accepted as such. If the property in the widow's possession exceeds in value her mahr, the other heirs are entitled to have the property realized so that the excess may be distributed. If on the other hand the property in her possession is of less value than her mahr, she is

Proper course to apply for administration of estate.

[19] *Amanat-un-nissa* v. *Bashir-un-nissa*, (1894) 17 All. 77.

[20] Widow's rights, however, come into prominence as they are governed more directly by Islamic law than by general law of India. Moreover she has many facilities for getting into possession not available to other creditors. RIGHTS OF CREDITORS in estate of deceased Muslims are frequently considered by Courts in cases where widow's rights to unpaid *mahr* are concerned. See below, chapter on administration. Sometimes question is unnecessarily dragged in : as where property transferred to wife by husband & alienates it : see e.g. *Ali Md. K.* v. *Azizullah*, (1883) 6 All. 50 ; & *Bindeshri Pershad* v. *Afzal Khan*, (1921) 19 All. L. J. 706, 709, 710.

[21] *Beejee B.* v. (*Syed*) *Moorthiya S.*, (1919) 43 Mad. 214 (F. B.) & *Sabur B.* v. *Ismail S.*, (1923) 51 Cal. 124 ; s. 108(1), *n.* 8.

[22] *Hamira* v. *Zubaida*, 43 I. A. 294 = 38 All. 581, 588. See s. 112.

entitled to have the estate administered, and the whole of her mahr paid. If there are no other assets than the property over which lien is in question, the position is not improved by being left in uncertainty. In other words, assuming that the other heirs consented to her possession they would still have the right to a due administration of the entire estate including the part in the widow's possession : so that instead of disputing the issue whether there was express or implied consent on their part when possession was taken, the practical and reasonable course seems to be to take steps for adjusting the situation to the real condition of the estate of the deceased in reference to his heirs and creditors.[23]

1. *Muhammad Karimullah* v. *Amani B.*
2. *Amanat-unnissa* v. *Bashir-un.* 17 All. 93, 77.

Facts.

Sect. 108, *ill.* (2), (3), were decided by the same judges. It has been questioned whether they are consistent with each other, and the judgment in Amatunnissa's case has been dissented from.[24] Some expressions[25] in the case may be open to criticism, but the actual decision could hardly have been otherwise. For the plaintiffs sued the widow for their shares in the estate, and offered to pay her a proportionate part of her mahr.[26] The widow cannot resist such a claim.[27] If she could, her rights would be not analogous to those of other creditors, but of a far more extended kind.[28]

Modes in which widow may obtain possession :
1. Contract.
2. Consent.

Before the view of Edge, C. J.,—that unless the widow comes in (1) under a contract with her husband, or (2) by the consent or acquiescence of the heirs, her possession is unlawful,[29]—can be pronounced unsound, it is necessary to

[23] *Mirza Mohammad* v. *Shazadi Wahida*, (1914) 19 C. W. N. 502 ; *Davuthammal* v. *Pasari*, [1925] AIR (MAD.) 1064.

[24] *Ramzan* v. *Asghari*, (1910) 32 All. 563, 565 (dissenting from 17 All. 93) : see s. 108(4). PRESUMPTION RAISED in *Muhammad Karimullah*, 17 All. 93, 95 (where (i) widow is in possession, (ii) has been for some in undisturbed possession, (iii) *mahr* is admitted or proved to be due to her, (iv) heir claims partition without paying his proportionate part of *mahr*). PRESUMPTION NOT RAISED in *Amatunnissa*, 17 All. 77, 79 (where (i) plaintiffs expressed willingness to pay proportionate part of any *mahr* that might be found to exist. (ii) widow was not in possession at husband's death, but immediately seized his property to have a lien : held p. 81 : widow failed to prove that she had any lien).

[25] The reference in 17 All. 81, *en bloc* to number of cases, relevance of some of which not at once apparent : viz. (i) (*Mt.*) *Wahid-un-nissa* v. *Shubrattan*, (1870) 6 Beng. L. R. 54—(= s. 571, *ill.* (1))—referred to as leading to conclusion at which Court arrived—merely decides that widow cannot follow property in hands of *bona fide alienee*, (ii) In (*Bebee*) *Mehran* v. (*Mt.*) *Kubeerun*, (1870) 13 W. R. 49 = 6 Beng. L. R. 60, plaintiff silent whether she had ever had possession since her husband's death, (iii) In *Ali Ma, K.* v. *Azizullah K.*, (1883) 6 All. 50, question really decided was that right to *mahr* is personal to widow, & does not pass to purchaser of estate ; yet last two cases cited by Edge, C. J., as "supporting" his view. (*Mt.*) *Meerun* v. (*Mt.*) *Najeebun*, (1867) 2 Agra 335 (widow's plea only maintainable if she had been put in possession by her husband or his heirs on understanding that she should hold it until payment of her *mahr*) not followed in (*Syud*) *Imdad H.* v. *M. Hosseini*, (1870) 2 N. W. P. 327 (same judge in both cases). See *nn.* 26-29.

[26] REDEEMING PIECEMEAL : see s. 108(1), *n.* 4, p. 185.

[27] See *Beejee B.* v. *Syed Moorthiya*, (1919) 43 Mad. 214, 237, 238.

[28] See Chap. on Admin., s. 563 "debt" *n.*, com. In cases where creditor is plaintiff, & heirs resist his claim on ground that they do not represent estate, it is admitted that heirs are entitled to their shares subject to payment by them of proportionate parts of debts : see ss. 566, 567, & *Jafri B.* v. *Amir*, (1885) 7 All. 822 ; *Ambashankar* v. (*Sayad*) *Ali Rasul*, (1894) 19 Bom. 273.

[29] This proposition (17 All. 73) not singular or devoid of authority. See (1) *Hamira Bibi's* case (1916) 43 I. A. 294 = 38 All. 580, (2) (*Meer*) *Meher A.* v. (*Mt.*)

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examine the other suggested circumstances in which the widow may claim to have obtained lawful possession. Assuming that she may take possession against the consent of the heirs, obviously she cannot be allowed to do so by force. There is a third mode in which the widow may get into possession, viz. (3) by claiming to have a right to be put into possession "in due course of law." Such a claim—as her rights are similar to those of other unsecured creditors of the deceased—cannot be recognized.[30] Assuming that she has such a right [32] she would have to apply to the Civil Court for being put into possession. It is clear that the decision on such a point by the revenue courts, on which Amanat-unnissa relied,[33] could not have any force in a civil court: ordinarily, the Revenue courts would refer the parties claiming such rights to the Civil courts. (4) Is there any fourth mode in which the widow may get into possession, lawfully without force or fraud? It seemed to Richards, J. that "if the widow obtains possession peacefully and quietly and without fraud, she is entitled to remain in possession until her dower debt is discharged, subject to her liability to account for the profits that she has received whilst so in possession." [24] If the widow takes possession of property of which only 1/8 or 1/4 devolves upon her as one of the heirs of her deceased husband, can she be said to have got possession of the whole of the property peacefully and quietly and without fraud, in a case in which it is shown that the other heirs did not expressly or impliedly consent?

Third alternative.

On principle. Possession cannot be obtained otherwise.

The same rights must be allowed to other creditors. This is pointed clearly by Abdul Rahim, O. C. J. The widow cannot turn herself into a secured creditor as against the other creditors. As between the widow and the other heirs the widow's claim to mahr as a debt has priority. As against the other creditors her possession does not enhance her rights as creditor.[27]

Amanee, (1869) 11 W. R. 212 ("contract itself does not give the woman a lien on her husband's property" (p. 213); carefully pointed out that widow is in exactly same position as other creditors, "it is not intended in any degree to lay down that a woman has a lien on her husband's property in the ordinary & legal sense of term lien.") (3) This case followed: (*Bibee*) *Meheran* v. (*Mt.*) *Kubeerun*, (1869) 13 W. R. 49, ((*a*) there is no lien by law itself, (*b*) no contract was set up, (*c*) "heirs never did allow her to take possession.") (4) *Ali M. K.* v. *Azizullah K.*, (1883) 6 All. 50, 51 ("except when there is a distinct agreement to that effect there is no presumption of hypothecation of his estate for her dower). (5) *Ajuba Begum* v. *Nazir Ahmad*, [1890] All. W. N. (Vol. X.) 115, (Mahmood, J.: widow purported to convey whole moiety of house belonging to her husband: but *held*, she passed only share she inherited, inasmuch as she was never placed in possession in lieu of *mahr*. by other heirs, p. 117, col. i. par. 3 & 7 of judgment). See reference to this case in s. 115, *n.* 1: AGAINST DEVOLUTION: ii(*b*).

[30] Sec. 108(1). Heirs could summarily recover POSSESSION under SPEC. REL. ACT, s. 9. Cf. *Mariam* v. *Mozhar A. K.*, (1904) 1 All. L. J. 394; *Mashal S.* v. *Ahmad H.*, (1937) 50 All. 86. *Rudrappa* v. *Narsingrao*, (1905) 29 Bom. 213 on (distinction between dispossessing legally & in due course of law under Specific Relief Act, s. 9).

[31] (*Bibee*) *Selamut* v. (*Shaikh*) *Mowla B.*, (1866) 5 W. R. 194: see also s. 103B; *Mashal S.* v. *Ahmad H.*, (1927) 50 All. 86 (no rights to recover possession, apart from rights under Spec. Rel. Act, s. 9, though wrongfully deprived of possession).

[32] She has no such right of possession against creditors, not being a secured creditor: *Maina B.* v. *Wasi A.*, (1919) 41 All. 533 547-8. "Her right is no greater than that of any other UNSECURED CREDITOR: *Hamira* v. *Zubaida*, (1916) 43 I. A. 294, 301 (*ll.* 11-12); *Mashal* v. *Ahmad*, (1927) 50 All. 86.

[33] Cf. s. 108, *ill.* (3).

SECTION 108. Presumption that possession lawful.

The presumptions as stated in s. 108 seem to present a view of the law as favourable to the widow as can be taken consistently with principle. In applying them to the facts of any particular case the Court may, and generally does, lean in favour of the widow, unless bona fide creditors are concerned. It must be borne in mind how easily, by collusion between the widow and other heirs, the claim of a lien for mahr may be raised against the ordinary creditors of a deceased person.[34]

Presumption is artificial.

The strength of the presumptions in s. 108 must, obviously depend on the circumstances. The possession of a great portion of the husband's property by the wife, would ordinarily be attributed to her management of the household —as possession in reality on his behalf, rather than as a lien in opposition to him.[35] To hold that the house, in which the husband and wife are staying, and the articles, in the immediate possession of the wife, but in the use of both, are in the possession of the wife in lieu of her mahr, would imply that, in the case of a dissolution of the marriage (either by the death of wife, or by divorce), the husband would have to vacate the premises, and that, the wife or her heirs could keep him out of possession, until the mahr were paid. The position, that in the lifetime of the husband, he had placed his property in the possession of his wife in lieu of mahr ought therefore not easily to be taken as normal. If the mahr is small compared to the husband's means, he would pay it off ; if it is large, he would not voluntarily place this additional burden and risk on himself.[36]

Koran relating to widows.

The presumption that the change in the nature of possession takes place[37] ipso facto on the husband's death can thus arise only by interpreting the law very favourably to the widow,—a course with which no Muslim (unless he be a party to a suit opposed to the widow) will find fault, for though she is not, like the minor, expressly and formally under the special protection of the courts of law,—in the Koran, her rights, like those of orphans, are specially safeguarded with strong injunctions not to be unjust or hard with her.[38]

Yet, (as has been already said) the mahr is a debt, and the husband is

[34] GENERAL LIENS NOT FAVOURED by Court : " Great inconvenience to generality of traders, because they give particular advantage to certain individuals who claim to themselves special privilege against body at large of creditors, instead of coming in with them for equal share of insolvent's estate. All these general liens infringe upon system of bankrupt laws, object of which to distribute debtor's estate proportionately amongst all creditors, & they ought not to be encouraged. But I do not mean to say that a usage in trade may not be so general & well established as to induce a jury to believe that parties acted upon it, in their particular agreement." " Growing liens are always to be looked at with jealousy & require stronger proof." *Rushforth* v. *Hadfield*, (1805) 6 East 519, 528 : (1806) 7 East 224, 229.

[35] *Kulsambi* v. *Bilankhan*, [1929] AIR (NAG.) 121.

[36] See s. 401, & Bills of Sale Act, (1878) (41 & 42 Vict. c. 31) : *Ramsay* v. *Margaret*, [1894] 2 Q. B., 18, 25-27, 28 (Lindley L. J., " wished to guard against it being taken that goods which were separate property of wife were in apparent possession of the husband when the husband & wife were living together ") ; *Shepherd* v. *Pulbrook*, (1887) 4 T. L. R. 642, 643.

[37] *Ramzan* v. *Asghari*, (1910) 32 All. 563, 564 : widow continued possession which she had in husband's life time. Some change in character of possession must take place, to turn it into lien : cf. Ind. Contr. Act, ss. 170, 171.

[38] Koran, iv. 1, 3, 23 ; ii. 240. On PRESUMPTIONS see *Subramanian C.* v. *Arunachelam C.*, (1905) 38 Mad. 1, 4 ; *Kunhambi* v. *Kalanthar*, (1914) 38 Mad. 1050, 1062.

SECTION 108. bound to pay it to his wife or her heirs, and whether any part of his property is in the possession of the wife in lieu of mahr or not does not affect the substantial rights of the parties, or the priorities between the wife and the other unsecured creditors. Hence the submission in s. 108(5).

Mahr : lien : transfer.

108A. The widow may assign [1] her right to mahr.[2] It is unsettled [3] whether her right to hold possession [4] of her husband's estate till her mahr is paid is not transferable at all; [5] or whether it may be transferred only for the period of her life; [6] and whether if transferable it may be transferred only with the right to mahr [7] (so that the transferee becomes

[1] Sect. 108A deals with transfer by widow; as regards devolution by inheritance see s. 115.

[2] *Bejee B.* v. (*Syed*) *Moorthiya*, (1919) 43 Mad. 214, 237, 238, 243 (F.B.); *Amir Hasan* v. *Md. Nazir*, (1932) 54 All. 499 (claim to *mahr* is actionable claim under TRANS. OF PROP. ACT, 1882, ss. 3, 130; s. 136 forbids a legal practitioner to buy such claim: if widow transfers her right to possession, or property itself without transferring right to receive *mahr*, transferee cannot hold possession as against heir in so far as heir's share goes: 54 All. 499, 506. In that case (i) *mahr*, (ii) possession, (iii) title to property were all purported to be transferred: but the transfer void under Trans. of Prop. Act, s. 136.

[3] See *Maina B.* v. *Chaudhri Vakil*, (1924) 52 I. A. 145, 159.

[4] Observe distinction between transferring this right & transferring property: *Ali Bakhsh* v. *Allahdad K.*, (1910) 32 All. 551, 555, 561; (*Mt.*) *Bibi Makbulunnissa* v. (*Mt.*) *Bibi Umatunnissa*, (1922) 2 Pat. 84, 89-91 (carefully reasoned: if property is purported to be sold, widow's vendee entitled to retain possession only so long as *mahr* unpaid). *Sheikh Abdul Rahman* v. *Sh. Wali Muhammad*, *ibid.* 75 (widow purported to transfer property itself: argued only in H. CT. that on proper construction of document, *mahr* debt must be transferred. See *nn.* 7, 9, 10).

[5] *Muzaffar Ali* v. *Parbati*, (1907) 29 All. 640, 646 (neither inheritable nor transferable) citing *Hadi Ali* v. *Akbar A.*, (1898) 20 All. 262.

[6] (*Shaikh*) *Abdul Rehman* v. *Sh. Wali Md.*, (1922) 2 Pat. 74 (right to possession transferable only for period of widow's life).

[7] *Md. Hasan* v. *Bashiran*, (1914) 12 All. L. J. 1114; *Amir Hasan K.* v. *Muhammad Nazir M.*, (1932) 54 All. 499, 506 (person who has not acquired right to *mahr* not entitled to retain possession against heir); cf. *Ali Muhammad K.* v. *Azizullah K.*, (1883) 6 All. 50; *Ali Bakhsh* v. *Allahdad K.*, (1910) 32 All. 551, 558; *Beejee Bee* v. *Syed Moorthiya Saheb*, (1919) 43 Mad. 214, 237 (F.B) (right to retain possession transferable with right to *mahr*). *Mt. Bibi Makbulunnissa* v. (*Mt.*) *Bibi Umatunnissa*, (1922) 2 Pat. 84, 88 (careful judgment: transfer of security, without assignment of debt itself is valid: transfer of security carries with it right to enforce security & consequently to receive payment of debt); *Sh. Abdur Rahman* v. *Sh. Wali Mohammad*, (1922) 2 Pat. 75, 79, 82, 83 (lien & right to possession not such interest in property as can be severed from right to *mahr* & transferred as separate interest: but widow may transfer possession for her lifetime: possession of transferee being constructively widow's possession); *Maina B.* v. *Ch. Vakil Ahmad*, (1924) 52 I. A. 145, 159 does not deal with points now under consideration: doubt is expressed whether widow could have assigned both (i) her dower debt, & (ii) her right to hold possession until that debt paid, but it is stated to be "clear" that (*a*) she "in fact never purported or attempted to do either of them," on the contrary, (*b*) she describes herself as absolute owner, & purports to convey that absolute ownership, (*c*) as to contention that deeds operated to transfer the widow's dower debt & her right to possession till *mahr* paid,--(i) it was not really put forward, (ii) if put forward, its ground would be that because these deeds fail to transfer absolute interest which they purport to transfer, they operate to transfer dower debt & right of possession: this ground not open, since by giving up possession of land she has undoubtedly lost her right to hold possession.

entitled both to receive the mahr and to be in possession)[8] or whether the right to hold possession may be transferred by itself[9] without assignment of the right to the payment of the mahr.[10] SECTION 108A. Transfer of right of possession.

It is not surprising that the incidents of the widow's possession in lieu of mahr should have given rise to so much difference of opinion. For, in fact the widow's possession ought to be a temporary measure. The estate of the deceased ought to be properly administered, so that the creditors (including the widow in respect of her mahr debt) may have their claims satisfied first, and then the heirs (including the widow as a sharer) may be paid their inheritances. Cases frequently arise which are not easy to reconcile : see s. 108A *nn.*

108B. Non-payment of the mahr does not convert the widow in possession into the absolute owner of the property.[11] Lien not ownership.

[8] In equity benefit of LIEN may be ASSIGNED with debt in respect of which it is claimed : *Bull* v. *Faulkner*, (1848) 2 De G. & Sm. 772.

[9] (*Mt. Bibi*) *Makbulunnissa* v. (*Mt. Bibi*) *Umatunnissa*, (1922) 2 Pat. 86 ; (*Mt.*) *Sogia* v. (*Mt.*) *Kitaban*, (1927) 7 Pat. 141, right of possession till *mahr* paid transferable. "The same view was taken... in *Sheikh Nabijan* v. (*Mt.*) *Sahifan*, (1923) 4 P. L. T. 278. This view supported by decision of Allahabad H. CT. in *Abdulla* v. *Shamsulhaq*, (1921) 43 All. 123. A different view was taken . .in *Sheikh Abdur Rahman* v. *Wali Muhammad*, (1923) 2 Pat. 75 ; "but with very great respect . . .the view taken in other two cases is correct view." *Submitted* : 2 Pat. 75 & 86 are not necessarily irreconcilable : former seems to be based more on construction of particular deed : see *n.* 7).

[10] *Maina B.* v. *Chaudhri Vakil Ahmad*, (1924) 52 I. A. 145, 159 (ALL.): "It is doubtful whether she could have done either of these things" viz. assign (i) her dower debt ; (ii) her right to hold possession of her husband's estate until that debt was paid. It has been held that she can assign her *mahr* & right to claim it. Claim for *mahr* is an actionable claim : *Ameer Hasan* v. *Md. Nazir*, (1932) 54 All. 499, but not transferable apart from right to demand *mahr* ; (*Mt.*) *Kummur-oot-Nissa B.* v. *Md. Hussain*, (1860) 1 Agra 287 & *Abdulla* v. *Shamsul Haq*, (1920) 43 All. 127 (RIGHT to hold POSSESSION inheritable & TRANSFERABLE, though right to receive *mahr* be not transferred therewith) did not follow *Md. Hasan* v. *Bashiran*, (1914) 12 A. L. J. 1114 (right of possession transferable only along with dower debt itself) : see s. 114. So also *Ali Bakhsh* v. *Allahdad K.*, (1910) 32 All. 551. SUBMITTED : If widow may not validly transfer possession, does it mean that she may not rent out the property : must she hold possession herself ? If on other had she can transfer right of possession, is there any reason why person claiming possession under widow should be disturbed in his possession, merely because she purports to transfer not only what is vested in herself (the right to possess) but something more ? (*Shaikh*) *Abdul Rehman* v. *Sh. Wali Md.*, (1922) 2 Pat. 74 (right to possession cannot be transferred by widow so as to enure for benefit of transferee after widow's death,—on which event *mahr* claim passes to her heirs). But (*Mt. Bibi*) *Maqbulunnissa* v. (*Mt. Bibi*) *Ummatunnissa*, (1922) 2 Pat. 86, followed in (*Mt.*) *Sugra* v. (*Mt.*) *Kitabai*, (1927) 7 Pat. 141, (right may be transferred with or without mahr debt & enures until *mahr* is paid off). Principle that lien lost if possession given up was applied in (*Mt.*) *Sitaran* v. *Ganesh*, (1927) 2 Luck. 553, 558. But SUBMITTED it may be considered whether in such cases possession is in fact given up, or held through another,—thus there may be an unwarranted assertion of rights in addition to right of holding possession. Does such an unwarranted assertion jeopardize rights which she does possess ? Cf. Trans. of Prop. Act, s. 43. *Nawab*) *Sharaf Jehan B.* v. (*Nawab*) *Mirza Md. Sadiq Ali K.*, (1926) 2 Luck. 408 (appointment of RECEIVER OF RENTS & PROPERTIES at wife's instance considered). *Submitted* : Court will endeavour to have estate administered : see s. 108(5), com.

[11] *Maina B.* v. *Chaudhri Vakil Ahmad*, (1924) 52 I. A. 145, 159, 160.

SECTION 109
Widow to account for profits ; entitled to interest.
Pre-emption.

109. The widow's possession in lieu of her unpaid mahr is with liability to account to the other heirs for the profits received.[12] As against this liability she may be allowed on equitable considerations to charge interest[13] on mahr, and to set it off against the profits.[13]

The widow in possession in lieu of mahr ranks as a co-sharer for the purposes of pre-emption.[14] Her possession is such possession as the Revenue Courts must recognize for purposes of registration.[15] The assertion of the claim for mahr does not, of course, deprive her of her right of inheritance.

Mahr satisfied by usufruct : suit.

109A. A suit may be instituted against the widow by the other heirs of her deceased husband for accounts, alleging that the mahr debt has been satisfied by the usufruct of the property in her possession.[16]

Such a suit is not barred as res judicata by a conditional decree for possession of the said property, obtained by the said heirs in an earlier suit on the terms that they would pay to the widow within a stated period a specified sum as her mahr, even though the said decree had provided that on failure so to pay, the suit should be dismissed, and they have failed so to pay the said sum.[16]

Doubt as to amount of mahr : lien.

110. The widow's lien over her husband's property for unpaid mahr is not affected by the amount of her mahr being unascertained.[17]

[12] (*Bebee*) *Bachun* v. (*Shaikh*) *Hamid*, (1871) 14 Moo. I. A. 377, 384 ; *Ramzan A. K.* v. *Asghari B.*, (1910) 32 All. 563 ; *Ali B.* v. *Allahdad K.*, (1910) 32 All. 551, 554 ; adopted *Mashal S.* v. *Ahmed*, (1927) 50 All. 85 ; *Bakreedan* v. *Ummatul Fatima*, (1905) 3 C. L. J. 541 (plaintiff alleged *mahr* satisfied by usufruct & that widow no more entitled to possession).

[13] On INTEREST see s. 4, com. *Hamira* v. *Zubaida*, (1916) 43 I. A. 294, affirming 33 All. 182 (F. B.) 6% interest ; *Woomat-ul-Fatima B.* v. *Meerunnissa*, [1868] 9 W. R. 318, 324, 325 (Peacock, C. J.) ; *Sahebjan Bewa* v. *Ansaruddin*, (1911) 38 Cal. 475, 480-481 ; (*Mt.*) *Fakrunnissa* v. *Moulvi Izarussadiq*, (1921) 25 C. W. N. 866, 875, (see s. 4 *n.*) ; *Nawasi B.* v. *Dilafroz*, (1926) 48 All. 803 = (1930) 57 I. A. 181 (widow sued for *mahr* : did not claim INTEREST : decree provided for none ; *mahr* not being paid, she took possession : subsequently accounts taken to determine if *mahr* debt fully discharged by usufruct : at that stage widow's claim to interest on *mahr* held barred : Civ. Pro. Code, 1908, s. 11, expl. 4). *Bakreedan* v. *Ummat-ul-F.*, (1905) 3 C. L. J. 541, (INTEREST DISALLOWED on ground that it could not have been in contemplation of parties that interest would be chargeable on such EXCESSIVE DOWER.") *Mirza Muhammad Sharafat B.* v. *Shazadi Wahida Sultan B.*, (1914) 21 C. L. J. 369 = 19 C. W. N. 501 = 28 I. C. 196.

[14] *Nabiban B.* v. *Shaikh M.*, (1905) 2 All. L. J. 775.

[15] *Umatul M.* v. *Kulsum*, (1907) 35 Cal. 120, 130.

[16] *Maina* v. *Chaudhri V. A.*, (1924) 52 I. A. 145 ; *Nawasi* v. *Dilafroz*, (1926) 48 All. 803 ; see s. 108(5). Widow has right to retain possession till *mahr* satisfied. *Mahr* may be satisfied (i) by payment by estate (or by other heirs) of her husband, or (ii) by usufruct of property in her possession, or (iii) partly payment & partly usufruct. The earlier suit was on third alternative, or it may be taken to have been on the first ; the second alternative was basis of second suit.

[17] *Ahmed* v. (*Mt.*) *Khodeja*, (1869) 10 W. R. 369 = 3 Beng. L. R. (A. C.), 28, *n.*

SECTION 110.

The heirs ought, in a case where the mahr is not ascertained, to bring a suit for an account of what is due for mahr and pray that upon satisfaction of that amount they be put into possession of their shares of the inheritance,[18] but they are "not entitled to recover possession and mesne profits so long as any portion of the dower is due."[18]

Lien and right to sue.

111. The widow by being in possession in lieu of mahr does not prejudice her right to sue[19] for her mahr, provided that she offers to surrender possession.[20]

Charge by decree.

112.[21] A decree obtained by the widow against the other heirs of her deceased husband declaring the amount of the mahr debt, and providing that certain properties shall be treated as her deceased husband's properties from which she shall be entitled to recover the decretal money, operates as a charge on the said properties in favour of the widow as against a purchaser from the other heirs who knows of the decree.[22]

Alienation of property under lien.

112A. Unless the widow is in possession of the property of the deceased, the other heirs may alienate it, and the widow has then no right to follow it in the hands of alienees in good faith for consideration.[23]

Limitation : adverse possession.

113. For the purposes of the Indian Limitation Act, while the widow is in possession of her husband's property in lieu of her unpaid mahr, time does not run[24] (*a*) against the other heirs of the husband if the widow relies on adverse possession ;[25] nor (*b*) under art. 104, against the widow or

[18] *Balund* v. (*Mt.*) *Janee*, (1870) 2 N. W. P. 319, 324. Cf. *Azizullah K.* v. *Ahmed A. K.*, (1885) 7 All. 353 ; *Sayad Umed Ali* v. (*Mt.*) *Saffiham*, (1869) 3 Beng. L. R. (A. C.) 175.

[19] See s. 109A : her suit would be subject of course to the Civil Pro. Code : e.g. if she sues only for part of *mahr* she would be debarred from suing again for the balance : O. II. r. 2 : *Kaniz Fatima* v. *Ram Nandan*, (1923) 45 All. 384.

[20] *Hamira* v. *Zubaida*, (1916) 43 I. A. 294 = 38 All. 581, 588 : see s. 103B : *Ghulam A.* v. *Saghir-ul-Nissa B.*, (1901) 23 All. 432 (judgment last 3*ll.*) ; *Mirza Muhammad Sharafat B.* v. *Shazadi Wahida Sultan B.*, (1914) 21 C. L. J. 319 = 19 C. W. N. 502 = 28 I. C. 191 ; *Maina B.* v. *Wasi A.*, (1910) 41 All. 538, 544.

[21] Sect. 103B = s. 112 in earlier editions. Present s. 112 is new.

[22] *Qasim* v. *Habib-ur-Rahman*, (1929) 56 I. A. 254 (PATNA) : but see *Maina B.* v. *Wasi A.*, (1919) 41 All. 538 confirmed 52 I. A. 145 on recognition of widow's charge : but there the widows purported to transfer property : effect of such transfer not beyond doubt. In 41 All. 538 widow relied not on any decree but on her lien : at least effect of decree was not considered.

[23] *Wahidunnissa* v. *Shubrattan*, (1870) 6 Beng. L. R. 53 = s. 571, *ill.* (1), approved by P. C.; (*Syed*) *Bazayet* v. *Dooli*, (1878) 5 I. A. 211 = 4 Cal. 402, 403.

[24] I.e. Widow's possession is not adverse to heirs, but prevents time running against herself in regard to a suit for her *mahr*.

[25] (*Beebee*) *Azeemun* v. *Asgur*, (1867) Agra 367 ; *Md. Ussud-Oolah K.* v.

SECTION 113. after her death against her heirs, if she or they claim her deferred mahr.[26]

A Muslim wife is put by her husband in possession of his property in lieu of her mahr. He dies in 1895. She continues in possession till her death. After her death her husband's other heirs in 1906 take possession of 3/4 of the estate, and obtain a decree entitling them to pre-empt the other 1/4 share. In 1907 her heirs bring a suit against her husband's heirs for unpaid mahr out of his estate. *Held*, that the suit is not barred, as the cause of action arose only in 1906, when the wrongful dispossession took place.[26]

Widow's lien : no power to transfer or charge.

114. A widow, in possession of the property of her deceased husband in lieu of her unpaid mahr is not entitled to transfer[27] or charge the property in derogation of the rights of the other heirs of her husband ; and the other heirs may avoid any such transfers or charges made by her.[28]

Illustration.

A Muslim died possessed of and entitled to a moiety of a house. His widow, *W* claiming to be in possession of the moiety in lieu of mahr, purported jointly with the owner of the other moiety of the house, to sell the whole of it to a third person. It was found that *W* had not entered into possession in lieu of mahr with the consent of the other heirs of her husband. *Held*, that she could only have transferred to the third person the rights which she acquired by inheritance in her husband's property, and could not have passed his entire rights, even if she had been validly possessed of the moiety of the house in lieu of mahr.[29]

(*Mt.*) *Ghasheea*, (1866) 1 Agra 150 ; *Abdullah* v. *Shumsul H.*, (1920) 43 All. 127 (the widow had transferred property in her possession : purchaser knew that she was not owner, but held in lieu of *mahr*).

[26] *Hamidullah K.* v. *Najjo*, (1911) 33 All. 568 ; *Sheikh Abdur Rahman* v. *Sh. Wali Md.*, (1922) 2 Pat. 75, 80.

[27] "Her right to dower did not confer upon her a saleable estate :" *Parbati* v. *Muzaffar A. K.*, (1912) 34 All. 289, 293 (P.C.). But see (*Mt.*) *Sitaram* v. *Ganesh P.*, (1927) 2 Luck. 553, 557, 558 ; *Bebee Azeemun* v. *Asgurali*, (1867) 2 Agra 367.

[28] *Sheikh Abd. Rahman* v. *Sh. Wali Md.*, (1922) 2 Pat. 75, 77, 78 ; (*Mt.*) *Sitaram* v. *Ganesh*, (1927) 2 Luck. 553 ; *Fahiman* v. *Bulaqui*, (1933) 10 Luck. 440 ; *Maina B.* v. *Chaudhri Vakil*, (1925) 52 I. A. 145 ; *Ussud-Oollah K.* v. *Md. Ghasheen B.*, (1866) 1 Agra 150, (gift of property avoided to extent of plaintiff's share therein) ; *Mt. Noor K.* v. *Hur D.*, (1866) 1 Agra, 67 (gift) ; (*Beebee*) *Azeemun* v. *Asgur A.* (1867) 2 Agra 367 (alienation set aside) ; *Beejee Bee* v. *Syed Moorthiya*, (1920) 43 Mad. 214, 238 ; *Chuhi B.* v. *Shame-ul-Nissa B.*, (1894) 17 All. 19 (mortgage by widow in possession declared inoperative : but "her possession cannot be disturbed except on payment of dower debt"). Heirs can set aside acts of widow only in so far as such acts ignore their own rights. In cases noted above, plaintiffs sued for possession which not decreed. *Ali Md. K.* v. *Azizullah K.*, (1883) 6 All. 50 (purchaser from widow not allowed to plead as against heirs of husband non-payment of *mahr* to widow) ; *Md. Husain* v. *Bashiran*, (1914) 12 All. L. J. 11, 41 (Piggott, J., *solus*) right of widow to possession in lieu of *mahr* "can only be transferred along with the dower debt itself" ; distinguished in *Abdullah* v. *Shams-ul-H.*, (1920) 18 A. L. J. 964 ; & considered in *Maina Bibi* v. *Wasi Ahmed*, (1919) 41 All. 538, 552, which was confirmed : (1926) 52 I. A. 145.

[29] *Ajuba B.* v. *Nazir Ahmed*, [1890] All. W. N. (Vol. x.) 115 (Mahmood, J.). See s. 115 *n.*

SECTION 115. Lien for unpaid dower : devolution on widow's heirs ?

115. (1) On a widow who has held possession of her deceased husband's property in lieu of her mahr, dying without having recovered the mahr, her heirs according to the majority of decisions succeed to her right of possession. There are two decisions that the right to possession does not devolve on the heirs.[30]

(2) If the widow dies without obtaining possession of the estate of her deceased husband in lieu of her unpaid mahr, her heirs are not entitled to take possession of it.[31]

§ 5.—PRESUMPTIONS : PROMPT PORTION OF MAHR.

Proper dower standard of probability.

116. Where at any time during the existence of the marriage, a dispute arises between the parties regarding the amount of the mahr, or its subject matter, the mahr-ul-mithl or proper dower is to be assumed as the standard of probability.[1]

30 IN FAVOUR OF DEVOLUTION on heirs ; (i) *Azizullah* v. *Ahmed*, (1895) 7 All. 353, (Oldfield & Mahmood, JJ.,) (ii) *Ali B.* v. *Allahdad*, (1910) 32 All. 551 556, (Richard & Tudball, JJ., all prior authorities considered ; she may transfer right to possession, not actual property, p. 555) ; (iii) *Mashal* v. *Ahmad*, (1927) 50 All. 86 ; (iv) *Manjiamian* v. *Bibi S. J.*, (1915) 40 Bom. 34, 47, 49 ; (v) *Chaudhri Ahmad Azim* v. *Chaudhri Safi Jan*, (1926) 2 Luck. 335, 380 ; (vi) *Amir Hasan K.* v. *Md. Nazir Husain*, (1932) 54 All. 499, 505. See s. 108A *nn.* (vii) *Beejee B.* v. *Syed Moorthiya*, (1919) 43 Mad. 214, 237 (right capable of descending to her heirs), [cf. *Abdulla* v. *Shams-ul-Haq*, (1920) 43 All. 127 (widow may transfer right to possession) ; (*Mt.*) *Makbulunnissa* v. (*Mt.*) *B. Umatunnissa*, (1922) 2 Pat. 184, & other cases under s. 108]. AGAINST DEVOLUTION : (i) *Muzaffar A. K.* v. *Parbati*, (1907) 29 All. 640, 646 (widow's rights "neither inheritable nor transferable") ; P. C. (1912) 34 All. 289, 293 (par. 3), 295 (*ll.* 9, 10) reversing H. C. *held* title at least of adverse possession established" & did not deal with question of devolution upon heirs. (ii) *Hadi* v. *Akbar*, (1898) 20 All. 262, (Edge, C. J. & Burkitt, J. upholding Banerjee, J. Judgment of Edge, C. J. as reported hardly carries any weight. (*a*) Two misprints on p. 263 : 16 All. is printed in *n.* for 6 All. ; last sentence on p. 263 difficult to understand ; (*b*) *Ajuba* v. *Nazir*, [1890] All. W. N. (vol. 10) 115 Mahmood, J. did not hold that widow had acquired lien as the C. J. said. On contrary : there widow (who had sold house, to a moiety of which her husband was entitled, owner of other moiety joining in sale) was "never placed in possession in lieu of dower, by other heirs of her husband, and therefore," said Mahmood, J., "whatever the amount of her dower may be, all that she could convey & pass. were her rights & interests only by inheritance from her husband." Moreover Mahmood, J., adhered to his decision in *Azizullah* v. *Ahmed*, (1885) 7 All. 353 that heirs "of a Muhammadan widow, who was in possession in lieu of dower, succeed to her estate, including her claim to dower." He holds "that the position of such heirs was vastly distinguishable from position of purchaser from her of an isolated piece of immoveable property." This decision (Edge, C. J., said) was in favour of view which he himself took, viz. that widow's lien purely personal right & did not devolve upon heirs. (ii) Other case which C. J. cites as supporting his view, *Ali Muhammad K.'s* case, (1883) 6 All. 50, deals not with rights of widow's heirs, but of purchaser from her. Question, therefore, not so much of choice between decisions of Edge, C. J. & of Mahmood, J., but whether latter is consistent & justified in holding that position of (1) purchasers from widow, & (2) her heirs so distinguishable that quite different rules of law should prevail regarding them).

31 *Tahirunnissa* v. *Nawab H.*, (1914) 36 All. 538, distinguishing *Ali B.* v. *Allahdad* (1910) 32 All. 551.

1 Bail. I. 130 : cf. s. 5B ; *Zakri B.* v. *Sakina B.*, (1892) 19 I. A. 157 (evidence as to *mahr* considered by Lord Hannen).

SECTION 117. Whole mahr presumed prompt.

117. (1) In the absence of any agreement or custom to the contrary, the whole [2] of the mahr will be presumed to be prompt.[3]

Custom.

(2) In places and amongst classes of people [4] where there is a custom that part only of the mahr is promptly payable, and the rest is deferred, such a portion only will be considered to be promptly payable, as in the case of women in similar circumstances, and with similar mahrs is customarily made promptly payable.[4]

Presumption.

(3) It is presumed in India except in Madras that by general custom part only of the mahr is promptly payable. In the absence of evidence of custom relating to women in similar circumstances, and with similar mahrs, the Court in its discretion fixes what portion should be held to be prompt : [6] a third or a fifth of the mahr may be so fixed.[7]

1. THE TEXTS Fatawa Kazi Khan on prompt mahr.

The Fatawa 'Alamgiri [8] cites the Fatawa Kazi Khan, on the point covered by s. 117(2). "Where a woman marries, and a certain amount of mahr is fixed, then she has the option of refusing herself, in order to have the whole of her mahr paid : but if he be in a place where the custom is that he should pay a portion promptly, while the balance is left deferred in his charge, till the time of divorce or death (as is the case in our country), then she is allowed to refuse herself in order to get the prompt portion, which is called 'dast-paiman' [9] in Persian, and she is not entitled to demand the whole of the mahr. If the parties have specified the amount of the prompt portion, that portion should be paid promptly, but if nothing has been specified [in this regard], then consideration should be given to the woman and the mahr mentioned in the contract, in determining what portion ought to be considered prompt in the case of such a woman [as the wife], from such a mahr [as was agreed upon], and that portion should be paid promptly."

PRIVY COUNCIL DECISION. (1873)

Must the whole, or only a part, of the mahr be presumed to be prompt? The Privy Council [10] have approved of Macnaghten's statement that "in all

[2] See s. 98. Macn. 279, approved *Mirza Bedar B. M. A. K.* v. *Mirza Khurram*, (1875) W. R. 315 (P. C.); *Husain* v. *Ghulam K.*, (1911) 35 Bom. 386; *Sheik Muhammad R.*, v. *Ayeesha B.*, [1937] 2 M. L. J. 779. As to Shiah Ismailis *Daaimu'l-Islam* says : where not specified whether *mahr* prompt or deferred, whole presumed prompt.

[3] *Muhammad Subhanulla* v. *Saghirunnissa*, (1919) 41 All. 363 (amongst Sunnis only REASONABLE portion deemed PROMPT : *mahr* Rs. 1,25,000 : husband already discharged Rs. 90,000 thereof : balance presumed deferred).

[4] Bail. I. 126-127.

[5] *Sheikh Muhammad R.* v. *Ayesha*, [1937] 2 M. L. J. 779; *Masthan Sahib* v. *Assan Bivi Ammal*, (1900) 23 Mad. 371 (F. B.).

[6] (*Mt.*) *Fatima B.* v. *Nur Md.*, (1920) 1 Lah. 597, 601 (1/5 held prompt).

[7] See s. 117, com. [8] Bail. I. 126-127 (= *Kazi Khan* I. 175).

[9] On DAST-PAIMAN, see Bail. I. 144-145.

[10] (*Mirza*) *Bedar Bukht Md.* v. (*Mirza*) *Khurrum*, (1873) 19 W. R. 315 (P. C.):

contracts....if it be not expressly stipulated that the payment of the consideration shall be deferred, it must be paid immediately as a matter of course, and that dower is the consideration of marriage." [11] The applicability of this general rule in the conditions prevalent in India had been denied by Baillie in a learned note,[12] which does not seem to have been brought to the notice of the Privy Council. At any rate it has not been referred to. The views of the two learned authors do not, however, seem to be irreconcilable. Baillie says that the amount that has to be promptly paid must be determined by a reference to the portion that is customarily made prompt in the case of "like women." [13] The question really is what the parties contracted and intended. Consequently any custom or usage prevalent amongst the people must be given effect to, on the ground that such usages represent terms so usual and well known that they need not be and are not expressly entered in the document, but impliedly form part of the agreement.[14] Baillie [15] means that mahr, in the absence of a contract to the contrary, must be presumed in law to be prompt as to only part thereof : [16] the practice of other ladies of the bride's family being the guide for determining what portion is to be considered prompt. The Privy Council judgment contains nothing, it is submitted, that can exclude this principle in the present case. But there was in the case evidence to which the judgment refers [17] of very large mahrs, which were apparently proved to have been prompt. Moreover "the law and practice of Oudh "[18] required even the mahr-ul-mithl (or proper dower) to be cut down to a "reasonable" mahr and they decreed this to be done. It was not contended that only a part of the mahr was prompt, and the rest deferred—the contention was on the one hand that the whole was deferred, and on the other that the whole was prompt.[19] The case has been mentioned [20] as an authority only on the Shia School. But the authorities referred to were not Shia texts. Nor is there anything to show that it was intended to differentiate between the two schools.[21]

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(i) Macnaghten's view : whole prompt.

(ii) Baillie's view : "properly prompt portion."

Effect of the law as stated by Baillie.

Purposeless destructions.

2. PROOF OF CUSTOM AS TO EXIGIBILITY OF MAHR.

Baillie holds that no evidence need be adduced to prove a custom that part only of the mahr is prompt, but that the Court will itself order (unless an agreement to the contrary is proved) that (i) only a part is to be prompt ; (ii) what part is to be prompt is to be determined by practice prevailing amongst

Mahrs of other ladies.

three points taken before P. C. : (1) was *mahr-namah* produced genuine ? (2) if genuine, had *mahr* not been satisfied ? (3) in any event, was not (whole of) *mahr* deferred, till after death of husband, & not payable in his lifetime, even though wife had already died.

11 Macn. *Moohum. Law*, 279 *n*. See also *ib*. 59, Ch. VII. par. 22.

12 Bail. I. 126-127 *n*., referring to *Durr-ul-Muktar*, *Sharh-i-Viqaya*, & other texts.

13 *Mu'ajjal-ul-mithl* in Arab. "properly prompt" on analogy of "proper dower ;" "proper" = what is done in case of woman of same family & status.

14 *Moult* v. *Halliday*, [1898] 1 Q. B. 125, 129. 15 Bail. I. 92, 126 f.

16 *Muhammad Subhanullah* v. *Saghirunnissa*, (1919) 41 All. 562.

17 (*Mirza*) *Bedar Bakht* v. (*Mirza*) *Khurrum*, (1873) 19 W. R. 315, 317.

18 Cf. s. 95(2) : Oudh Laws Act, dated 1875 : decision being of 1873.

19 Passing reference by Mahmood, J., to 19 W. R. 315, *Abdul Kadir* v. *Salima*, (1886) 8 All. 149, 158, does not carry us any further.

20 *Umda Begam* v. *Muhammadi Begam*, (1910) 33 All. 291, 293, 294.

21 See s. 11(2) on PURPOSELESS DISTINCTIONS.

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other ladies of the same social position, apparently assuming that those who assert that part only is prompt will produce evidence to show what part is prompt and what deferred : viz. evidence of the contracts relating to mahr of other ladies of the wife's family. This is not, in effect, distinguishable from proof of custom. Where no such evidence is adduced, Courts accepting Baillie's view are inclined to order 1/3 as prompt, and 2/3 as deferred,—which is no doubt departing from Macnaghten's exposition.

Practice : a third prompt.

3. DECISIONS. Conflict.

Sect. 117, attempts to evolve a general rule, out of the conflicting decisions which are noted below.[21]

[21] (i) *Tadiya* v. *Hasanebiyari*, (1870) 6 Mad. H. C. R. 9 (whole presumed prompt, but not contended that part only was prompt : nor did question arise WHAT PART PROMPT). This case followed by F. B. (ii) *Masthan S.* v. *Assam B.*, (1900) 23 Mad. 371 (F. B.) (Davis, Benson & Boddam, JJ.) who preferred *Tadiya's* case & Macn. to Bail. Order of reference carefully collates all authorities : pp. 372-374, per White C. J. & Moore, J. : evidently preferring Bail. to Macn.). The F. B. case followed as regards Hanafis : (iii) *Sheikh Muhammad R.* v. *Ayeesha*, [1937] 2 M. L. J. 779. (iv) *Murriam-oon-Nissa B.* v. *Imdadee B.*, (1848) 3 S. D. A. (N. W. P.) 185 = Morl. Dig. (N. S.) I. 182, (1/3 prompt : per C. Thomson, J. *solus.* : wife claimed *mahr* alleging whole prompt, which husband admitted : this fact, Court held, showed collusion : "Since never customary for whole of so large dower to be prompt or payable on demand, nor do witnesses brought forward.. .depose to its being so. Moreover, by *futwa* now obtained from law officer, it appears that while husband alive, Imdadee B. could not claim whole dower as exigible, for by Muhammadan law where (as in this case) no specific amount proved expressly declared exigible, 1/3 of whole must be considered as exigible or payable on demand, *mowajjul*, (*sic* for *mu'ajjal*) 2/3 deferable or payable at future time, *mowujjul*." (v) *Fatma B.* v. *Sadruddin V. N.*, (1865) 2 Bom. H. C. R. 291 (Couch, Tucker & Warden, JJ.) (*Muriamoonnissa's* case 3 S. D. A. (N. W. P.) 185 referred to with approval after citing Baillie I. 126 ; lower Court's order that 1/3 prompt, not disturbed. ALL. H. C. followed Bail. holding only part of *mahr* prompt, with DISCRETION TO COURT TO DECIDE how much prompt : (vi) *Eidan* v. *Mazhur H.*, (1877) 1 All. 483 (wife prostitute, of prostitute family : H. C. held that lower Court had exercised discretion wisely in directing only 1/5 prompt) : (vii) *Taufik-Un-Nissa* v. *Ghulam K.* ; *ib.* p. 506 ; (viii) *Habibunnissa* v. *Nizamuddin*, decided 31 Jul. 1877 (*unrep.*) see 1 All. 507 ; (ix) *Umda B.* v. *Muhammad B.*, (1910) 33 All. 291 ; (x) *Mohammad Subhanullah* v. *Saghirunnissa*, (1919) 41 All. 562 ; (xi) *Mangal R.* v. *Sakina B.*, [1934] 32 All. L. J. 64 ; (xii) *Maimuna B.* v. *Sharafatullah*, [1931] 29 All. L. J. 197 ; (xiii) (*Mt.*) *Fatma* v. *Nur M.*, (1929) 1 Lah. 597 (1/5 prompt) ; (xiv) *Mt. Bibi Mahooban* v. *Sheikh M. Ameruddin*, (1929) 8 Pat. 646 (1/3 prompt) ; (xi) *Husain K.* v. *Gulam K.*, (1911) 35 Bom. 386 (husband set up, but could not prove, custom that *mahr* could not be claimed except on divorce, or death of husband ; Court consequently held whole prompt). If no express agreement, whole consideration for *khul*, (separation by agreement) is prompt : s. 181. Consideration for *khul* is counterpart of, & closely connected with, *mahr* ; *mahr* being frequently spoken of (though not with strict accuracy) as consideration for marriage : ss. 176 ff.]

CHAPTER V.

DIVORCE [1] AND DISSOLUTIONS OF MARRIAGE.

§ 1.—PRELIMINARY.

Modes of dissolving or annulling marriage.

118. Marriage [2] may be dissolved,[1] in the lifetime [3] of the parties thereto, by the act of the husband or wife, or by mutual agreement, or by operation of law, or by a judicial order of separation ; [4] or it may be annulled.[5] In this Chapter, unless there is anything repugnant in the subject or context, by the word " divorce " [6] is meant talaq as defined in s. 119.[7]

" Of all things that have been permitted by the law " said the Prophet, " the worst is divorce." [8]

Prophet's disapproval of divorce.

The Sharai'ul-Islam accordingly explains the strict requirements for talaq under Shia law in these terms : " As a rule marriage being a chaste or protected condition, favoured by the law, and in its own nature, not admitting of being dissolved,[9] it is necessary, in taking off or removing the tie, to adhere strictly to the terms of the legal permission." [10]

Reason for strictness of form.

Our (viz. Hanafi) doctors say that divorce is in itself a dangerous and disapproved procedure as it dissolves marriage, an institution which involves

[1] For sake of conforming with familiar title this chapter headed " divorce," in sense of all dissolutions of marriage ; but in body of chapter, word " divorce " used (unless subject or context indicates otherwise) to refer to one particular method of dissolving marriage, viz. *talaq* : s. 119. On ambiguity of word " divorce " see s. 40, com.

[2] Marriage in accordance with Muhammadan law is meant : not, e.g. marriage in England between Muslim & Christian woman : see *Rex* v. *Hammersmith, Supt. & Regist. of Marr., ex parte Mir Amiruddin,* [1917] 1 K. B. 63.

[3] Death of course dissolves marriage : *Jehangir Khan* v. *Syed Abdur Rahim,* (1921) 20 All. L. J. 56 : s. 98.

[4] Called *firqat,* in Arabic : see ss. 210-212.

[5] In Arabic *faskh* = annulment or cancellation or judicial rescission of contract : see s. 191 ff.

[6] Baillie calls a separation caused by the husband pronouncing certain appropriate words, REPUDIATION : all other separations for causes originating from husband, " divorces." Bail. I. 204 : " divorce " or *talaq* is used in this work to refer to what Baillie calls " repudiation."

[7] *Khul* = to pull off, take off, release ; *mubaraat* = dismissing a partner, dissolving a partnership, dissolution of marriage by consent ; *tuhr* = period between two successive menstrual courses : s. 138 *n.*

[8] *Mishkat-ul-Mas.* XIII. xii. 2, (Matthews, II., 118); Abdur Rahim, *Mmdan. Jurispr.*, 335-336, citing *Fath-ul-Qadir,* III. 326 ; *Asha B.* v. *Kadir Ibrahim Rowther,* (1909) 32 Mad. 22, 25.

[9] The allusion is to fact that most transactions under Muslim law are " in their nature " revocable during a stated period : e.g. a sale for 3 days.

[10] Bail. II. 113.

SECTION 118. many circumstances as well of a temporal as of a spiritual nature ; nor is its propriety at all admitted but on the ground of urgency of release from an unsuitable wife." [11]

Talaq. Ila. Zihar. Lian. Cancellation Judicial separation.

Marriage[12] may be dissolved (or marital rights otherwise affected) in the lifetime of the husband and wife by : (1) talaq, i.e. a pronouncement of divorce made by the husband or by some person duly authorized by him in that behalf ; (2) ila, i.e. the husband abstaining from connubial intercourse in accordance with an oath to that effect ; (3) zihar, i.e. the husband comparing the wife to a person within the prohibited degrees, on which the marriage may be dissolved by the Court on the application of the wife ; (4) lian, i.e. the husband solemnly accusing the wife of adultery : the wife denying the accusation, and each respectively imprecating the curse of God, on the husband for falsely accusing, and on the wife for falsely denying the accusation,—on which the marriage may be dissolved by the Court ; (5) khul or mubaraat, i.e. mutual agreement between the husband and wife to dissolve the marriage (for some consideration proceeding from the wife to the husband) ; (6) faskh or the cancellation of marriage on account of physical defects in the husband or wife ; (7) the Court separating parties whose marriage is irregular ; (8) a minor exercising his option of puberty : ss. 69-78 ; or (9) quasi-guardian on the ground of inequality : ss. 79-80, or (10) by a domestic tribunal created by the husband or by contract between the parties to the marriage with power to dissolve the marriage : s. 24A ; (11) the wife or other person exercising a power to divorce delegated to her or him by the husband : ss. 128-134 ; (12) the Court dissolving the marriage under Shafii or Shia law (i) after an ila : s. 159, or (ii) on prohibition becoming established by fosterage : s. 210, or (iii) on parties adopting Islam : s. 210, or (iv) under Shia law if the husband is missing : s. 211, or (v) on the husband falsely charging the wife with infidelity : s. 110A, or (vi) on desertion, failure to maintain, and/or cruelty : s. 210B, or (vii) the Court refusing restitution of conjugal rights (without dissolving the marriage) : s. 212A.

The first, second, third, sixth and eleventh forms are by the act of the husband, the third, fourth and eighth partly by act of husband (and wife) and partly by operation of law, the fifth by agreement, ninth and tenth by persons authorized by law or consent of parties, the seventh and twelfth by the Court. In the following pages the forms in which the husband has greatest voice are mentioned first. The first and the last are probably the most important.

§ 2.—DISSOLUTION OF MARRIAGE BY TALAQ OR DIVORCE.

119. A talaq is a dissolution of marriage effected by the husband [13] making a pronouncement [14] to the effect that the

[11] Hed. 73, col. i. par. 3.

[12] This & following paragraph cited with approval : (*Mt.*) *Mustafa B.* v. *Mirza Kazim Raza K.*, (1932) 8 Luck. 204, 212, 213. Cf. Dissol. of Musl. Marr. Bill, 1939.

[13] See s. 41, com.

marriage[15] is dissolved, or that the marital relation shall not any more subsist between himself and his wife.

SECTION 119.
1. FORM OF TALAQ.
Pronouncement by husband.

SUMMARY OF LAW OF TALAQ : SS. 119-158.

The incidents of the law of talaq are closely interdependent. It is difficult, therefore, to realize their true effect unless a bird's eye view is taken of the law as a whole. The following summary may therefore be useful : the reader must, however refer to the sections themselves for appreciating the gist of this summary.

Talaq is a dissolution of marriage caused by a pronouncement, or the utterance of words to the effect that a divorce shall take place (s. 119). Talaq.

The law of talaq may be divided under four main heads :—

I. *Relating to the formula (or terms) and the circumstances in which the pronouncement may be made, and its interpretation* : I. MAIN HEAD Pronouncement

(*a*) The terms or formula in which the pronouncement has to be framed or expressed : terms

(i) Shia law insists on the strict formula (laid down by the Prophet) being used : Hanafi law permits the formula to be disregarded : ss. 119, 120, 120A, 146, 147.

(ii) Shia law does not, except in special circumstances, permit the pronouncement to be in writing ; Hanafi law does : ss. 120A, 141, 143.

(iii) Conditional, contingent or qualified pronouncements are permitted in Hanafi (not Shia) law : ss. 122, 144, 145.

(*b*) The circumstances in which the pronouncement may be made and conditions applicable to it : circumstances

(i) At the time of the pronouncement, the wife must not be in menstruation or puerperal courses, unless the marriage is unconsummated : s. 136. Hanafi law permits disregard of this requirement : s. 140.

(ii) Continued abstinence from intercourse by the husband since the wife last menstruated upto the time of pronouncement : s. 136. Hanafi law permits disregard of this requirement.

(iii) Not more than one pronouncement may be made during the same tuhr : s. 136. Hanafi law permits disregard of this requirement : s. 142.

(iv) Pronouncement under compulsion, without intention to dissolve marriage, etc. valid under Hanafi law : ss. 123, 143, 146, 147.

II. *Revocability of pronouncement.* The injunctions of the Prophet do not permit of a pronouncement being made irrevocable at the will of the II. MAIN HEAD Revocability.

[14] Texts ordinarily contemplate PRONOUNCEMENT to be ORAL ; but it may be IN WRITING : see s. 143. *Ma Mi* v. *Kallandar Ammal*, (1926) 54 I. A. 61, 63 (RANG.).

[15] There is no *talaq* in *muta* ; but relation arising from MUTA may be otherwise TERMINATED : see s. 25(8), s. 295, *ill.* (4) ; Bail. II. 110.

SECTION 119. husband : s. 136. It is only after 2 pronouncements have been made and revoked (where persons who have been divorced, remarry, their remarriage counts as a revocation of the talaq for this purpose) that the 3rd pronouncement by operation of law (and not at the will of the husband) becomes irrevocable : ss. 138, 139. But Hanafi law permits triple or irrevocable divorces in one breath at the husband's will : ss. 41, 121, 137, 142, 147-149.

Competence. III. *Competence to pronounce talaq* : s. 124. Wife or other person may be authorized by husband to pronounce talaq : ss. 125, 126-135.

Legal effects. IV. *Legal effects of pronouncement* :

(*a*) dissolution of marriage : s. 153 ; the pronouncement may be prevented from dissolving the marriage : revocation : ss. 150-152.

(*b*) as to inheritance : ss. 154-157.

(*c*) prohibition against remarriage after 3 pronouncements : ss. 41, 153.

Form of pronouncement.

120. Under Hanafi law no special form or formula [16] of pronouncement is necessary for effecting talaq.[17]

Hanafi law.

Shia law.

120A. (1) Under Shia law a pronouncement of talaq must be uttered orally [18] in the presence and hearing of two male witnesses, who are Muslims and of approved probity.[19]

[16] *Ma Mi* v. *Kallandar Ammal*, (1926) 54 I. A. 61, 65 (RANG.); *Ibrahim* v. *Syed B.*, (1888) 12 Mad. 63 ; *Wahid* v. *Zainab*, (1914) 36 All. 458 ; *Hamid* v. *Imtiazan*, (1878) 2 All. 71 (husband said, "Thou art my cousin, the daughter of my uncle, if thou goest." Evidence showed words used in sense that no other relation would subsist (if wife went) & they were held to constitute valid pronouncement of divorce : consequently, husband not entitled to recover either his wife or his infant daughter). *Talaq* pronounced in ABSENCE OF WIFE may be effectual : *Sarabai* v. *Rabiabai*, (1905) 30 Bom. 537 ; *Mohan Mulla* v. *Baru Bibi*, (1920) 26 C. W. N. 261 ; *Rajasaheb* v. *Rasulsaheb*, (1919) 44 Bom. (neither KAZI'S NOR WIFE'S PRESENCE NECESSARY) ; *Ahmad Kasim Molla* v. *Khatun B.*, (1931) 59 Cal. 833 (*talaqnama* sent by registered POST : RETURNED with postal authority's endorsement "refused" : *talaq* held effective from time of execution); *Asha* v. *Kadir*, (1909) 33 Mad. 22, 23 (dissenting from *Furzund* v. *Jami*, (1878) 4 Cal. 588 ; *Wahid* v. *Zainab Bibi*, (1914) 36 All. 460, 461 (Rafiq & Piggott, JJ. : All that law requires is that words of divorce pronounced by a husband should show a clear intention on his part to dissolve contract of marriage.)

[17] Contrast this with Shia law : s. 118, com., s. 120A. But see under Hanafi law *Furzund Hossein* v. *Janu B.*, (1878) 4 Cal. 588 (pronouncement must consist of coherent sentence : so that intention to divorce may be inferred : "simply pronouncing word *talaq* is not sufficient to constitute a valid divorce".)

[18] Under Shia law TALAQ (i) cannot be effected by WRITING, nor (ii) in any OTHER LANGUAGE THAN ARABIC when there is ability to pronounce the words specially applied, nor (iii) by signs except when the party is unable to speak : (iv) but though it cannot be given in writing by one who is present & able to pronounce the proper words, yet if he is unable to do so & writes them fully intending repudiation it takes effect & is quite valid. (v) Some persons have maintained that a wife may be lawfully repudiated in writing by her husband when he is absent from her but this opinion is not to be relied upon. Bail. II. 113-114.

[19] PRESENCE OF WIFE UNNECESSARY : *talaq* pronounced in ABSENCE OF WIFE may be effectual : *Rashid Ahmed* v. *Anisa K.*, (1921) 59 I. A. (wife not present); *Sarabai* v. *Rabiabai*, (1905) 30 Bom. 537 ; *Asha B.* v. *Kadir Ibrahim Rowther*, (1909) 33 Mad. 22, 23 (dissenting from *Furzand Hossein* v. *Jami B.*, (1878) 4 Cal. 588); *Wahid K.* v. *Zainab*, (1914) 12 All. L. J. 707 ; *Muhammad Ishaq* v. *Mt. Sairan*, [1936] AIR (LAH.) 633 (*talaq* in writing : in customary form : no notice to wife necessary); *Abdul Ghani* v. *Azizul Huq*, (1911) 39 Cal. 409, 414-415.

SECTION 120A. (Shia law) Unexceptionable form.

(2) Under Shia law a pronouncement made in the Arabic language in one of the following forms (provided that it complies with s. 136 or s. 138) gives effect to a talaq, viz.,—

(*a*) the husband uttering Arabic words meaning : [20] " Thou art," or " this person," or " such and such a person " " is divorced ; " or

(*b*) the husband replying in Arabic to a question, in one of the following forms :

(i) Question : " Is thy wife divorced ? "—Answer : " Yes."

(ii) Question : " Hast thou divorced thy wife, or such a person ? "—Answer : " Yes." [21]

Provided that persons unable to pronounce the specially appointed Arabic words (but not other persons) may use another language for expressing what is above stated.[21]

(Shia law) Doubtful forms.

(3) The Shia authorities are divided in opinion as to whether talaq takes place unless the pronouncement is made in one of the forms mentioned above. *Semble,* in British India if the form of words used does not strictly conform with the above, but nevertheless consists of an unequivocal declaration that the wife is divorced, and is made in the presence of two male witnesses who are Muslims and of approved probity, a talaq will be effectuated under Shia law, provided s. 136 or s. 138 is complied with.[22]

Illustrations.

(1) If [23] a man should say " thou art the repudiation, or (divorce)" or " repudiated," or (divorced); or " among the repudiated or (divorced),"—the words would in Shia law be without effect, even though he intended to repudiate thereby.[24]

(2) So also would they be ineffectual if he were to say " a repudiated (divorced) person." The Sheikh [25] however has said that in this case repudiation (divorce) would take effect if intended ; but the opinion is not supported by the grammatical construction of the phrase.[24]

(3) On the other hand he (the Sheikh) [25] has said that it (divorce) would

[20] Necessity of using ARABIC LANGUAGE : see s. 118, com., cf. similar necessity in marriage contract : s. 18(3). *Daa'mu'l-Islam,* however does not refer to Arabic language being necessary. Hanafi law requires witnesses for marriage but not for divorce ; Shia Ithna Ashari law *vice versa.*

[21] Bail. II. 113-115. [22] See *ill.* & com.

[23] The *ill.* to s. 120A intended not to make section clearer, but for most conveniently representing differences amongst Shia authorities ; who are not inclined to let *talaq* be effectuated whenever husband intends to dissolve marriage.

[24] Bail. II. 113, set out s. 118, com ; see ss. 5C, 5D.

[25] SHEIKH = Muhammad al Hasan ibn 'Ali Ja'far al Tusi, author of *Mabsut.*

SECTION 120A. *Illustrations.*

not take effect if a man were to say "I have repudiated such an one;" but this also is attended (in Shia law) with some difficulty arising from the fact that if the question were asked: "Is thy wife repudiated?" and the person addressed should answer: "Yes" there would be an effectual repudiation.[24]

(4) If one should say to his wife, "Thou art vacated" or "free," or "the reins are on thy back," or "betake thyself to thy people," or "Thou art absolutely separated," or "unlawful," or "cut off," or "released,"[26] the expressions would, in accordance with Shia law, be quite nugatory, and no repudiation take place, whether it were intended or not."[27]

(5) If he (the husband) should say "Count",[28] intending talaq thereby, it is maintained that under Shia law there would be a valid repudiation: and there is a tradition to that effect recorded by Halbi and Muhammad from Abu Abdullah on whom be peace; but this has been disputed by many of Shia doctors whose opinion is more in accordance with the general principles of the law.[26]

On the modes of pronouncing talaq see s. 136.

Revocable and irrevocable pronouncement.

121. Pronouncements[1] of talaq are either revocable[2] or irrevocable.[3] A revocable pronouncement of talaq does not dissolve the marriage until the period of iddat has expired[4] and may, at any time during the said period, be revoked.[5] An irrevocable pronouncement of talaq dissolves the marriage immediately on its utterance.[6]

In speaking of "revoking talaqs" the usual terminology has been adhered to. It would no doubt conduce to greater clearness if the expression "withdrawing the pronouncement" were adopted. The prevalent phraseology is too firmly rooted to be entirely avoided and has its conveniences.

Revocation of pronouncement distinguished from re-marriage.

Marriage may be dissolved by the mere pronouncement of the formula of talaq, but, during the period of iddat the husband has the power of revoking

[26] Bail. II. 114 (par. 1). [27] Bail. II. 114 (par. 2).

[28] Viz. root word of *iddat* implying commence to observe *iddat*.

[1] The epithet "REVOCABLE" or "IRREVOCABLE" is annexed to "pronouncement," & not to divorce (or *talaq*); revoking pronouncement is different from annulling result of unrevoked pronouncement being dissolution of marriage, this result may in a certain sense be annulled by re-marriage. Revocation of divorce is, however, frequently spoken of, when what is meant is revocation of pronouncement. This often causes confusion. In present work, therefore, the expression REVOCATION OF PRONOUNCEMENT has been used where there is any danger of ambiguity.

[2] Revocable = (Arabic) *raj'i*.

[3] Irrevocable = (Arabic) *bain*: *Abdul Gani* v. *Azizul Huq*, (1911) 39 Cal. 409.

[4] In Shia law, marriage may sometimes be said to subsist even beyond period of *iddat*: s. 155.

[5] After *iddat* expires, the pronouncement effectuates divorce: after which, whether pronouncement was in its inception revocable or not, it cannot be revoked: (*Syed*) *Mozuffur Ali* v. *Kumeerunnisa B.*, [1864] W. R. 32 (husband claimed right to revoke divorce as not proved that he had repeated formula three times: but as *iddat* had expired this claim disallowed). Parties may, however, immediately re-marry, unless there have been three pronouncements or a triple pronouncement: see s. 41.

[6] *Ghulam Mohy-ud-Din* v. *Khizar Hussain*, (1928) 10 Lah. 470.

or withdrawing the pronouncement,[5] either by express words or by resuming the conjugal relation, (ss. 150, 151). This power of preventing the pronouncement from becoming effectual, is distinct from the option to the divorced parties to re-marry after the pronouncement has had its effect.[7] SECTION 121.

First two pronouncements revocable : third irrevocable.

The law gives to the husband the power to revoke the first two pronouncements of talaq, but when he has made three pronouncements, the third is irrevocable.[8] The Hanafi law, moreover, permits a man (1) to pronounce three talaqs in one breath ; and, (2) as an extension of this principle, it permits a pronouncement of talaq to be irrevocable, though three talaqs are not pronounced, one after the other, and though the pronouncement is not in the triple form, but is stated to be irrevocable ;[9] (3) finally, the Hanafi law even permits a pronouncement of talaq to be interpreted as an irrevocable one, where there is something implying that it is such,—though, in its terms, it is not expressly stated to be either triple or irrevocable. The Shia law does not permit any of these three courses.[10] What has just been said refers to pronouncements of talaqs and not to other modes of dissolving a marriage, some of which are revocable, others not, as will appear hereafter.

Revocation of pronouncement : re-marriage.

With reference to the revocation (or withdrawal) of pronouncements of talaq, three notions must be kept distinct : [11]

(1) the power to revoke a pronouncement after it has been uttered, so as to prevent a dissolution of the marriage ;

(2) the power to pronounce a talaq in such form that there cannot be any revocation of it ;[12] and

(3) the right of the divorced parties to re-marry after their marriage has been once or twice dissolved.

Effect of pronouncement.

The effect of revoking or withdrawing a pronouncement of talaq is, that the marriage continues undissolved. The effect does not go beyond this. The revocation has not the effect of wiping out (so to say) the fact that the

[7] But though pronouncement may be revoked in sense of being rendered incapable of dissolving marriage, revocation does not wipe out the pronouncement : once made, it counts for one of three pronouncements for prohibition under s. 41.

[8] Unless, of course, the pronouncement is in an irrevocable form.

[9] Bail. I. 285 (287) ; II. 120. [10] See s. 142, com.

[11] They are, however, frequently confused : e.g. in (*Mt.*) *Hayat Khatun* v. *Abdullah Khan*, [1937] AIR (LAH.) 270 : marriage, 11 June, 1922 : *talaq* by deed 25 Sep. 1927 : reconciliation & cohabitation for 5 years : *oral talaq* alleged to be triple, 30 Oct. 1932. Court decided on basis that reconciliation after *talaq* of 1927 could not in law restore relations of husband & wife. But there is no foundation (so far as the judgment & report show) for holding this. Crucial question was whether 1927 *talaq* was triple &/or otherwise irrevocable : it was evidently intended to be revoked : that intention would be effective if *talaq* was revocable : though question whether 1927 *talaq* became "ineffectual" is alluded to, yet there is no allusion to methods by which it could be made ineffectual, viz. by (1) revocation during *iddat*, or (ii) marriage after it ; nor (iii) are the reasons for which reconciliation (i.e. revocation of *talaq*) would be ineffectual considered, viz. no allusion either (1) to lapse of period of *iddat*, or (2) to three pronouncements having been made.

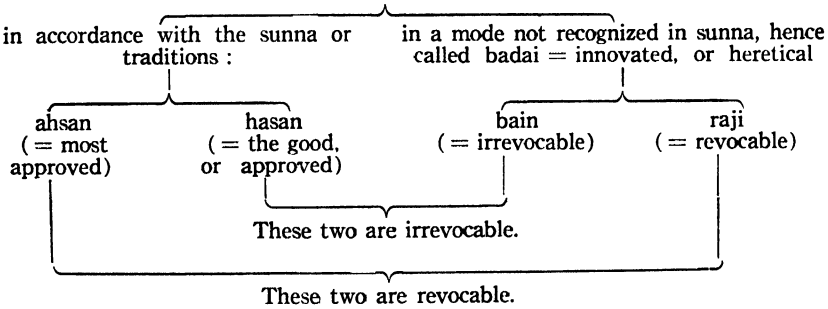
[12] "The power to pronounce an irrevocable divorce,"—is in reality "the power" to husband to deprive himself of power of revoking : husbands in anger occasionally wish to threaten their wives with a pronouncement of divorce which cannot be withdrawn, however much the wife may plead ; and after which they cannot remarry, however much he may repent.

SECTION 121. pronouncement was once made. This is material for the purpose of s. 41, which refers to an important result of making a pronouncement of divorce quite irrespective of the dissolution of marriage following (or not following) the pronouncement : for though the primary result of the pronouncement (dissolution of marriage) may be prevented by revoking the utterance, a husband cannot indulge in more than two such pronouncements without coming under s. 41.

Effect of three or triple pronouncements.

On the other hand, under Hanafi law, the husband who desires to make three pronouncements in one breath, may do so, and he may if he desires impress irrevocability on a single pronouncement (though normally a single pronouncement is revocable). A single pronouncement, provided it is expressed or implied to be irrevocable, completely severs the marriage tie, and, in this respect, its result agrees with that of three pronouncements, but where there is a single irrevocable pronouncement, although the pronouncement itself is irrevocable (so that it must cause the marriage to be dissolved) the parties have the right to re-marry; whereas where there are three pronouncements or a single pronouncement effecting three talaqs, they cannot re-marry unless s. 41 is satisfied.

CLASSIFICATION OF PRONOUNCEMENTS OF TALAQ IN HANAFI LAW.



Option or restriction in pronouncements of divorce void.

122. Where the pronouncement of talaq purports to be subject to an option in the husband to cancel it, or to be restricted as to its effect within certain places only, the option or restriction is void, and the talaq is absolute.[13]

Divorce pronounced under compulsion, or in a state of intoxication.

123. Under Hanafi (but not Shafii or Shia) law a pronouncement of talaq is valid and effects a dissolution of marriage, though made under coercion,[14] or without the

13 Cancellation of the pronouncement to be distinguished from revocation or withdrawal. Bail. I. 217 (217-218) : s. 121, com.

14 Three CRITERIA mentioned by *Sharai'ul-Islam* FOR divorce being deemed to be by COMPULSION : (1) threat of serious injury to husband himself, or " to some one dear to him as his own soul, such as a father or a child ; " (2) power in coercer to carry out threat ; (3) strong apprehension of threat being carried out in case of refusal to comply : Bail. II. 108. *Furzund Hossein* v. *Janu B.*, (1878) 4 Cal. 588, (father of wife induced husband to believe marriage invalid : husband pronounced word *talaq* three times : he did not pronounce formula of *talaq* : he did not say I give you, or so & so *talaq* or any complete sentence. " If the formula for divorce prescribed by the

intention of dissolving the marriage ;[15] provided that, under all schools, it has no such effect if pronounced by a person who is involuntarily or for a necessary purpose in a state of intoxication.[16] SECTION 123.

Has the Court under s. 123 power to compel a person to divorce his wife? This question, depends not only on Muhammadan law, but upon the adjective law prevailing in India. The Fatawa 'Alamgiri refers[17] to a divorce given under compulsion by the Sultan.[18] In one case the District Judge suggested that it would be best for the husband to divorce a wife who had, by suing for dissolution of the marriage on the ground of his impotence, and by alleging cruelty on his part, shown her determined aversion to him. The husband having "reluctantly consented" to a divorce (in the form of khul), the High Court upheld the divorce, holding that the husband had freely consented to the District Judge's suggestion, though they add in the next sentence : "Under the Muhammadan law a khoola divorce is valid even though it may be given under compulsion."[18] Divorce under compulsion. Court's authority to dissolve marriage.

124. Any husband, who is of sound mind and has attained puberty, may make a pronouncement of talaq.[19] 2. PERSONS WHO MAY PRONOUNCE TALAQ.

A marriage became unlawful by supervenient prohibition : the husband then law-books had been really pronounced," (p. 590) there would "probably" have been a divorce, notwithstanding that false representations had been made to husband). Cf. *Buzl-ul-Ruheem* v. *Luteefutunnissa*, (1861) Moo. I. A. 379. Husband sui juris. *Illustration.*

[15] *Rashid Ahmad* v. *Anisa Khatun*, (1931) 59 I. A. 21 (pronouncement three times before witnesses, naming WIFE who was NOT PRESENT ; a few days later deed of divorce executed, stating that three divorces pronounced in 'abominable' form : cohabitation continued, however, until 15 years later when he died : five children born after divorce : during that period he treated woman as his wife & children as legitimate, *held* divorce was effectual & being in *bid'at* form was irrevocable, irrespective of *iddat*, or period of abstinence. It was immaterial whether husband had as was alleged, mental intention that divorce should not be effective); *Ibrahim Molla* v. *Enayet ur Ruhman*, (1869) 12 W. R. 460 = 4 Beng. L. R. (A. C.) 13 ; *Jorina Aktar Khatun* v. *Hafizuddin*, (1925) 30 Cal. W. N. 178 = [1926] AIR (CAL.) 262 ; see *Vadaka Vatil Ismail* v. *Odakel Beyakutti Umah*, (1881) 3 Mad. 347. *Rasul Bakash* v. (*Mt.*) *Bholan*, (1932) 13 Lah. 780 may seem, but is not inconsistent with this rule ; there *talak* not pronounced orally ; but in writing & to interpretation of written *talaqs* special rule in s. 143 applies : see also s. 146, citing Fitzgerald, *Muh. Law*, (1931), 72. There is said to have been well-understood convention under Sultans of Turkey for wife wishing to be rid of dissolute husband to allege divorce during VOLUNTARY INTOXICATION (which husband would not be in position to deny) : Ostrorog Angora Reform, Lond. 1977, p. 82, cited Fitzerald, *ibid.* p. 73. Thus it would seem that England is not the only country where divorce cases give rise to evidence peculiarly adapted to needs of the law.

[16] Bail. I. 208-209 ; II. 107, 108 ; Hed. 75, 523. Cf. s. 22 & traditions there cited.

[17] Bail. I. 210.

[18] *Vadaka Vitil Ismail* v. *Odakal Beyakutti Umah*, (1881) 3 Mad. 347. Both volumes of Baillie cited in judgment : no indication whether parties Sunnis or Shia, nor what was meant by *khoola divorce* under compulsion : see s. 162 ff.

[19] Bail. I. 208-209 ; II. 107, 108 ; Hed. 75 ; *Asha* v. *Kadir*, (1909) 33 Mad. 22, 23 ; *Ata Mohammad Choudry* v. (*Mt.*) *Saiqul Bibi*, 8 All. L. J. 952, 954 = 7 Ind. Cas. 820. There is one Shia tradition (which *Sharai'ul-Islam* considers unauthenticated) that boy of ten years may lawfully & effectively pronounce divorce in form approved by Prophet's traditions (under s. 136, or s. 138). Bail. II. 107.

SECTION 124. purported to divorce his wife. Separation became incumbent on them, but the divorce did not take effect, as in the eye of the law H was not *W's* husband at the time.[20]

There must be a marriage contracted under Muhammadan law before it can be dissolved by talaq. See s. 18, com. on marriages under English law.

Divorce through agent.

125. A husband may lawfully authorize[21] his wife,[22] or any other person, as his agent, to make or to revoke a pronouncement of talaq on his behalf.[23]

Illustration. A Hanafi, says to his wife : " Every woman I marry, I have sold her repudiation to thee for a dirham." After this he marries a second wife. As soon as the first wife becomes aware of his second marriage, she says : " I have accepted," or " I have repudiated her," or " I have bought her repudiation." Then the second wife is divorced.[24]

Giving power to divorce and appointing an agent for divorce.

The modes in which the marriage may be made dissoluble at the instance of the wife, are referred to in ss. 134, 144, s. 308, *ill.* (2); see also s. 18, com. The power to divorce and agency for divorce are distinct.[25] The authority of the agent if restricted to a particular mode of pronouncement, must be exercised in that mode.

126. The guardian of a husband of unsound mind who has attained puberty, may pronounce a talaq on behalf of the husband if doing so is to the husband's benefit.[26]

127. The guardian of a person who has not attained puberty[27] cannot pronounce an effectual talaq on the minor's behalf.[28]

Illustration. One Mt. Rakima, a minor, was married to another minor, Shafi. A week later she was purported to be married to one Zakaria, also a minor. Later, talaqs were purported to be pronounced either by the minor husbands, Shafi and Zakaria, or their fathers, and Rakima was purported to be married (for the 3rd time) to Hashmatullah. *Held,* that the guardian of a minor has no

[20] Bail. I. 205, 210 (par. 3, 4).

[21] A general agent for all affairs of husband has no authority to pronounce *talaq,* unless terms of his agency expressly or impliedly include such authority.

[22] Shia authorities differ on this point, Imam Ja'far-as-Sadiq being of opinion that wife may not be appointed agent. Bail. II. 109.

[23] Bail. I. 236 (238), 244 (246), 252-3 (254-255), 287 (289); II. 109.

[24] Bail. I. 263 (265). Thus sale to wife for one dirham of right to divorce any other wife whom husband may marry, held valid.

[25] Cf. *Hamidolla* v. *Faizunnissa,* (1882) 8 Cal. 372 ; *Ayatunnessa* v. *Karam Ali,* (1908) 36 Cal. 23, (distinction given effect to though not clearly enunciated).

[26] Bail. II. 108.

[27] Whether or not the infant is of sound mind : Bail. II. 107-108. After attaining puberty he is competent to act.

[28] Bail. II. 107. See s. 127, *ill.*

power to pronounce a divorce on his behalf, and consequently that the marriage of Rakima to Hashmatullah was invalid.[29] SECTION 127.

The guardian of a female may in certain circumstances agree to a khul with the husband : ss. 185, 186. Khul.

128. The husband may either in the contract of marriage or by agreement after marriage delegate to his wife or to any other person his power to divorce.[1] 3. DELEGATION OF AUTHORITY TO DIVORCE.

129. A power[1] to divorce must, in the absence of an express provision to the contrary, be exercised "at the same meeting"[2] at which the grantee becomes aware of its being granted ; and it is determined by his or her rising from the meeting :[3] provided that if granted to the wife, she will be presumed to have exercised it at the same meeting, on her so affirming.[4] (*a*) Power to divorce. Husband may authorize another. Duration of power.

130. A power to divorce granted after the marriage by the husband to the wife, (the duration of the power not being fixed) may be determined by the husband (*a*) causing the wife (with or without her wish and consent) to rise from the meeting or (*b*) having intercourse with her, but (*c*) the (*b*) Termination of powers to divorce.

[29] *Ata Mohammad Chowdry* v. *Saiqul Bibi*, (1910) 8 All. L. J. 953, 955 (*per* Karamat Husain, J.). In appeal findings called for ; final judgment not reported. But opinion of K. Husain, J., on technicalities of Muslim law must carry greatest weight.

[1] (A) DELEGATION of divorces = *tajwiz-e-talaq* : see ss. 125, 134, & 144, comm. for comparison between POWER TO DIVORCE & AGENCY FOR DIV. ; cf. s. 308, *ill.* (2). (B) Baillie translates "options" in all cases : that expression was reserved in earlier editions of this work for cases, where power given to wife. "Power" being used to refer to authority given to other persons. (C) Terminology adopted by Shamsul Huda, J., has now been followed out of deference to important judgment in *Sainuddin* v. *Latifunnessa*, (1918) 46 Cal. 141 (*kabin-nama*, original of which lost, executed 5 years after marriage, provided that husband would not marry SECOND WIFE WITHOUT FIRST WIFE'S PERMISSION : that if he violated any stipulation or portion of *kabin-nama*, he DELEGATED to her his own POWER OF giving THREE TALAQS such as is possessed by males : whenever she chooses she may *talaq* or repudiate her person three times & then take another husband. He took second wife without her permission. When suit for restitution of conjugal rights instituted, she gave herself 3 *talaqs* which held effective). (D) Marriage contract or post-nuptial arrangement may authorize wife to divorce herself (specifying conditions under which authority exercisable) : *Badarunnissa B.* v. *Mafiatalla*, (1871) 7 Beng. L. R. 442 ; *Hamidoolla* v. *Faizunnissa*, (1882) 8 Cal. 327 ; *Nurudin* v. *Mt. Chenuri*, 3 Cal. L. J. 49 ; *Poona* v. *Fyez B.*, (1878) 15 Beng. L. R. (APP.) 5 ; (*Meer*) *Ashruf A.* v. (*Meer*) *Ashad A.*, (1871) 16 W. R. 260, followed *Ayatunnessa B.* v. *Karam A.*, (1908) 36 Cal. 23 ; *Mi Nafizunnissa alias Ma Enda* v. *Bodi Rahiman*, 20 Ind. Cas. 642 = 7 L. B. R. 48 = 6 Bur. L. T. 125 ; *Khalil-al-R.* v. *Mariam B.*, (19) 59 I C. 804 = B. Bur. L. T. 80 = 10 L. B. R. 194 ; *Fida Ali* v. *Sanai Badar*, [1923] AIR (NAG.) 262 (wife authorized to divorce if husband secedes or is expelled from *Mahdi Bagh* or *Atba-e-malako Badar* community).

[2] *Majlis* translated "MEETING" by Bail. ; but "SITTING" in *Sainuddin* v. *Latifannessa*, (1918) 46 Cal. 141. Cf. Bail. I. 10, for details as to when "meeting" comes to end ; Hed. 38, 87.

[3] Bail. I. 236-237 (238-239).

[4] Bail. I. 242-243 (244-245) ; but see Ind. Ev. Act, s. 106 ; ss. 5B, 5C, 5D, above.

SECTION 130. husband may not otherwise revoke, or bring about its termination, notwithstanding an express provision that the power to divorce shall arise at a future period of time, which period has not arrived.[5] Where the parties, either before marriage, or in the marriage contract, enter into an agreement that the wife shall, in certain contingencies, have the option to divorce herself, she need not, immediately on the happening of the said contingencies, exercise the option.[6]

Sect. 131 is now incorporated in s. 130(*c*).

(*c*) Interpretation : power to divorce. When power commences

132. A power to divorce, fixing a period of time within which it must be exercised, but silent as to the time from which the said period shall commence, commences from the time when it is granted,[7] notwithstanding that it does not then come to the knowledge of the grantee ; provided that if such a power first comes to the knowledge of the grantee after the expiration of the said period, he may validly exercise it " during the meeting " in which he first becomes aware of it.[8]

Determination of option or power.

133. A power to divorce is exhausted if it is once rejected, unless its terms provide that it shall be continuing or recurring.[9]

Illustration.

A husband says to his wife : " Exercise the option of divorce to-day, and exercise it to-morrow." She may reject her option of the first day without affecting her option of the next day. But if he had said, " I give you an option till to-morrow," her exercising it on the day it was given would have finally determined the option.[9]

Effect.

134. On the power to divorce being exercised, the divorce takes effect ; and the exercise of the power may not be revoked or cancelled.[10]

Modes in which wife may acquire power to divorce.

The wife may derive the right to effectuate a divorce in several ways :

(1) the marriage contract may stipulate for such a right ;

[5] Bail. I. 240 (242) 253 (par. 4).

[6] So *held* in *Ayatunnessa* v. *Karam Ali*, (1908) 36 Cal. 33 (contingency was marrying second wife ; delay in exercising option does not terminate option) followed *Mi Nafiiz-un-nissa* v. *Bodi Rahiman*, 7 L. B. R. 48 = 6 Bur. L. T. = 20 I. C. 642 (option conditioned on ill treatment by husband) ; see also *Nurnani* v. (*Mt.*) *Chenuri*, (1906) 3 Cal. L. J. 49.

[7] Bail. I. 240 (242), 243 (245), 248 (250), 249 (*l.* 11) (251). But see s. 5c.

[8] Bail. I. 249 (par. 1) (251) : s. 146, table.

[9] Mere omission to exercise does not terminate option : *Ashruf Ali* v. *Arshad Ali*, (1871) 16 W. R. 260. Bail. I. 240 (242).

[10] Bail. I. 240 : this, of course, does not mean that pronouncement of *talaq* may not be revoked : whether it may be revoked or not would depend upon nature of pronouncement & that again upon terms of option, or power.

(2) she may derive an option to divorce from the husband ;
(3) she may be appointed the husband's agent in that behalf ; [11]
(4) the husband may pronounce a divorce contingently on some thing happening, the contingency being subject to the wife's control : see ss. 125, 128, 134, 144.

Stipulation in marriage contract.

The first seems to be the most prevalent in India.[12] All power of divorce is normally vested in the husband. This fact is no doubt responsible for its being overlooked that a stipulation in the marriage contract for divorce, is not a delegation of the husband's power to the wife. At the time when the agreement is made the man is not the husband of the woman—but about to become her husband. The stipulation consequently takes effect as part of an independent contract to which the persons who subsequently become husband and wife are both parties. Shamsul-Huda, J., has laid down the exact position in Muslim law of wife's power of divorce when derived from her husband : [13]

Delegation of authority.

s. 128. The forms (2)-(4) above are not necessarily contemporaneous with the marriage contract ; they must, in strictness, come after the marriage contract, because it is only then that there is a husband and only then that he himself has the authority to divorce.

Contingent.

The fourth is a contingent divorce. If its terms are not carefully considered, it may be like a floating mine, capable of destroying the marital bond, beyond the direct control of the husband or wife : though it cannot seriously harm them in practice if both wish to ward it off. But this method of empowering the wife to free herself from the husband may. with care, be moulded in a most beneficial manner. In the earlier editions of this work forms of clauses in marriage agreements were given at this place, providing for a power to the wife to effect a dissolution of the marriage. It has seemed necessary to give greater prominence to that discussion. It will now be found in s. 24A.

Divorce.

Wife's option to divorce.

Various illustrations of options and their exercise are given in the texts having reference generally to the interpretation of Arabic words and expressions. They are not likely to be of much use in India.[14] The general rules of agency would, no doubt, be applicable.

Second wife.

In the reported cases the stipulations entitling the wife to divorce herself have been conditioned mostly on the husband taking a second wife.[15] Such a conditional option is obviously different from an agreement prohibiting the husband to marry another wife, which latter would, in accordance, at any rate, with the Sharaiu'l-Islam, be void, in which such a prohibition is expressly stated to be " contrary to the (Shia) law." [16] But the question is very doubtful.

[11] See s. 144, com. : divorce pronounced by husband contingently on his marrying another wife—or stipulation in marriage contract that second marriage will *ipso facto* render first marriage void.

[12] See s. 128 & *n.*

[13] *Sainuddin* v. *Latifannessa,* (1918) 46 Cal. 141, 145.

[14] See ss. 5C, 5D, comm.

[15] *Hamidoolla* v. *Faizunnissa,* (1882) 8 Cal. 327 ; *Ayatunnissa Beebee* v. *Karam Ali,* (1908) 36 Cal. 23 ; *Maharam Ali* v. *Aysha Khatun,* (1915) 19 Cal. W. N. 1226 ; *Badu* v. *Badarannessa,* (1919) 29 C. L. J. 230.

[16] Bail. II. 76. *Daaimu'l-Islam* seems to be to same effect : but see ss. 24, 30, comm.

SECTION 134. *Contract Act, s. 26.*

Again, the Indian Contract Act, s. 26, also declares agreements in restraint of marriage to be void. That section might apply where such a stipulation is made as an independent contract, or after the marriage has taken place and when it does not form part of the marriage contract ; for then the law governing the agreement would apparently be the law that is laid down in the Indian Contract Act, and not the Muhammadan law of marriage : s. 6A.

FOUR MODES OF PRONOUNCING DIVORCE.

135. The pronouncement of divorce may be made in one of four modes : ss. 136, 138, 140, 142.

I. The first : ahsan, most approved mode.

136. The ahsan (or most approved)[17] mode[18] of pronouncing divorce is approved by the traditions[19] of the Prophet, and valid under all schools of law. Compliance with it requires that at the time when the pronouncement is made,—if the marriage has been consummated,[20]

(*a*) the wife is free from her menstrual courses ;

(*b*) if the wife is subject to menstruation, the husband has not had sexual intercourse with her since her last menstruation ;[21]

(*c*) he has not made a pronouncement of divorce against her since her last menstruation ;[22]

(*d*) under Shia (but not Hanafi) law the wife is not in her puerperal courses.[23]

When husband absent.

Under Shia law, where the husband is absent from the wife, the

[17] It would be more correct to call it "least disapproved mode," see s. 118, com.

[18] Usually referred to as "forms" of divorce : "mode" has been preferred in this work, to draw attention to fact that not merely is "form" of words involved, but also occasion of pronouncing them, & other circumstances.

[19] In Arabic *talaq-us-sunna* = complying with requirement of traditions,—in contrast with *talaqul-bidat* : *Ghulam Mohy-ud-Din* v. *Khizar Hussain*, (1928) 10 Lah. 470 ; *Sheikh Fazlur Rahman* v. (*Mt.*) *Aisha*, (1929) 8 Pat. 690, 695. *Sunna*, Arabic for "tradition." Divorce complying with requirements of traditions, occasionally referred to as *sunni* or "traditional" mode of divorce—an expression that has been avoided in present work, as it may convey implication that these modes are not recognized by Shias, whereas fact is that only these two traditional modes are recognized by Shias.

[20] In Hanafi law valid retirement is, in this case, equivalent to consummation.

[21] Bail. I. 205 ; II. 111 ; this ensures that marital intercourse has ceased for some time & that *talaq* is not given in anger or impulse ; as stated in less delicate terms in Hidaya : "*Tuhr* during which the husband has not had carnal connection with her,—because it is proof of urgency that is regarded ; & the act of proceeding to a divorce at a time when desire of coition with the woman is fresh renewed (as at the commencement of her *tuhr*) is the best proof of such urgency ; for during the actual time of the courses the woman is not an object of desire & in a *tuhr* where she has been enjoyed desire is lessened towards her. With respect to an unenjoyed wife the *tuhr* & courses are equal,—that is to say the pronouncing of divorce upon her whilst she is in the latter situation is not irregular nor reprobated"—Hed. 73, col. ii.

[22] Bail. II. 110 : so that there cannot be more pronouncements than one in interval between two menstruations.

[23] Bail. I. 206 ; Hed. 72.

SECTION 136.

pronouncement may be made at any time (irrespective of her being free from menstruation.[24]) after she has either actually menstruated since the last occasion on which they had sexual intercourse, or after the expiration of sufficient time for the husband to be certain that she has menstruated since the said occasion : [24] for this purpose the husband is not considered to be absent from his wife, if he lives in the same city as herself, and meets her so as to know when her courses are on her.[25] These rules would no doubt be followed in India should the question ever arise. See s. 142, com.

Ahsan mode of talaq.

137. A pronouncement of talaq in the ahsan mode (s. 136) is revocable ; [1] provided that where (1) the marriage has not been consummated, or (2) the wife is past child-bearing, or (3) has not attained puberty, the pronouncement is under Shia law irrevocable.[2]

II. The second : hasan or good mode of talaq.

138. The hasan [3] or good mode of divorce is also approved by the traditions of the Prophet and valid under all schools of law. It consists of three successive pronouncements made during consecutive tuhrs (or periods of purity)[4] during which there has, prior to the pronouncement, been no sexual intercourse ; or, in cases where the wife is not subject to menstruation, after intervals of a month or thirty days between each proceeding and succeeding pronouncement.[5] The first two pronouncements are revoked [6] before the second and third pronouncements are respectively made.

Three pronouncements.

The course followed in the hasan mode of divorce is : (1) The husband pronounces talaq (first time) in a tuhr (period of purity) in which there has not been intercourse with the wife. (2) He revokes the pronouncement (in the same tuhr or in the next). (3) In the second tuhr, i.e. the tuhr which succeeds that in which the 1st pronouncement has been revoked,—there having been no intercourse—he pronounces the second talaq. (4) The second pronouncement is revoked in the third tuhr, viz. the tuhr succeeding that in

[24] Bail. II. 110.

[25] Bail. II. 111. *Daaimu'l-Islam* (a Shia Ismaili text seems to be to same effect. It gives following details : absence must last not less than 3 months, distance must be not less than 2 *barids* (i.e. 56 English miles).

[1] I.e. it is revocable during period of *iddat* : s. 121.

[2] Bail. II. 119, 127-128.

[3] Or "approved,"—as distinguished from "most approved." See s. 118, com. This is one of the two modes allowed by the traditions of the Prophet.

[4] *Tuhr* = time when a woman is not in her menstruation (or period between two successive menstrual courses). It may be translated period of purity.

[5] Bail. I. 206 ; Hed. 72. See also Bail. I. 205. *Ghulam Mohy-ud-Din*, v. *Khizar Hussain*, (1928) 10 Lah. 470.

[6] Where the revocations are followed by resumption of cohabitation, the divorce that is effected is called TALAQ-UL-IDDAT : Bail. II. 119. See s. 142, com.

SECTION 138. which the second pronouncement had been made. (5) In fourth tuhr, i.e. that which succeeds that in which the second pronouncement has been revoked there having been no intercourse in that tuhr, the third pronouncement of talaq is made. This being the third pronouncement is immediately irrevocable and the marriage is dissolved. Iddat becomes incumbent. Intercourse cannot be had after this pronouncement. But there may be intercourse after the first and second pronouncements, provided that prior to the pronouncement there is no intercourse in that particular tuhr in which the pronouncement is made.

Second mode irrevocable after third pronouncement.

139. A talaq pronounced in the hasan mode (under s. 138) dissolves the marriage irrevocably when the third pronouncement is made.[7]

III. THE THIRD MODE—

140. Under Hanafi (but not Shia[8]) law where the marriage has been consummated, the pronouncement of a single talaq is valid, though made at a time when the wife is in her menstruation, or after the husband has had intercourse with her since her last menstruation.[9] This mode of talaq is disapproved, but under Hanafi law, it is valid.

In this mode the Prophet's directions are disregarded both as to the times when, and occasions on which, divorce may be pronounced.[10]

Revocable.

141 A divorce in the mode referred to in s. 140, is revocable.[11]

IV. THE FOURTH MODE— (Hanafi law).

142. (1) Under the Hanafi (but not Shia)[8] law three pronouncements of talaq (either in a single sentence or in separate sentences) or a triple or irrevocable talaq (either in triple form or expressly or impliedly triple or irrevocable)[12] may be validly made during a single tuhr of the wife.

TALAQ-I-BAIN.

(2) This is the fourth mode of talaq known as talaq-i-ba'in[13] or complete and final divorce : by it the marriage is immediately and irrevocably dissolved. It is highly

[7] Bail. I. 205, 206. The object of revoking first & second pronouncements & making third pronouncement is to bring s. 41 into operation : *Ghulam Mohy-ud-Din* v. *Khizar Hussain*, (1928) 10 Lah. 470, 475 (revoked by resuming cohabitation).

[8] Bail. II. 118.

[9] Bail. I. 207 : (*Sheikh*) *Fazlur Rahman* v. (*Mt.*) *Aisha*, (1929) 8 Pat. 690, 697. This mode & that mentioned in s. 142, characterized *bada'i* = "new" or "innovated" or "un-orthodox." *Bid'at* or *bid'a* = novelty, new doctrine, heresy.

[10] Bail. I. 207.

[11] As explained in s. 121, com. primarily the first two pronouncements are revocable, (or capable or being withdrawn); here, as there is only a single pronouncement it is necessarily revocable.

[12] *Rashid Ahmad* v. *Anisa Khatun*, (1931) 59 I. A. 21 (ALL.)

[13] *Bain* = manifest, notorious, complete, final.

disapproved and held sinful, but (under Hanafi law) lawful.[14] SECTION 142.

1. THE FOUR MODES OF DIVORCE COMPARED : Their origin.

The four modes of divorce (ss. 136, 138, 140, and 142), seem to have all originated from the first one, which alone appears to have been sanctioned or contemplated by the Prophet. The first (least disapproved) mode, (1) contains several restrictions as to the occasions on which it can be pronounced, (2) is revocable during the whole period of iddat. The other modes are here mentioned in the order in which they approximate to the first mode.

Characteristics of first mode.

The following are some of the main characteristics of a divorce in the first mode : (1) It is not pronounced when the husband is prevented from having intercourse with his wife owing only to her courses. (2) Abstinence from intercourse is required. (3) The divorce is in suspense during iddat : the husband has time to reconsider his decision ; so that if the pronouncement is not revoked, there is indication that it was not capriciously or hastily made. (4) After the divorce is complete and marriage dissolved, there being only one pronouncement, there is no prohibition against the re-marriage of the parties.[15] (5) The period of suspense for the wife is not so prolonged as it is in the second mode : in the third and fourth modes the period is not longer, but it is unrelieved by the chance of a revocation, as revocation is impossible. (6) If the husband or wife dies during the period of iddat, the other inherits : s. 154(1). (7) The wife's menstruating after the last occasion when there has been sexual intercourse, assures the husband that she is not going to bear a child to him ; her being pregnant may remove the cause of the divorce : s. 136(*b*) *n*.

2. THE SECOND MODE OF DIVORCE : Evasion of first.

The second mode (s. 138) follows, on most points, the letter, though not the spirit, of the Prophet's injunctions. A divorce is pronounced as in the first mode, and then revoked ; again, as soon as possible, viz. during the next tuhr, a second pronouncement is made, and again revoked ; and again a third : on the the third pronouncement the divorce becomes irrevocable : the marriage is then completely and irrevocably dissolved, and the parties are prohibited from intermarrying with each other. Thus, in the main, it consists of the pronouncement and revocation of two talaqs followed in rapid succession by a third pronouncement which (by reason of being the third) is irrevocable : the power to revoke pronouncements is utilized for bringing about an irrevocable dissolution of marriage : or, to put it in another form, the first two pronouncements which alone are revocable are made and revoked in rapid succession, with the object of exhausting the two pronouncements which the law makes revocable ; thereafter a fresh pronouncement (the third) is made ; and this, the third, is incapable of being revoked.[16]

Revocation not genuine.

[14] *In re Abdul Ali Ishmailji*, (1883) 7 Bom. 180 ; *Sarabai* v. *Rabiabai*, (1905) 30 Bom. 537 ; *Sheikh Fazlur Rahim* v. (*Mt.*) *Aisha*, (1929) 8 Pat. 690, 697 ; *Abdul Ghani* v. *Azizul Haq*, (1911) 39 Cal. 409, 414-415.

[15] See s. 41 : see SUMMARY, s. 119, com. : divorced parties sometimes remarried even ante Holywood conditum, e.g. *Fendall* v. *Goldsmith*, (1877) 2 P. D. 263.

[16] *Talaq-ul-iddat* in Arabic, Bail. II. 119 ; the name betrays that revocation of first & second pronouncements not genuine, for, after sincere & effectual revocation, there would be no *iddat*. Practical difference : husband, by repeating pronouncements, places it out of his power to revoke pronouncement, or to remarry wife unless she is intermediately married to another husband : s. 41.

SECTION. 142.

Shia law : talaq-ul-iddat.

This mode is called by the Shia lawyers the talaq of iddat,[16] where after each revocation, the husband resumes cohabitation. That fact may suggest, that he does not intend to dissolve the marriage. There may occasionally be a genuine case where the man thinks he will dissolve his marriage but changes his mind ; and though the pronouncement of another talaq soon after, or in the next tuhr, may cast suspicion on the motive with which the first pronouncement was revoked, and though that suspicion may be enhanced almost to certainty when the process is repeated a second time, still it was felt by the Shia authorities that such an evasion could not be prevented, without radically adding to the requirements or restrictions of the first mode[17] : such additional restrictions[18] would, almost of necessity, have to be of a nature that might affect even a husband who has no intention of evading the law at the time that he revokes the earlier divorce ; so that adding restrictions would indirectly have the tendency of preventing genuine revocations.

The husband may revoke the first pronouncement verbally, (viz. without resuming cohabitation) merely for the purpose of following up the revocation with a second and a third pronouncement in succession ; it is none the less a valid revocation.

For these reasons, in spite of the anxiety of the Shia lawyers to " adhere strictly to the terms of legal permission " as to talaq,[19] they could not hold that it was unlawful for a man (i) to revoke a pronouncement which he had made in the preceding tuhr of his wife, and at the same time (ii) to make, if he chose to do so, another pronouncement, in the same breath with which he revoked the previous pronouncement. In other words, the talaq-ul-iddat could not be prohibited.[20]

Next, is there such a departuure from the injunctions of the Prophet, when the revocations of the first and second pronouncements are made verbally, without resumption of conjugal relations, as to justify the proceeding being declared invalid ? The Shia authorities are not agreed. The balance of authority, however, is stated in the Sharaiu'l-Islam to be in favour of holding the pronouncements valid, though they have the effect of establishing a triple divorce, unrelieved by a genuine revocation intervening between the first and second pronouncements.[20]

Shia law permits first and second modes :

Thus the Shia authorities permit with difficulty, and with dissentient voices, a second and third divorce, where the first two are not revoked by resumption of conjugal relations. They had less difficulty in rejecting a further suggested evasion,[20] viz. that the three divorces may be permitted to be pronounced in the same tuhr, two of them being revoked intermediately ; for, in this case it amounted to a direct breach of the rule contained in s. 136(1)(*c*). If this evasion had been permitted, then the Shias would have come to the other two

[17] I.e. of s. 136.

[18] It could, e.g. have been provided that a certain period must elapse between revocation & another pronouncement ; or that a divorce may not be pronounced in a *tuhr* in which a previous pronouncement is revoked. The Arabs were (& are at present day) inveterate in divorcing propensities.

[19] See s. 118, com.

[20] Bail. II. 120-121.

modes of divorce which are recognized by the Hanafi law in spite of their being stigmatized in that law as sinful : s. 142. These forms have next to be considered. The main points of difference and the gradations by which they got a footing in the law have already been indicated.

SECTION 142. not third and fourth modes.

In the third mode (s. 140) there is a disregard of the injunctions that the divorce ought not to be pronounced while the wife is in her courses, nor unless she has passed through one period of menstruation after the last occasion when there has been intercourse between the parties.

3. THIRD MODE OF DIVORCE :

The fourth mode (s. 142) disregards the injunctions of the Prophet both as to the wife being in a tuhr, and by being triple and therefore irrevocable : s. 136(1). Nor does the departure of this mode from the approved form stop here ; for, (1) if the three pronouncements were allowed to be made in one tuhr, it followed that they could, so far as the rules contained in s. 136, were concerned, be made in immediate succession, and, (2) if so, then they could be made in one sentence ; and (3) if in one sentence, then there would be little meaning in insisting upon the formula being pronounced three times : the husband might (it was thought) be allowed to say : " I divorce three times," instead, of having to reiterate : " I divorce, I divorce, I divorce." Next, (4) the husband could say " I divorce irrevocably," instead of saying " I divorce three times." Finally, (5) he could indicate his intention of the divorce being irrevocable, without using the word " irrevocable," or " triple."

4. FOURTH MODE OF DIVORCE : (*a*) no regard to tuhr, (*b*) irrevocable.

Steps of departure from first mode.

By [21] a deplorable, though, perhaps, natural, development of the Hanafi law, it is the fourth and most disapproved or sinful mode of talaq that seems to be most prevalent, and in a sense, even favoured by the law. For, the requirements of the other mode being seldom attended to, it is generally assumed (on the principle that the intention of the parties must, as far as possible, be given effect to) that the fourth mode was intended to be employed,[22] with the result not only that the formalities for the divorce are done away with, but even its effects are aggravated ; for inasmuch as the pronouncement is presumed to be in this mode, it is presumed to be irrevocable. It is indeed possible, that the Hanafi jurists wished to inflict on a husband, who disregarded the requirements of s. 136, the penalty of rendering the talaq irrevocable ; and there are indications that they considered it always a favour to the wife to relieve her of the husband ; cf. s. 147, *ill.* (8).[22] " Men have always moulded the law of marriage so as to be most agreeable to themselves." [23]

Prevalence of fourth mode.

Possible explanation.

143.[24] (1) Under the Hanafi texts a document,[25] executed by the husband, if it contains a statement that he divorces his wife, and is properly superscribed and addressed in the usual

5. DIVORCE IN WRITING.

[21] This paragraph set out & applied in *Amiruddin* v. *Khatun*, (1917) 39 All. 371, 375 ; & in *Sheikh Fazlur Rahman* v. (*Mt.*) *Aisha*, (1929) 8 Pat. 690, 699.

[22] See ss. 147-149. [23] Mayne, *Hindu Law*, par. 93 *ad. fin.*

[24] Sect. 143 set out & applied : *Rasul Bakhsh* v. (*Mt.*) *Bholan*, (1932) 13 Lah. 780, 785 ; & (*Mt.*) *Saddan* v. *Faiz Bakhsh*, (1920) 1 Lah. 402.

[25] Texts ordinarily contemplate oral divorce : see s. 119. Between persons of rank & property, a document is to be expected for satisfactory evidence : (*Khajah*) *Gauhar*

SECTION 143.

form and shows the name of the writer and the person addressed, constitutes a valid pronouncement of divorce, irrespective of the intention with which it is written.[25] If the document is not written and superscribed in the usual form, it does not constitute a pronouncement of talaq unless it can be comprehended and read, and unless it has been written with the intention of operating as a pronouncement of talaq.[26]

Intention to divorce when required.

(2) The Indian Evidence Act, ss. 63(5) and 60 apply to divorces in writing. If the document is not produced, its contents can only be proved by secondary evidence : so that if the document is sought to be proved by oral evidence, it must be the evidence of some person who has read it.[26]

When permitted by Shia law.

(3) In Shia law the pronouncement of a talaq in writing, or by signs, is not valid, unless the husband is unable to pronounce the formula of talaq ;[27] and unless the document is written, or the signs made, with the intention of pronouncing a talaq.[28]

Where the words used are " express," or well understood as implying divorce (such as talaq) no proof of intention is required.[29] If the words used are ambiguous the intention of the user must be proved.[29] It is not necessary under Hanafi law that the pronouncement should be made in the presence of the wife, or even addressed to her.[29] The direct form of speech is not of the essence of the formula.[30]

3. WHEN DIVORCE COMES INTO EFFECT : CONDITIONAL DIVORCE.

144.[1] Under Hanafi (but not under Shia) law[2] a pronouncement of talaq may be so made as to come into effect

A. v. (*Khajah*) *Ahmed*, (1873) 20 W. R. 214 ; *Rajasaheb, Rasulsaheb, in re*, (1919) 44 Bom. 44 ; *Ahmad Kasim Molla* v. *Khatun B.*, (1931) 59 Cal. 833 (letter takes effect on execution, even if refused by wife).

26 Bail. I. 232 (233) ; *Ma Mi* v. *Kallandar Ammal*, (No. 2), (1926) 54 I. A. 61, 65 : (Ind. Ev. Act, ss. 60, 63), upholding *Kallenther Ammal* v. *Ma Mi*, (1924) 2 Rang. 400 ; (*Mt.*) *Saddan* v. *Faiz Bakhsh*, (1920) 1 Lah. 402 ; *Rasul Baksh* v. (*Mt.*) *Bholan*, (1932) 13 Lah. 780 ; *Wajid Ali K.* v. *Jafar Husain K.*, (1931) 7 Luck. 430 (see s. 146, *n.* 18).

27 Bail. II. 113-114 ; *Daaimu'l-Islam* ; see s. 120(2).

28 Witnesses are also necessary : s. 120.

29 *Ma Mi* v. *Kallander Ammal*, (1926) 54 I. A. 61, 65 (par. 5) (RANG.).

30 *Asha Bibi* v. *Kadir Ibrahim Rowther*, (1909) 33 Mad. 22 (principles of Hanafi law stated with great care & precision ; actual words uttered explicit enough : addressed to father of wife, included following : " It is 4 or 4½ (*sic*) since I married your daughter. You have now brought her away. This is the Talaku for your daughter ....Hereafter you may marry your daughter yourself or marry her to a Pallan. She has become my mother.")

1 Sect. 144 cited & applied : *Bachoolal* v. *Abdul Khaliq*, [1936] 34 All. L. J. 302.

2 One aparent exception mentioned under Shia law, viz. when " there is a condition in appearance, but none in reality," husband knowing it to be fulfilled at time of pronouncing *talaq*. Bail. II. 115.

not immediately, but at some future time,[3] or contingently[4] on the happening of some specified future event.[5] A talaq may be pronounced by a man between himself and a woman who is not his wife,[6] contingently on his marrying that woman, with or without other conditions.[7] SECTION 144.

Illustrations.

(1) The husband says to his wife : Thou art repudiated after a month." The talaq under Hanafi law takes effect a month later.[7]

(2) The husband says to his wife : " Thou art repudiated, and I have an option to cancel the repudiation for three days." The talaq is under Hanafi law absolute and the option void.[7]

(3) The husband says to his wife : " Thou art divorced in Mecca." The pronouncement of talaq must be construed as being absolute, and it holds in all places.[7]

(4) A Hanafi says to a woman who is not his wife : " If you enter this house you are divorced." He then marries her, and she enters the house. There is no divorce ; but if he had said, " If I marry you (and you enter this house) then you are divorced," the divorce would under Hanafi law be effectuated on his marrying (and her entering the house after the marriage).[7]

Shia law.

(5) Under Shia law, the pronouncements in *ill.* (1)—(4), would be invalid. The validity of the form of pronouncement is not enough to effect a talaq in Shia law, unless the requirements of s. 136, or s. 138 are also complied with.

Time when talaq in writing takes effect.

145. A pronouncement of talaq in writing[8] may be so expressed as to take effect either from the time when it is written[9] or from the time when it reaches the wife.[10] It is considered to reach the wife (*a*) if it reaches the father[11] of the wife, provided that he is in the town in which she is at the time, and that he has the disposal of her affairs generally ;[12]

[3] Bail. I. 212.

[4] See s. 24A, com.

[5] Bail. I. 212 ; II. 115 ; *Sainuddin* v. *Latifannessa Bibi*, (1918) 46 Cal. 141 (see s. 128) ; *Hamid Ali* v. *Imtiazan*, (1878) 2 All. 71 (s. 146, *n.*) ; *Bachoolal* v. *Bismilla*, [1936] 34 All. L. J. 302 ; *Fida Ali* v. *Sanai Badar*, [1923] AIR (NAG.) 262 (option to wife to get divorce if he seceded from *Mahdi Bagh* or *Atba-e-Malak-o-Badar* community) ; *Md. Dad Md.* v. *Fatima*, (1914) 24 I. C. 881 (SIND) (agreement to pay balance of *mahr* & arrears of maintenance : in default wife to be considered divorced : *held*, not to operate as contingent divorce) is, *submitted* erroneous.

[6] Cf. *Furzund* v. *Janu B.*, (1878) 4 Cal. 588.

[7] Bail. I. 217 ff. ; 263 ff. (267 ff.) ; II. 109, 110, 114-115 ; s. 144, *ill.* (4)

[8] See ss. 120, 120A.

[9] " And then *iddat* becomes obligatory from the time of writing " : Bail. I. 233 (233-234). Since *iddat* means no more than abstinence from marriage & wife cannot re-marry while marriage subsists, this really means *iddat* will be held to run from time of writing, i.e. she may remarry when iddat expires after writing.

[10] As in *Sherif Saib* v. *Usanabibi Ammal*, (1871) 6 Mad. H. C. R. 452 (husband was in Trichinopoly ; he divorced wife who was at Tinnevelly ; no evidence of wife having received any intimation of divorce) ; *Sarabai* v. *Rabiabai*, (1905) 30 Bom. 537 ; *Raja Saheb* v. *Rasul S.*, (1919) 44 Bom. 44.

[11] Cf. (*Mt.*) *Waj Bibee* v. *Azmut Ali*, (1867) 8 W. R. 23.

[12] Bail. I. 233 (235) ; *Ma Mi* v. *Kallandor*, (1926) 54 I. A. 61 (RANG.).

SECTION 145. or (*b*) if endeavours are made to communicate it to the wife, and she frustrates them by keeping out of the way.[13]

The pronouncement need not be in the presence of the wife, or even addressed to her.[14]

7. INTERPRETATION OF THE PRONOUNCEMENT.

(*a*) Ambiguity.

146.[15] Under Hanafi texts, where the husband utters ambiguous[16] words,[17] susceptible of being interpreted as a pronouncement of talaq they effectuate a talaq, if they are uttered with that intention.[18]

In determining the question whether or not, in any particular case, a dissolution of marriage has taken place, and whether, from the facts before the Court, the inference ought or ought not to be drawn that a talaq was validly pronounced, the various considerations and points of view referred to in ss. 119-157, have all to be borne in mind : see summary in s. 119, com.

General rule stated. *Hamid Ali's* case. 2 All. 71.

Thus,[19] the words uttered were : "Thou art my cousin, the daughter of my uncle, if thou goest." Marriage with the daughter of an uncle is not prohibited, so that the expression could not be taken to correspond even remotely to zihar (s. 187), and yet it was construed as implying that, in the contingency referred to, the lady would not continue to be the speaker's wife and would bear to him no relation other than that of a cousin. The case is, therefore, a striking illustration of the principle of Hanafi law contained in s. 146 as well as s. 144. A few months earlier it had been held in Calcutta[20] that the "mere pronunciation of the word talaq three times by the husband without being addressed to any person is not sufficient to constitute a valid divorce." The words uttered were held not to constitute a coherent and unambiguous statement to the effect that the marriage was dissolved. Being

Furzund Hossein's case. 4 Cal. 588.

[13] *Sarabai* v. *Rabiabi*, (1905) 30 Bom. 537 ; *Rajasaheb* v. *Rasulsaheb*, (1919) 44 Bom. 44 ; *Mohan Mulla* v. *Baru Bibi*, (1921) 26 C. W. N. 261.

[14] *Ma Mi* v. *Kallandar Ammal*, (1926) 54 I. A. 61 (RANG.).

[15] Sect. 146 cited and applied : *Kalenther Ammal* v. *Ma Mi*, (1924) 2 Rang. 400, 406, upheld *Ma Mi* v. *Kallander Ammal*, (1926) 54 I. A. 61.

[16] Implied divorce : *Ata Mohammad* v. *Saiqal B.*, (1910) 8 All. L. J. 952, 961, *n.* 11(2).

[17] Ind. Evid. Act, ss. 61, ff. apply to documents : s. 143(2). A man said to his wife : "Thou art my cousin, daughter of my uncle, if thou goest" : on being proved that he meant by the words that she would be no other relation to him, given effect to as *talaq* : *Hamid Ali* v. *Imtiazan*, (1878) 2 All. 71.

[18] Taken from Bail. I. 228-229 (229-230) : *Wajid Ali K.* v. *Jafar Husain K.*, (1931) 7 Luck. 430 (statement in fit of temper that he would have nothing more to do with wife, does not, without intention to divorce, effectuate divorce). Acts done in anger not effective in Roman law, unless *perseverantia apparuit judicium animi fuisse*, Dig. XXIV. 23). *Kalanther Ammal* v. *Ma Mi*, (1924) 2 Rang. 400 affirmed 54 I. A. 61. Bail. I. 236 (236) contains various particulars about interpretation to be put on certain Arabic expressions. In previous editions they were analyzed & their effect stated, but that table is omitted as being unlikely to be of use & possibly might mislead : see ss. 5B, 5C.

[19] *Hamid Ali* v. *Imtiazan*, (1878) 2 All. 71.

[20] *Furzund Hossein* v. *Janu B.*, (1872) 4 Cal. 588 dissented from in *Asha B.* v. *Kadir Ibrahim Rowther*, (1909) 33 Mad. 22. See also *Sarabai* v. *Rabiabai*, (1906) 30 Bom. 537, 544.

ambiguous, their legal effect depended upon the intention with which they had been pronounced.[21] The mere pronunciation of the word talaq would obviously be meaningless. It is clear that the intention to dissolve the marriage must be manifested (ss. 119, 143). If ambiguous words are used, their effect depends upon the intention with which they are pronounced (s. 146). If the words uttered are unambiguous, then under Hanafi texts, there is a divorce even though they have been pronounced under coercion (s. 123, *nn.*) SECTION 146.

In two decisions of the Madras High Court [22] the facts and the Hanafi law are stated with great precision.

147. (1) Where the terms of a pronouncement are ambiguous, or silent as to whether a revocable or irrevocable talaq is intended,[1] a single revocable talaq is under Hanafi law effected if the expression is such as to imply that a talaq has already been effected.[2] In all other cases an irrevocable divorce is effected.[2] (*b*) Whether the divorce is revocable or irrevocable. Hanafi law: ambiguity.

(2) Where the marriage has not been consummated,[3] all the pronouncements following the first effective one are void.[4]

Illustrations. Hanafi law.

(1) H says to his wife, marriage not having been consummated: "Thou art repudiated, repudiated, repudiated." The first pronouncement takes effect as a talaq, the next two are nugatory.[5]

(2) If he says, "Thou art repudiated three times," three talaqs take place.[5]

(3) If he says, "Thou art repudiated once before this repudiation," two talaqs take place.[5]

(4) If he says, "Thou art repudiated a thousand times," three [6] talaqs take

[21] Cf. 4 Cal. 588 ff.: (1) "If the *formula* of divorce prescribed in Muhammadan law books, has been really pronounced by plaintiff, marriage would have been probably dissolved"; (2) husband simply pronounced *word* '*talaq*' three times; (3) simply pronouncing *word* '*talaq*' is not sufficient to constitute a valid divorce. Lower appellate Court, however, found that husband said: "If she be not my wife I can give her 1,000 (or 20) *talaqs*, so why not 3, & having so said, pronounced 3 *talaqs* which are held to constitute one form of Muhammadan divorce." Is it possible to reconcile this finding with view that *talaq* was incoherently & meaninglessly uttered, without words in grammatical sequence, to indicate that marriage had been dissolved? H. C. apparently considered either that "by pronouncing 3 *talaqs*" lower appellate Court meant, "pronouncing *word* talaq 3 times," or that there was no evidence on which any different finding could have been arrived at. In any case the portion of head note above cited (submitted) represents law correctly.

[22] *Ibrahim* v. *Syed Bibi*, (1888) 12 Mad. 63; *Asha B.* v. *Kadir Ibrahim*, (1909) 33 Mad. 22, 26-28.

[1] This doubt can arise only under Hanafi law; under Shia law, *talaq* cannot be made irrevocable by form of words uttered: pronouncement irrevocable under Shia law only where two other pronouncements have preceded it.

[2] Bail. I. 230 (251); see ss. 5B, 5C. Cf. *In re Abdul Ismail* v. *his wife Husenbi*, (1883) 7 Bom. 180 (*talaq bidat* or irregular divorce which is effected by three repudiations at same time . . sinful but valid. . . . recognized: *Kasam Pirbhai & wife Hirabai* (1871) 8 Bom. H. C. (CR. CAS.) 95); *Sarabai* v. *Rabiabai*, (1905) 30 Bom. 537.

[3] In which case—s. 136(2)—single divorce is effected in most approved mode (*viz.* after expiration of *iddat*).

[4] Bail. I. 213. See s. 5C, s. 149 *ill.* [5] Bail. I. 226-227 (227-228).

[6] I.e. as many as possible, since there cannot be more than three.

SECTION 147. place ; but if he says, " thou art repudiated once and a thousand times," there is only one talaq.[7]

(5) If he says, " Thou art repudiated and repudiated and repudiated if thou enterest the house," there are three talaqs if and when she enters the house.[5]

(6) If he says, " Thou art divorced," or " I have divorced." There is one revocable talaq, whatever his intention.[8]

(7) If he says to his wife, " Thou art repudiated and repudiated and repudiated." Three talaqs take place, if the marriage has been consummated, and one if not consummated.[9]

(8) H (married to *W* regularly and to *X* irregularly) pronounces a talaq in terms applicable to either : *W*, the regularly married wife, is divorced.[10]

(9) H repudiates his wife " when she goes to Mecca " : she goes there some time after : under Hanafi law, the talaq then takes effect.[11]

(10) H says to his wife, " Thou art repudiated yesterday." She is divorced immediately if she was his wife " yesterday,"—but not otherwise.[12]

See s. 149, *ill.*

Effect of comparison.

148. When the terms of a pronouncement of talaq liken it to anything, Abu Hanifa holds that it is irrevocable, whether mention be made of the greatness of the thing referred to or not : Abu Yusuf holds the talaq irrevocable if magnitude is mentioned, and revocable if magnitude is not mentioned.[13]

Illustrations.

(1) H says to his wife, " Thou art divorced or repudiated like the magnitude of the point of a needle, or of a mountain." It would be irrevocable according to both Abu Hanifa and Abu Yusuf.[13]

(2) H says to his wife, " Thou art divorced like the point of a needle, or a grain of mustard seed, or like a mountain." This is irrevocable according to Abu Hanifa, but revocable according to Abu Yusuf.[13]

(3) H says to his wife, " Thou art divorced thus," pointing one, or two or three fingers separately. There are one or two or three talaqs respectively.[14]

Effect of description.

149. A description of the pronouncement contained in the pronouncement, (1) if the description is inapplicable to talaqs, must be taken as a mistake or redundancy and the pronouncement is revocable ; (2) if it is not an aggravation of the talaq it renders the pronouncement revocable ; but (3) if it is an aggravation of the talaq it renders it irrevocable and single ; unless three talaqs are intended, in which case three will take effect.[15]

7 Bail. I. 227 (228) 235 (236-237).
8 Bail. I. 212.
9 Bail. I. 213.
10 Bail. I. 215.
11 Bail. I. 217 (218).
12 Bail. I. 221 (222).
13 Bail. I. 224 (225). See s. 5c.
14 Bail. I. 225 (par. 2) (226 par. 2).
15 Bail. I. 225 (par. 3) (226).

SECTION 149. *Illustrations.*

(1) H says to his wife, "Thou art divorced—a divorce that does not affect thee or does not take effect," or "the best," or "the most excellent," or "the most beautiful" or "most just of repudiations." There is one revocable talaq.[16]

(2) H says to his wife, "Thou art divorced or repudiated the strongest of repudiations." The talaq is irrevocable and single, unless three are intended, when three will take effect.[17]

(3) H says to his wife, "Thou are repudiated irrevocably," or "certainly," or "the most infamous of repudiations," or "badai repudiation," or "the hardest repudiation." There is one irrevocable talaq unless three are intended.[18]

8. REVOCATION OF PRONOUNCEMENT.

(1) Express.

150. A revocable[1] talaq may, at any time before the expiration of the period of the iddat, be expressly revoked by the husband (provided that he is of sound mind) or by an agent duly authorized by him in that behalf. The husband may ratify an unauthorized revocation.[2]

(2) Implied.

151. Under Hanafi and Shia law the revocation of a talaq may be implied or conclusively presumed from the conduct of the husband, even though he be of unsound mind.[3] Under Shafii law revocation must always be express, or by resumption of conjugal intercourse.[4]

Illustrations.

(1) H pronounces a single revocable talaq against his wife and then says, "I have retained thee," or "my wife," or has sexual intercourse with her, or kisses her with desire, or looks on her nakedness with desire. The pronouncement is revoked under Shia and Hanafi law.[5]

(2) H pronounces a talaq against his wife while absent from her, and then enters her apartment on his return : under Shia and Hanafi law the pronouncement is revoked.[6]

(3) Wishes of wife.

The revocation of a talaq, it will be seen, is as entirely a matter for the husband, as is its pronouncement. The ultimate basis of the law is to be found in the following verse of the Koran :

[16] Bail. I. 225, 226 (226). [17] Bail. I. 226 (227).

[18] Bail. I. 225 (par. 3) (226, par. 3), 226 (par. 1) (226, par. 3).

[1] Only a revocable (*raj'i*) divorce can be revoked : not if it is triple, or pronounced in the *bain* form : *Amiruddin* v. *Khatun Bibi*, (1917) 39 All. 371.

[2] A *talaq* is normally revocable during *iddat*, unless (i) pronouncement repeated 3 times, or (ii) according to Hanafi law, if it is pronounced in such terms that it is interpreted as a triple pronouncement, after which wife must be married to a second husband, & thereafter second marriage must be consummated & then dissolved, before she can be remarried to her first husband : s. 41.

[3] Bail. I. 285-286 (287-289), 287 (289); Hed. 106-107. The *Daaimu'l-Islam* adds : revocation need not be communicated to wife : though recommended that there should be witnesses. This relevant only on question of fact whether there was revocation.

[4] Hed. 103. [5] Bail. I. 285 (287) ; II. 126-127.

[6] Bail. II. 121 (*fifth*).

SECTION 151. "When ye have divorced women, and they have fulfilled their term, then either retain them in kindness or release them in kindness. Retain them not to their hurt so that ye transgress (the limits). He that doth that injureth his own soul."—Koran, ii. 231.

Though the husband has the right to revoke the talaq, he is enjoined to consider the feelings of his wife, and not to "retain" her against her wishes. Sale translates the relevant words, "and retain them not with violence" and explains—"i.e. by obliging them to purchase their liberty with part of their dowry :" on the marriage being dissolved the wife has to be paid her mahr even if deferred.

Contingency invalid.

152. A pronouncement of talaq cannot be revoked contingently.[7]

9. INCIDENTS OF TALAQ. Result of one or two talaqs,

153. (1) In the cases in which the separation of the husband and wife has become irrevocable,[8] they cannot lawfully have conjugal intercourse[9] with each other without remarriage ;[10] but they may remarry[11] immediately unless more than two talaqs have been pronounced by the husband against the wife.[12]

three or more talaqs.

(2) Where more pronouncements[13] of talaq than two have been made[14] (*a*) the separation of the husband and wife becomes irrevocable ; (*b*) they cannot lawfully have conjugal

[7] Bail. I. 287 (289); II. 127.

[8] I.e. either pronouncement was itself irrevocable, or period of *iddat* has elapsed without the pronouncement having been revoked. The pronouncement may be irrevocable, though single, so that husband had no power to revoke it, if he desired to do so ; or it may be irrevocable because it had been preceded by two other pronouncements (in which latter case not only would (i) re-marriage be necessary, but (ii) there would be the necessity of complying with s. 41, before re-marriage would be lawful).

[9] Bail. I. 205, 290 (292), 292 (294); II. 42 ; Cf. s. 13. When they have become divorced their conjugal intercourse is not lawful : nor can intercourse affect status of man & woman, their marriage having been dissolved : *Rashid Ahmad* v. *Anisa K.*, (1931) 59 I. A. 21.

[10] For re-marriage besides consent of parties, witnesses, & fresh *mahr* necessary.

[11] REMARRIAGE is necessary if ultimately the marriage has become dissolved irrespective of question whether (i) first or first two pronouncement(s) had been revoked so that original marriage had revived by revocation & thereafter fresh pronouncement was made or (ii) the pronouncement(s) had remained unrevoked during the period of *iddat*, so that marriage had been dissolved, but after the dissolution parties had remarried, & then again the second marriage had been dissolved.

[12] Bail. I. 205, 290 (292), 292 (294); II. 42 ; cf. s. 13.

[13] Irrespective of questions whether (i) pronouncements were revoked & thereby original marriage revived, or (ii) they were in themselves irrevocable, or (iii) they became irrevocable by lapse of period of *iddat* ; & (iv) whether the parties had intermediately to re-marry in cases (ii) & (iii).

[14] Three pronouncements of talaq may be made (i) either simultaneously, or (ii) in *first* instance a single pronouncement may be made, and the pronouncement either (*a*) revoked, or (*b*) allowed to become absolute & marriage dissolved : thereafter parties may have remarried. *Secondly*, a pronouncement may similarly be made & followed by revocation or remarriage. Or two pronouncements simultaneously made & revoked or followed by remarriage ; & then a third pronouncement.

intercourse with each other unless they are remarried ; and (*c*) they are under a prohibition against remarrying each other, which prohibition is not removed unless the wife first complies with the requirements of s. 41. SECTION 153.

I. The legal results of, (*a*) a triple divorce, (*b*) a single irrevocable divorce, and (*c*) a single revocable divorce after the expiration of the period of iddat, are the same in regard to the necessity of the parties remarrying before they can again become husband and wife. II. The results are different, however, in this regard, that where there have been three pronouncements, the parties cannot lawfully remarry except in compliance with the provisions of s. 41. Result of three talaqs.

154. When the husband or wife dies during the iddat [15] after talaq has been pronounced— Death during iddat : inheritance.

(1) if the pronouncement was revocable [16]—they are reciprocally entitled to inherit ; [17] 1. Revocable divorce.

(2) if the pronouncement was irrevocable, or if there were three pronouncements,[18] not referable to any act proceeding from the wife, (*a*) the husband does not inherit from the wife ; [19] (*b*) the wife does not inherit from the husband, provided that under Hanafi and Shia (but not Shafii) law the wife is entitled to inherit if the pronouncement is [20] made in the husband's death-illness, and the wife has not expressly or impliedly consented to the talaq being triple or irrevocable (as the case may be) ; [21] 2. Irrevocable. (*a*) Husband's rights. (*b*) Wife's

(3) if the marriage is dissolved by an act proceeding from the wife during her death-illness, and then she dies during the iddat, the husband is entitled to inherit.[22] 3. Dissolution at wife's instance.

155. For the purposes of s. 154, a talaq pronounced by a person (1) holding an irrevocable power to divorce, is deemed to be pronounced at the time when the power was given ; (2) holding a revocable power, is deemed to be pronounced at the time when it was actually pronounced.[23] Power of talaq : when operative.

15 And see s. 155.

16 Whether *talaq* pronounced in *marz-ul-maut* (= DEATH-ILLNESS) or "in health" i.e. not in death-illness : see s. 359 B., *expl.*

17 Bail. I. 277 (279); II. 122.

18 Third pronouncement is irrevocable by law : s. 153(2).

19 Bail. I. 278 (280).

20 Or "pronouncements,"—if there were more pronouncements than one.

21 Bail. I. 278 (280), 280 (282); II. 122, 123. See s. 157 *ill.* ; s. 600 *ill.* (16).

22 See s. 157 *ill.* Sect. 154(3) = s. 154A in last ed. 23 Bail. I. 284 (286).

SECTION 156. Death-illness : presumptions.

156. (1) Under Hanafi law, if the husband dies during the wife's iddat, after having pronounced three revocable or one irrevocable talaq[18] (such pronouncements not being referable to any act proceeding from the wife)[25] it will be presumed (if the wife so affirms) that the pronouncements were made in death-illness unless the contrary is proved.[25]

(2) Under Shia law the presumption is that the pronouncement was made in health.[26]

(Shia law.) Divorce in death illness : inheritance.

157. Under Shia Ithna Ashari law if the husband pronounces a talaq during his death-illness and dies[27] within a year of the pronouncement,[28] the wife (provided that she remains unmarried) inherits from him, whether the pronouncement was revocable or irrevocable.[29]

Illustrations.

(1) H pronounces a revocable talaq against his wife. An impediment, which, at the date of the talaq would have prevented her from inheriting is removed during her iddat, and then while the iddat is still unexpired, H dies. The wife is entitled to inherit.[30]

(2) H is separated from his wife, for impotence after the lapse of the year given to him for consummation : s. 201 ; she exercises her option in marz-ul-maut, and then dies within the iddat. H does not inherit, the cause of separation having arisen before the wife's death-illness.[31]

(3) If H is separated from his wife for impotence, while he is in death-illness, and he dies before the iddat expires, she does not inherit from him as her act brought about the divorce.[32]

(4) H slanders his wife, while in health, and takes the lian (ss. 193, 194) against her in death-illness. She inherits if he dies during her iddat.

(5) During his death-illness the husband, makes the ila (s. 158) or vow of abstinence. The period of the vow expires while the wife is in her iddat. Then he dies of the illness. She is entitled to inherit.

(6) H, in his death-illness is asked by his wife for a revocable divorce. But he divorces her irrevocably or three times : she is entitled to inherit, if he dies during iddat.[32]

[24] See s. 154(2).

[25] Bail. I. 282 (84); see s. 5B, s. 157 *ill.*

[26] Bail. II. 123-4 ; s. 151 " irrevocable " *n.* s. 154, *n.* 16.

[27] Death-illness or *marz-ul-maut* implies that the illness proved fatal ; s. 395B, *expl.* if he recovers from illness during which divorce pronounced, she does not inherit unless it is a revocable divorce & he dies while she is in her *iddat* : s. 154(1).

[28] *Daaim'ul-Islam*, (Shia Ismaili text) omits provision about death within a year. Presence or absence of this provision is, it is submitted, not very important ; it would seldom happen that a person should really be in death-illness and thereafter continue to live for a year.

[29] Bail. II. 122.

[30] Bail. I. 277 (279).

[31] Bail. I. 281 (283).

[32] Bail. I. 280 (282).

(7) H, being in health, says to his wife : "When the beginning of the month comes, thou art divorced," and at the beginning of the month, he is in death-illness, and then he dies ; under Hanafi law she is not entitled to inherit.[33] SECTION 157.

(8) H, while in death-illness, pronounces a divorce conditionally on his wife doing some act which it is in her power to avoid doing (as entering a house). She does the act. Under Hanafi law her act effectuates a divorce ; and she is not entitled to inherit.[33]

(9) H, having four wives, divorces them all during marz-ul-maut, marries four others, and consummates the marriage with them, and then dies during the period of their iddat. All eight are entitled to inherit.[34]

See also ss. 600, 641 *ill.*

The Daaimu'l-Islam makes it incumbent on the husband to give a mit'at, or present to the wife on talaq : the value of the present to correspond to the means of the husband,—a duty derived from the Koran ii, 231 (cited in s. 151, com.) requiring the husband, if he release his wife, to do so with kindness.

§ 2.—Dissolution of Marriage by Ila.

Ila : vow against intercourse.

158. (1) If a husband,[1] having attained puberty, and being of sound mind, swears by God not to have sexual intercourse with his wife for a period of four months or more, or for an unspecified period (or under Hanafi but not Shia law, if he vows that he will undergo a penalty should he have such intercourse) he is said to make ila.[2]

(2) Under Shia Ithna Ashari law, ila may be made only after the marriage has been consummated.[3]

(3) Under Shia Ismaili law ila may be made only if the wife is not in her menses, and if the husband has not had intercourse with her since her last menstruation.[4]

Illustrations.

(1) H says to his wife : (*a*) "I swear by God that I shall not approach thee," or (*b*) "If I approach thee, pilgrimage or alms or fasting is incumbent on me."[1] The first is a valid ila under all schools, and the second under Hanafi law.

(2) H says to his wife : "When I approach thee, prayer, or to follow a bier, is incumbent on me" : there is no ila as these duties are incumbent on all ; nor if he says : "If I approach thee thou art divorced."[5]

Effect of acting upon ila.

159. If the husband, having made ila, abstains from intercourse with his wife for four months during the period

33 Bail. I. 283 (285). 34 Bail. II. 124.

1 Married permanently : not by *muta* : Bail. II. 148.

2 Bail. I. 294, ff.; Hed. 109 ; Bail. II. 147-148. *Ila* is Arabic for "swearing." Husband who has made *ila* = *muli* ; wife with reference to whom made = *mula.*

3 Bail. II. 148. 4 *Daaimu'l-Islam*, cf. s. 136.

5 Bail. I. 249 (251); II. 147-8 ; Hed. 109.

SECTION 159. comprised in the ila, (1) under Hanafi law the marriage is dissolved with the same legal results, as if there had been one irrevocable pronouncement of talaq made by the husband ;[6]

Hanafi law.

Shafi and Shia law.

(2) Under Shafii and Shia law, the wife is entitled to apply to the Court for restitution of conjugal rights, and on her doing so, the husband has the option of either divorcing her, or resuming sexual intercourse, [and, *semble,* on his refusing to do either, the Court may itself dissolve the marriage.][7]

Ila how cancelled.

160. Under Hanafi law, ila may be cancelled by (*a*) the husband resuming intercourse with his wife within the period comprised therein, provided that he has not continued abstinent for four months during the said period ; or by (*b*) a verbal retraction thereof, provided that, at the time of such retraction, and during the whole of the unexpired period comprised in the ila, sexual intercourse between the husband and wife is, and has been impossible.[8]

Presumption.

161. If, within the period of ila, the husband asserts that he has cancelled the oath or vow, it will be presumed [9] to have been cancelled ; but after the said period, there is no such presumption unless the wife assents to it.[10]

§ 3.—KHUL AND MUBARAAT.

1. DEFINITION AND FORM. Agreement to dissolve marriage.

162. (1) Marriage may be dissolved by an agreement [11] between the parties, for a consideration paid or to be paid by the wife to the husband.

(2) Such an agreement [12] if the wife alone is desirous of having the marriage dissolved is called a khul ; if both parties are so desirous it is called a mubaraat.[13]

[6] Bail. I. 249 ; Hed. 109.

[7] Bail. II. 149 (*second*); Hed. 109. But cf. "The judge has no power to compel him to do either (i.e. restitution or divorce) in preference to the other :" Bail. II. 149, par. 1, *ll.* 16, 17). DISSOLUTION OF MUSLIM MARRIAGES ACT, 1939, set out s. 212 B below : Rep. of Sel. Com. *Gaz. of Ind.* (Part v.) 11 Feb. 1939, p. 5 ; cf. (1938) XVI. Bom. L. Journ. 85.

[8] Bail. I. 300 (302), 301 (303); Hed. 112.

[9] See s. 5c. [10] Bail. I. 301 (303).

[11] On question of wife's consent to divorce, cf. *Maung Pe* v. *Ma Lon Ma Gale,* (1911) 38 I. A. 140, 144 = 38 Cal. 629 (wife allowing decree for divorce to be passed against herself, does not = consenting to divorce).

[12] *Abdul Rahman K. L.* v. *Ma Kye,* (1914) 24 I. C. 102 (Lower Burma). This word is written "*Khoola*" by Baillie, who represents Arabic letter *ein* by vowels marked with circumflex : *khul* is, in Arabic, monosyllabic, final letter being not a vowel, but guttural consonant *ein* represented by inverted apostrophe [']. See s. 96, com. *n.* to *sam'at.*

[13] Bail. I. 303 (305) pronounced *mooba-ra-at,* two final *a's* are sounded separately,—

SECTION 163.

Khul : Mubaraat : form.

163. Under Hanafi law,[14] a khul or mubaraat is effected on the husband proposing to pronounce a talaq, or otherwise to dissolve the marriage for a consideration, and the wife at the same meeting accepting it ;[15] the proposal and acceptance need not be in any particular forms ;[16] the contract itself dissolves the marriage without a talaq being pronounced.[17]

Sunni law.

(Shia law.)

Form of khul. Witnesses.

164. Under Shia law,[18] (1) an agreement by way of khul must be made in the presence of two witnesses, and where the marriage has been consummated, it must be made at a time when the wife is in a tuhr,[19] unless the husband is absent[20] from her ;[21] (2) where the proposal for khul is not made in an Arabic sentence containing that word, or its inflection, it must be followed by a talaq, pronounced in due form by the husband ;[21] (3) an agreement by way of mubaraat requires the use of no special formula or words, but it must be followed by a talaq in due form ; (4) a khul is said to be effected when the agreement to effect it has been made, and the wife has, in accordance with it released her unpaid mahr, or otherwise paid the consideration agreed upon.[22]

Arabic Formula.

2. KHUL : MUBARAAT : LEGAL EFFECTS.

165. (1) Under Hanafi and Shia Ismaili law, the dissolution of marriage on a khul or mubaraat has the same effect as a single irrevocable divorce.[23]

(2) Under Shafii law a khul or mubaraat is not reckoned as a talaq for the purposes of s. 41.[24]

being each short, like the sound of *a* in *woman*. *Daaimu'l-Islam* says that in *khul* consideration paid is *mahr* & something more ; in *mubaraat* it is less than *mahr*.

14 For Shia law, see s. 164.

15 Bail. I. 304 (306), 314 (316). SAME MEETING, see Bail. I. 11, 237 ; Hed. 38, 87.

16 Bail. I. 304 (306).

17 In (*Moonshu*) *Buzul-ul-Raheem* v. *Luteefutoonnissa*, (1861) 8 Moo. I. A., 379, there was *khul-nama* but husband pronounced *talaq*, P. C. held, dissolution of marriage independent of *khul*, but whole transaction vitiated by husband's cruelty & ill-usage.

18 For Hanafi law, see s. 163.

19 I.e. time when menstrual courses not on her : see s. 138 *n*.

20 Cf. Shia rule about *ahsan talaq* : s. 136, com.

21 Bail. II. 133-134. The *Daaim'ul-Islam* contains no reference to Arab language.

22 Bail. II. 129-137. Under Shia law, *mubaraat* does not operate as dissolution of marriage.

23 Bail. I. 303 (305) *Daaimu'l-Islam*. Result of s. 165(1) = parties may not resume their marital state, unless there is fresh marriage. Though Shia authorities are divided on whether *khul* is a *talaq*, they agree that it is irrevocable on the part of husband, unless wife demands back payment during *iddat* : & if she does so, husband may revoke the *khul* : s. 165(3) ; Bail. II. 135 ; if husband dies during wife's *iddat*, she does not inherit unless *khul* agreed upon during *marz-ul-maut*, Bail. II. 123.

24 *Sharh-i-Viqaya* : *Nikah*, chapt. *khul* ; see s. 41.

SECTION 165.

(3)[25] The Shia Ithna Ashari authorities are not agreed whether a khul or mubaraat must be reckoned as a talaq under s. 41,[25] but they are agreed that when the khul is effected, (*a*) the husband has no power of revocation, but (*b*) the wife may at any time during iddat, re-claim the consideration paid to her ; and if she does so, the husband may revoke the khul at his option.[26]

Iddat : wife's right to maintenance.

166. A khul or mubaraat does not, in the absence of express agreement, affect the wife's right to claim from the husband, during the period of her iddat, maintenance for herself and for children borne by her to him, and wages for suckling such children, if she is required by him to do so.[27]

Under Shia Ismaili law the wife has no right to maintenance during iddat after khul or mubaraat. Daaimu'l-Islam.

Mahr : Effect of khul and mubaraat.

167. Under Hanafi law in the absence of express agreement, the rights relating to mahr are (*a*) according to Abu Hanifa extinguished by both khul and mubaraat ; and his opinion is adopted by the Fatawa 'Alamgiri,[28] Hidaya, Durr-u'l Mukhtar, and Sharh-i-Viqaya.[28] (*b*) Abu Yusuf holds that they are extinguished by mubaraat alone,[29] and not by khul.[28] (*c*) Imam Muhammad holds that they are extinguished by neither.

Distinction : reason.

It might appear at first sight that (contrary to Abu Yusuf's view) mahr would be extinguished rather under khul (i.e. when the wife alone is desirous of separating) than mubaraat (i.e. when both parties desire it : see s. 162).

Abu Yusuf's view is, perhaps, based on the ground that where both parties agree to dissolve the marriage (i.e. in a mubaraat) they ought to be placed as nearly as possible in the position in which they would have been had they never married. The husband can, however, always dissolve marriage by talaq. It is, therefore, a necessary precaution that he should not be tempted to drive the wife into a request for a talaq so that he may gain pecuniarily.[30] On the other hand when the wife is trying to bargain for a release from an unwilling husband by a khul, Abu Yusuf may have thought that in a khul all terms should be presumed in the husband's favour.

[25] Bail. II. 120. Sect. 165(3) cited & applied : *Qasim H.* v. *Kaniz Sakina*, (1932) 54 All. 806.

[26] Bail. II. 135, 137 ; *Qasim H.* v. *Kaniz Sakina*, (1932) 54 All. 806, 810 (she cannot reclaim after *iddat*).

[27] Bail. I. 303-306 (305-308) : cf. ss. 294, 300, 316(2), 317.

[28] Bail. I. 303-306 (305-308). [29] See comment.

[30] Cf. Bail. I. 304, (par. 2), (306).

SECTION 167. Khul.

The first instance of khul recorded in Islam is said to be that of the wife of Thabit ibn Qais, who asked the Prophet to get her husband to divorce her, on her giving him her garden. Thabit was very ugly, and his wife is reported to have said : " If I had had no fear of God, I should have struck him on the face whenever he approached me." [31]

First instance.

When express provisions with regard to the rights relating to mahr have not been made, the effect of the law is not quite clear.

Effect of khul on mahr.

Two extracts quoted in the Fatawa 'Alamgiri bear on this point. They appear to be incapable of reconciliation. The first [32] is taken from the Muhit. It is an illustration of Abu Hanifa's opinion, viz. that after a khul, in the absence of express agreement, the wife cannot ask for her unpaid mahr, nor, where mahr has already been paid, can the husband demand re-payment of any part thereof, even, though the marriage has been dissolved without being consummated. The effect of the second extract [33] (taken from the Wajiz-i-Kurduri) :— H marries *W* for a mahr of Rs. 3,000 which is unpaid ; a khul is effected before consummation, in consideration of *W* (the wife) paying Rs. 1,000 (nothing being said about the mahr in the agreement for khul). In this even it is said that the Rs. 1,000 payable by *W* as consideration for the khul are to be set off against the Rs. 1,500 due from H to *W* for her mahr,[34] and *W* is entitled to Rs. 500 from the husband—in other words, the mahr is not extinguished by the khul. This second illustration is in accordance with the opinion of Imam Muhammad,[35] (whose opinion, no doubt, the Kurduri has adopted).

Contradictory extracts.

1. representing Abu Hanifa.

2. representing Imam Muhammad.

Except, however, for the quotation above referred to as the second extract,[32] the Fatawa 'Alamgiri has adopted the view of Abu Hanifa, and it would seem that the said second extract has crept in by inadvertence,[36] a fact that is not inexplicable when it is remembered that that work is a very elaborate digest of innumerable extracts from almost all the books of authority, ingeniously pieced together in mosaic.[37]

Second extract inadvertent.

31 *Sharh-i-Viqaya*, Vol. II. Book II. Book of *Nikah*, Ch. on *khul* (*ad init.*).

32 Bail. I. 306 (par. 1) (308). 33 Bail. I. 312 (par. 1) (314).

34 Only half *mahr* due, as marriage dissolved before consummation : See s. 102.

35 Abu Yusuf agrees with Imam Muhammad as to effect of *khul* : on effect of *mubaraat* he took the view of Abu Hanifa, opposed to that of Imam Muhammad.

36 See s. 87, com. for similar lapse.

37 KHUL or MUBARAAT does not affect,—(*a*) ordinary debts of husband & wife to each other, (*b*) nor any rights other than those depending on marriage. The following three sentences, Bail. I. 304-305 (306-307) have been misunderstood & repay careful examination : (the italics in the quotation are mine) : viz. (1) " *khul* & *mubaraat* cause every *right* to fall or cease, which either party has against the other, *depending on marriage.*" (2) " When a *khul* is made by means of word *khul* it does not occasion the release of any other *debts* than dower " ; and (3) " In like manner with regard to word *mubaraat* though there is a difference of opinion, the correct view is that it does not occasion the release of any other *debts* than dower." These sentences, are not contradictory, but supplementary : (A) first lays down that all *rights depending on marriage* " fall or cease—i.e. marriage is dissolved,—not that rights of wife to be paid her debts—which do not depend on continuance of her marriage also cease ; (B.) question may no doubt arise whether in addition to what wife has agreed to pay as consideration for *khul* she is to be presumed to have also released her husband from payment of any *debt* he owes her : sentences (2) & (3), answer this in negative ; (C.) it may still have to be considered, whether *mahr* is to be taken as " *right* depend-

3. KHUL : REVOCATION : REVOCATION : by husband.

168. The husband cannot retract a proposal made by him for a khul [1] even though he reserves an option to do so. It is deemed to be rejected unless accepted by the wife during the meeting at which she becomes aware of it.[2]

Wife reserving option

169. The wife may reserve an option to herself, to withdraw within a specified period of time, from a proposal of khul made by herself.

– revoking proposal.

170. A proposal for a khul made by the wife may be retracted by her at any time before it has been accepted by the husband, and it is cancelled by her rising from the meeting.[3]

Conditional or contingent khul.

171. The husband may, but the wife may not validly propose a khul conditional or contingent on the happening of a future event.[4]

No option to husband to revoke khul.

172. A khul may not be entered into with an option to the husband to revoke it. Under Hanafi law the khul with such an option is absolute, and the option is void.[4] Under Shia law both the khul and option are void.

Option to wife to revoke khul.

173. A khul may be entered into with an option to the wife to revoke it.[4]

4. CONSIDERATION OF KHUL : (i) Subject.

174. Anything that may be the subject of mahr may be the consideration of a khul.[5]

ing on marriage,"--in which case it would "fall" (under first sentence) or *debt* independently due,—in which case it would under sentence (2) be placed on same footing as other debts, (viz. remain unreleased by *khul*). *Mahr* is, no doubt *debt*, often becoming payable, at least in part, only after dissolution of marriage : but it originates with marriage. This ambiguity about nature of *mahr* reflected in *mahr* being placed in category by itself, & not as other debts : see sentence (2). Some authorities think that *mahr* should be considered as "right depending on marriage," & not debt : this is shown by sentence (3). Majority hold, however, that *mahr* in this respect also is debt like other debts. (D.) It is quite clear that debts other than *mahr* unaffected by *khul* or *mubaraat*, just as such other debts unaffected by other modes of dissolving marriage (as, for instance, by death of the husband or wife). (E.) No doubt half of *mahr* is in certain cases extinguished when marriage dissolved : yet never suggested that *talaq* can affect in any manner any other debt due from husband to wife, e.g. money lent to him by her.

1 Cf. s. 162(2).

2 Bail. I. 314 (316); *Qasim Husain B.* v. *Kaniz Saktna*, (1932) 54 All. 806.

3 Bail. II. 290.

4 Bail. I. 314 (316); *Abd. Rahman K. L.* v. *Ma Kye*, (1915) 26 I. C. 104 (Lower Burma); cf. s. 165(3): Bail. II. 135, 137.

5 In Shia law there is no recommendation to limit consideration for *khul* to less than 500 *dirhams*, as there is for *mahr* ; Bail. II. 130 ; cf. s. 96.

175. After the consideration for a khul has been once agreed upon,[6] it cannot be lawfully increased.[7] (ii) Increase.

176. Where a khul is entered into on a consideration to be determined thereafter, (1) such consideration may not, (*a*) unless the wife agrees, exceed the mahr actually paid to the wife, nor (*b*) unless the husband agrees, less than such mahr.[8] (iii) Standard.

[Sections 177, 178 are incorporated in s. 176 *n.*]

179. Where a khul is entered into in consideration of a fraction of the mahr, (1) if the wife has not received her mahr, her right to demand it is extinguished, and the husband has no claim against her for payment of the said fraction ; (2) if the wife has received her mahr, she must pay to the husband the fraction agreed upon (*a*) of the whole of the mahr if the marriage has been consummated, or (*b*) of half of the mahr if the marriage has not been consummated. (iv) Fraction of mahr.

180. If after the wife proposes a khul for a specified consideration, the husband pronounces a talaq against her, which is either single or triple as she has proposed, the husband (if he so asserts) will, in Hanafi law, be presumed to have accepted her proposal for a khul and to be entitled to the consideration specified.[9] The Shia authorities are divided whether a khul or a talaq without consideration will be presumed.[10] Talaq following a proposed khul : Presumption.

181. In the absence of an agreement specifying the time for payment of the consideration for a khul it is payable immediately [11] but the dissolution of marriage is not contingent on the payment of the consideration.[12] (v) Promptly payable.

[6] Bail. I. 307 (309); cf. s. 99.

[7] Bail. I. 310 (312); II. 130 ; *Qasim Husain Beg* v. *Kaniz Sakina*, (1932) 54 All. 806 (relinquishment of *mahr*).

[8] So that whether consideration is whole *mahr*, or specified property of equal value, or its consideration is undetermined, wife's right to demand payment of *mahr* is extinguished, & she must return such part of it as she has actually received : in marriage, "proper dower" is standard for fixing *mahr*, (s. 116), so here *mahr* is standard. Bail. I. 311 (par. 1), (313): Bail. I. 306-307 (308-309).

[9] Bail. I. 312-313 (314-315), but see s. 5B.

[10] Bail. II. 130.

[11] Bail. I. 314 (316).

[12] (*Moonshu*) *Buzul-ul-Raheem* v. *Luteefutoonnissa*, (1861) 8 Moo. 11 A. 379 ; cf. s. 117 ; (*Mt.*) *Saddan* v. *Faiz Baksh*, (1920) 1 Lah. 402 (he may of course sue for the consideration).

SECTION 182. 5. PERSONS AUTHORIZED TO ENTER INTO KHUL.

182. A minor or a person of unsound mind may not validly effect a khul.[13]

(i) Under compulsion.

183. Under Hanafi (but not to Shafii or Shia) law a khul under compulsion or by a person in a state of voluntary intoxication is valid.[14]

(ii) Through agents.

184. A khul may be entered into through agents on behalf of either party.[15]

(iii) By minor wife's guardian.

185. The guardian of a minor wife may, under Hanafi law, validly enter into a khul on her behalf, the consideration being payable by the guardian and not by the wife. A provision that the consideration is payable by the wife, is of no effect, *semble,* unless it is (on her attaining puberty) sanctioned by her.

(iv) By minor husband's guardian.

186. The guardian of a minor husband may not validly effect a khul on his behalf.[16]

§ 4.—ZIHAR.

ZIHAR : in Sunni law,

187. Under Hanafi law zihar is a declaration by the husband (he being adult and of sound mind)[17] that his wife (or any undivided part of her person, or any member which implies the whole person) is to him like the back (or any other part which it is unlawful for him to see) of his mother (or of any other person whom he is prohibited from marrying).[18]

in Shia law.

(2) Under Shia Ithna Ashari law zihar is a declaration, made in the presence of two just witnesses, by the husband [19] (he being adult and of sound mind), that his wife [20] is to him

[13] Bail. I. 319 (321); II. 133 ; *Rashid Ahmad* v. *Anisa Khatun,* (1931) 59 I. A. 21 (ALL.).

[14] Bail. I. 318 (320), 319 (322) ; *Rashid Ahmad* v. *Anisa Khatun,* (1931) 59 I. A. 21 (ALL.)

[15] Bail. I. 319 (321); details given in Texts omitted here : they are out of date. Texts not unanimous.

[16] Bail. I. 319 (par. 6, 7), (322 par. 1, 2).

[17] Bail. I. 321 (323), 324 (par. 2) (326 par. 2). "The husband must be capable of making expiation, hence *zihar* of a *zimmi,* a boy, or an insane person, is not valid." *Zihar* is valid though wife has been revocably divorced, provided that her *iddat* has not expired ; it is not valid if she has been irrevocably divorced : Bail. I. 325 (327).

[18] Bail. I. 321-322 (323-324). See s. 192, com. ; Koran, xxxiii, 4, s. 225, com. "nor hath he made your wives whom ye declare to be your mothers, your mothers."

[19] In accordance with majority of Shia authorities, he may be *muta* husband : Bail. II. 140 : point considered doubtful & left undecided in *Ludden Sahiba* v. *Kamar Kudar,* (1882) 8 Cal. 736 = 11 Cal. L. R. 237.

[20] Not merely a part of her.

like the back[21] of his mother, (or of any other woman whom he is prohibited from marrying otherwise than by affinity or unlawful conjunction), provided that when the husband is not absent from the wife, and she is subject to menstruation, the declaration must be made while the wife is in a tuhr[22] during which there has been no connubial intercourse.[23] SECTION 187.

The Daaimu'l-Islam lays down with regard to the Shia Ismaili law two further restrictions on zihar : (1) the marriage must have been consummated ; (2) there must be the intention to cause the effects mentioned in s. 189. So that, if the husband says to his wife that she is like his mother or sister, meaning thereby that she is as dear or kind to him or as much respected by him there is no zihar.

188. Zihar may be made subject to an option to revoke it, or restricting its legal effects to a specified period of time, or contingently on a condition being fulfilled ; but in the absence of specific provision it is irrevocable, perpetual, and absolute.[24] (i) Restrictions.

189. It is unlawful for a husband who has made zihar to have sexual intercourse with his wife[27] (and under Hanafi law, it is so notwithstanding that the zihar was made in jest, or under compulsion or mistake) ; and the wife may prevent[25] his having sexual intercourse with her, unless and until he makes an expiation, which may be done by freeing a slave,[26] or fasting for two months or feeding sixty poor persons.[27] (ii) Legal effects. (iii) Expiation.

190. Zihar does not of itself dissolve the marriage, or disentitle the wife to claim restitution of conjugal rights, even though expiation has not been made.[1] (iv) Dissolution of marriage.

191. On a wife suing for restitution of conjugal rights after her husband has made zihar and not made expiation, he (v) Wife's suit for restitution of conjugal rights.

21 No other part,—" except by a weak tradition : " Bail. II. 138.

22 See s. 138 *n.*

23 Bail. II. 139-140, cf. s. 136 : where marriage not consummated there is some doubt whether *zihar* may validly be made under Shia law : " later opinions favour the view " that consummation not necessary for *zihar.*

24 Bail. I. 323 (324), 324 (326), 326 (328), 325 (327).

25 Cf. *Nowroz Ali* v. (*Mt.*) *Aziz B.*, (1876) 11 P. R. 253, (No. 124), (CIV. JUDGMENTS) restitution refused as husband apostatized : ss. 50, 192, 212.

26 This provision explains scope of explanation for *zihar* : parties may be where slavery exists ; or husband may get slave outside India freed.

27 Bail. I. 322-323 (324-325) ; II. 139, 142 ; *Daaimu'l-Islam.* EXPIATION NECESSARY, after *zihar* ; & sexual intercourse unlawful between husband & wife till expiation made ; even though, after *zihar,* he should divorce his wife irrevocably, & then remarry her, still expiation necessary.

1 Bail. I. 323 (325) ; Hed. 142.

SECTION 191. may be ordered to make the expiation ; but he cannot be forced to divorce her.[1]

Presumption.

192. The husband's assertion that he has made the expiation under s. 189 will be presumed to be true.[2]

Instance of zihar.

The following is an instance of zihar : "Sulaiman said 'you are to me as the back of my own mother until after Ramzan.' Then Sulaiman slept with his wife when half of the month of Ramzan had passed, and the Prophet enjoined him to make expiation." [3]

pre-Islamic origin.

Zihar is a pre-Islamic institution. At the start, the formula seems to have been a sign of the husband's respect and regard for the wife as a woman whom he compared to his mother.[4] But by the time of the Prophet it had degenerated into an engine of oppression : [5] while the husband had an excuse [6] for disclaiming the obligations of a husband, she was still kept tied to him. The Koran removed the hardship of such a leonina societas, or rather leonina dissolutio societatis. The wife has now the option of having it determined for once, whether the husband wishes to dissolve the marriage, and if he intends to dissolve it, to do so in clearer terms. Where he acts without such intention, he is required to make an expiation for trying to over-reach his wife.

Means of oppression.

Not important in India.

Zihar has hardly any significance so far as the law courts in India are concerned. The words do not come naturally to Indian Muslims. A person wishing deliberately to give his wife a cause of action for restitution of conjugal rights in India, would probably adopt an easier, more usual, and better understood mode of doing so. Still, it is difficult to anticipate, by reasoning, the course that such a person may adopt. Should a person of sufficient acquaintance with the expressions and institutions of a distant country be desirous of trying the experiment, the wife may prefer not to sue for restitution of conjugal rights. But, if she does so, before the suit could come on for hearing, the husband would have plenty of time to make up his mind whether he should not settle the suit with the wife, or end it by talaq. If he does neither, the Court would (submitted) be bound by law to offer to the husband the option of talaq or expiation, and, it is submitted, if necessary, to take evidence of the fact whether or not expiation has been made by feeding sixty poor persons.

Restitution of conjugal rights after zihar :

Procedure.

§ 5.—LI'AN.

LI'AN.

193. (1) On an adult Muslim husband who is sound of

[2] Bail. I. 323 (par. 3), (325). But see s. 5A.

[3] *Mishcat-ul-Mashbih*, Book XIII, ch. xiii, part 2, Matthews, I. 122.

[4] Cf. Smith, *Kinship Marr. Anc. Arab.*, 193 *n*.; Koran xxxiii, 4. commentaries.

[5] Koran xxxiii, 4.

[6] So Shylock says, "I have an oath in heaven ; shall I lay perjury upon my soul ? —No, not for Venice,"—*Merch. of Ven.*, IV. i, 228-230. One might exclaim : "Oh what authority & show of truth can cunning sin cover itself withal."—*Much Ado*, IV. i, 32, 33. Cf. *Venlanki* v. *Venkata Rau*, (1876) 4 I. A. 113 = 1 Mad. 174 (motives in making adoption : Hindu law : presumptions in such cases).

mind,[7] making a statement [8] that his regularly married wife [9] has been guilty of adultery,[10] she has (unless she has been previously notorious for loose life, or borne a child of unknown paternity),[11] the option of applying to the Court to put the husband upon the alternatives of (*a*) retracting [12] his statement,[13] or (*b*) swearing four times by God that she is guilty of adultery, and imprecating upon himself the curse of God if he accuses her falsely.[14]

SECTION 193. Lian defined.

1. Accusation.

2. Retraction.

3. Imprecation.

[7] Koran xxiv. 6-9; Bail. I. 333-344 (335-346); II. 152-159; Hed. 123-126. See also s. 210A & DISSOLUTION OF MUSLIM MARRIAGES ACT, 1939, noted below, pp. 251 f.

[8] Under Hanafi law dumb husband cannot make *li'an*: Shafii & Shia law permit to it by signs; Hed. 125; Bail. II. 155. Under Shia law (1) husband must allege that he caught wife in the act: so blind husband cannot make *li'an*, (2) there must be no other proof of adultery: Bail. II. 152.

[9] Though wife has been revocably divorced,—provided she is in *iddat*, Bail. II. 153; but she must be permanently married & not be deaf nor dumb: Bail. II. 155.

[10] The accusation may be implied by denying paternity of her child: Bail. II. 152. Cf. s. 81.

[11] Shia law: wife must have been chaste, not notorious for bad character: marriage must have been consummated: Bail. II. 152.

[12] Husband has clearly alternative of RETRACTION: on exact significance of this alternative see *Fakhr Jehan B.* v. *Md. Hamidulla K.*, (1928) 4 Luck. 168 (procedure examined with great care: right of retraction upheld: Shia law: husband may, by retraction, nullify imputation of adultery in so far as it leads to dissolution of marriage: 4 Luck. 178). If husband retracts, he may be liable for slander but marriage cannot be dissolved. The Indian Courts have made stepping stones of Texts on *li'an* developing law in favour of wife: (A) IMPUTATION OF ADULTERY gives right to obtain dissolution: see s. 210A. (B) Retraction strictly construed: denial of having imputed adultery (where Court holds that adultery had in fact been imputed) not deemed retraction: *Zafar H.* v. *Ummat U. K.*, (1919) 41 All. 278; *Rahima B.* v. *Fazil*, (1926) 48 All. 834, 838, 842, 843. (C) Express OPPORTUNITY OF RETRACTION held to have no place in British procedure; Court need not expressly ask husband whether he chooses to retract: so held in *Ahmed S.* v. *Bai Fatima*, (1930) 55 Bom. 160, 162. (This, *submitted*, is opposed to principles of original law of *li'an*); *Zafar H.* v. *Ummat-U. R.*, (1919) 41 All. 278. (D) Compliance with FORMALITIES HELD UNNECESSARY: p. 283, *l.* 2): followed, *Rahima B.* v. *Fazil*, (1926) 48 All. 834, 838, 842, 843. (E) DURATION of husband's right to retract: (*a*) *Zafar H.* v. *Ummat-U. R.*, (1919) 41 All. 278 (husband falsely denied having imputed adultery: in his memorandum of second appeal pleaded that his statement on oath, his plaint & course of conduct amounted to retraction: Court dissolved marriage not accepting this as retraction, holding that retraction implies admission of having made it & acknowledging it to be false: *per* Mears, C. J.; Sulaiman, J. said that assuming *Kazi's* procedure allowed retraction at that stage, it could not be allowed under Indian procedure after both parties had gone to trial on the issue whether imputation had or had not been made: no question of taking further oaths where husband not prepared to substantiate imputation); (*b*) *Fakhr Jehan B.* v. *Md. Hamidullah K.*, (1928) 4 Luck. 168, (wife neither admitted nor denied imputation: [Cf. s. 193(3)(*b*)] husband pleaded in his W. S. that imputations made in good faith, but that he withdrew them unconditionally & expressed his regret: retraction held valid & proper: marriage not dissolved: Here s. 193(1) & (2) satisfied). See s. 212B, com., DISSL. OF MUS. MARR. ACT, 1939.

[13] Shia law requires use of Arabic language, unless parties unable to use it. Bail. II. 156 (par. 2): cf. ss. 18(3), 120A(2).

[14] The implications in this have been overlooked: Islamic law of proof is very strict (Hed. 353: s. 593; Bail. I. 415, 424-425: s. 81.) Texts assume in this connection that husband unable to produce legal evidence required by Islam for proving adultery: alternative of swearing four times, therefore allowed as concession: after such oath, procedure is on basis that though accusation not proved by legal evidence, it may be true. In India Muslim law of evidence is not applicable. Therefore may not

SECTION 193.

3. Oath and imprecation : (i) by husband.

(2) On the wife's exercising the said option,[15] intercourse between her and her husband becomes unlawful,[16] unless the husband in his turn chooses the alternative of retracting his accusation.[17]

(ii) by wife.

(3) If the husband does not retract the accusation, but (*a*) chooses the alternative [18] of swearing with the said imprecation, (*b*) the wife has again the option of admitting her guilt,[18] or swearing, in the same mode, that she is innocent, with an imprecation upon herself if she be guilty.

(4) Making such oaths and imprecations in the circumstances above referred to is termed making the li'an.

4. Dissolution of marriage.

(5) On the husband and wife having both reciprocally made the li'an [19] the husband has the option of divorcing the wife, and on his refusal to do so, notwithstanding any agreement between the parties to forgive each other, or to release their liabilities, or otherwise to condone the alleged adultery, the marriage must be dissolved by the Court : [20] provided that a wife who is guilty of adultery has been held not to be entitled to talaq by reason of li'an.[21]

husband offer to prove truth of his allegation under the Ind. Ev. Act, notwithstanding that evidence required by Islam not available to him ? This question overlooked by Subordin. Judge in *Khatizabai* v. *Umarsahib*, (1927) 52 Bom. 295. The special oaths " involve on part of husband, if his accusation be false, the curse of God, which stands as a substitute of punishment for slander " : Hed. 123 : see *n.* 17. Inter-mixture of adjective & substantive law may be too close to admit of proof of infidelity in any other mode than in compliance with the strict requirements of Islamic law of evidence ; but whether this is so, must surely be adjudicated upon by the Courts as matter of law.

[15] Exercising option = applying to court : s. 193(1). She may not exercise it— in which case husband's statement does not prevent him from applying for restitution of conjugal rights : *Husaini B.* v. *Md. Rustom A. K.*, (1906) 29 All. 222 ; see *Jaun* v. *Beparee*, (1865) 3 W. R. 93.

[16] But does not of itself " operate as a divorce " : *Jaun* v. *Beparee*, (1865) 3 W. R. 93.

[17] By retracting, he becomes, in Islamic law, liable to criminal penalty for slandering wife : Bail. I. 335-336 (337-338) ; Hed. 123, col. ii, par. 2 ; 125 col. ii, par. 2 ; *Rahima B.* v. *Fazil*, (1926) 48 All. 834, 842 ; (*Mt.*) *Fakhr Jahan B.* v. *Md. Hamidullah K.*, (1928) 4 Luck. 168, 176, 177. Imputing unchastity to woman first made actionable in England, by (1872) 54 & 55 Vict. c. 51.

[18] In which case she would be criminally liable to be punished for adultery : Bail. I. 335-336 (337-338) : cf. analogous case when in India husband becomes liable to prosecution for perjury : *Rahima B.* v. *Fazil*, (1926) 48 All. 834, 837.

[19] " The procedure as to taking of oaths in course of trial was method of proof only, & could not confer on *kazi* jurisdiction, which existed before trial began " : *Rahima B.* v. *Fazil*, (1926) 48 All. 834, 841.

[20] Hed. 123-126 : Bail. I. 333-337 (335-339) ; II. 122, 123.

[21] *Khatijabi* v. *Umar Sahib*, (1927) 52 Bom. 295 ; (*Mt.*) *Fakhr J. B.* v. *Md. Hamidulla*, (1928) 4 Luck. 168, 180. With great respect (*submitted*), these decisions overlook nature of *li'an* : see s. 193(1) *nn.* : if adultery is proved, procedure of oaths & implications is meaningless : for then even the stage represented by s. 193(1) is not reached. The very severe criminal law of Islam no more applicable in India.

194. The dissolution of marriage by the Court after li'an has the same effect as one irrevocable talaq ; but in Shia law the parties to a li'an are perpetually prohibited from remarrying each other.[22]

SECTION 194. Effect of Lian.

Li'an is perhaps somewhat less inapplicable to the circumstances of India than zihar.

Procedure on li'an in India.

Prior to the first edition of this work no case of li'an had been decided by the High Courts, but it was stated in that edition that if a case in which li'an is involved should come up before the Courts,[23] the Oaths Act, X. of 1873, ss. 8-12 partially provide a machinery for the enforcement of the law. The procedure suggested in this work has since been followed by the Courts. The wife who brings a suit for dissolution of marriage under s. 193 is taken to make an offer under the Oaths Act, s. 2.[24] The husband must agree to make the li'an, in terms bringing the matter within ss. 8 & 9 of the Act.[25] The wife's refusal to accept the offer[26] would naturally render her suit liable to be dismissed. Should, however, the husband retract the accusation,[27] the wife's suit would fail,[28] probably with the solatium of costs. When, on the other hand, the husband neither adduces justifying proof of his accusation nor agrees to make the oath, nor retracts the accusation, it all becomes "part of the proceedings" (Oaths Act, s. 12), and it is submitted that the Court would then be authorized to dissolve the marriage on the ground of justice, equity, and good conscience.[29]

On the effect of li'an for disclaiming paternity, see s. 218.

Procedure under s. 193(3) is on basis (already explained) that adultery is neither proved, nor disproved. This criticism is made not with object of suggesting that the orders in the particular cases were not justified, but to submit respectfully that should a case arise, in which it would be just & equitable to dissolve marriage though wife guilty of adultery, Court would have jurisdiction to do so. It may be of opinion that no useful object is served by keeping undutiful wife tied to dissatisfied husband. DISSOLUTION OF MUSLIM MARRIAGES ACT, VIII. of 1939, s. 2 (viii), (ix) : ACCUSING WIFE OF ADULTERY is not specified as form of CRUELTY for which marriage may be dissolved ; but other grounds recognized as valid for dissolution of marriages under Muslim law are saved.

22 Bail. II. 29 (par. 1) : s. 45.

23 Cases have come up before Courts since this was written & procedure suggested followed : see s. 193 *nn.*

24 The commission empowered to be issued by Oaths Act, s. 10, also contemplated by at least Shia authorities : "It is not valid except in presence of judge or some one appointed by him for purpose. Yet if parties are content with a private person & take *li'an* before him it is lawful :" Bail. II. 156. Cf. *Abbas Khan* v. *Muhammad Ali*, [1934] 32 All. L. J. 92 for oaths taken under Oaths Act.

25 (*Mt.*) *Khadija B.* v. *Umarsaheb*, (1927) 52 Bom. 295, 300.

26 Under Hanafi law judge may compel parties by imprisonment to take *li'an* or retract : Bail. I. 335-336 (337-338).

27 With reference to RETRACTION rapid development of law is stated in s. 193(1) *n.*

28 (*Mt.*) *Fakhr Jahan* v. *Md. Hamidullah K.*, (1928) 4 Luck. 168, 173, 178.

29 It was said in earlier edition : "if necessary, Court will no doubt call in aid maxim : *boni judicis est ampliare jurisdictionem*, & also reasoning similar to that in *Vadaka Vitil Ismail* v. *Odaket Birjakutti Umah*, (1881) 3 Mad. 347." This has since happened : see s. 210A. Proceedings of like nature not unknown in Eng. : *William* v. *Innes*, (1808) 1 Camp. 364 ; *Daniel Pitt*, *ibid.* 366 *n. t. Lloyd* v. *Willan*, (1794) 1 Esp. 178 ; *Price* v. *Hollis*, (1813) 1 M. & S. 105.

§ 6.—Apostasy.

Adoption of Islam by one of the parties.

194A.[30] Where persons not governed by Muhammadan law contract or celebrate a valid marriage in accordance with a system of law other than Muhammadan law, the marriage and its dissolution will be subject to the provisions of that other system of law and not to ss. 195-200,[31] notwithstanding that one of the parties to the marriage has, after being so married, been converted to Islam.[32]

Equity : law of defendant.

Sect. 194A often raises questions difficult to decide. Considerations of justice, equity and good conscience are not inapplicable. The law to be enforced may be that of the defendant (see s. 8). Hence, no fixed rule governing every case can be laid down. Attention may, however, be drawn to the class of questions that may arise.

Liberty of religion.

The rules of law that would be applied by the Courts in a Muslim State to a case where persons, who do not follow Islam, and who are married in accordance with their own non-Muslim law, are not enforceable in India inasmuch as, the law that prevails is not the law of Islam but the law of India, —which may generally be said to be, that the personal law of the parties shall be enforced (s. 6). In this last respect the injunctions of Islam relating to zimmis (non-Muslim subjects) are thus stated by the author of the Hidaya : "We are commanded to leave them (zimmis) at liberty in all things which may be deemed by them to be proper according to their own faith."[33] This exactly corresponds, in its latitude, to the law of India.

Absence of State religion in India.

The law of Islam on this head may be divided, in the first instance, under : (1) the law that has to be enforced by a Muslim Government ; (2) the law that has to be observed by an individual Muslim, wherever he be. The first is for the guidance of a Muslim sovereign,—the policy that he must observe towards his non-Muslim subjects. A Muslim sovereign is required (as stated above) to adopt, in substance, the same policy as that which the Government of India has adopted. It is not necessary to deal with the policy of the state in detail. Cf. Dissolution of Muslim Marriage Act, 1939, s. 4 : s. 212B below.

With reference to the second head mentioned above, where persons, who have married under a non-Muslim system of law, adopt Islam, the rules contained in the texts of Islam are again not applicable. The reason is that the Muslim texts contemplate a State religion, which does not exist in India.

[30] Sect. 194A cited & applied : *Keolapati alias Khurshed J. B.* v. *Harnam Singh Raja*, (1936) 12 Lah. 568, 581.

[31] In *Khambatta* v. *K.*, (1934) 59 Bom. 278 rules of *talaq* held to apply on adoption of Islam by woman who at her marriage with Muslim was Christian.

[32] *Budamsa Rowther* v. *Fatema Bibi*, (1914) 25 Mad. L. J. 260 ; *Govt. of Bom.* v. *Ganga*, (1880) 4 Bom. 380 ; *Adm.-Gen.* v. *Anandachari*, (1886) 9 Mad. 466 ; *In matter of Rama Kumari*, (1891) 18 Cal. 264 : *Emperor* v. *Lazar*, (1907) 30 Mad. 550 ; *Sundari Letani* v. *Pitambari Letani*, (1905) 32 Cal. 871 ; *Nandi alias Zainab* v. *Crown*, (1919) 1 Lah. 440.

[33] Hed. 75.

SECTION 194A.

Religious equality.

The laws of every religion being enforced in India on a footing of equality, the rules that are applicable in India to converts to Islam from another religion, who were married prior to their conversion, may be somewhat different from the rules that would be applied to such converts in a Muslim State. The rule of Islam, is that when a non-Muslim is converted to Islam, he should appear before the Kazi's Court and apply that his or her spouse should be required to adopt Islam. On the spouse refusing to do so, the Kazi is empowered to dissolve the marriage.[34]

Apostasy cancels marriage.

195. A marriage between Muslims becomes, under the texts, null and void[1] on either party apostatizing[2] from Islam : a woman converted to Islam from another faith who [marries as a Muslim woman and then] re-embraces her former faith, remains subject to this rule, but with this exception the Dissolution of Muslim Marriages Act, 1939, s. 4[3] regulates the effect of the renunciation of Islam by a married woman, or her conversion to a faith other than Islam.

Illustrations.

A woman, married under Hindu law, adopted Islam. The marriage was held to be governed by Hindu law and accordingly, not dissolved by her adoption of Islam : she could not subsequently marry a new Muslim husband.[4] See s. 194A. But where a Muslim husband adopted Christianity, his marriage with a Muslim wife was held to be governed by Muhammadan law, and to become null and void ; so that if the woman purported to marry again during her iddat, though such a marriage was invalid under Muhammadan law, she could not be said to have a husband living, and could not be charged with bigamy.[5]

The difficult question whether there may be a merely colourable apostasy

[34] *Ram Kumari*, (1891) 18 Cal. 264, 269 ; *Haripada R.* v. *Krishna B.*, [1939] AIR (CAL.) 430.

[1] Bail. I. 182 (182-183); II. 29. As distinguished from " dissolved," see Bail. II. 266, ss. 196, 201, com. Caste Disab. Remov. Act, XXI. of 1850, set out s. 1, com. ; *Nowroz* v. (*Mt.*) *Aziz B.*, (1876) 11 P. R. 253, No. 124 (no law or usage, inflicting forfeiture of rights or property by reason of renunciation or exclusion from any religion is enforceable). That Act does not affect Muhammadan law by which apostasy deprives husband of right to sue for restitution of conjugal rights. See *n.* 3.

[2] Adoption of Christianity is apostasy : (*Mt.*) *Khan B.* v. *Pir Shah*, [1884] 19 Punj. Rec. 353, (No. 123) ; *Amin B.* v. *Saman*, (1910) 33 All. 90 ; *Zuburdust Khan* v. *His wife*, (1870) 2 N. W. P. 370 ; *Imam Din* v. *Hasan Bibi*, [1906] Punj. Rec. 309 ; Bail. I. 182 ; Hed. 66 ; Ameer Ali, *Mdan. Law* ii. 442-444 (390-394) (to the effect that when woman abjures Islam for scriptural or revealed religion like Judaism or Christianity her renunciation of Islam does not dissolve marriage) not followed. But becoming an AHMEDIAN is not apostasy : *Narantakath* v. *Parakkal*, (1922) 45 Mad. 986 ; *Hakim Khalil* v. *Malik Israfi*, (1917) 2 Pat. L. J. 108 ; (*Mt.*) *Nani Jan* v. *Husain Bakhsh*, (1891) 26 Punj. Rec. 502 (No. 106) (Disrespectful language against Prophet uttered by husband in fit of anger, without any intention to apostatize does not dissolve marriage). See *n.* 3.

[3] DISSOLUTION OF MUSLIM MARRIAGES ACT VIII. of 1939 : see s. 212B, com. ; cf. *Amin Beg* v. *Saran*, (1910) 33 All. 90.

[4] *Bhudansa Rowther* v. *Fatema*, (1914) 26 M. L. J. 260.

[5] *Abdul Ghani* v. *Aziz-ul-Huq*, (1911) 39 Cal. 409 ; *Amin Beg* v. *Saman*, (1910)

SECTION 195. which would not dissolve the marriage, has been raised in several cases.[6] See also Dissolution of Muslim Marriages Act, 1939 s. 4 (p. 252 below).

Mahr : apostasy (1) after consummation ;

196. If a marriage has been consummated and then (subject to s. 195) it becomes void by the husband or wife apostatizing, the wife is entitled to the whole of the mahr ; if it has not been consummated she is entitled to half of the mahr where the husband apostatizes, and to no part of it where she herself apostatizes.[7]

(2) without consummation : wife's apostasy.

Apostasy of both together.

198. On both parties apostatizing together and coming back of Islam, the marriage is re-established.[7]

(Shia law.) Marriage during iddat.

199. Under Shia law a marriage that has been consummated, does not become void by apostasy until after the expiration of the iddat.

(Hanafi law.) Dissolution after apostasy : divorce.

200. On a marriage becoming void by apostasy Abu Hanifa and Abu Yusuf hold (Imam Muhammad dissenting) that under Hanafi law the same effects follow as on a talaq.[8] Under Shia law the person apostatizing is taken to have died, and the same legal results follow as on death.[9]

§ 7.—COURT DISSOLVING MARRIAGE : HUSBAND MISSING, CRUEL, IMPOTENT, INSANE, ETC.

Dissolution by Court at wife's instance.

Sectt. 201-203 [10] omitted. The Dissolution of Muslim Marriages Act, 1939, now regulates dissolution of marriages by the Court on the application of women married under Muslim law. See s. 212B, pp. 251, 252 for text of Act.

33 All. 90 ; *Imam Din* v. *Hasan B.*, (1905) 41 Punj. Rec. 309 (No. 85) ; *Karam Singh* v. *Emperor*, [1933] AIR (ALL.) 433 ; *Mt. Sardaran* v. *Allah Bakhsh*, [1934] AIR (LAH.) 976 (wife, on conversion to Christianity, entitled to dissolution of marriage : immaterial whether motive was genuine conversion or mere device ; but cf.—" without any intent to commit a fraud upon the law, the motive need not affect the question : but there must be conversion in fact "—*Skinner* v. *Skinner*, (1897) 25 Cal. 537, 546 =25 I. A. 34, 41 : s. 9, com.) ; (*Mt.*) *Resham* v. *Khuda Bakhsh* (1937) 19 Lah. 277 ; (*Mt.*) *Rahmabi* v. *Nikkha*, [1928] AIR (LAH.) 954 ; *Sardar Muhammad* v. (*Mt.*) *Maryam B.*, [1936] AIR (LAH.) 666 ; *Haripada* v. *Krishna*, [1939] AIR (CAL.) 430.

[6] In (*Mt.*) *Resham B.* v. *Khuda Bakhsh*, (1937) 19 Lah. 277 (cases reviewed : only material issue, whether Islam had been renounced—not justifiable to try to ascertain true nature of disbelief : by instituting enquiry into genuineness of party's declaration to determine extent of disbelief : renunciation of faith requires no other proof than person's declaration : only condition being that declaration not casual).

[7] Sect 196 (= ss. 196, 197 in earlier edd.) is based on Bail. I. 182 (par. 2), II. 29.—the effect of which was wrongly stated in former editions : see [*Ebrahim* v. *Fatima Bibi* [1939] Rang. 383, 386. Difficult questions may arise as to effect of s. 196 : see s. 9 Com. ; ss. 98-103, & *nn.* 5, 6.

[8] Hed. 66.

[9] Bail. II. 268 (par. 4), DISSOL. OF MUSL. MARR. ACT, 1939 : s. 212B below.

[10] Secs. 201-203 cited & applied : *Altafan* v. *Ibrahim*, (1923) 21 All. L. J. 811, confirmed *Muhammad Ibrahim* v. *Altafan*, (1924) 47 All. 243 : ss. 201-23 represented in earlier editions, effect of texts, viz. Bail. I. 345-349 (347-351) ; Hed. 128 ; *Fatawa Alamgiri* (Cal. Ed.) i. 711. Hed. does not expressly state that Imam Muhammad's

204. On a marriage being dissolved on the ground of the husband's impotence if the parties have validly retired, the whole mahr is payable to the wife, and she must observe iddat. If they have not validly retired, she need not observe iddat ; and is entitled to half the specified mahr, or if no mahr has been specified, to a present.[11]

SECTION 204. (Hanafi law.) Mahr and iddat after such dissolution.

205. Under Shia and Shafii law [12] a marriage may, subject to s. 207,[13] be annulled by the wife (without the intervention of the Court)[13] on ground (1), (2), or (3) below ; and under Shafii law also on ground (4) :

(Shia and Shafii law.) Avoidance of marriage of wife :

(1) the insanity of the husband, whether or not he has lucid intervals, and whether it comes on before or after the marriage, and whether before or after consummation ; [12]

insanity

(2) the fact that the husband was prior to the marriage a eunuch ; according to the opinion of some Shia Ithna Ashari authorities (not endorsed by the Sharaiu'l-Islam) even if that condition supervenes ; [12]

eunuch

(3) the husband's impotence with reference generally to all women, whether it comes on before or after the marriage

impotence

opinion as regards lunacy, leprosy & scrofulous diseases is preferred : but indicates it by stating his opinion last. Impotent (Arab. *inneen*) = physically unable to have sexual intercourse with women generally or any particular woman : Bail. I. 345. On impotence, *quoad hanc* : *G.* v. *M.*, (1885) 10 A. C. 171, (*per* Dr. Lushington & Lord Watson); *S.* v. *B.*, (1892) 16 Bom. 639 ; *Asha Bibi* v. *Kadir*, (1909) 33 Mad. 22 (under texts wife cannot obtain dissolution of marriage if she was before marriage aware of impotence. Bail. I. 348-349 (350-1).).

11 Or *mit'at*. See s. 102(*b*), table, p. 180 (s. 103); also s. 212B, com.

12 Bail. II. 59-60, 34 (*first*); Hed. 128. *Daaimu'l-Islam* (Shia Ismaili text) generally agrees with *Sharaiu'l-Islam*. Hed. 142 ; see s. 210, com. *Najbunnissa* v. *Mohamed Shafi Ghafur*, Bom. H. C. (o. o. c. J.) Suit 1015 of 1918 (*unreported*) (plaintiff married on 10 Apr. 1914, in accordance with Hanafi rites. On 12 Nov. 1918 she (20 years old) sued as pauper for DISSOLUTION of marriage. Her husband, a weaver, had treated her with great CRUELTY, & driven her out of his house ; on 17 Feb. 1917 had made murderous assault on her father, who died next day ; husband was found guilty : sentenced to transportation for life. Since his transportation (13 Apr. 1917) he had neither MAINTAINED nor made provision for her : she had no means to maintain herself & could not communicate with him. He was not possessed of any property from which her maintenance could be recovered ; nor had she any near relatives able & willing to maintain her. On 28 Feb. 1918 plaintiff changed her sect from Hanafi to Shafiite. Macleod, J. ordered & declared that marriage be dissolved on ground that according to Muhammadan law defendant had been guilty of DESERTION since date of marriage). On change from Hanafi to Shafii law, see s. 9 ; *Md. Ibrahim* v. *Ghulam Ahmed*, (1864) 1 Bom. H. C. R. 236.

13 Bail. II. 66 (*fourth*). Disputes may of course arise : but formal declaration may be made before *Kazi*, or Magistrate, or J. P. Under DISSOL. OF MUSL. MARR. ACT, 1939 Court dissolves the marriage : s. 2 (ii) (husband's failure to maintain for 2 years), (v) (impotence), (vi) (insanity, leprosy, virulent venereal disease). According to most generally received Shia Ithna Ashari traditions supervenient disability on part of husband to maintain wife, does not confer on her power of annulling marriage : Bail. II. 60.

SECTION 205. contract, provided that the marriage has never been consummated ; [12]

(Shafii law.) Inability to maintain. (4) the husband's inability to maintain his wife.[12]

(Shia and Shafii law.) wife's— total insanity, leprosy, structural defects.

206. Under Shia Ithna Ashari and Shafii law a marriage may, subject to s. 207, be annulled by the husband (without the intervention of the Court) if the wife is subject to any of the following physical or mental defects, viz. (1) total insanity,[13] (2) leprosy whether black or white [14] or causing the members to wither away,[15] (3) structural defects preventing sexual intercourse ; [16] provided that (*a*) the best supported Shia Ithna Ashari authorities require the ground of avoidance to have existed before the marriage was contracted ; [17] (*b*) other authorities hold that the ground of avoidance may arise after the marriage was contracted, and that in such a case half the mahr-ul-mithl is due whether or not any mahr has been specified.[18]

Order of Court not necessary.

207. Section 206 is subject to (1) the option being exercised without delay [19] after the ground comes to the knowledge of the party concerned ; [20] and (2) where the ground is the husband's impotence,[18] subject to the wife applying to the Court to fix a period of time for establishing it ; and if no sexual intercourse takes place during the period so fixed, the wife may annul the marriage without any further order of the Court.[21]

208. Under Shia Ithna Ashari and Shafii law the annulment of a marriage under s. 205, 206 or 207 does not amount to a talaq for the purpose of s. 41.[22]

Effect on mahr.

209. Under Shia Ithna Ashari and Shafii law on either party annulling an unconsummated marriage under s. 205 or

[14] Bail. II. 60. *Bars* in Arabic. [15] *Juzam* in Arabic.

[16] Bail. II. 61 (*first*); see s. 212B, pp. 251 f.

[17] In Arabic *qarn, ifzau, ratak* : Bail. II. 60, 61 : also *juzam* & *urj* (female blemish when it amounts to actual lameness).

[18] Bail. II. 66. See DISSOLUTION OF MUSLIM MARRIAGES ACT : s. 212B below.

[19] Cf. *per* Lindley L. J. *in re Sharpe*, [1892] 1 Ch. at 168, on " staleness of demand as distinguished from the Statute of Limitation," " analogy to which may furnish defence to equitable claim." *Lindsay Petroleum Co.* v. *Hurd*, (1874) L. R. 5 P. C. 221, 239 ; *Erlanger* v. *New Sombrero Phosphate Co.*, 3 App. Cas. 1218, 1279 ; & cases on acquiescence.

[20] Bail. II. 61 (*second*). [21] Bail. II. 61-62 ; see ss. 201, 204.

[22] Bail. 6I. (*third*).

206, no portion of the mahr become due,[23] unless the ground of annulment is impotence, in which case the wife is entitled to half the mahr.[23] On a consummated marriage being annulled, the whole mahr is due.[23] SECTION 209.

209A. The Court in whose jurisdiction the marriage has been celebrated has jurisdiction to dissolve it.[24]

§ 8.—DISSOLUTION OF MARRIAGE BY COURT : FASKH.[1]

210. Under Hanafi law a marriage may be dissolved by the Court[1] where (1) the marriage is irregular ; or (2) a person having an option to avoid a marriage has exercised it ; [or (3) parties are married between whom prohibition by fosterage is established ;] [2] or (4) the marriage having been contracted by non-Muslims, the parties adopt Islam.[3] Dissolution of irregular marriage. Options.

210A. Muslim wives have been granted declaratory decrees that their marriages have been dissolved by the Court[5] on the ground that their husbands had falsely charged Marriage dissolved on 1. husband falsely charging infidelity or adultery.

[23] Bail. II. 62 (*sixth*); "husband has, however, right of recourse against person by whom he was deceived." Effect of fraud on marriage : s. 72 ; cf. table following s. 103, p. 180. See also s. 212A, com.

[24] *Ahmed Suleman* v. *Bai Fatma*, (1930) 55 Bom. 160. Under *Shariat* Act, XXVI. of 1937, s. 5, the District Judge may on petition made by a Muslim woman dissolve a marriage on any ground recognized by Muslim personal law (Shariat). Presumably "District Judge" = "District Court" : General Clauses Act X. of 1897, s. 3(5). But DISSOLUTION OF MUSLIM MARRIAGES ACT, 1939, s. 6 repeals Shariat Act, s. 5 : see s. 212B, below.

[1] *Buchan Mirdha* v. (*Mt.*) *Khodeja B.*, [1937] 2 Cal. 79. Judicial rescission of marriage called FASKH (lit. = annulment, rescission, abrogation). See DISSOLUTION OF MUSLIM MARRIAGES ACT, 1939, s. 2(vi), (s. 212B, pp. 251 f., below).

[2] See ss. 87, 83(1)(*b*).

[3] Hed. 62-66 ; Bail. I. 178-187 ; II. 30 ; Bail. I. 443 (447); "a man is not to be separated from his wife for inability to maintain her. See ss. 205(4), 294 ff., 217.

[4] This is stated apart from *li'an* for reasons that appear from s. 193 *nn.* *Zafar Husain* v. *Ummat-ul-Rehman*, (1919) 41 All. 278 (Banerji, J., last sentence); followed in *Rahma Bibi* v. *Fazil*, (1926) 48 All. 834, 838 ; *Ahmed Sulaiman* v. *Bai Fatima*, (1930) 55 Bom. 160. Accusation must be false : *Khatijabi* v. *Umar Saheb*, (1927) 52 Bom. 295 "procedure apart, an innocent wife who proves that her husband falsely charged her with adultery is alone entitled to a divorce" (p. 300). Though references are made in judgments to law of *li'an*, decisions proceed on quite distinct & new lines ; & will probably be followed as establishing new grounds of divorce in themselves. Procedure of *li'an* is quite special & distinct. (*Mt.*) *Fakhr Jahan B.* v. (*Md.*) *Habibullah K.*, (1928) 4 Luck. 168, 177, 178 (mere accusation by husband cannot dissolve relation of husband & wife : dissolution takes place only by order of Court : before Court makes an order husband has opportunity of retraction); (*Mt.*) *Nandi* v. *Crown*, (1919) 1 Lah. 440 (dissolution by Court necessary). See ss. 212B.

[5] See now DISSOL. OF MUSL. MARR. ACT, 1939, s. 2(i), (ii), (viii) : set out pp. 251, 252. *Kadir* v. *Koleman Bibi*, (1935) 62 Cal. 1088 (CRUELTY & DESERTION a ground for dissolving marriage); Suit 1260 of 1931, Bom. H. C. (O.O.C.J.) *Fatmabai* v. *Ismail Salehji Inayat* (Kania, J., 18 Nov., 1931 : DESERTION for 9 years, marriage declared to be dissolved by Court); Suit 1386 of 1933, Bom. H. C. (O.O.C.J.) *Fatimabai daughter of Haji Abdulla* v. *Ali Mahomed Ismail Banker* (B. J. Wadia, J., 20 Dec., 1939 : marriage of plaintiff with defendant be hereby dissolved by Court : DESERTION

SECTION 211.
2. desertion, failure to maintain, cruelty.

them with infidelity and adultery, and on proof of desertion, failure to maintain and cruelty. But the Court refused to do so on the ground of incompatibility of temper.[6]

Sect. 211. See now Dissolution of Muslim Marriages Act, s. 2.

Husband not liable for wife's costs.

212. In divorce proceedings between Muslim husbands and wives in India, the husband is not liable, as such, for the costs incurred by or on behalf of the wife, even though she be not possessed of sufficient property to bear them herself.[7]

Refusal of conjugal rights.

212A. The Court may refuse restitution of conjugal rights to a husband who is so cruel as to cause physical danger to the wife [8] or falsely accuses the wife of adultery ; [9] and, in cases of less cruelty, may put him on terms before granting restitution of conjugal rights.[10]

The Court has ordered that conjugal rights be exercised by the husband on the bari (residence) of the wife's parents ; [12] and dissolved the marriage altogether on proof of cruelty : see s. 210B.

DOMESTIC TRIBUNAL.

Closely connected with ss. 210-212 is a dissolution of marriage brought about by a domestic tribunal created by contract : ss. 24A, 118, comm.

DISSOLUTION OF MARRIAGE : OTHER MODES AND GROUNDS.
Dissolution of Muslim Marriages Act.

212B. The Dissolution of Muslim Marriages Act, VIII. of 1939, came into force on 17 March, 1939. It provides for the dissolution of Muslim marriages on grounds specified under eight heads, and saves other grounds recognized under Muslim law.

for 10 years, FAILURE to perform MARITAL OBLIGATIONS, failure to MAINTAIN, & PHYSICAL CRUELTY during time that husband resided with wife). Probably these decisions will be followed without discussion. Marriage being Civil contract, may (it seems to have been assumed) be dissolved on grounds on which contracts generally may be put an end to. Cf. *Ahmed S.* v. *Bai Fatma*, (1930) 55 Bom. 160, 163 ("to grant a divorce would mean in effect that wife terminates contract [of marriage] by which otherwise she would be bound & is free to contract a second marriage if she chooses"). Cf. *Kulsambi* v. *Abd. Kadir*, (1920) 45 Bom. 151 = 38A, *ill.* 7 ; *Mt. Fakhre J. B.* v. *Md. Hamidullah K.*, (1928) 4 Luck. 168, 169 (suit in alternative for cancellation of marriage for cruelty); *Najbunnissa* v. *Mahomed Shafi Ghafor*, (*unrep.*) = s. 205, *n.* must of course be distinguished, as under Shafii law failure to maintain in itself ground for dissolving marriage. *Mairaj Fatima* v. *Abdul Waheed*, (1921) 19 All. L. J. 713 (missing husband : Ind. Ev. Act, s. 108 applies). See ss. 289-290. Bail. II. 165-166 ; DISSOLUTION OF MUSLIM MARRIAGES ACT.

6 (*Mt.*) *Mustafa B.* v. *Mirza Kazim Raza Khan*, (1932) 8 Luck. 204 (Shia case), *Muhammad Khan* v. *Mt. Fatima*, (1929) 11 Lah. 85, 87 (mere inability to get on with husband's mother not lawful cause to justify refusal to return to husband).

7 *A.* v. *B.*, (1896) 21 Bom. 77 : s. 24, com.

8 *Husaini B.* v. *Muhammad Rustam Ali K.*, (1906) 29 All. 222 ; (*Moonshee*) *Buzloor Ruheem* v. *Shumsoonnissa Begum*, (1867) 11 Moo. I. A. 551 ; *Muhammad Abdul Rahman* v. *Taslim-un-nissa*, (1905) 2 All. L. J. 608.

9 (*Mt.*) *Maqboolan* v. *Ramzan*, (1927) 2 Luck. 942 (such accusation relied upon merely as defence to suit for restitution of conjugal rights : & accepted : presumably there were aggravating circumstances). Cf. s. 212B, pp. 251 f.

10 *Sabid Khan* v. *Bilatunnissa*, (1919) 25 C. W. N. 888.

DISSOLUTION OF MUSLIM MARRIAGES ACT, VIII. OF 1939.

An Act to consolidate and clarify the provisions of Muslim law relating to suits for dissolution of marriage by women married under Muslim law and to remove doubts as to the effect of the renunciation of Islam by a married Muslim woman on her marriage tie.

Received assent of Governor-General, 17 March, 1939.

Whereas it is expedient to consolidate and clarify the provisions of Muslim law relating to suits for dissolution of marriage by women married under Muslim law and to remove doubts as to the effect of the renunciation of Islam by a married Muslim woman on her marriage tie ; It is hereby enacted as follows :—

Short title and extent.

1. (1) This Act may be called the Dissolution of Muslim Marriages Act, 1939.

(2) It extends to the whole of British India.

Grounds for decree for dissolution of marriage.

2. A woman married under Muslim law shall be entitled to obtain a decree for the dissolution of her marriage on any one or more of the following grounds, namely :—

(i) that the WHEREABOUTS of the husband have not been known for a period of four years ;

(ii) that the husband has neglected or has failed to provide for her MAINTENANCE for a period of two years ;

(iii) that the husband has been sentenced to IMPRISONMENT for a period of seven years or upwards ;

(iv) that the husband has failed to perform, without reasonable cause, his MARITAL OBLIGATIONS for a period of three years ;

(v) that the husband was IMPOTENT at the time of the marriage and continues to be so ;

(vi) that the husband has been INSANE for a period of two years or is suffering from LEPROSY or a VIRULENT VENEREAL DISEASE ;

(vii) that she, having been given in marriage by her father or other guardian before she attained the age of fifteen years, REPUDIATED the marriage before attaining the age of eighteen years :

Provided that the marriage has NOT been CONSUMMATED ;

(viii) that the husband treats her with CRUELTY, that is to say,—

(*a*) habitually ASSAULTS her or makes her LIFE MISERABLE by cruelty of conduct even if such conduct does not amount to physical illtreatment, or

(*b*) associates with WOMEN OF EVIL REPUTE or leads an INFAMOUS LIFE, or

(*c*) attempts to FORCE her to lead an IMMORAL LIFE, or

(*d*) disposes of HER PROPERTY or prevents her exercising her legal rights over it, or

(*e*) obstructs her in the observance of her RELIGIOUS PROFESSION or practice, or

SECTION 212B.

(*f*) if he has MORE WIVES than one, does not treat her EQUITABLY in accordance with the injunctions of the Qoran ;

(ix) on any other ground which is recognized as valid for the dissolution of marriages under Muslim law :

Provided that—

(*a*) no decree shall be passed on ground (iii) until the sentence has become final ;

(*b*) a decree passed on ground (i) shall not take effect for a period of six months from the date of such decree, and if the husband appears either in person or through an authorized agent within that period and satisfies the Court that he is prepared to perform his conjugal duties, the Court shall set aside the said decree ; and

(*c*) before passing a decree on ground (v) the Court shall, on application by the husband, make an order requiring the husband to satisfy the Court within a period of one year from the date of such order that he has ceased to be IMPOTENT, and if the husband so satisfies the Court within such period, no decree shall be passed on the said ground.

Notice to heirs of husband when his whereabouts unknown.

3. In a suit to which clause (i) of section 2 applies—

(*a*) the names and addresses of the persons who would have been the heirs of the husband under Muslim law if he had died on the date of the filing of the plaint shall be stated in the plaint,

(*b*) notice of the suit shall be served on such persons, and

(*c*) such persons shall have the right to be heard in the suit :

Provided that paternal uncle and brother of the husband, if any, shall be cited as party even if he or they are not heirs.

Wife's conversion to another faith : effect.

4. The renunciation of Islam by a married Muslim woman or her conversion to a faith other than Islam shall not by itself operate to dissolve her marriage :

Provided that after such renunciation, or conversion, the woman shall be entitled to obtain a decree for the dissolution of her marriage on any of the grounds mentioned in section 2 :

Provided further that the provisions of this section shall not apply to a woman converted to Islam from some other faith who re-embraces her former faith.

Right to dower unaffected.

5. Nothing contained in this Act shall affect any right which a married woman may have under Muslim law to her dower or any part thereof on the dissolution of her marriage.

Repeal of Shariat Act, s. 5.

6. Section 5 of the Muslim Personal Law (*Shariat*) Application Act XXVI. of 1937, is hereby repealed.

CHAPTER VI.

PARENTAGE.

§ 1.—PRELIMINARY.

Establishment of paternity : maternity :

213. When one person is deemed in law to be the father [1] or mother [2] of another, paternity or maternity of the latter is said to be established in the former.

1. PATERNITY IN LAW.

The law does not refer necessarily to that person alone as the father who has actually begotten another. The actual begetter of a child may not be recognized, by the law as his father, e.g. for the purposes of inheritance, guardianship, or other consequence ordinarily annexed to the relation of father and child. Thus, in Shia law the child of illicit intercourse is not "related in law" to its father,[3] so that some authority seems even to have thrown doubt as to a man being prohibited from marrying his own child born by illicit intercourse. The rule of Shia law is different with reference to a mother and her son.

Paternity and maternity confer upon the child the status of legitimacy. That status cannot be conferred by acknowledgment on the part of the father (or mother).[4] Acknowledgment is a declaration (of legitimacy): it is implied that legitimacy existed prior to the acknowledgment. Acknowledgment is not legitimation (or making one legitimate who was not so prior to acknowledgment). Acknowledgment is merely a piece of evidence of an independent fact or state of facts, which state of facts cannot be brought into existence by acknowledgment. Thus when it is in issue whether the parents of the child have been married, an acknowledgment of paternity or of legitimacy, viz. that the child is the child of the acknowledger and is a legitimate child, raises a presumption of marriage between the parents,—a presumption that may be rebutted by contrary proof. On the other hand when it is proved as a fact that there was no marriage, acknowledgment is of no avail.

2. ORIGIN AND DEVELOPMENT OF LAW OF PATERNITY.

Previous to Islam it seems probable, that the customary rules relating to parentage, prevalent in Arabia, were as elastic, and as much in favour of the man in power, as those about marriage and talaq. It must have been a source of strength, in those unsettled times, to have sons, real or adopted, able to bear arms, and there seem to have been few, if any, counter-balancing duties. The feelings of the mothers were, as usual, neglected.

[1] Bail. II. 14. [2] See s. 214.
[3] Bail. II. 14 (*l.* 7).
[4] *Habibur Rahman* v. *Altaf Ali*, (1921) 48 I. A. 119, 120, 121 (CAL.).

SECTION 213. Strengthening of family tie by Islam : duties.

The change brought about by Islam was directed to strengthening the tie of the natural relations, and duties to it. The actual father's claim over his own child could not be contested by a stranger, but where a person claimed to be the father, and there was no one to dispute his assertion, nor any ground for disbelieving the claim, it was allowed.

It will for the purposes of the present work be useful to formulate the law in the shape of the rigorous rule that it was the aim of Islam to see enforced, and then to state the modifications that came to be introduced in later times. These modifications are based on various presumptions, of which the origin may be traced to the principle that a person will be presumed to be acting lawfully, unless the contrary is proved. In enforcing the rigorous rule,

Strict rule.

" Parentage is only established in the real father and mother of a child, and only if the child is begotten by them in lawful wedlock," presumptions seem to have been given effect to, which may be stated categorically : Presumption

Presumptions—

I. A child's mother, if married, is presumed not to have been guilty of adultery ; II. Where a man asserts that a child has been begotten by him, the child not disputing that assertion, no other person claiming to be its father, and the ages of the two persons are such that they may be father and child, then they are (subject to the third presumption) presumed to be such ; III. Such an assertion, cannot be presumed to be true when it implicates the mother of the child in the guilt of zina, (fornication or adultery), which would make her criminally liable (s. 214) ; though, no doubt if the statement is untrue he makes himself liable to be punished for slander.

The rules of parentage probably arose as rules of evidence.[5] They now form part of the Muhammadan law of inheritance and marriage.[6]

3. LEADING IDEAS IN LAW OF PARENTAGE. Artificial parentage (adoption).

The questions arising with reference to the law of parentage may be considered under the following heads : (1) What are the legal effects of parentage and filiation, (e.g. with reference to inheritance, maintenance, guardianship of the person, property, and marriage)? (2) Is parentage in law,—as distinct from natural parentage, recognized ? in other words, can legal parentage be established (e.g. by adoption) over other people's children ? (3) Does the law recognize actual parentage of only one class, or of several classes and grades, with varying legal effects, and does it distinguish in each case between

[5] This process by which RULE OF EVIDENCE PASSES into realm of SUBSTANTIVE law, not by any means rare : even as to so integral part of the substantive law of England as doctrine of consideration : " I take it," said Lord Mansfield " that the ancient notion about the want of consideration was for the sake of evidence only," ; *Pillans* v. *Van Mierop*, (1765), 3 Burr. 1664. " In one sense," it has been said, " everything is form, which the law requires in order to make a promise binding, over & above the mere expression of the promiser's will. Consideration is a form as much as a seal." Holmes, *Com. Law*, 273.

[6] *Muhammad Allahdad* v. *Mahomed Ismail K.*, (1888) 10 All. 289 ; approved *Sadik Husain K.* v. *Hashim A. K.*, (1916) 43 I. A. 212, 234 (OU.) ; *Habibur Rahman Chowdhury* v. *Altafali C.*, (1921) 48 I. A. 114, 122 (*per* Lord Dunedin : Mahmood, J., thoroughly & very learnedly examined whole question in 10 All. 289) ; (*Mt.*) *Bibee Fazilatunnessa* v. (*Mt.*) *Bibee Kamarunnessa*, (1905) 9 C. W. N. 352. In this regard acknowledgment of child differs from acknowledgment of other relations, such as brother or uncle : for latter may be binding between themselves, but does not affect other parties : Bail. I. 406 ; *Himmat Bahadur* v. *Sahebzadi B.*, (1873) 1 I. A. 23.

the relation that the father and mother respectively bear to the child (e.g. between the parentage of (*a*) children born in lawful wedlock, (*b*) the issue of irregular marriages, (*c*) children whose parents are not, though they could be, legally married, and (*d*) children whose parents could not, even if they had desired to do so, have been legally married, re-dividing such children again as the issue (i) of adultery and (ii) of incestuous adultery)? (4) Can a relation, in its inception illegitimate, be legitimated (e.g. by the subsequent marriage of the parents or acknowledgment, etc.)?[7] (5) Has the subsequent legitimation of a relation, that in its inception was illegitimate, the same legal effect as a relation that was from its inception legitimate? (6) Is a man permitted to acknowledge the natural parentage of a child, without taking upon himself some or all of the burdens of legal parentage, and, if so, what is the position of a child so acknowledged? (7) Can a person disown the paternity of his actually begotten child, of any or all the classes referred to under the third main head above? and, if so, can he degrade a child from a higher to a lower class of filiation?[7]

SECTION 213. Different classes of actual parentage.

Legitimation : effects of,— partial,— disowning.

Not all these matters find a place in the body of Muslim law ; nor are all covered by the sections of this chapter. Some preliminary analysis of ideas is, however, necessary inasmuch as those who are familiar with one legal system are apt to consider that the notions underlying the expressions " legitimacy," " parentage," " acknowledgment," etc. prevalent in that system, are the same as those prevalent in the law of Islam, whereas in truth each expression connotes in each system of law some one or more of the elementary ideas indicated above.

§ 2.—Establishment of Parentage.

The establishment of parentage (paternity and maternity) confers no right of property except mutual rights of inheritance on the death of the parent or child.[8] There is no joint family nor joint family property[9] amongst Muslims in the sense in which these expressions are understood in Hindu law. Nor, is there any distinction between ancestral and self-acquired property.[10] Apart from custom, when a joint family is spoken of amongst persons governed by

NO FAMILY JOINT (as understood in Hindu law) amongst Muslims.

[7] E.g. in Roman law it could also be done by rescript of Emperor, or by testament confirmed by Emperor : Hunter, *Roman Law*, (3rd ed.), 203 ; *Sadik Husain* v. *Hashim A. K.*, (1916) 43 I. A. 212, 234 (OUDH). Cf. EXCOMMUNICATION : *Neelawa* v. *Gurshiddappa*, (1936) 39 Bom. L. R. 211 ; *diminutio capitis* : Dig. 49, 15 ff.

[8] *Solema Bibi* v. *Hafez Mahammad Hossein*, (1927) 54 Cal. 687 (no family trading partnership : partnership governed by contract) ; *Tarachand* v. *Mohideen*, (1935) 37 Bom. L. R. 654 (son assisting father in business : presumably son is father's agent, not partner unless agreement proved).

[9] *Mohidin Bee* v. *Sped Meer Saheb*, (1915) 38 Mad. 1099 (no such thing as joint family property : each heir takes share in each item) ; *Atia Kichai Rowthan* v. *Pappathammal*, (1918) 36 M. L. J. 184 ; *Shukrullah* v. *Zahra Bibi*, (1932) 54 All. 916 ; *Muhammad Esuf Sahib* v. *Amin Khan S.*, (1918) 42 Mad. 161 ; *Mahamad* v. *Hasan*, (1906) 31 Bom. 143 (principles governing purchase by one member of joint Hindu family from another not applicable to Muslims).

[10] *Murtuza Husain K.* v. *Mahomed Yasin Ali*, (1916) 43 I. A. 269, 282, (par. 2), (OU.) (no distinction between self-acquired & ancestral property) ; *Abadi Begam* v. *Mirza Ahmed M. B.* [1925] AIR (OU.) 190, 195 (col. ii.).

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Ancestral property.

Manager of property.

Acquisitions.

No Joint-family business.

Partition : Administration.

Muhammadan law, it is intended to speak of a number of persons descended from a common ancestor living together in commensality.[11] They may or they may not have property belonging to them as a body. If they have, they hold it as tenants in common.[12] If their ancestors had some property, which has devolved on them and been allowed to remain undivided, the shares of each individual is definite.[13] When one individual is allowed to hold property on behalf of several others and to manage it, he does not become a manager with the powers and authority of the Karta of a Hindu family.[13] Circumstances may create a presumption that acquisitions arise out of the joint funds [13] and are accretions to the property held in common,[14] and the Indian Trusts Act, s. 90 may apply.[15] But apart from such circumstances, prima facie, property bought by a person would be property bought with his own money.[12] There is nothing exactly like a joint family business known in a joint Hindu family.[16] If any business is carried on with common funds and by some members of a family, there may be an express agreement, or the circumstances may show an implied agreement, of partnership. But apart from such express or implied agreement, sons assisting the father would not acquire by birth any interest in the business of the father. They would not be his partners unless an agreement for partnership is proved or implied. The relations between brothers [8] carrying on business together would depend upon their agreement express or implied. If one of the heirs of a common ancestor holds exclusive possession of property in which other heirs are entitled to share, the excluded heir may bring a suit for partition of that property,[17] though it might be preferable to bring an administration suit.[18] The statement

[11] *Aminaddin Munshi* v. *Tajaddin*, (1931) 59 Cal. 541 ; *Shukrullah* v. *Zohra Bibi*, (1932) 51 All. 916 ; *Tarachand* v. *Mohideen*, (1935) 37 Bom. L. R. 654.

[12] *Aminaddin Munshi* v. *Tajaddin*, (1931) 59 Cal. 541 ; *Muhammad Wali Khan* v. *Md. Mohiuddin K.*, (1919) 24 C. W. N. 321, 323 (P. C.) = [1919] AIR (P. C.) 47 (son purchases 4 villages after death of father : in order that second son should make out claim to share in these villages, he must show : (i) that they were property of his father, or (ii) that they were purchased out of what was joint undivided property : no presumption in case of Muslims such as exists in case of Hindu family. The succession of Muslims is individual succession ; prima facie, therefore in absence of other evidence property bought by son would be property bought with his own money —Lord Dunedin) ; *Moidin Kutti* v. *Mariam Umma*, (1921) 41 M. L. J. 457.

[13] *Alla Pachai Rowthair* v. *Pappathiammal*, (1918) 36 M. L. J. 184 ; *Solema Bibi* v. *Hafez Mahammad Hosein*, (1927) 54 Cal. 687.

[14] *Shukrullah* v. *Zohra*, (1932) 54 All. 916.

[15] *Babani* v. *Dulba*, (1931) 34 Bom. L. R. 357 ; *Re Biss, Biss* v. *Biss*, [1903] 2 Ch. 40.

[16] *Ammaddin Munshi* v. *Tajaddin*, (1932) 59 Cal. 541 ; *Salema Bibi* v. *Hafez Mohammad Hossein*, (1927) 54 Cal. 687 ; *Shukrullah* v. *Zohra Bibi*, (1932) 54 All. 916 (no joint-family commensality).

[17] *Solema B.* v. *Hafez Mahammad*, (1927) 54 Cal. 687.

[18] *Moiddeensa Rowthen* v. *Mahammad Kasim Rowthen*, (1915) 28 I. C. 895 (MAD.) (suit by heir for his share in property of deceased, in hands of dft. 3.—dfts. 1 & 2 contended that suit not maintainable as framed, being for partial partition ; held, as each heir has a share in each item of property, suit maintainable : but if defts. 1 & 2 had at proper time contended that multiplicity of suits should be avoided & whole estate should be administered & in due administration partitioned, Court might, have acceded to request : not having done so, defts. 1 & 2 must be left to bring their own suit for administration), followed *Moidin Kutti* v. *Mariam Umma*,

that in a Muslim family there is a presumption that cash and household furniture belong to the husband, must (*submitted*) be taken with some caution and subject to circumstances as women are entitled to inherit, and a rich man's daughter married to a poor man, may furnish the household.[19]

SECTION 213. Husband and wife.

214. (1) Maternity is established under Muhammadan law only in the woman who gives birth to a child ; it cannot be disclaimed.[20]

Maternity.

(2) In Hanafi law maternity is established in the case of every child : in Shia law, only where the child is begotten in lawful marriage.[21]

Illegitimate children.

215. (1) Paternity[22] is (subject to ss. 216-220) established in the mother's husband[23] whether he is regularly or irregularly[24] married to her or is merely her semblable[25] husband ; provided that,—

(*a*) the child is born not earlier than six lunar months after[26] its mother has contracted (and under Shia law consummated) marriage with her husband ; and

(*b*) in case the marriage has been dissolved, also within the following periods respectively after its dissolution, viz.—

(i) under Hanafi law within two lunar years ;[27]

(ii) under Shafii and Maliki law within four lunar years,[27]

(1921) 41 M. L. J. 457 ; & *Vazir* v. *Dwarkamal*, [1922] AIR (SIND) 41, 44, (F. B.). See (*Nawab Mirza Mohammad*) *Kazim Ali K.* v. *Sadik A. K.*, (1938) 65 I. A. 219.

[19] *Ma Khatun* v. *Ma Bi Bi*, [1933] AIR (RANG.) 393, 398.

[20] Bail. I. 389 (391) 411 (414-415) ; Hed. 354, 136.

[21] Cf. s. 213, com. Sect. 214 might have been worded thus :—" No woman is in Muhammadan law considered to be the mother of a child who has not actually borne him ; & in Shia law a woman who gives birth to a child without being married to the person by whom the child is begotten, is not considered to be the mother of the child."

[22] *Moosa* v. *Ismail*, (1909) 12 Bom. L. R. 169, 174 (Courts lean strongly in favour of legitimacy, until convinced by proof of contrary : absence of marriage certificate amongst Muslims does not matter).

[23] Bail. I. 389 (391) ff.

[24] The rule applies in IRREGULAR MARRIAGE : Bail. I. 157 ; *Ata Muhammad Chaudhry* v. *Saiqul B.*, (1910) 8 All. L. J. 953 = 7 Ind. Ca. 820. In *Abdul Razak* v. *Aga Mahomed Jaffer*, (1893) 21 I. A. 56 = 21 Cal. 666, this point seems overlooked. But, of course, rule does not apply to children born in ZINA : *Mahomed Allahadad* v. *Mahomed Ismail*, (1888) 10 All. 289 ; *Mardan Saheb* v. *Rajaksaheb*, (1909) 34 Bom., 111 ; *Budansa Rowther* v. *Fatma B.*, (1914) 26 Mad. L. J. 260 = [1914] Mad. W. N. 278 = 15 Mad. L. T. 107.

[25] Semblable husband = one who has " semblance of right " as husband : see ss. 14, 81 ; (*Mt.*) *Bakh B.* v. *Qaim Din*, [1934] AIR (LAH.) 907 ; *Muhammad Hayat* v. *Muhammad Navaz*, (1935) 17 Lah. 48, 156.

[26] Bail. II. 90.

[27] Hed. 137 ; Bail. I. 390, 391, 393, 394 ; Bail. II. 90, 14, 153 (penult, sent.) ; *Minhaju't Talibin*, 259 (Bk. 29, s. 1) ; *Jeswunt Singjee Ubby S.* v. *Jet Singjee Ubby S.*, (1844) 3 Moo. I. A. 245 = 6 W. R. (P. C). 46.

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(iii) under Shia law within ten lunar months ;[28]

provided that the woman has in each case remained unmarried after the dissolution.[28]

(*c*) where the marriage has been dissolved and the woman has, at a time when her iddat may reasonably be supposed to have expired,[29] made a declaration that it has expired,[30] in such a case paternity is not established in her former husband unless the child is born within six months of such declaration as well as within two or four lunar years [or ten lunar months] of the dissolution of the marriage under Hanafi or Shafii and Maliki [or Shia law] respectively as the case may be.[31]

(2) The rules stated in this section are subject to the Indian Evidence Act, s. 112,[32] so far as it is applicable.[33]

Illustrations. Shia law.

(1) On the 1 Jan. 1900, H marries *W*,—the parties being governed by HANAFI LAW,—

(*a*) *W* gives birth to a child before 1 Jul. 1900 (within 6 lunar months from 1 Jan. 1900) : the paternity of the child is not established in H ;[34]

(*b*) H divorces *W* on 1 Jan. 1901, without consummation, and *W* gives

[28] Two other views mentioned in *Sharaiu'l-Islam* : (1) cutting down longest period of gestation to 9 months, (2) extending it to one year : latter stated to be exploded & abandoned : Bail. II. 90. Cf. *Gaskill* v. *Gaskill*, (1821) 38 T. L. R. 1 (Lord Birkenhead, L. C. (Prob. Div.) in considered judgment : birth 331 days after last intercourse with husband, not in itself sufficient evidence of adultery).

[29] *Iddat* can only expire if she is not pregnant : s. 39.

[30] Bail. I. 394 (398); also I. 34 (last sent.): necessity for (i) observing *iddat*, & (ii) in natural course declaring that *iddat* has expired, materially restricts duration of period during which presumption under s. 215 prevails : period of presumption is practically cut down to period of *iddat*, unless (1) woman had illicit relation without her husband's knowledge prior to dissolution of marriage (viz. while husband living & had not divorced her), or (2) unless she becomes illicitly pregnant during *iddat*, & at time when she would be anxious to declare that *iddat* expired becomes aware of conception having taken place.

[31] Bail. I 394 (398); cf. s. 215(*b*). There seems no reference to this point in *Sharai'ul-Islam* : explanation probably being that under Shia law presumption lasts only for 10 months : s. 215(*b*)(iii); if it is borne in mind that longest period of *iddat*, apart from pregnancy, is 4 months & 10 days from dissolution of marriage, it appears that there is in Shia law hardly any object in adding the restriction (i) that child's birth must be within 6 months of declaration, to the restriction, (ii) that it must be within 10 months of dissolution of marriage.

[32] Ind. Ev. Act, s. 112 : " The fact that any person was born during the continuance of a valid marriage between his mother & any man, or within 280 days after its dissolution, the mother remaining unmarried, shall be conclusive proof that he is legitimate son of that man, unless it can be shown that the parties to the marriage had no access to each other at any time when he could have been begotten." *Ghulam Mohy-ud-Din* v. *Khizar H.*, (1928) 10 Lah. 470, 471 (s. 112 applied as of course) : *Sibt Muhammad* v. *Md. Hameed*, (1926) 48 All. 635 (s. 112 applicable); *Rahmat Ali* v. (*Mt.*) *Allahdi*, [1884] 19 Punj. Rec. (No. 1) (Muhammadan law abolished by s. 112); *Waras Muhammad* v. *Ali Bakhsh*, [1891] 26 Punj. Rec., 375 (No. 76) (do.)

[33] (*Mt.*) *Kaniza* v. *Hasan Ahmed K.*, (1925) 1 Luck. 71 (Ind. Ev. Act, s. 112 not applicable to irregular marriage : but to flawless regular marriage).

[34] Bail. I. 391 (393).

birth to a child, before 1901 (within 6 months from 1 Jan. 1901) ; H's paternity is established : if the child is born more than 6 months after 1 Jan. 1901, the paternity of H is not established ; [35]

(*c*) H divorces *W* on 1 Jan. 1901, the marriage having been consummated, and *W* gives birth to C within two [36] lunar years of Jan. 1901 : the paternity of C is (under Hanafi, Shafii, and Maliki law) established in H ; [37]

(*d*) H dies on 1 Jan. 1901 ; then, whether or not the marriage has been consummated, if *W* remains unmarried and gives birth to C within two[36] lunar years [36] of H's death, the paternity of C is established in H ; unless six months before C's birth *W* had declared her iddat to have expired.[37]

Illustrations. Hanafi law.

(2) On 1 Jan. 1900 H consummates [35] his marriage with *W*, the parties being governed by SHIA LAW,—

(*a*) *W* gives birth to a child, C, before 1 Jul. 1900 (within 6 lunar months from consummation) : the paternity of C is not established in H ; [38]

(*b*) H dies on the 1 Jan. 1900, and *W* gives birth to C on 1 Nov. 1900, (more than 10 lunar months after H's death). C is illegitimate in Shia law [39] [but legitimate in Sunni law].

1. PARENTAGE CONFLICT : EVIDENCE ACT : MUHAMMADAN LAW :

The rules in ss. 215-221 must be taken to be repealed by the Indian Evidence Act, s. 112.[40] The general intention of the Legislature seems clearly to be that s. 112 should govern questions arising with reference to persons of every denomination. That section gives effect to the same principles, on which the rules of Muhammadan law are grounded but on the basis of present day information. Its general application has the additional advantage of removing difficulties about the choice of law that would arise if the Muhammadan law were to be applied in cases between parties both of whom are not governed by the same school of law. The policy underlying these presumptions equally of Muhammadan law, of English law, and of the rules laid down in the Indian Evidence Act, and the reasons why some of the Muslim exponents of law stretched the length of the period of gestation to two and four years, are not difficult to surmise. There was, no doubt, an initial want of scientific knowledge, though the latest scientific authorities show that the period of gestation is always subject to doubt.[41]

Policy.

[35] Bail. 394, *ll.* 1-6 (396 last *ll.*). Shia law : same would hold : Bail. II. 92 ; but only if there has been consummation : Bail. II. 90, 91, 14 ; cf. s. 218, *ill. nn.*

[36] Four years under Shafii or Hanafi law.

[37] Bail. I. 394 (396-398).

[38] Bail. II. 91. See also s. 215 *ill.* (1)(*b*).

[39] Bail. II. 91. *Quære*, what law would govern if one of parties to marriage were Sunni & other Shia ?

[40] *Muhammad Allahdad* v. *Muhammad Ismail K.*, (1888) 10 All. 289, 339. Earlier editions contained detailed discussion of question, which in view of decisions approving of result arrived at, seems unnecessary to reprint. *Muhammad Ismail K.* v. *Lala Sheo Mukh*, (1913) 17 Cal. W. N. 97 = 15 Bom. L. R. 76 (P. C.) (indicates that applicability of Muhammadan law in India based on principles of justice, equity & good conscience, & less dependent on stringent interpretation of enactments constituting the civil courts). See s. 10, com.

[41] Taylor, *Medic. Jurispr.* (5th ed., 1905), II. 60, ff. at 63 : "It is not in our power to fix" limit to gestation ; cases are recorded of its being prolonged to 324 days ; see also Lyon, *Med. Jurispr.* (1889) 343 ; Barry, *Legal Med.* (1903, II. 104, 106.

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Added to this was the desire not to take any risk of bringing down on the head even of an erring woman, the extremely severe punishment that adultery involved.[42] English law abounds in cases in which the rigour of the law is lessened by fictions and technicalities. The effect however of iddat on the duration of the presumption is apt to be overlooked : see s. 215 (1)(*c*) with *nn.* in respect of its significance.

2. RULE LAID DOWN IN TEXTS.

Difference : Presumption not conclusive.

Can presumption be rebutted except—

(i) by lian.

(ii) by other than the putative father ?

Muslim Texts in their strictness differ in three points from the Indian Evidence Act : (1) The presumption of legitimate conception arises if the child is born six months after marriage, and not before. (2) It continues not only during 280 days after dissolution of marriage, but during the periods mentioned in s. 215 of this work, i.e. 2 years, 4 years, and 10 months respectively. This is subject to the important restriction already adverted to, which arises naturally from the necessity of observing iddat, and of declaring in the ordinary course that iddat has expired. (3) The rule of Muhammadan law as stated may seem to be irrebuttable. But clearly the presumption of paternity may, by the observance of iddat be subjected to a fresh restriction, which strangles its period of duration : s. 215(1)(*c*). It may be rebutted in one mode, viz. li'an.[43] The question whether the presumption may be rebutted in any mode other than by making li'an, is not likely to arise. May the presumption of paternity be rebutted only by the putative father ? or also by other parties, and may the right of other parties to rebut the presumption (if any) be exercised while the father himself is on the scene ?

Practical result.

If the presumption is rebuttable (as has been submitted) the effect of the rule would be that after the expiration of 280 days succeeding the dissolution of the marriage, formal evidence would presumably be considered sufficient to counterbalance the presumption. Before the passing of the Evidence Act this part of the rule of Muhammadan law was rejected as being " contrary to the course of nature, and impossible." [44] The Court referred to the Hidaya, but did not consider the question in all its bearings, nor the full effect of its ruling. No attention was paid to the importance of s. 215(1)(*c*). The actual decision, however, is consistent with the Muhammadan law, if the presumption is held to be rebuttable.

3. EFFECT OF THE EVIDENCE ACT, S. 112 : OF MUHAMMADAN LAW.

Difficulties of applying Evidence Act. s. 112 to Muhammadan law.

Assuming that the Indian Evidence Act, s. 112, supersedes Muhammadan law, we are faced by questions of varying degrees of importance regarding the manner in which the section should be interpreted and applied to persons governed by the Muhammadan law of marriage. The proposition in s. 112 that " a child born during the continuance of a valid marriage " is " legitimate," [32] has, it is assumed, as clear and definite a meaning, and, presumably, the same meaning in Muhammadan law, as it has in English law. But what effect is to be given

[42] See also s. 213, com.

[43] In earlier editions (prior to which there were no cases of *li'an* in India) it was submitted that rules relating to *li'an* would be given effect to in India. Since then this has been done in several cases & law greatly developed. That discussion is, therefore omitted : see ss. 193, 194, com., & Oaths Act, there cited ; cf. Hed. 135 (col. i. par. 1) ; 136 (col. ii. par. 2).

[44] (*Mir*) *Ashruf Ali* v. (*Mir*) *Ashad Ali*, (1871) 16 W. R. 260.

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1. Marriages : (*a*) regular, irregular. (*b*) permanent, temporary.

to the words "a valid marriage" in Hanafi law?—in which marriages are divided into regular and irregular marriages; power being given to the regularly married man to disclaim a child of his wife, by li'an; but not to one irregularly married. Is any distinction to be preserved?[33] The Shia Ithna Ashari law also recognizes two classes of marital relations, the permanent and the temporary (muta). The latter is generally spoken of as a "marriage" in books written in English, because it permits a relation in many respects similar to that of the ordinary marriage; but it is said in a work of great authority[45] that "the the name of wife does not in reality apply to a woman contracted in muta for of these a man may possess more than four at a time....Since then....these women are not in reality wives, it follows that they cannot be included in the law of marriage, nor comprehended in the sense and intention of the sacred text already quoted," i.e. she is not a "wife" for purpose of inheritance.[46] Shall the connection by muta, then, be held to fall within the expression "valid marriage" in the Indian Evidence Act, s. 114, or, if not, will the Muhammadan law of paternity be followed in regard to muta but not in regard to the regular marriage? Are the distinctions between a regular and an irregular marriage, and a permanent marriage and muta to be nullified? For the words "valid marriage" are the words "any connection between persons of the opposite sexes which the law permits without penalizing, and from which legal rights and liabilities flow" to be substituted?

2. As to legitimacy.

Next with reference to the interpretation of the words "legitimate son" in s. 112.[32] Legitimacy attaches to the child. It is an incident annexed to the status of a person, so that the relation subsists between the child, and, not only both its parents, but all its other blood relations.[47] The Muslim texts, on the other hand, speak of relations between specified persons and not of the immutable status of the person. In particular they speak of two distinct relations, viz. paternity and maternity. As to maternity, there is, at least in Hanafi law, nothing like an illegitimate mother.[48] To qualify the term mother with the epithet "legitimate" or "illegitimate" is using an unmeaning expletive in the Hanafi law. With reference to paternity, the law gives to the man in certain cases the power of establishing, and in others of disclaiming, paternity: though his disclaimer has no effect on the child's relation to its mother: acknowledging paternity being the nearest approach in Muhammadan law to adoption,[49] and the disclaimer of parentage the one mode of disinhert-

[45] Bail. II. 344-345. Passage translated does not occur in *Sharai'ul-Islam* but taken from Digest of Sir W. Jones, consisting of extracts from (1) commentary on *Mafatih*, (2) *Kafi*, (3) *Sharai'ul-Islam* : Bail. II. p. XXVII.

[46] Women contracted by *muta* come within the term "wife" in the Crim. Pro. Code, s. 448 : maintenance ordered in their favour : s. 294(3).

[47] Cf. Bail. I. 433 (437) *n.* 1.

[48] Shia authorities recognize difference between mother who is married & by illicit intercourse : so far that ILLEGITIMATE MOTHER does not inherit from her child, nor *vice versa* : Bail. II. 305 (par. 4).

[49] If slave-girl owned by two men jointly, paternity could be established in either owner : Bail. II. 92-93, 93 (par. 2)[1]; woman cannot ACKNOWLEDGE CHILD without assent of husband : Bail. I. 404. And in regard to "SEMBLANCE OF RIGHT" husband's knowledge & state of mind alone considered, Bail. II. 92-93, 172.

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ing a child born to one's wife. Is the whole Muhammandan law of disclaiming parentage repealed by s. 112?

3. If any portion of Muhammadan law unaffected by s. 112. Presumptions after 280 days.

Then again the section does not purport to lay down that legitimacy cannot be established in any other circumstances than those mentioned in s. 112,[28] nor that the absence of the circumstances mentioned in the section shall be conclusive proof that the child is "illegitimate." Unless words to this effect are read into the section it would appear that in the case of birth after the expiration of 280 days, there is nothing to prevent the Muhammadan law having its effect. So that even if the section be held to apply, still without doing violence to it, paternity may in the case of a child governed by Shia law be presumed to be in the late husband of the mother, provided it is born between 280 days and 10 months after the dissolution of the marriage; and a similar presumption may be made as to a child governed by Hanafi law born between 280 days and two years after the dissolution of the marriage,—unless in either case the putative father disclaims the child by li'an. Taking the terms of s. 112 rigidly, the period after the dissolution of marriage must be divided into two parts: (i) the first 280 days after the dissolution: for these days s. 112 specifically provides; (ii) the period commencing from the expiration of the said 280 days and continuing until the expiration of the periods of two or four lunar years, or ten lunar months mentioned in the texts: for this second period, s. 112 does not seem specifically to provide, so that apparently the presumption under the texts with reference to this second period stands. But the rule and power of the presumption during this last remnant of its reign is rendered faineant, by the knowledge of physiological facts that we now possess. Such presumptions can prevail effectively only when they either represent some policy of the law or are found to be in general conformity with human experience.[50]

4. CONCLUSION. Evidence act applies: presumption 280 days intact.

It [51] is difficult to resist the conclusion that the Indian Evidence Act, s. 112.[32] was drafted without giving a thought to the framework in which it would have to be set, if it is to displace the Muhammadan law on the same point. But this oversight can hardly be a ground for disregarding its provisions. The uncertainty and difficulty of applying an Act of legislature does not have the same effect on its provisions as similar defects in a contract.[52]

(Hanafi law.) Presumption: paternity.

216. Under Hanafi law, where, after the dissolution of a woman's marriage, she marries again, and bears a child at such a time that its paternity may (in accordance with s. 215) be established in favour both of a husband regularly married, and of another irregularly married, preference will be given

[50] *Subramanian Chetty* v. *Arunachelam C.*, (1905) 28 Mad. 1, 4.

[51] This paragraph cited & approved: *Sibt Muhammad* v. *Md. Hameed*, (1926) 48 All. 625 (628); *Sampatia Bibi* v. *Mir Mahboob Ali*, [1936] 34 All. L. J. 911.

[52] *Manchester Ship Canal* v. *Manchester Racecourse Co.*, [1900] 2 Ch. 352; [1901] 2 Ch. 37; *Ryan* v. *Thomas*, Sol. Journ., 25 Mar. 1911, at p. 364, *per* Warrington, J. *Aminabai* v. *Abasahib*, (1930) 55 Bom. 401, excellent example of Court interpreting statute in view of framework of principles.

to the paternity of the former. Paternity will be ascribed to an irregularly married husband, where, if that is not done, the child must be held to be born of illicit intercourse.[1] SECTION 216.

217. Under Shia law the paternity of a husband who had no access to the wife, or who was not able to have matrimonial intercourse at any time when the child could have been begotten, is not established.[2] No access to wife.

§ 3.—DISCLAIMER OF PATERNITY.

218. (1) The husband may disclaim by li'an, the paternity of a child born to his wife :[3] provided that he has not previously acknowledged his paternity, nor acquiesced[4] in its being attributed to him,[5] and his marriage was regular.[2] Disclaimer of paternity : lian.

(2) An Ithna Ashari Shia may, in some cases, apparently disclaim the paternity of a child borne by a woman with whom he has contracted muta, without making li'an.[6]

(3) Paternity cannot be lawfully disclaimed except as provided in this section.[7]

Illustration.

H consummates[8] his marriage on 1 Jan. 1900. His wife commits adultery and gives birth to a child on 1 Aug. 1900. H's paternity is established, but he can disclaim it by making li'an and in no other way.[9]

It must not be assumed that treatment of a son born of a wife of lower degree with less care, kindness, consideration and respect than treatment of sons of high-born ladies, furnishes evidence of the former's illegitimacy.[10]

[1] Bail. I. 395-396 (398-399). Cf. *Roshun Jehan* v. *Enaet Hossein*, (1886) 5 W. R., 5, affirmed by P. C. as *Khajooroonissa* v. *Rowshan Jehan*, (1876) 3 I. A. 291 = 2 Cal. 184 = 26 W. R. 36.

[2] Bail. II. 153, *ll.* 32-34. Cf. Ind. Ev. Act, s. 112, set out p. 258, *n.* 32.

[3] Where marriage irregular, husband cannot disclaim child by *li'an*. Paternity is burden on father ; so in Shia law child of woman married during *iddat* affiliated to husband : Bail. II. 26 (*second*). In England parents cannot be compelled to state what might bastardize their children : see *Aylesford Peerage*, (1885) 11, A. C. 1 ; *Poulette*, [1903] A. C. 395 ; *Burnaby* v. *Baillie*, (1889) 42 Ch. D. 282.

[4] See ss. 218-221. As to lapse of time required for presuming acquiescence,—Abu Hanifa said to have considered this as governed by "CUSTOM," "WHAT IS USUAL," or "in discretion of judge." Abu Yusuf & Muhammad fixed 40 days : Bail. I. 390 (392). Cf. s. 10, com., p. 66 on references to custom in texts.

[5] Bail. I. 390 (392), 391 (393), 393 (395), 394 (396-398), 413 (416) ; II. 91, 43.

[6] Bail. II. 43 (*fifth*), 91 (par. 2). See s. 193 (*li'an*) ; s. 25 (*muta*).

[7] Bail. I. 340 (*ll.* 30-35) (342).

[8] "Consummates" because the *ill.* is from Shia authority. Hanafi text would say "contracts" : ss. 215(1), 217.

[9] Bail. II. 91.

[10] *Sadik Husain* v. *Hashim Ali*, (1916) 42 I. A. 212, 231 = 38 All. 627, 658 (though under law legitimate son of low-born, debased & degraded woman has just same proprietary right in his father's property as if his mother had been most well-born & purest, it is rather against human nature to suppose that this equality before law should secure equality of treatment in domestic circle).

SECTION 219. Paternity : disclaimer : acknowledgment.

219. Paternity may not under Hanafi law be disclaimed or renounced after it has once become established.[11]

220. Under Shia law paternity after being disclaimed by the husband of the mother making li'an, may nevertheless be subsequently established by his acknowledging paternity : [12] s. 222 ; but in such a case the man has no right to inherit from the child.[13]

[Section 221 is now incorporated in s. 215(1)(*c*)].

§ 4.—ACKNOWLEDGMENT OF PATERNITY.

Paternity : acknowledgment by father.

222. Paternity of a child is presumed [13] in any man who acknowledges it [14] with the intention of admitting that it has been established : [15] provided that each of the following five conditions are complied with : viz. that (1) the paternity of the child is not established in anyone else ; [16] (2) the ages of the parties are such that they may be father and child : [17] (3) the child, if it is of an age to confirm or acquiesce [18] in the

[11] Bail. I. 408 (411). *Ashruf-ood--dowla Ahmed H.* v. *Hyder Hossein K.*, (1866) 1 Moo. I. A. 94 (formal deed of renunciation put forward, but taken into consideration merely to disprove allegation that it had been preceded by acknowledgment). See also *Muhammad Allahdad* v. *Muhammad Ismail*, (1888) 10 All. 289, 340 ; *Sadik Husain K.* v. *Hashim Ali K.*, (1916) 43 I. A. 212 = 38 All. 627 (father after acknowledging son, omitted name of son in autobiography in which he enumerated his heirs ; & stated that none but those mentioned were his children : held not to affect previous acknowledgment). Cf. "The son of....I also was, and if I was, I am ; RELATION STANDS" : *Par. Reg.* IV. 519.

[12] Bail. II. 14 (par 4). Instances refer only to paternity acknowledged by father, but if established in any other way, same results would no doubt follow.

[13] It can be disproved only by positive proof that no marriage took place : *Ibrahim Ali Khan* v. (*Mt.*) *Mubarak B.*, (1919) 1 Lah. 229 ; *Muhammad Shafiqullah* v. *Nuh-ullah Khan*, (1929) 48 I. A. 52 (ALL.).

[14] *Sadik Husain K.* v. *Hashim Ali K.*, (1916) 43 I. A. 21 = 38 All. 627 ; *Muhammad Allahdad Khan* v. *Muhammad Ismail Khan*, (1888) 10 All. 286 ; *Mahammad Azmat Ali Khan* v. *Lalli Begum*, (1881) 8 Cal. 422 = 9 I. A. 8 : *Ata Muhammad Chaudhri* v. (*Mt.*) *Saiqul Bibi*, (1910) 8 All. L. J. 950 (comprehensive judgment of Karamat Husain, J., on regular & irregular marriages).

[15] *Habibur Rahman* v. *Altaf Ali*, (1921) 48 I. A. 114, 120 (acknowledgment must be not merely of sonship but made in such way that it shows that acknowledger meant to accept the other not only as his son but as his legitimate son) ; *Mohabbat Ali K.* v. *Mahomed Ibrahim K.*, (1929) 56 I. A. 20 (admission of paternity made casually, & not intended to have serious effect, is not "sufficient" "to confer the status of legitimacy") ; *Ashru-food-dowla Ahmed Hossein* v. *Hyder Hossein K.*, (1866) 11 Moo. I. A. 49, 104 ; *Abdul Razak* v. *Aga M. Bindanim*, (1893) 21 Cal. 666, 678 = 21 I. A. 56 ; *Budansa Rowther* v. *Fatma Bi*, (1914) 26 Mad. L. J. 260 = [1914] M. W. N. 278 = 15 M. L. T. 107. For Shafii law see *Minhaj-ut-Talibin*, 193. (Bk. 5, s. 5).

[16] Hed. 439 ; Bail. I. 408 (411) ; *Nujeebunnisso* v. *Zumeerun*, (1869) 11 W. R. 420 = 4 Beng. L. R. (APP. CAS.) 55 ; affmd. on appl. : *Jaibun* v. *Nujeeboonissa*, (1869) 12 W. R. 497 ; *Muhammad Allahdad K.* v. *Muhammad Ismail K.*, (1888) 10 All. 289, 317, 335 ; *Usmanniya* v. *Valli Mahomed*, (1915) 40 Bom. 28.

[17] I.e. man must be at least 12½ years older than child : Bail. I. 408 (411) ; *Habibur Rahman* v. *Altaf Ali*, (1921) 48 I. A. 114, 121.

[18] *Kedarnath* v. *Donzelli*, (1873) 30 W. R. 352 ; *Oomda B.* v. *Jonab Ali*, (1866)

acknowledgment, does so ;[19] (4) the man could at the time when the child was begotten,[20] have lawfully been the husband of its mother,[21] which implies (*a*) that it has not been proved that the child is the offspring of illicit intercourse ;[22] and (*b*) that the alleged marriage has not been disproved ; and (5) the acknowledgment is not merely of sonship, but of legitimate sonship (the fact, however, that the acknowledgment was of legitimacy as well as of sonship, may be inferred from circumstances justifying that inference).[23] SECTION 222.

Rule stated by Privy Council.

" Legitimacy is a status which results from certain facts. Legitimation is a proceeding which creates a status which did not exist before. In the proper sense there is no legitimation under the Muhammadan law. In Muhammadan law such an acknowledgment is a declaration of legitimacy, not a legitimation." [24]

" No statement made by one man that another (proved to be illegitimate) is his son, can make that other legitimate, but where no proof of that kind has been given, such a statement or acknowledgment is substantive evidence that the person so acknowledged is the legitimate son of the person who makes the statement, provided his legitimacy be possible." [25]

Paternity : acknowledgment : formal, informal.

The distinction between casual, deliberate, formal and informal, acknowledgments [26] would be unnecessary if Muslim criminal law were enforced : for, under it, unlawful intercourse is punishable as such, and acknowledgement has always serious consequences : it may impose the liability to be criminally punished either for zina or slander.[27] The introduction by the Courts of British India of this distinction, however, aids the intention of Muhammadan law. Acknowledging as a child, prima facie means acknowledging as a legitimate child.[28] The acknowledgment itself need not be of such a character as to be evidence of marriage.[29]

Illustrations.

Where the mother is a prostitute, the child cannot be acknowledged :[30] nor

5 W. R. 132 ; *Fuzeelun B.* v. *Omdah B.*, (1868) 10 W. R. 469 ; *Wuheedun* v. *Wusee Hossein*, (1871) 15 W. R. 403.

19 See s. 225, com. 20 Hed. 439 ; Bail. I. 405 (408) ; s. 222, com.

21 *Wuheedun* v. *Wusee Hossein*, (1871) 15 W. R. 403 ; *Muhammad Shafiqullah K.* v. *Nuhullah K.*, (1926) 48 All. 58 = (1929) 48 I. A. 52.

22 *Aizunnissa* v. *Karimunnissa*, (1895) 23 Cal. 130. See ss. 81, 83, comm.

23 *Usmanmiya* v. *Valli Mahomed*, (1915) 40 Bom. 28.

24 *Habibur Rahman* v. *Altaf Ali*, (1921) 48 I. A. 114, 121 (CAL.).

25 *Sadik Husain* v. *Hashim Ali K.*, (1913) 43 I. A. 21 = 38 All. 627, 661.

26 *Ashruofood-dowla Ahmed* v. *Hyder Hossein*, (1866) 11 Moo. I. A. 94 ; *Abdul Razak* v. *Aga Md. Bindanim*, (1893) 21 Cal. 666, 678 = 21 I. A. 56.

27 See s. 193(2), (3), *nn.*

28 *Fuzeelun B.* v. *Omdah B.*, (1868) 10 W. R. 468 = 11 Beng. L. R. 60, *n.* ; *Sadik Husain K.* v. *Hashim A. K.*, (1916) 43 I. A. 212 = 38 All. 627, 659.

29 *Wuheedun* v. *Wusee H.*, (1871) 15 W. R. 403 ; cf. s. 81 (presumptions of marriage).

30 *Dhan B.* v. *Lalon B.*, (1900) 27 Cal. 801 ; *Ghazanfar* v. *Kaniz F.*, (1910) 32 All. 345 ; *Mardan* v. *Rajaksaheb*, (1909) 34 Bom. 111.

SECTION 222. Acknowledgment.

where she is the sister of the acknowledger's wife : [22] nor where she has another husband.[31] The question whether "the offspring of adulterous intercourse could have been legitimated by any acknowledgment" left undecided by the Privy Council in 1883,[32] was later answered in the negative :[33] paternity can be established neither in the case of a child of fornication nor of adultery.

The effect of acknowledgment of paternity, s. 222, and evidence for the purpose of disproving it, are considered in several cases.[34]

Proof of paternity.

223. Statements by a member of the family touching the sonship or heirship of a person are good evidence of the family reports concerning him.[35]

Presumption of acknowledgment.

224. If a man has openly treated another as his child it may be presumed [1] that the former has acknowledged the parentage of the latter.[2]

§ 5.—ADOPTION AND MUHAMMADAN LAW.

Adoption not known to Muhammadan law.

225. Subject to s. 226, paternity or maternity is not established in a Muslim who purports to adopt another,[3] nor is the latter considered in law to be the child of the former.[4]

[31] *Liaqat A.* v. *Karam-ul-nissa*, (1893) 15 All. 396.

[32] *Sadakat Hosein* v. *Mahomed Yusuf*, (1883) 10 Cal. 663, 668 = 1 I. A. 31 ; *Mohammad Azmatali K.* v. *Lalli B.*, (1881) 9 I. A. 8 = 8 Cal. 422, 428 ; *Sadik Husain K.* v. *Hashim A. K.*, (1916) 43 I. A. 212 (ALL.).

[33] *Muhammad Allahdad* v. *Md. Ismail*, (1888) 10 All. 289, 337.

[34] *Re Petit. of Najib*, (1869) 4 Beng. L. R. (A. C.) 55 = 11 W. R. 426 : affirmed on appl. ; *Jaibun* v. *Nujeeboonissa*, (1869) 12 W. R. 497 ; *Nubo* v. *Mahtab*, (1873) 20 W. R. 164 ; *Muhammad Allahdad* v. *Muhammad Ismail*, 10 All. 289. See also *Mohammad Azmat* v. *Lalit B.*, (1881) 8 Cal. 422 = 9 I. A. 8 ; *Sadakat* v. *Md. Yusuf*, (1883) 10 Cal. 663 = 1 I. A. 31.

[35] *Sadik* v. *Hashin A. K.*, (1916) 43 I. A. 212 = 38 All. 627, 661 ; *Zamin Ali* v. *Azizunnissa*, (1932) 55 All. 139.

[1] Presumption rebuttable : *Buttolum* v. *Koolsoon* ; *Buttoolun* v. *Lloyd*, (1876) 25 W. R. 444 ; s. 81, prov. (3), *nn.*

[2] *Mohabat* v. *Mahomed Ibrahim*, (1929) 56 I. A. 201 (son of Muslim by servant from prostitute caste ; parents had continuously cohabited for many years ; father on several occasions acknowledged son ; document asserting that marriage ceremony had taken place on a particular date ; some evidence of *nikah* ; evidence that other members of family had illegitimate children by servant, held inadmissible to rebut presumption of legitimacy by acknowledgment ; mother not being *pardanishin*, fact to be considered, but insufficient to interfere with presumption or balance of proof of legitimacy) ; *Irshad* v. *Mt. Kariman*, [1917] AIR (P. C.) 169 = 20 Bom. L. R. 790, 793, 794 (OU.) ; *Mahomed Gouhur* v. *Harratoonissa*, (1865) 2 W. R. 52 ; (*Khajah*) *Hubeeboollah* v. *Gouhur A. K.*, (1872) 18 W. R. 523 ; *Khajooroonissa* v. *Rowshan*, (1876) 3 I. A. 291 (CAL.) ; *Muhammad Ismail* v. *Fidayatunnissa*, (1881) 3 All. 723 = 6 Ind. Jur. 198 (P. C.) ; *Waliulla* v. *Miran*, (1864) 2 Bom. H. C. R. 285 ; *Mahommad Azamat* v. *Lalli B.*, (1881) 9 I. A. 8 (CAL.) ; *Mahomed Bauker* v. *Shurfoonnissa*, (1860) 8 Moo. I. A. 136, 159.

[3] *Abdul Halim Khan* v. *Saadat Ali K.*, (1932) 59 I. A. 202 (OU.) ; *Muhammad Allahdad* v. *Md. Ismail*, (1888) 10 All. 289, 340 ; *Jeswunt S.* v. *Jet*, (1884) 3 Moo. I. A. 245 ; *Ghasiti & Nani* v. *Umrao*, (1893) 20 I. A. 193, 199 (CAL.) ; (*Muhammad*) *Umar* v. (*Muhammad*) *Niajuddin* (1911) 39 I. A. 19 (CAL.) ; *Ma Mi* v. *Kallandar Ammal* (No. 1), (1926) 54 I. A. 23, 31 (*l.* 9).

[4] Cf. s. 24(5), & *n.* So a claim of parentage cannot be lawfully compounded : Hed. 444, col. ii. par. 3.

SECTION 225. The Koran on adoption.

A form of adoption seems to have been in vogue in Arabia, previous to Islam, based either on a sense of comradeship in arms, or on blood-wite and blood-feud. This continued in the early days of Islam as a substitute for, or rival to, blood-kinship. So it was at first laid down :

> "Verily those who have believed and emigrated and striven with their substance and their soul in the way of God, and those who took them in and helped them : these shall be near of kin the one of them to the other."—Koran, viii, 72.

Reason for abolition.

Such persons were at the start deemed to constitute a group or family of their own, inheriting to each other. This was abrogated by the verses preferring consanguinity to any artificial modes of creating ties not based on actual parentage :—

Strengthening tie of blood.

> "God hath not assigned unto any man two hearts within his body, nor hath He made your wives whom ye declare (to be your mothers) your mothers,[5] nor hath He made those whom ye claim (to be your sons) your sons. This is but a saying of your mouths. But God speaks the truth and He sheweth the way. Call them after their fathers. This will be more right before God. But if ye know not who their fathers are, then (they are) your brethren in the faith, and your comrades. And they who are related by blood are nearer of kin one to the other in the Book of God than (other) believers and the fugitives (who fled from Mecca), except that ye should do kindness to your friends."—Koran, xxxiii, 4-6.

Acknowledgment.

These verses show the connection between acknowledgment of parentage, adoption and comradeship in arms, and the reason for the rule requiring the acknowledged child, when he is old enough, to consent to the acknowledgment of his parentage.[6] The rule seems to be derived from the same theory as that which gave birth to the rule relating to the "acknowledged heir" or the "heir by contract" (s. 634). The tie of blood-feuds was replaced by that of blood relation, a disclaimer of parentage was restricted by the imposition of heavy penalties, except in the case of the offspring of adultery.

Companionship in arms.

Legal consequences of adoption.

In England adoption, in the sense of a transfer to another person, and assumption by him, of parental rights and duties in respect of a child, is not recognized. A contract to maintain another's child as though it were the promisor's own, relieving the real parent from all liability and responsibility for its bringing up and maintenance, will not be enforced.[7] A relative or a stranger may, however, place himself in loco parentis towards a child, and certain legal consequences as between the parties result from that position.[8]

Oudh Estates Act :

226. Under the Oudh Estates Act[9] every Muslim taluq-

[5] This refers to *zihar* : s. 187.

[6] See s. 222(3).

[7] *Humphreys* v. *Polak*, [1901] 2 K. B. 853, (C. A.) : (illegitimate mother sued adoptive parents for breach of contract to maintain child).

[8] See *Re O'Hara*, (1900) 2 Ir. Rep. 232, 241-244, *per* Fitz-Gibbon, L. J. See however, s. 260, com.

[9] Act I. of 1869, s. 29 applies only to estates referred to.

SECTION 226. Legislative power to adopt.

dar[10] grantee[10] heir or legatee[11] referred to in the Act, and every widow of such taluqdar grantee heir or legatee, with the consent in writing of her deceased husband, has for the purposes of the said Act power to adopt a son whenever if he or she were a Hindu he or she might adopt a son.[12] Such a power is exercisable only by writing duly executed and attested in the manner required by the said Act.

Giving Hindu son in adoption.

227. A convert to Islam from Hinduism may give in adoption his son who is still a Hindu, or may authorize his being given in adoption.[13]

Law of adoption by custom.

228. A Muslim who alleges that he is by custom subject to the Hindu law of adoption, must prove it,[14] and proof of the retention of the law of inheritance and succession does not imply that the law of adoption has also been retained.[15]

"Adoption is not necessarily inheritance or succession, although it leads to inheritance or succession. The Muhammadan law does not recognize adoption. The presumption is that as a necessary consequence of conversion to Muhammadanism, the law of adoption recognized by Hindu law and usage has been abandoned by the Girasias. Therefore, those who allege that the usage and law in question had been retained must prove it." [15]

[10] I.e. one whose name is entered in list I. V. VI. mentioned in s. 8 of the Act.

[11] I.e. person (other than widow) who inherits property, or to whom property is bequeathed under Oudh Estates Act.

[12] *Abdul Halim* v. *Saadat Ali*, (1932) 59 I. A. 202; *Ghulam Abbas* v. *Amatul Fatima*, (1929) 48 I. A. 135.

[13] *Shamsing O.* v. *Santabai*, (1901) 25 Bom. 551, 555. Hindu converted to Islam, retaining his law. "Where the parties are Brahmans, not Rajputs, & dattahoma (= "sacrificial burning of clarified butter in accordance with practice of Hindu religion"; *Bal Gangadhar Tilak* v. *Shri Shrinivas Pandit*, (1915) 59 Bom. 441, 452, (P. C.).) is essential, then," it has been observed, "possibly father, after becoming Muhammadan, could not sanction his brother to be present at giving during dattahoma." Professing Islam & yet giving son in adoption as a Hindu is so opposed to Islam, that it might appear as though such circumstances would never arise. But cases apparently of still greater improbability have come before Courts, e.g. of Muslim family in matters of worship adopting Hindu religion: *Azima B.* v. *Munshi Shamal Anand*, (1913) 17 Cal. W. N. 121, (P. C.). *Neelawa* v. *Gurshiddappa*, (1936) 39 Bom. L. R. 211.

[14] *Abdulla Khan* v. *Sunda*, (1911) 11 I. C. 670 (AJMER *per* Colvin, J. C.): (village of Ramsar recognizes adoption).

[15] (*Bai*) *Machhbai* v. (*Bai*) *Hirbai*, (1911) 35 Bom. 264.

CHAPTER VII.

GUARDIANSHIP.

§ 1.—PRELIMINARY.

Minor in Muhammadan law.

229. (1) Under the law of Islam persons of either sex, are minors till they attain puberty.[1]

—under Indian Majority Act.

(2) Under the Indian Majority Act X. of 1875 and the Guardians and Wards Act, VIII. of 1890,[2] every minor whose guardian[3] has been appointed by any Court, and every minor under a Court of Wards, attains majority at 21 years, and not before. Other persons attain majority on completing 18 years, and not before. But the Indian Majority Act does not affect (*a*) the capacity of any person to act in the following matters (namely), marriage, dower, divorce[4] and adoption ; (*b*) the religion or religious rites and usages of any class of persons ; or (*c*) the capacity of any person who before the said Act came into force had attained majority under the law applicable to him.

Disabilities of minors : absolute : qualified.

Minors being of immature intellect and imperfect discretion, for protecting their interests, the power of legal action possessed by them is carefully limited. But the law does not inflict upon them an absolute disability as regards all

[1] *Balig* (feminine *baligha*) = person who has attained puberty. *Bulughiyat* = puberty. In England minor may be adjudged of full age by Act of Parliament ; his status cannot be changed in any other way ; Hals., *Laws of Eng.*, XVII. 126. A person who is minor not estopped from proving his minority because he represents himself as of full age : *Sadiq A. K.* v. *Jai Kishori* [1928] AIR (P. C.) 152, 153 = 30 Bom. L. R. 1346, 1352 ; *Balamgowda* v. *Gadiappa*, (1928) 31 Bom. L. R. 340 ; *Kebul K.* v. *Ram*, (1868) 9 W. R. 571. As to converse see *Mohori* v. *Dharmodas*, (1902) 30 Cal. 539, 545, cases there cited. Difficulty of determining age of women : Year Book 56 Ed. III. 6, 12 : *Il nad nul homme en Englet' soe luy adjudge a droit deins age ou de plein age, car ascun femes que sont de age de* XXX. *ans, voile apper dage de* XVIII. ans. Quoted in 76 Sol. Journ. 102 (13 Feb. 1932).

[2] The Guardian & Wards Act VIII. of 1890 is referred to in this Chapter as Guard. Act or the Act.

[3] Guardian of person or property not guardian for suit. *F. A. Shihan* v. *Abdul Alim Abid*, (1930) (GUARDIAN AD LITEM falsely stated that his interest was not adverse : held minor not properly represented) ; *Azimunnissa* v. (*Sirdar*) *Ali Khan*, (1926) 29 Bom. L. R. 434.

[4] Wife aged 16 may sue for divorce without guardian as Majority Act does not apply to acts in matter of divorce : *Ahmed S.* v. *Bai Fatima*, (1930) 55 Bom. 160.

SECTION 229. civil acts. There are matters in regard to which they are only under qualified disabilities. So there is no express statutory provision [5] placing minors, under "a general incapacity to exercise the rights of citizenship and to perform civil duties." [6] Moreover a minor may be authorized to do some specified juristic acts, on attaining a fixed age, falling short of majority. As to the custody of a minor's person, different considerations may prevail at different ages. The Indian Majority Act emancipates the minor, as a rule, as soon as he attains 18 years of age, but if there is a guardian appointed by the Court, or if his property is under the supervision of the Court of Wards, the age of minority is prolonged to 21 years.

Capacity may vary at different ages—for different transactions.

230. In this Chapter unless there is anything repugnant in the subject or context,

Guardian. (1) "minor" means a person who has not attained the age of majority under the Indian Majority Act X of 1875 ;

Minor. (2) "guardian" means a person who lawfully has the custody and care of the person of a minor,[7] or of his property, or both his person and property ; [8]

De facto guardian. (3) "de facto guardian" means an (unauthorized) person who as a matter of fact (de facto) has custody and care of the person [9] of a minor and|or of his property ; [10]

Natural guardian. (4) the person who is entitled by the general law to the custody of a child is frequently referred to as his "natural guardian" [11] to distinguish him from a guardian appointed by the Court, and from a testamentary guardian.[12]

[5] See s. 5A, com.

[6] Cf. Halsb., *Laws of Eng.*, XVII. 130 : ENGLISH LAW : "guardianship in socage" lasts only till 14 years attained ; then infants may choose their own guardians.

[7] See ss. 232, 234.

[8] Sect. 230 = Guard. Act VIII. of 1890, s. 4(2). As to "guardians for marriage" see s. 59, ff. ; *Monijan* v. *Dist. Judge*, (1914) 42 Cal. 351. Generally, word "GUARDIAN" standing alone = guardian of person : *Remington* v. *Hartley*, (1880) 14 Ch. D. 630, 632, *per* Jessel, M. R.

[9] *Musa Miya* v. *Kadar Bux*, (1928) 55 I. A. 171, 179 (BOM.) (Sir L. Sanderson speaks of "any other person maintaining a child") ; cf. s. 503A.

[10] *Imanbandi* v. *Mutsaddi*, (1918) 45 I. A. 73 (CAL.) : see ss. 272, 284A, comm. ; *Matadin* v. *Shaikh Ahmed*, (1912) 39 I. A. 49 (ALL.) ; *Mohammad Ezaz* v. *Mohammad Iftikhar*, (1932) 59 I. A. 92 ; *Ati* v. *Reoti Kuar*, [1937] All. 195 ; *Abdul Rahim* v. *Abdul Hakim*, (1930) 54 Mad. 543, 547, 549 ; *Muhammad Maizuddin* v. *Nalini Bala Devi*, [1937] 2 Cal. 137 (term apt to mislead). On want of precision in meaning of term DE FACTO GUARDIAN : *Harilal* v. *Gordhan*, (1927) 51 Bom. 1040, 1047 : (Crump, J. "I take it to mean *so far as it can be defined*, a person who being neither a legal guardian nor a guardian appointed by Court takes it upon himself to assume management of property of minor as though he was a guardian") ; *Tulsidas* v. *Raisingji*, (1932) 34 Bom. L. R. 1483, 1493-1495, 1494 (F. B.).

[11] *Imambandi* v. *Mutsaddi*, (1918) 45 I. A. 73, 83 (mother not natural guardian).

[12] GUARDIANSHIP BY NATURE is, however, a term of art in English law : in its STRICT SENSE = "the natural paternal jurisdiction between age of discretion & age

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It is not the object of this Chapter to state the general law of guardians and wards. Where, however, the general law is intermixed with the special provisions of Muhammadan law, it has been considered best to state the whole of the law, and not to give it piecemeal ; and the Guardians and Wards Act has, therefore, been frequently referred to at length. That Act leaves to the Court the choice of the person to be appointed guardian, on an application being made to it : fettering the discretion of the Court mainly with the object of seeing that the persons entitled, by the personal law of the minor, to be his guardians, are not, without some good cause, deprived of that right.[13] The first point, therefore, to which attention has to be directed is to determine who are entitled by law to be guardians.

Guardians and Wards Act :

Muhammadan law : persons primarily guardians.

(1) CLASSIFICATIONS OF LAW OF GUARDIANSHIP.

The law of guardianship applicable to Muslims in British India may be arranged under two categories : I. with reference to guardians (1) of the person ; and (2) of property ; or II. guardians (1) by operation of law ; (2) by testamentary appointment ; (3) appointed by other instrument ; (4) appointed by the Court.

Arrangement.

Whichever category is adopted, the subject has to be re-divided in accordance with the others, necessitating some repetition. On the whole it has seemed more convenient to follow, though not rigidly the second category which depends on the source from which the guardian derives his authority.

(2) GENERAL CONSIDERATIONS.

Guardianship : nature : how conferred.

Prof. Holland's[14] observations are an appropriate preface : " The right of a tutor or guardian....is, of course, given to him not for his own benefit, but for that of his pupillus or ward[15] whose want of understanding he supplements, and whose affairs he manages. It is an artificial extension of the parental power, and may be conferred (1) by the last will of the parent, [ss. 257-260], (2) by a deed executed by him,[16] or (3) by a judicial act [s. 261], or (4) by devolution on certain defined classes of relatives, [ss. 235-244], or (5) may

of 21 which law will recognize" over heir-apparent. *Per* Bowen, L. J., *re Agar-Ellis* ; *Agar-Ellis* v. *Lascelles*, (1883) 24 Ch. D. 317, 335, 336. Expression employed now in England in same unrestricted sense as in India : *Ib.* Hals., *Laws of Eng.* XVII., s. 283, p. 122. See also Hals, *ib.* XVII., s. 281, p. 105 cited below s. 256, com. *n.* father's & mother's right to custody of child of tender age has been referred to as GUARDIANSHIP FOR NURTURE : Hals., *Laws of Eng.*, XVII., s. 255 ; *per* King, L. C. " father is entitled to custody of his own children during their infancy not only as guardian by nurture but as guardian by nature" : *Ex. p. Hopkins*, (1732) 3 P. Wms. 154. " In the laws of England there are THREE MANNERS OF GUARDIANSHIP, viz. by common law, by statute law, & by custom. By common law there are four manners of guardians, viz. guardian in chivalry, guardian by nature, as father of eldest son, guardian in socage, & guardian per cause de nurture. According to strict language of 'our' law only an heir-apparent can be subject of guardianship by nature." Co. Litt. 886 Harg. *nn.* 12, 13, quoted Simpson, *Infants* (3rd ed. 1909) 105, 106 (4th ed. 1926) 91-96. Blackst. *Comm.* Bk. I. ch. xvii. (1765) I. 449.

[13] Sir C. Ilbert, in introducing Guard. Act, said : " Nothing can be further from my intention than to interfere with native customs or usages, or to force Hindu or Muhammadan family law into unnatural conformity with English law....It is not intended by this Act to make any alteration in Hindu or Muhammadan family law."

[14] *Jurispr.* 157, quoted with kind permission of author : numbers added by me in [ ] refer to ss. of present work.

[15] " The Lord's Wardship in Chivalry without amount of profits was on the contrary for his own benefit."

[16] " See Stat. 12 Car. II. c. 24, s. 8, as varied in favour of mother by 49 & 50 Vict. c. 27."

SECTION 230.

vest in a tribunal, such as the Court of Chancery, [or Court of Wards : s. 261]. According to some systems, the guardian cannot refuse to accept the office which is regarded as being of a public character, [s. 267]. In French law a subroge tuteur is appointed by the family council as a check on the tuteur.[17]

Termination of authority.

The right terminates on the death of the tutor or ward, on the resignation or removal of the former,[18] on the marriage of the latter [s. 256], or his attainment of a certain age [ss. 277-278]. By the older Roman law a woman was

Emancipation of ward.

under perpetual guardianship [s. 278]. Under those systems which release the ward at an early age, generally at fourteen in the case of a boy, and twelve in the case of a girl, [ss. 5A, 278], from the superintendence of a guardian, he may be placed for a further period under the lighter control of a curator, whose duties cease when the ward attains the age of full majority.[19] Such curators, and the curators or committees of lunatics or persons interdicted as

Infringement of right of guardianship.

prodigals, are generally appointed by a court of justice. The right is infringed by any interference with the control of the tutor or curator over the person [20] or property of the ward, lunatic or prodigal."

The Koran frequently refers to the duties to orphans and the necessity for dealing justly and carefully with them and their concerns. The following verses may on occasion be of guidance,—

> "Give unto orphans their substance ; and give them not the bad in exchange for the good : and devour not their substance by adding it to your own substance. Verily, that would be a great sin. Give not unto the weak of understanding the substance which God has appointed you to preserve for them, but provide them therewith, and clothe them and speak to them with kindly speech. Prove orphans until they attain the age of marriage ; then, if ye perceive that they are able to manage their affairs well, then deliver unto them their substance ; and devour it not wastefully or hastily for that they are growing up. Let him that is rich abstain generously (entirely from taking of the property of orphans); and whoso is poor let him take thereof in reason. And when ye deliver up their substance unto orphans, have (the transaction) witnessed in their presence. God sufficeth as a reckoner."—Koran, iv. 2, 5, 6.

Guardian of the person : hizanat or custody.

231. Guardianship of the person is referred to in Muslim texts as hizanat or custody.[21]

[17] "Code Civile," art. 420.

[18] See Guard. Act, ss. 38-42.

[19] Control naturally exercised by father over children after they attain majority or puberty gives rise to moral obligations, though not always amounting to legal duties, yet hardly less dutifully observed.

[20] "On writ of ravishment of gard," see 2 Inst. 440. "When tutelary right has been vested in a Court, any infringement of it becomes a matter of public law. Thus interference with a ward of Chancery is treated as contempt of Court." E.g. *In re H's Settlement*, [1909] 2 Ch. 260, ward of Court committed to prison because he "interfered with the Court's control" over himself, by marrying without its sanction.

[21] Custody not restricted to mere physical or actual custody : *Siddiq-un-Nissa* v. *Nizamuddin*, (1931) 54 All. 128, 135. Right to *hizanat* or custody must be distinguished from duty to maintain, on which see next Chapter.

232. Muslim texts rarely (if at all) contemplate the appointment of a person specifically as the guardian of a minor's property, which is ordinarily assumed to be in the charge and under the control of the executor [or administrator] [1] of the minor's father. Executors may be appointed to take charge of specific portions of the estate of the deceased.[2] The guardian of the minor's person is not necessarily the guardian of his property.[3]

SECTION 232. Guardians of property. Executors.

232A. There are under Muhammadan law special "guardians for marriage"; [4] the guardian under the Guardians and Wards Act has no power of contracting the ward in marriage.[5]

Guardian for marriage.

The right of contracting a minor in marriage inheres in a line of guardians different from those to whom the management of the minor's property and person are entrusted. The intervention of the guardian for marriage is an essential condition to the validity of the marriage of a minor, but it is obligatory neither upon the guardian of the person, nor upon the guardian for marriage, to provide a suitable marriage for the ward.[5] See also ss. 59, 230.

233. The Sharaiu'l-Islam, (Shia Ithna Ashari text), does not seem to contemplate joint guardians of the person; [6] there does not seem to be any indication of the view taken by the Sunni authorities on the point.

Joint guardians.

The Guardians and Wards Act, s. 15(1) contemplates the possibility of the personal law of a minor not permitting the appointment of joint guardians even by the Court. See s. 263, below.

Court appointing.

234. The Muslim law relating to the guardianship of persons of unsound mind is with the necessary changes to the

Guardian of lunatic.

[1] *Wasi* is Arabic, includes executors as well as administrators. See Chapter on Administration, Bail. I. 129, 665, (675).

[2] Cf. Guard. Act, s. 15(5): "If a minor has several properties, the Court may, if it thinks fit, appoint or declare a separate guardian for any one or more of properties;" Hanafi Jurists hold dissenting views on this point: Bail. I. 671 (682).

[3] Cf. Guard. Act, s. 15(4): "Separate guardians may be appointed or declared of the person & of the property of a minor."

[4] See Guard. Act, s. 24. On guardian for marriage (*wali*) see ss. 59-68: Gloss to *Bahr-ur-Raiq*, cited *Atimanessa* v. *Abdul Sobhan*, (1915) 43 Cal. 467, 480, 481.

[5] The words in s. 24 of the Act are: "Such other matters as the law requires." *Monijan B.* v. *Dist. Judge*, (1914) 42 Cal. 351; *Salubai Ganesh* v. *Keshavrao Vasudeo*, (1931) 56 Bom. 71, 74, 78, 81. Cf. *In re H's Settlement* [1909] 2 Ch. 260: s. 230 com. *n.* 20.

[6] Bail. II. 96, suggests that "where there is a combination of persons equal in degree.... right to infant's custody is to be determined by casting lots between them." —a crude method, that has not been scorned in Punjab Laws Act, s. 9 cited under s. 557. Under the Guard. Act, s. 17(1) Court may apparently choose person whose appointment would be most in interests of child; cf. *Bindo* v. *Sham*, (1906) 29 All. 210; *re Gulbai & Lilbai*, (1907) 32 Bom. 50. But see *Audiappa* v. *Nallendra*, (1915) 39 Mad. 473; *Salubai G.* v. *Keshavrao V.*, (1931) 56 Bom. 71.

SECTION 234. same effect as the law relating to the guardianship of minors.[7]

Custody. This chapter, however, has been framed with reference only to minors, to whom alone the authorities refer in direct terms. Lunatics are subject to special enactments. Where the person exercising control over the person or property of another derives his authority from the Court, he may, at the time of his appointment or afterwards, obtain directions from the Court.[8]

§ 2.—PERSONS ENTITLED BY LAW TO BE GUARDIANS.

(*a*) Infants' custody mother : females.

235. Under Hanafi law the mother [9] is entitled [10] to the custody of a male child [11] until he attains the age of seven years ; [12] and of a female child [11] until puberty.[12]

Where the husband and wife are living together, the child must stay with them, and the husband cannot take the child away with him ; nor can the mother, even during the period that she is entitled to the custody of the child, take it away without the permission of the father.[13] Where the child is with one of its parents, the other is not to be prevented from seeing and visiting it.[14]

The father's supervision over the child continues in spite of the child being under the care of female relations : as the burden of providing maintenance rests exclusively on the father.[15] The mother's right to custody is not lost merely by her being divorced.[16]

[7] Koran iv. 2, 5, 6, cited s. 230, com. ; Hed. 524-525 ; Bail. I. 4, 208, 209, 403 (406), 530 (539), 552 (560); 669 (680); II. 4, 7, 8, 107, 203, 214, 248, 249. (*Mt.*) *Mehr Bibi* v. *Chanan*, (1917) 52 Punj. Rec. 209 ; *Ummi B.* v. *Kesho*, (1908) 30 All. 462 must be read subject to *Mata Din* v. *Ahmed*, (1911) 39 I. A. 49 (ALL.).

[8] *Muhammad Kalu* v. *Saifulla*, (1884) 22 Punj. Rec. 193 (No. 91) (lunatic's rights of inheritance : representation in suit).

[9] Under Muslim law MOTHER entitled to custody of person of her minor child only upto a certain age : s. 235. "But she is NOT NATURAL GUARDIAN ; father alone, or if he be dead, his executor (under the Sunni law) is legal guardian. Mother has no larger powers to deal with her minor child's property than any other outsider or non-relative, who happens to have charge for the time being of infant (DE FACTO GUARDIAN]." *per* Syed Ameer Ali—*Imambandi* v. *Mutsaddi*, (1918) 45 I. A. 73, 83 ; *Siddiq-un-nissa* v. *Nizamuddin*, (1931) 54 All. 128 ; (*Mt.*) *Ghuran* v. *Riaz Ahmad*, (1935) 11 Luck. 553 ; (*Mt.*) *Atkia B.* v. *Muhammad Ibrahim Rashid*, [1916] AIR (P. C.) 250 = 24 C. W. N. 345 ; *Moyna Bibi* v. *Bauker Behari Biswas*, (1902) 29 Cal. 473. In Eng. prior to, & apart from, Guard. of Inf. Act, 1886, (49, 50 Vict. c. 27) s. 5, mother had no right, as against father, to control & custody of child ; Hals., *Laws of Eng.* XVII. 108, § 254.

[10] On her rights as against husband of minor daughter : s. 256 : *Nur* v. *Zuleikha* (1885) 11 Cal. 649 ; *Korban* v. *King-Emp.*, (1904) 32 Cal. 444 ; cf. s. 249(3), *nn.*

[11] Bail. I. 431 (435), 438 ; Hed. 131 ; *Zarabibi* v. *Abdul Rezzak*, (1911) 12 Bom. L. R. 891 ; *Imambandi* v. *Mutsaddi*, (1918) 45 I. A. 73, 83.

[12] Cf. s. 234.

[13] Bail. I. 435 ; Hed. 139. Wife's movements during coverture under control of husband : s. 24(2). Bail. I. 435 : texts do not expect child to be taken out of place where marriage took place, probably survival of pre-Islamic tribal custom : cf. *Usmanbhai* v. *Bai Sakina*, (1926) 29 Bom. L. R. 106 (residence during *iddat*). Cf. Guard. of Inf. Act, 1886 (49, 50 Vict. c. 27) ss. 5, 8.

[14] Bail. I. 435.

[15] *Siddiq-un-Nissa* v. *Nizamuddin*, (1931) 54 All. 128, 136 ; *Allah Rakhi* v. *Karam Ilahi*, (1933) 14 Lah. 770 ; (*Mt.*) *Ghuran* v. *Riaz Ahmad*, (1935) 11 Luck. 553 (father must be allowed to see minor).

[16] *Allah Rakhia* v. *Karam Ilahi*, (1933) 14 Lah. 770, 777.

SECTION 236. (Hanafi law.) Custody in absence of mother.

236. In the absence, or on the disqualification,[17] of the mother, the custody of the child during the ages mentioned in s. 235 belongs to the following persons in the order of priority in which they are mentioned :[18] (1) mother's mother ;[19] (2) father's mother ;[20] (3) mother's grandmother howsoever high ; (4) father's grandmother[20] howsoever high ; (5) full sister ; (6) uterine sister ;[20] (7) daughter of full sister, howsoever low ; (8) daughter of uterine sister, howsoever low ; (9) full maternal aunt, howsoever high ; (10) uterine maternal aunt,[20] howsoever high ; (11) full paternal aunt,[20] howsoever high.

Mother's relations.

The inclusion here of the paternal grandmother and paternal aunt[21] is anomalous,—" the principle in this kind of guardianship being that the custody of an infant belongs of right to its mother's relations." [22] If the paternal aunt and grandmother are included, there is no reason why the consanguine half-sister should not come in between the uterine sister and the daughter of the full sister, and similarly the other consanguine half-relations (half-sister of the father, etc.).

Devolution of mother's right to custody.

In effect, if the mother dies during the period mentioned in s. 235, i.e. before the father is entitled to custody, then the mother's rights devolve upon her nearest female relation : proximity being considered on the same principles as for guardianship for marriage and for succession : viz. descendants[23] first, then ascendants, and finally collaterals. The rules by which the mother's rights of guardianship devolve are analogous to the rules by which the father's rights devolve and these last again are based on the pre-Islamic law of succession.[24] It is possible that qiyas or analogy on the part of the text writers may also have produced a uniformity of principles.[25]

Testamentary guardian.

236A. The father has no power to appoint a testamentary guardian of his minor child during the ages mentioned in s. 235, so as to derogate from the rights of the persons entitled to act as guardians.[26]

[17] See ss. 245-256.

[18] Bail. I. 431 (435).

[19] *Bahadur* v. *Mussumat Bivi*, [1910] 45 Punj. Rec. 154 (No. 48) (maternal grandmother has, during ages mentioned in ss. 235, 236, priority over father) ; *Bhoocha* v. *Elahi*, (1885) 11 Cal. 574 (failing father's mother, mother's mother's mother entitled) ; Bail. I. 432.

[20] See s. 236, com.

[21] Bail. I. 432 (*l.* 8) (436).

[22] Cf. Bail. I. 432 (*ll.* 8-11) (436) see translation from *Sharh-i-Viqaya* in s. 239A, com. ; also *Minhaj-at-Talibin*, Shafii text.

[23] Minors cannot, but lunatics may, have descendants who have prior right to guardianship.

[24] Matriarchal system not unknown in Arabia.

[25] See Introductory Chapter.

[26] *Bahadur Ali* v. (*Mt.*) *Bivi*, [1910] 54 Punj. Rec. 154 (No. 48). See s. 239A.

SECTION 237. (Sunni law.) Right of males if no female entitled.

237. During the ages mentioned in s. 235, in the absence or on the disqualification[27] of the mother and the females mentioned in s. 236, the father and the males mentioned in s. 239 are entitled to the custody of the child ;[28] provided that they are not otherwise disqualified[29] from taking charge of the child.

(Sunni law.) (*b*) Custody —, after infancy : the father and male agnates. ,— in absence of father.

238. The father[1] becomes entitled to the custody[2] of a male child who has attained the age of seven years ;[3] and of a female child[4] who has attained puberty.[5]

239. After a child[6] attains the age at which the father becomes entitled to its custody, (s. 238), if the father is absent or disqualified,[7] the following persons are, subject to s. 239A, entitled (in the order of priority in which they are mentioned) to its custody : (1) nearest paternal grandfather ;[8] (2) full brother ; (3) consanguine half-brother ; (4) full brother's son ; (5) consanguine half-brother's son ; (6) father's full brother ; (7) father's consanguine half-brother ; (8) father's full brother's son ; (9) father's consanguine half-brother's son.[9]

Testamentary guardian.

239A. It is doubtful whether while the paternal grandfather [or any other relation mentioned in s. 239], is living and competent to act as guardian,[10] the father has the right to

27 See ss. 245-256.

28 Bail. I. 433 (437).

29 See ss. 241, 245-256 ; *Ulfat Bibi* v. *Bafati*, (1927) 49 All. 773.

1 *Siddiqunnissa* v. *Nizamuddin K.*, (1931) 54 All. 128 (where minor has father, not unfit to be guardian COURT has no AUTHORITY to APPOINT anyone, not even father himself as guardian of minor's person : father is guardian within meaning of Guard. Act, though he cannot be appointed as such); *Sukhdeo R.* v. *Ramchandra R.*, (1924) 46 All. 706 ; *Annie Besant* v. *Narayaniah*, (1914) 38 Mad. 807, 822, (P.C.); (*Mt.*) *Ghuran* v. *Riaz Ahmad*, (1935) 11 Luck. 553. *Ma Juli* v. *Moola Ebrahim*, [1933] AIR (RANG.) 201 (RELIGION OF FATHER preferred ordinarily, but here special circumstances).

2 I.e. he is entitled to custody after ages mentioned in s. 235.

3 *Idu* v. *Amiran*, (1886) 8 All. 322 ; Hed. 129 ; Bail. I. 434.

4 Cf. s. 234.

5 Hed. 129 ; Bail. I. 434 (438).

6 Cf. s. 234.

7 See s. 256.

8 Sister's minor girl's husband not entitled to be appointed guardian of person or property : *Asghar Ali* v. *Hamida B.*, (1914) 36 All. 280 ; (*Mt.*) *Hurunnessa Bibee, re*, (1913) 18 Cal. W. N. 853.

9 Hed. 138 ; Bail. I. 433 (437).

10 Bail. II. 251 : guardian cannot be appointed by father to his son when grandfather living. See ss. 236A, 257, 258 ; *Mt. Atkia B.* v. *Muhammad Ibrahim*, [1916] AIR (P.C.) 250 = 21 C. W. N. 345, 349, 353-354 (ALL.) (ceremony, however regular in other respects, ineffectual to create valid marriage without consent of guardian : grandmother has no right to give minor in marriage if there is paternal uncle : Arusa B., not correctly advised & " fancied a nuncupative will of a father would be sufficient to confer authority to give his minor child in marriage," 353, 354).

appoint, for the ages mentioned in s. 238, a testamentary guardian of the person of his minor children, so as to derogate from the rights arising under s. 239.[10] SECTION 239A.

The question whether under the law of Islam the father's "executor" (i.e. guardian appointed by the will of the father) has priority over the grandfather, is doubtful. The executor is defined as "an ameen or trustee appointed by the testator to superintend, protect and take care of his property and children after his death," [11] and Macnaghten [12] refers to the following from the Sharh-i-Viqaya: "He to whom the father has entrusted the disposal of his family and fortune, is his executor," and "The guardianship of a minor belongs first to the father, next to his executor, next to the paternal grandfather." Grandfather:

The question is unlikely to arise in British India in this form. Should it do so and it be held that the directions of Islam are doubtful, the Courts would, no doubt, act in accordance with justice, equity and good conscience, no less than with the rule laid down in the Guardians and Wards Act, by giving great weight to the desires of the deceased parent. In cases likely to cause disputes it would be desirable to obtain the Court's sanction, or for the testamentary guardian to get himself declared or appointed. Guardian appointed by father's will.

The law as to the right of custody is thus stated in the Sharh-i-Viqaya: [13] "For the education of a minor (1) the *mother* has the first claim, but she cannot be compelled to undertake its custody [in case she refuse to do so, for the refusal would probably be on account of her inability to undertake it; but where there is no one else to undertake it, she should be compelled] whether she has separated from her husband or not. And when the mother is not available, i.e. she is either dead, or has married a stranger, [or is otherwise disqualified from acting as a guardian in consequence of her renouncing Islam, or getting depraved in character, and the like] then (2) the *maternal grandmother* is entitled, howsoever high she be, [for this reason that the right is inherent, in mothers, so that] if the mother is absent, it will go to the mother's mother, and if the mother's mother is absent, it will go (3) to the *father's mother*, and then (4) to the *sisters*, the *full* sisters are entitled first then the *uterine*, and then the *consanguine*, and (5) then the *maternal aunt* in the same priority, [and according to one tradition the maternal aunt is preferred to the sister, for the Prophet said that the mother's sister takes the place of the mother...], then follow (6) the *full sisters of the mother* and the *uterine half-sister of the mother*, and then the *consanguine half-sisters of the mother*; [for this reason that in this matter the mother has the prior right, and Sharh-i-Viqaya: Right to custody. Disqualifications.

[11] Bail. I. 665 (676) citing *Inayah* IV. 607, 610: *Hidaya* IV. 1496, 1488. This does not occur in *Fatawa 'Alamgiri, Book on Talak*, Ch. XVI. in *Hizanat* = Bail. I. 433, consists of excerpt from *Kafi*.

[12] Macn., *Mooh. Law, Guardians*, precedent 6, p. 310; Case 1, p. 304.

[13] *Sharh-i-Viqaya*, Book on *Talaq*, Ch. on *Hizanat*, Vol. II. p. 168 (Luck. ed. 1313, A.H.). *Sharh-* = commentary portions enclosed in [ ] are from *Umdat-ul-Riaya*, com. on *Sharh-i-Viqaya* (which itself consists of com. on *Viqaya*).

SECTION 239A. consequently the relations through her are given preference over those on the father's side], then (7) the *sisters of the father, full* then *uterine*, then *consanguine.*

Disqualifications

"And this is on the condition that the women are free; for a slave and umm-i-walad are not entitled to custody [as they have no leisure from their service]; and if a woman marries one who is not prohibited from marrying the minor, that woman loses her right of custody, but if such a marriage is dissolved, then the right reverts to that woman. If there is no woman either from the paternal or maternal side, then (8) the right of bringing up is in the *agnates* in the order of priority mentioned in the chapter on inheritance, [that is to say, the *father* comes first, then the (9) *paternal grandfather* howsoever high, then the (10) *full brother*, then the (11) *consanguine*[14] half brother, then the (12) *sons of the full brother*, then the (13) *sons of the consanguine half-brother*, and similarly (14) their descendants howsoever low (15) then comes the paternal uncle, and then (16) the paternal uncle's son]. But a female minor will not be under the guardianship of an agnate who is not prohibited from marrying her, e.g. her emancipator or the son of a paternal uncle, nor one depraved in character."

Agnates—

Father.

(Shia law.) (*a*) Parents' right to custody.

240 Under Shia Ithna Ashari law the mother[15] has the right to the custody of a male child[16] until he attains the age of two years;[17] and of a female child[16] until she attains the age of seven years.[18]

In the Daaimu'l-Islam[19] (Shia Ismaili authority), however, it is stated that the mother has the prior right to the custody of a child (of either sex) till it is able to take care of itself, so that it can eat, drink and dress without the help of others; and that this happens about the age of 7 to 8, depending upon the intelligence of the child, and upon its capacity to take care of itself.

(Shia law.) Father's right at later age.

241. After the child[16] attains the age mentioned in s. 240, the father has, in Shia Ithna Ashari law, the right to the custody of the child.[20]

(Shia law.) Survivor of parents.

242. In the absence of either the father or the mother, the other parent has under Shia law the right to the custody of a minor child,[21] whatever its sex and age.[22]

14 Uterine brothers are not agnates & find no place in present list.

15 See s. 235 as against executor of father, *Re Hooseini Begum*, (1884) 7 Cal. 134; to s. 242 *n.*; also *Lardli Begum* v. *Mahomed Amir Khan*, (1887) 14 Cal. 615 (*obiter*).

16 Cf. s. 234.

17 Bail. II. 95; cf. s. 234.

18 *Ibid.* Two other opinions mentioned fixing age at 10 years, & at puberty: but the opinion said to be "more agreeable to traditional authority" is 7 years.

19 See Introductory chapter p. 26 above on this text.

20 Bail. II. 95; *Re Petit. of Mahomed Amir K., Lardli B.* v. *Mahomed Amir K.*, (1887) 14 Cal. 615.

21 Cf. ss. 234, 235, 267, 268.

22 Bail. II. 95; *Nadir Mirza* v. *Munni B.*, (1930) 6 Luck. 350; *Salimunnissa* v.

SECTION 243. (Shia law.) Custody. (*b*) Absence of parents.

243. In the absence of both parents, the father's father is under Shia law entitled to the custody of the children.[23]

244. In the absence of both parents, and of the father's father, it is doubtful who under Shia law are preferentially entitled to the custody of the children.[22]

Illustrations.

The Sharaiu'l-Islam mentions the following cases, though some doubt is expressed as to all of them, viz. : (1) The consanguine half-sister is preferred to the uterine half-sister. (2) The paternal grandmother is preferred to the maternal grandmother. (3) The grandmother is preferred to the sister. (4) The paternal and maternal aunts are equally entitled. It would seem that these preferences can only serve as guides to the Court in selecting the guardian, without fettering its discretion.

SUMMARY OF LAW OF RIGHT OF GUARDIANSHIP.

Custody : Property.

1. : HANAFI LAW.—(1) CUSTODY of male child till age of 7 and female till puberty : the female relations are entitled : the first one so entitled is, of course, the mother. (2) After the said ages the male agnates, commencing with the father, are entitled. (3) Failing qualified male agnates, the Court must appoint a female as guardian to a female. (4) Very remote blood relations are entitled to be guardians to the PERSON of a minor. (5) Only the father and grandfather, and persons appointed by them, are entitled to be GUARDIANS OF THE PROPERTY.[24]

SHIA LAW.—(1) The first right of CUSTODY is that of the parents, with priorities between them on the basis that the mother should be entitled during infancy, i.e. male child till age of 2 years and female till 7 years, and later on the father. (2) Failing the parents, the father's father is entitled to the custody. (3) Failing the father's father, the other relations : with some doubt as to their priorities. (4) Only the father and grandfather, and persons appointed by them, are entitled to be guardians of PROPERTY.[25]

§ 3.—DISQUALIFICATIONS : LOSS OF RIGHT OF GUARDIANSHIP.

1. GENERAL DISQUALIFICATIONS. (*a*) AGE.

245. A minor is incompetent to act as the guardian of any minor other than his own wife or child.[26]

Saadat Husain, (1914) 36 All. 466 (maternal grandmother cannot, under Shia law, claim custody of female child 3½ years old, during life-time of father); *Re Ebrahim M. Hassain, Sherbanoo* v. *Ajbai*, (1908) 11 Bom. L. R. 75 (under Crim. Pro. Code, s. 491 ; mother not deprived of custody of child, as no specific appointment of guardians by will of father ; question left open whether even such specific appointment, when arbitrarily & capriciously made, deprives mother of right of guardianship); *Kundan* v. *Aisha Begum*, [1938] All. 963.

23 Bail. II. 95 ; cf. s. 234.

24 Cf. *Abdul Bari* v. *Rash Behari Pal*, (1880) 6 Cal. L. R. 413 (uncle cannot be guardian of property).

25 Bail. II. 4, 7, 9, 10, 12, 96, 232, 251.

26 Guard. Act, s. 21 ; cf. s. 224 above : minor disqualified from acting as guardian for marriage ; Bail. I. 47 ; II. 4, or as executor, though not quite clear whether, while minor acts in capacity of executor, & until he is removed, his acts are void : current opinion is that they are not void. Bail. I. 669 (680); II. 4, 248-249.

SECTION 246.
(*b*) RELIGION. Muslim parent preferred.
Non Muslims disqualified.
Caste Disabilities Removal Act.

246.[27] (1) Subject to the Caste Disabilities Removal Act, XXI. of 1850,[28] (*a*) if either parent is not a Muslim, the other is entitled to the custody of the child, whatever its age ;[29] (*b*) a non-Muslim may not, under Shia law, have the custody of a child.[30] *Quaere,* whether these provisions are by the said Act, abrogated either entirely, or in so far as they affect the right of apostates to the custody of children.

Is there a "right" to be guardian ?

Is there such a "right" to the custody of a child as is contemplated by Act XXI. of 1850 ? The appointment of a guardian to a minor is not such a matter of private "right" between the parties, as can be settled by arbitration.[31] Act XXI. of 1850, in its terms, applies only to those who have "renounced, or been excluded from the communion of religion, or been deprived of caste,"—not to one who is born a non-Muslim.[32] Where an apostate, but for his change of religion, would be entitled to be the guardian, is it still in the discretion of the Court to appoint another person ? The Guardians and Wards Act, s. 17(2), requires the religion of the minor to be considered in the appointment of guardians. The Courts, as a rule, do not trouble themselves about such details, but, in cases of doubt, are apt to fall back on the principle that the paramount consideration to be regarded is that of the welfare of the ward.[33] See s. 262, com.

2. DISQUALIFICATIONS AFFECTING FEMALES. Mother : females : when disentitled : custody.

249.[27] The mother, or other female loses the claim that she might otherwise have to the custody of a child,[33] (1) if she is immoral or has committed adultery,[34] or some criminal offence ;[35] or (2) if she is incapable of taking care of the child ;[36] or (3) if she marries a man not related to the child

[27] Sect. 246 = ss. 246-248 in earlier editions.

[28] Act XXI. of 1850 set out s. 1, com. In Guard. Act, s. 17(2) RELIGION OF MINOR mentioned merely as one of considerations to be regarded in appointment of guardian ; but on other hand in first paragr. of same section, "consistency with the law of the minor," is insisted upon. See s. 262.

[29] Bail. II. 95 ; cf. s. 234. [30] Cf. ss. 234, 236.

[31] *Mahadeo Prasad* v. *Rindeshi Prasad*, (1908) 30 All. 137.

[32] *Mitar Sen* v. *Maqbul Hasan K.*, (1930) 57 I. A. 313 (OU.).

[33] *Bindo* v. *Sham Lal*, (1896) 29 All. 210 (maternal grandmother preferred to father, though conceded that "there was nothing against the father"—on ground that father had married again & girl would be happier with grandmother : reversing lower Court—*sed quaere*) ; *Audiappa* v. *Nallendrani*, (1915) 39 Mad. 473, dissents from *Bindo* v. *Sham Lal* ; see *Re Gulbai & Lilbai* ; *Dhaklibai*, (1907) 32 Bom. 50.

[34] Bail. I. 431 ; *Abasi* v. *Dunne*, (1878) 1 All. 598 (prostitute), (*Mt.*) *Shahjehan Begum* v. *David Munro*, (1850) 5 S. D. A. (N. W. P.) 39 (custody given to unmarried female living with Christian). In Eng. father's adultery does not disqualify him, if he does not bring child into contact with woman : *R.* v. *Greenhill*, (1836) 4 A. & E. 624, 640.

[35] Cf. Guard. Act, s. 39(*f*).

[36] Cf. Guard. Act, s. 39(*b*), (*c*), (*d*), (*e*) ; Bail. I. 431 (435) : "A person is not worthy to be trusted, who is continually going out, & leaving her child hungry," citing *Durr-ul-Mukhtar*, 80 ; *Jannatunnessa* v. *Hafizuddin*, (1911) 10 Ind. Cas. 904.

within the prohibited degrees ;[37] provided that after the dissolution of such a marriage, her right to custody revives,[38] or (4) subject to s. 246, if she apostatizes from Islam.[39] SECTION 249.

The Guardian and Wards Act, s. 41(1)(*d*) & (*e*) seems to assume that the father's and husband's rights alone revive after once being lost. It may be that the Act wished to avoid a change of the custody of the child from time to time, save in the two cases specially excepted ; or (as is more likely) that it was drafted on the assumption that no other person had a legal *right* to custody.

250. A woman is not disqualified for being guardian of a minor's[40] property by reason of her being a pardanishin.[41] Pardanishin as guardian of property.

251. No male is entitled to the custody of a female minor,[40] unless he is related to her by consanguinity[42] within the prohibited[43] degrees.[44] A profligate[45] is disqualified. 3. DISQUALIFICATIONS AFFECTING MALES. Within prohibited degree : no custody of female.

The Shia law, (ss. 240-242), does not recognize any guardians, as of right, except the parents and grandfather. It is submitted, that the disqualification under s. 251 not being mentioned either in the Shia books or in the Guardians and Wards Act, the Court, in appointing a guardian amongst Shias, will not consider this rule as implying absolute disqualification, though it may be borne in mind in choosing from rival claimants.

In Eng. parents lose right if child abandoned or deserted, etc. : Halsb. *Laws of Eng.*, XVII. s. 256. If her INTEREST BECOME ADVERSE to minor's she is disqualified : cf. *F. A. Shihan* v. *Abdul Alim Abed*, (1930) 58 Cal. 474.

37 As in *Bhoocha* v. *Elahi Bux*, (1885) 11 Cal. 574 ; *Fuseehun* v. *Kajo*, (1883) 10 Cal. 15 ; *Beedhun Bibee* v. *Fuzuloollah*, (1873) 20 W. R. 411 ; *Kundan* v. *Aisha Begam*, [1938] All. 963 ; Bail. I. 432 (436); Hed. 138 ; but not by divorce *Zarabai* v. *Abdul Rezzak*, (1910) 12 Bom. L. R. 981 ; *Allah Raki* v. *Karam Ilahi*, (1933) 14 Lah. 770.

38 See Guard. Act, s. 41 referred to in s. 249, com.

39 Bail. I. 432 (435); Hed. 139. Shia law see s. 246. Guard. Act, s. 17, mentions RELIGION OF MINOR as a consideration to be regarded in appointing or declaring guardian : see s. 262 ; *Nadir Mirza* v. *Munni B.*, (1930) 6 Luck. 350, Shia wife converted to Christianity held entitled to custody of son,—*sed quaere* ; *cf. Ma Juli* v. *Moola Ebrahim*, [1933] AIR (RANG.) 201.

40 Cf. s. 234.

41 *Jaiwunti* v. *Gajadhar*, (1911) 38 Cal. 783. Texts refer to mother only in her capacity of guardian of person : see s. 259.

42 *Asghar Ali* v. *Hamida B.*, (1914) 36 All. 280 ; (*Mt.*) *Hurunnessa Bibee, re*, (1913) 18 Cal. W. N. 853 (text cited).

43 See ss. 26 ff.

44 Hed. 138, 139 ; Bail. I. 433 (437). Minor girl's SISTER'S HUSBAND not entitled to guardianship of person & property of minor : *Asghar Ali* v. *Hamida B.*, (1914) 36 All. 280 ; (*Mt.*) *Hurunnessa B. re*, (1913) 18 Cal. W. N. 853. Cf. s. 249(4).

45 Bail. I. 433 (last line) (437), (par. 4) (438). Muhammadan law is fairly definite as regards PROFLIGATES : Kazi has jurisdiction to subject them to inhibition. But in India those rules can have hardly any operation. Courts in Eng. may deprive husband of right to custody, if convicted of aggravated assault upon wife, or desertion : Summ. Jurisd. (Marr. Wom.) Act, 1895. Cf. also Prev. of Cruel. to Child. Act, 1894, s. 6 (child may be taken away from both parents); cf. *F. G. Shihan* v. *Abdul Alim Abed*, (1930) 58 Cal. 474.

SECTION 252. Female stranger : guardian of female.

252. When a female [1] has attained puberty [2] and there is no male entitled to her custody, the Court may appoint any female as her guardian.

The Court is required by the Guardians and Wards Act, s. 17, to be guided, in appointing or declaring a guardian, by what appears to be for the welfare of the minor "consistently with the law to which the minor is subject." See s. 251, com. The restriction (Hanafi law) under s. 252, is similar to that imposed by Act XI. of 1858 (s. 27) and Act XX. of 1864 (s. 31), which applied prior to Act VIII. of 1890, viz. only a female could be appointed the guardian of a female ; but the Acts went beyond [3] Hanafi law, inasmuch as the restriction imposed by the latter is only against such males as are not within the prohibited degrees, and it is only when there are no such males that the exclusive right is given to females.

4. DISQUALIFICATIONS AFFECTING PARENTS. Father when disqualified.

253. The Court will not interfere with the right of the father to the custody of his children except on the ground [4] of (*a*) his unfitness in character and conduct ; [5] (*b*) unfitness in external circumstances ; [5] (*c*) waiver of his right ; [3] (*d*) agreement ; [5] or (*e*) his being out of jurisdiction, or intending to go out.[5]

By unfitness of conduct.

"When the natural guardian ceases to be a natural guardian, and shows by his conduct that he has become an unnatural guardian," [6] he loses his right ; as for instance,[7] by cruelty to his wife or children ; [8] or by felony ; [9] or adultery ;[10] though adultery by itself is no disqualification, if the woman is not brought into contact with the child ; [11] nor is mere harshness ; [12] nor bad

1 Bail. I. 435, *n.* 1 (439) suggests same rule must apply to male child born in *zina*, whose paternity not established in anyone : for he has no relations in law. But Hanafi law recognizes mother's relation to her illegitimate child : s. 214 : hence she would be entitled to custody till it is 7 years old : s. 235.

2 Cf. s. 234.

3 See *Fuseehun* v. *Kajo* (1883) 10 Cal. 15 : under Act XX. of 1864 paternal uncle held disqualified, though girl had attained an age when male agnates entitled to custody : paternal uncle (being within prohibited degrees) not disqualified under Hanafi law.

4 See Simpson, *Infants* (4th ed. 1926), 106 ff.

5 See ss. 253, 263, comm. E.g. father to take charge of earnings of his minor children, but if he is spendthrift, Court shall take the property out of his hands, & place it with trustee to keep it for minor, until age of puberty ; & then deliver it over to him : Bail. I. 458 ; cf. ss. 290-292.

6 Bowen L. J. *In re Agar-Ellis, Agar-Ellis* v. *Lascelles*, (1883) 24 Ch. D. 317, 337 ; natural guardian explained in s. 230(4).

7 Cf. *F. A. Shihan* v. *Abdul Alim Abed*, (1930) 58 Cal. 474.

8 *Ex p. Warner*, (1792) 4 B. B. C. 100 ; *Whitfield* v. *Hales*, (1806) 12 Ves. 492.

9 *Ex p. Bailey*, (1838) 6 Dowl. 311. 10 *Warde* v. *W.*, (1849) 2 Ph. 786.

11 *Ball* v. *B.*, (1827) 2 Sim. 35 ; *March* v. *M.*, (1867) L. R., 1 P. & D. 437 ; *R.* v. *Greenhill*, (1836) 4 A. & E. 624, 640.

12 *Blake* v. *Lord Wallscourt*, (1846) 7 L. T. 545.

temper ; [13] nor intemperance,[14] nor the mere fact of his marrying a second wife.[15] SECTION 253.

Mere poverty is no ground for disqualifying the parents,[16] unless it is accompanied by desertion [17] or bad character [18] or by the application of the minor's property to the use of the guardian.[19] So a Hindu mother lost her right as against Christian missionaries, by not contributing to the expenses of the child for 8 years,[20] and a Chinaman was held not entitled to be restored to the custody of a child kept with Roman Catholics for 1½ years.[21] On the other hand, where a father had become a convert to Christianity from Hinduism, and had left the child in the charge of its Hindu grandfather and uncle, for 6 years, he was held to have lost the right to the custody of the child.[22] See s. 262, com. " Welfare of the minor how considered." Poverty : Desertion : Bad character : Misapplication of property. Waiver.

The leading English case on the point of the parents' waiving or losing their rights is Lyons *v.* Blenkin.[23] There Lord Eldon laid down the principle that if the father's conduct has raised in the minds of the children expectations, founded on a particular species of maintenance and education, which he himself cannot afford, he cannot afterwards claim such rights over them as will alter the course of their lives, habits, and connections. Where the father in the exercise of his discretion as guardian entrusts the custody of his children to another, the authority he thus confers is revocable ; and if the welfare of his children requires it, he can, notwithstanding any contract to the contrary, take such custody and education once more into his own hands. However, the authority may have been acted upon in such a way, as in the opinion of the court exercising the jurisdiction of the Crown over infants, to create associations, or to give rise to expectations, on the part of the infants, which it would be undesirable in their interests to disturb or disappoint. If so the court will interfere to prevent the revocation of the authority.[24] Lyons *v.* Blenkin. Expectations of minor.

There may be an agreement between the parents relating to the custody of children.[25] By agreement.

Under English law going out of jurisdiction deprives the father of his right By going out of jurisdiction.

[13] *Re Curits*, (1858) 28 L. J. (CH.) 458.

[14] *Re Goldsworthy*, (1876) 2 Q. B. D., 75.

[15] *Audiappa* v. *Nallendrani*, (1015) 39 Mad. 473 ; *Siddiqunnissa* v. *Nizamuddin*, (1931) 54 All. 128.

[16] Per Kindersley, V. C., *Re Curtis*, (1858) 28 L. J. (CH.) 458, 463.

[17] *Re England*, (1830) 1 Russ. & M. 499 ; *ex. p. Swift*, *ib.* 575 (1828).

[18] *Ex p. Warner*, (1792) 4 B. C. C. 100.

[19] *Ex p. Mountford*, (1808) 15 Ves. 445.

[20] *In re Saithri*, (1891) 16 Bom. 307. [21] *Joshy Assam*, (1895) 23 Cal. 290.

[22] *Mokoond Lal S.* v. *Nobodip Chunder S.*, (1898) 25 Cal. 881. S. 262, com.

[23] *Lyons* v. *Blenkin*, (1821) Jac. 245, 255, 263 ; Halsb., *Laws of Eng.* XVII. s. 251.

[24] *Annie Besant* v. *Narayaniah*, (1914) 38 Mad. 807, 819 (P. C.) = 41 I. A. 314, 321 (very full report of arg. in (1914) 27 Mad. L. J. SUPPL.).

[25] See s. 24(7) ; cf. Cust. of Inf. Act, (1873) 36, 37 Vict. c. 12, s. 2 (agreement in separation deed between father & mother providing that father shall give up custody of infant to mother, not invalid ; but no Court shall enforce such agreement if of opinion that it will not be for benefit of infant to give effect thereto). Previously such agreement held invalid as contrary to public policy.

SECTION 253. to custody. This may have to be modified to suit Indian society and circumstances.[26] It may have more direct applicability where the property is in the charge of the Court of Wards, or the father leaves British India, and not merely the jurisdiction of the Court where the minor resides.[27]

Mother not disqualified by divorce but by re-marriage.

254.[28] The mother does not, on being divorced, lose her right (under s. 235, or 242), to the custody of her children,[29] unless she marries a second husband who is not related to the minor within the prohibited degrees ;[30] on so marrying she loses her preferential right, and the father becomes entitled to the custody of the children whatever be their age ; but on the death of the father,[31] or on the mother being divorced by her second husband,[32] her right revives.

5. DISQUALIFICATIONS AFFECTING THE HUSBAND :

Custody of wife.

256.[28] The husband has no right to take custody and possession of his wife before she attains puberty, unless she is, in the opinion of the Court, of such an age as to permit of consummation :[33] *semble,* under the Guardians and Wards Act, s. 19(*a*),[34] the husband would, in the absence of special circumstances, be considered unfit to be the guardian of the

[26] See s. 12, com.

[27] Cf. s. 235. Guardian appointed by Court : Guard. Act, s. 39(*h*). See also Emigration Act XXI. of 1883, ss. 6(3), 6(4), 33, 35(1). For English law *Re Suttor*, (1860) 2 F. & F. 267 ; *Re Thomas*, 22 L. J. (CH.) 1075 ; *Re Fynn*, (1848) 2 De G. & S. 457.

[28] Sect. 254 = ss. 254, 255 of earlier editions.

[29] *Sharh-i-Viqaya*, Vol. II. Book on *Talaq*, ch. on *Hizanat* (*init.*); *Emperor* v. *Ayshabai*, (1904) 6 Bom. L. R. 536 (divorced wife entitled to custody but father bound to provide maintenance, which wife may claim : Crim. Pro. Code, s. 488); *Mahomed Jusab* v. *Haji Adam*, (1911) 37 Bom. 71 : see s. 288(*a*) "father" *n.* & cases there cited ; *Zarabibi* v. *Abdul Rezzak*, (1910) 12 Bom. L. R. 891, 894.

[30] Bail. I. 432 (436); *Kundan* v. *Aisha B.*, [1938] All. 963 (females including mother otherwise entitled to custody lose right on marrying person not related to child within prohibited degrees). The Shia law is in Bail. II. 95-96.

[31] Bail. II. 95, 96 (*third*). Mother also loses right to custody in Shia law if she refuses to nurse child without being paid for it at higher rate than stranger demands : Bail. II. 96 (*first*).

[32] Bail. II. 96 (*third*) : some difference of opinion on this point.

[33] See s. 24(2), com. (2nd head); cf. also Guard. Act, s. 41(1)(*d*), (*e*); *Wazeer Ali* v. *Kaim Ali*, (1873) 5 N. W. P. 196 ; *Nur Kadir* v. *Zuleikha B.*, (1885) 11 Cal. 649 ; *Korban* v. *King-Emp.*, (1904) 22 Cal. 444. *In re Mahin B.*, (1874) 13 Beng. L. R. 160, (father apostatised from Islam, mother living with him : custody in circumstances to husband, though wife only 10 years old). *In re Khatiza B.*, (1866) 5 Beng. L. R. 557 (husband had not paid *mahr* : so not entitled to custody : s. 106).

[34] GUARDIAN NOT TO BE APPOINTED BY COURT IN CERTAIN CASES. The Guard. Act, s. 19(*a*) is as follows : "Nothing in this Chapter shall authorize Court to appoint or declare a guardian of person—(*a*) of a minor who is a married female, & whose husband is not, in the opinion of Court, unfit to be guardian of her person." See *Audiappa* v. *Nallendrani*, (1915) 39 Mad. 473. Compare ss. 230(4), 234 ; *Dinu* v. *Abdulla*, (1894) 29 Punj. Rec. 97 (No. 35). In England, as soon as daughter married, father's "natural jurisdiction over her, & right to her custody during her infancy," determined : Halsb. *Laws of England*. XVII. s. 251, p. 105.

person of the wife, or have her in his custody unless she has attained the statutory age of consent.[35] SECTION 256.

§ 4.—GUARDIANS OF PROPERTY : TESTAMENTARY GUARDIANS.

257. Under Hanafi law, the guardian of the property of minor children is their father ;[36] after the father's death, his executor ;[36] after the father's executor the paternal grandfather ; after him his executor. After the last, the Court[37] may take charge of the property, or appoint a guardian for it.[38] Guardian of property : father : grandfather : testamentary— 1. Hanafi law.

Illustration.

H purporting to act as the guardian of his minor brother, sold the minor's property. " The Governor's agent at Surat and the representative of the ruling authority in the management of the estate, was consulted as to the sale, and approved of it," and the Government sanctioned it. *Held* that the sanction of the " ruling power " constituted a sufficient authority for the act of the guardian, provided that the transaction was one that a duly constituted guardian might have entered into on behalf of his ward under the rules of Muhammadan law.[37]

258. (1) The father and after him the grandfather is under Shia law the guardian of a minor's [1] property,[2] and their survivor may appoint a guardian of the property.[2] 2. Shia law. Father's right to be guardian of property.

(2) The Shia authorities are divided as to the effect of an appointment by the father of a guardian for his minor children's property,[2] while the paternal grandfather is living. The better opinion seems to be that such appointment is of no effect ; but some authorities hold it valid with reference to one-third of the property.[2]

The guardianship of property does not, like the guardianship of the person (s. 236) devolve upon all blood-relations in succession.[3] The father is naturally

[35] See Ind. Pen. Code, s. 275 on AGE OF CONSENT.

[36] Cf. s. 234 ; *Ulfat B.* v. *Bafati,* (1927) 49 All. 773 (father is natural lawful guardian until deprived by competent court). *Imambandi* v. *Mutsaddi,* (1918) 45 I. A. 73, 83, 84. Executor may be appointed for limited purpose, or on condition that he shall not be executor in other matters (Bail. I. 671) ; presumably, in this manner testamentary guardian may be appointed ; some doubt whether (under Shia law) father can appoint guardian in lifetime of grandfather : ss. 258, 272, comm.

[37] *Husein B.* v. *Zia-ul-nissa B.,* (1882) 6 Bom. 467 citing Macn. VIII., s. 5 ; ss. 11A, 256, 284A.

[38] Bail. I. 530 (539) 529-531 (538-540) ; 689 ; Hed. 555 : *Abdul Bari* v. *Rash Behari Pal,* (1880) 6 Cal. L. R. 413 (uncle has no right).

[1] Cf. s. 234.

[2] Bail. II. 230, 251. Opinion of minority, seems to indicate that guardians of property alone referred to, & not of person. Where testamentary guardian appointed, not easy to decide whether (i) mother loses right to guardianship either of minor's person [or property (if any)—as to which see s. 259] ; or (ii) whether mother's right is subject to right of testamentary guardian, but has priority over claims of all other persons,—latter seems more probable : see s. 259, com.

[3] Sect. 259 : *Abdul Bari* v. *Rash Behari Pal,* (1880) 6 Cal. L. R. 413.

SECTION 258. the guardian of the property of his minor children : s. 230(4). This right is generally taken for granted by the Muslim texts,[4] though express reference to it is not absent.

Father's right to appoint guardian.

The Guardians and Wards Act, s. 6, saves the right to appoint a testamentary guardian from being affected by anything in the Act.

(*a*) Of person.
(*b*) Of property.

It seems to have been assumed [5] that the Muhammadan law recognizes an absolute power of appointing testamentary guardians both of the person and of property (ss. 235, 244) and that if the power is exercised, no one else may be appointed guardian by the Court under s. 7 (1) of the Act, until the will is proved to be invalid. There are, however, reasons to doubt [6] whether Hanafi law permits the appointment of guardians of the person, so as to oust the rights of those entitled by law to have the custody of children. Under Shia law, the power of appointing testamentary guardians is more clearly defined : though there is some doubt, whether the power is confined to guardians of property (which seems most probable) or covers also guardians of the person.

An application may be made to the Court for the appointment of a guardian : If the father or grandfather has by will nominated as guardian a person other than the one with preferential claims under the law, the Court in making its order considers the father's or grandfather's wishes and weighs the reasons on which the testamentary appointment was made : [7] s. 259, com. (last paragr.).

Executors or guardians by implication.

The testator by leaving the whole of his property to his four grandsons (one of them a minor) in equal shares, without expressly appointing any executor, does not make the grandsons his executors, much less are the major grandsons thereby made the guardians of the minor.[8]

Mother not entitled to be guardian of her children's property.

259. Neither the minor's mother [8] nor uncle,[9] nor

[4] English law similar : *Thomasset* v. *Thomasset*, [1893] P. 295.

[5] (*Sayad*) *Shahu* v. *Hapija Begam*, (1892) 17 Bom. 560.

[6] *Matadin* v. *Sheikh Ahmad*, (1912) 39 I. A. 49 = 34 All. 213. TESTAMENTARY GUARDIANS IN ENGLISH LAW : in England Stat. 12 Car. II., c. 24, s. 8 authorizes father, by deed or will, to appoint guardian for any of his children until they attain 21 years. "The right of father himself as guardian is taken for granted although not expressly declared in Statute," *Thomasset* v. *Thomasset*, [1893] P. 295, 298.

[7] Cf. *Bosch* v. *Perpetual Trustee Co.*, [1938] A. C. 463, 481 (consulting WISHES OF PARENTS). *Tahad Ali K.* v. *Israr-ullah*, [1939] All. 89 (perpetual lease of agricultural land by major co-sharers & mother of minor co-sharers as their *de facto* guardian ; *held*, (1) settlement with a tenant for agricultural purposes of agricultural land forming part of zamindari property, inherited by widow & minor son, does not amount to alienation or transfer of minor's interest in immovable property, & is not therefore invalid, under *Imambandi* v. *Mutsaddi*, (1918) 45 I. A. 73 ; (2) though perpetual lease not binding on minor, yet (3) relation of landlord & tenant established between parties, & (4) revenue court alone could adjudicate on their rights & liabilities : head note misleading).

[8] Bail. II. 232 ; *Imambandi* v. *Mutsaddi*, (1918) 45 I. A. 73, 83 (cited in s. 235 com.) ; *Mahomed* v. *Esmail*, (1924) 51 I. A. 236 ; *Sita* v. *Amir*, (1886) 8 All. 324, 329, 339-340 (Mahmood, J.) followed *Baba* v. *Shivappa*, (1895) 20 Bom. 199 ; *Moyna B.* v. *Banku B.*, (1902) 29 Cal. 473 ; cf. *Aydeman K.* v. *Syed A.*, (1912) 37 Mad. 514, 519 ; *Hurbai* v. *Hiraji*, (1896) 20 Bom. 116 ; *Amina B.* v. *Ram Shankar Misra*, (1919) 41 All. 473 ; *Laloo Karikar* v. *Jagat Chandra Saha*, (1920) 25 C. W. N. 258 ; *Md. Shafi* v. (*Mt.*) *Kalsum B.*, (1923) 4 Lah. 467 ; *Rang Ilahi* v. *Mahbub Ilahi*, (1925) 7 Lah. 35 ; *Kannusami Chetty* v. *M. Rahimat Ammal*, (1932) 65 M. L. J. 548 ; *Shaikh Rajab Ali* v. *Sh. Wazir* A., (1916) 1 Pat. L. J. 188 ; *Kapura* v. *Shankar*, (1918) 53 Punj. Rec. 350 (No. 108) : acts of mother in dealing with estate of her

SECTION 259. nor uncle, nor brother, nor sister.

brother,[10] nor sister [11] is entitled to act as the guardian of the minor's property,[12] except on being appointed by the father, or paternal grandfather of the minor or by the Court ; [13] none of them has the power to sell [14] or mortgage [14] or otherwise deal with [14] the minor's immoveable property,[15] or to appoint by will a guardian for the minor.[16]

minor son are valid if they are to his manifest advantage, or caused by urgent or imperative necessity : so *held* on authority of (i) Ameer Ali, *Mahomm. Law* (4th ed.) II. 611 ; (ii) *Thandan Vallapil* v. *Kotuseri*, (1912) 15 I. C. 576 per A. Rahim, J. ; *Karim Khan* v. *Jaikaran*, [1937] Nag. 458.

[9] *Abdul Bari* v. *Rash Behari Pal*, (1880) 6 Cal. L. R. 413 (see *n.* 14).

[10] *Mata Din* v. *Sheikh Ahmad*, (1912) 39 I. A. 49 = 34 All. 213 ; *Fateh Din* v. *Gurmukh Singh*, (1928) 10 Lah. 385 ; *Ram Autar* v. *Ghulam Dastgir*, (1929) 51 All. 589 ; *Maiz Uddin Miya* v. *Nalini Bala Debee*, [1937] 2 Cal. 137 (BROTHER not guardian : cannot bind minor by promissory note).

[11] (*Mt.*) *Bukshan* v. (*Mt.*) *Maldai K.*, (1869) 3 Beng. L. R. (APP. CIV.) 423.

[12] As to guard. *ad. lit.* see *F. A. Shihan* v. *Abdul Alim Abed*, (1930) 58 Cal. 474 : as to citation in probate proceedings : *Azimunnissa* v. *S. Ali Khan*, (1926) 29 Bom. L. R. 434.

[13] Bail. II. 232 is misleading : mother may surely be appointed guardian by father or grandmother. It seems, therefore, that rule must refer to guardianship of property & that "of the property" must be read into text : Mother entitled to be guardian of her children in their infancy. See *n.* 15 on *Jafferali* v. *Standard B.*, (1927) 30 Bom. L. R 762 (P. C.) & *Tahad A. K.* v. *Israrullah*, [1939] All. 89 (see *n.* 7).

[14] *Mata Din* v. *Sheikh Ahmed*, (1912) 39 I. A. 49 = 34 All. 213 (BROTHERS) ; *Imambandi* v. *Mutsaddi*, (1913) 45 I. A. 73, 83 (sale by ELDER BROTHER) ; *Nizamuddin S.* v. *Anandi P.*, (1896) 18 All. 373 (UNCLE) ; *Abdul Bari* v. *Rash Behari*, (1880) 6 Cal. L. R. 413 (niece's property mortgaged by UNCLE) ; *Alim Ullah* v. *Abadi*, (1906) 29 All. 10 (paternal UNCLE cannot claim to be appointed guardian of nephew's niece's property in preference to mother) ; *Bhutnath* v. *Ahmed*, (1885) 11 Cal. 417 (mortgage by MOTHER, elder BROTHER & SISTER of minor's property not binding, there being no urgent necessity) ; see also *Fakiruddin* v. *Abdul Hussein*, (1910) 35 Bom. 217 ; *Tahad Ali Khan* v. *Israrullah*, [1939] All. 89 (see in n. 7). Cf. Bail. I. 530-531 (539-540) ; person having custody of a minor may take POSSESSION OF GIFT on his behalf ; *Karim Khan* v. *Jaikaran*, [1937] Nag. 458 (headnote misleading : judgment points out that if minor after attaining majority & after having accounts fully explained to him, executes promissory note, he is responsible : there was decree against defendant : p. 459, *ll.* 20-25 ; some expressions perhaps show disregard of language of Ind. Contr. Act, 1872, ss. 195-200). See also *Anto* v. *Reoti Kuar*, [1937] All. 195—*sed quaere*. *Md. Sultan* v. *Abdur Rahim*, [1937] AIR (RANG.) 175 ; (*Syed*) *Zainuddin* v. *Md. Abdur Rahim*, [1933] AIR (CAL.) 102, 106, col. ii, (MINOR MAY RATIFY on coming of age).

[15] *Mohammad Ejaz* v. *Md. Iftikhar*, (1931) 59 I. A. 92 (OU.) (MOTHER de facto guardian not competent to refer to ARBITRATION disputes in regard to her minor child's immovable property : fact that AWARD acted upon for many years during minority does not make it binding as FAMILY ARRANGEMENT) ; (*Syed*) *Zainuddin Hossain* v. *Md. Abdur Rahim*, [1937] AIR (CAL.) 102, 105. If, however, mother APPOINTED GUARDIAN UNDER GUARD. ACT, she may refer disputes to arbitrators, though more prudent to obtain Court's sanction under s. 33 : *Saidunnissa* v. *Ruqaiya B.*, (1930) 53 All. 428 ; *Mohsiuddin Ahmed* v. *K. Ahmed*, (1929) 47 Cal. 713 ; *A. Khorasamy* v. *C. Acha*, (1928) 6 Rang. 198 (mother not competent to enter into PARTNERSHIP contract with deceased husband's partner to continue business so as to bind minor children) ; *Jafferali* v. *Standard Bk.*, (1927) 30 Bom. L. R. 762 (P. C.) (STH. AFR.) (guardian had power under will & under law as stated in this work, to arrange for carrying on business for benefit of six sons two of whom minors) see s. 273 B ; *Tahad Ali Khan* v. *Israr-ullah*, [1938] All. 89 (see *n.* 7).

[16] Macn., *Mooh. Law*, 304. Hindu law is to same effect ; *Venkayyagaru* v. *Venkata*, (1897) 21 Mad. 401 : but see ss. 234, 238, & com. ; *Lyons* v. *Blenkin*, (1882) Jac. 245.

SECTION 259. Dealings with property

Consequently the Indian Limitation Act, art. 44, does not apply to the acts.[17] of such persons unless they have been appointed guardians : see ss. 284A, 284B. " In the absence of duly appointed testamentary guardians, the care of Ahmad Ali's [the minor's] property would devolve first on the father and his executor, next on the paternal grandfather and his executor, and failing these, the right of nomination of a guardian would rest in the ruling power and its administration ; (Macnaghten's Principles of Moohummudan Law, 5th ed., p. 304) : The brothers had, therefore, no right whatever to act except under the authority of an appointment by the Court." [14]

Executors and guardians.

The line is not strictly drawn in the texts between " executors " (of the father and grandfather) and guardians (of their minor children and grandchildren), though there are important distinctions between those entitled to be guardians of property and of the person respectively.

Testamentary guardian appointed by the mother.

Adoption is not recognized by the law of England any more than by Muhammadan law.[18] Yet a person may, on the father waiving his right over the child, by the force of circumstances, acquire or, (per Lord Eldon)[19] " purchase the power " of educating the children, " in the way and under the control and guardianship " which such person has " pointed out," and to which the parent has consented. Lord Eldon, accordingly upheld the appointment of guardians made by the will of the grandmother, who had maintained and brought them up, notwithstanding that the strict law of England [20] permits the father alone to appoint a guardian by will. Thus distant relations, and even strangers, who had been in loco parentis, acquire something like a right, to appoint testamentary guardians. When the mother recommends a guardian in her will, the weight to be attached to the recommendation as " the wishes of a deceased parent," [21] must be very considerable. This is subject to the father not having already made an appointment, and subject to the observations in s. 284A, com.

Sect. 260 : now see s. 284A.

§ 5.—GUARDIANS APPOINTED BY THE COURT.

Appointment of guardian by Court.

261. The District and High[22] Courts may appoint a

[17] *Mata Din* v. *Sh. Ahmad Ali*, (1912) 39 I. A. 49 ; *Laloo Karikar* v. *Jagal Chandra S.*, (1920) 25 C. W. N. 258 ; (*Mt.*) *Bukshan* v. (*Mt.*) *Maldai*, (1869) 3 Beng. L. R. (APP. CIV.) 423.

[18] See s. 225, com.

[19] *Lyons* v. *Blenkin*, (1821) Jac. 345, 263-264 : *Khiarajmal* v. *Daim*, (1904) 32 I. A. = 32 Cal. 296 = s. 569, *ill.* (4) (furnishes another example : estate of Naurez (i) purported to be represented by one of his children ; (ii) contended that that child was himself represented by his uncle as his guardian ; both contentions rejected).

[20] ENG. LAW, *s.* 225, com.

[21] Guard. Act, s. 17(2). In *Lyons* v. *Blenkin*, (1872) Jac. 245, 261 (GRANDMOTHER " attempts to do that which she could not lawfully do, viz. the father of her grandchildren being living, she APPOINTS A GUARDIAN during their minority.") ; *Bosch* v. *Perpetual Trustee Co.*, [1938] A. C. 463, 481, 482 (on regard to be paid to WISHES OF FATHER & MOTHER depending upon wishes appearing just & wise).

[22] Not other Courts : Guard. Act, s. 4.

guardian,[23] or declare a person to be the guardian of the person or property of a minor,[24] or both his person and property.[25] SECTION 261.

Guardians and Wards act, s. 7.

The Guardians and Wards Act, s. 7, authorizes the Court (1) if satisfied that it is for the welfare of a minor to do so, to (*a*) appoint a guardian of his person or property, or both, or (*b*) declare a person to be such a guardian.[26] (2) An order under this section shall imply the removal of any guardian who has not been appointed by will or other instrument or appointed or declared by Court. (3) Where a guardian has been appointed by will or other instrument or appointed or declared by the Court, an order under s. 7 appointing or declaring another person to be guardian in his stead shall not be made until the powers of the guardian appointed or declared as aforesaid have ceased[27] under the provisions of the Act.[28] The Court is not authorized (s. 19) "to appoint or declare a guardian of the property of a minor whose property is under the superintendence of a Court of Wards."[29]

Court of Wards.

262. In appointing or declaring the guardian of a

Appointment or declaration of guardian.

[23] See Guard. Act, s. 7, set out, s. 261, com. High Court's inherent jurisdiction to appoint guard. of minor, or his estate, irrespective of Guard. Act: *Re Petition of Jairam Luxman*, (1892) 16 Bom. 634 (though under Guard. Act guardian cannot be appointed of Hindu minor member of joint family [*Sham-Kuar* v. *Mohananund Sahoy*, (1892) 19 Cal. 301], High Court may nevertheless do it); *In re Manilal Hargovan*, (1900) 25 Bom. 353 (F. B.).

[24] I.e. MINOR defined in Ind. Maj. Act, IX. of 1875, s. 3, viz. person under 18 years of age; *Mohideen Ibrahim N.* v. *M. Ibrahim Sahib*, (1915) 39 Mad. 608.

[25] Guard. Act, s. 7.

[26] In args. in *Annie Besant* v. *Narayaniah*, (full report, 27 M. L. J. (SUPPL.): suggested that father could never be declared or appointed guardian under Guard. Act. But later on pointed out that if father finds it necessary to have his right of guardianship declared, he is not prevented, 27 M. L. J. (SUPPL.) 26, 27, 30.

[27] See Guard. Act, ss. 38-41 = ss. 279, 282-284 of this work.

[28] PROCEDURE FOR APPOINTMENT of guardian under Guard. Act, s. 8: APPLICATION by person desirous of being, or claiming to be, guardian or relative or friend, or by Collector; s. 10: *form* of application, (i) particulars to be contained therein, for purpose of identifying minor, (ii) his or her circumstances relating to position in life, religion, property, relatives & residence, (iii) mentioning CAUSE for application; s. 11: PROCEDURE on such application viz. for fixing day for hearing by Court & serving notices upon persons concerned (parents, de facto guardians, etc.); s. 12: INTERLOCUTORY orders for PROCEDURE OF MINOR & INTERIM PROTECTION of person & property; after which Court hears EVIDENCE that may be adduced. Court cannot refuse to do so: (*Sayad*) *Shahu* v. *Hapija B.*, (1892) 17 Bom. 560; s. 13: APPOINTS a guardian (ss. 15-18); PROCEEDINGS IN MORE COURTS THAN ONE regarding person or property of same minor: ss. 14 & 16.

[29] ACTS RELATING TO COURTS OF WARDS—(*a*) BENGAL: (i) Act XXVI. 1854, applying originally to Presid. of Fort William; repeated,—in BENGAL, by Act IV. 1870, s. 86; in N. W. PROV. (except as to the scheduled districts), by Act XIX. 1873; in ASSAM by Act V. (1897): & in BURMA by Act XIII. 1898, s. 18; (ii) BENGAL Act IX. 1879 (Bengal Ct. Wds. Act) amended 1881, 1892; (iii) BENGAL Act III. 1881. (*b*) The N. W. P. LAND REVENUE Act, XIX. 1873 (ch. VI.), amended by Act VIII. 1879; see BENG. Reg. V., 1799, s. 8. (*c*) OUDH REVENUE Act, XVII. 1876 (ch. VIII.) amended by Act XX. 1890, ss. 3, 12, 28, 31. (*d*) CENTRAL PROVINCES Ct. Wds. Act, XXIV. 1899. (*e*) PUNJAB LAWS Act IV. 1872 (ss. 34-38) amended by Act XII. 1878; Act XXVI. 1854 still printed in Punjab & Lower BURMA Codes. (*f*) MADRAS Reg. V. 1804; Reg. X. 1831; Act. XXI. 1855; Act XV. 1874. (*g*) BOMBAY Act I. 1905 (Bom. Ct. Wds. Act). (*h*) See also Act XXXIV. 1858, s. 24; Act XXXV. 1858, s. 9, for LUNATICS' estates; and Reg. I. 1888 (for AJMERE) where Bengal Act, IX. of 1879, also extends.

SECTION 262.

1. Law to which minor subject.
2. Welfare
3. Preference
4. Willingness of guardian to act.

Muslim, the Court is guided by the provisions of the law [1] to which the minor is subject,[2] and consistently with that law, by what in the circumstances appears to the Court to be for the welfare of the minor, having regard to (*a*) the age, sex, and religion of the minor ; (*b*) the character and capacity of the proposed guardian, and his nearness of kin [4] to the minor ; [3] (*c*) the wishes, if any, of deceased parents ; [3] and (*d*) any existing or previous relations of the proposed guardian with the minor or his property ; [3] provided first that if the minor is old enough to form an intelligent preference, the Court may consider that preference,[5] and secondly, that the Court has no power to appoint or declare any person to be guardian against his will.[6]

1. RELATIVE IMPORTANCE OF CONSIDERATIONS IN APPOINTING GUARDIAN

This section is based entirely on the Guardians and Wards Act, s. 17, omitting sub-s. (4), which refers only to European British subjects.

Sub-s. 17(1) provides that " 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." Consequently for the selection of a guardian all considerations are made subject,—

Welfare of minor.

(A) to the provisions of s. 17 itself.[1] Out of the four other sub-sections of s. 17, sub-ss. (3), (5) seem to be the only provisions to which the Courts can attend in the first instance. For sub-s. (4) does not apply to Muslims ; and sub-s. (2) merely explains what shall be considered for the welfare of the minor ; and that consideration—the minor's welfare—is by the section itself expressly subordinated to the law to which the minor is subject : inasmuch as the welfare of the minor has only to be attended to " consistently with " that law.[1]

(B) The Courts are next to be guided by what " appears to be for the welfare of the minor." But in considering this they have, as already stated, to act consistently with the law to which the minor is subject.

The reasons stated above justify, it is submitted, the form in which s. 262

1 Guard. Act, s. 17(1); see com. and *n.* 7 thereto.

2 Not necessarily the law laid down in the texts e.g. Caste Disab. Rem. Act, XXI. of 1850 & some provisions of Guard. Act, alter Muhammadan law.

3 Guard. Act, s. 17(2). *F. A. Shihan* v. *Abdul Ali Abed*, (1930) 58 Cal. 374 (GUARD. AD. LIT. must have no adverse interest : if he has & minor not properly protected, decree may be declared inoperative against him); *Azimunnissa* v. (S.) *Ali Khan*, (1926) 29 Bom. L. R. 434 ; *Bosch* v. *Perpetual Trustee Co.*, [1938] A. C. 463, 481, 482 (WISHES OF PARENTS).

4 Cf. *Sohna* v. *Khalak Singh*, (1889) 13 All. 78 (mere PROPINQUITY not the only consideration).

5 Guard. Act, s. 17(3); see com.

6 Guard. Act, s. 17(5); see com. Civ. Pro. Code, O. XXXII. r. 4(3) is to same effect.

of this work is framed. The subject is considered below in greater detail on general principles.

It is submitted that on the true construction of the Guardians and Wards Act s. 17, the provisions of Muhammadan law (if any) on the points contained in the two provisoes to s. 262 of this work are repealed.

Law by which minor governed : Court's opinion as to minor's welfare.

In some cases the Courts have said broadly that the welfare of the minor shall be the paramount consideration in appointing (or declaring) guardians.[7] This may afford an explanation of the different views on whether the Courts should consider the welfare of the minor in the first instance, or subordinate that consideration to the law by which he is governed.[8] The terms of the Act, its history, and the decisions of the Courts, support the view that the law governing the minor is the paramount consideration. But on examination it will be found that to contrast (1) the welfare of the minor with (2) the law by which the minor is governed, is to overlook certain fundamental notions underlying the law and its administration. As the judges are themselves required to follow the law,[9] not to give decisions in accordance with their own views of expedience, it is almost a contradiction in terms to say that the paramount consideration should be, not the law, but any other matter, e.g. the opinion of the Court as to the welfare of the minor. Moreover, the law is professedly based on a regard for the welfare of the minor. Assuming that it fails in its purpose, it is not the function of the judicial tribunals to set right the shortcoming of legislators. As to one of the component parts making up the welfare of the minor, viz. freedom from restraint it has been laid down : "Where the person is too young to have a choice, we must refer to legal principles to see who is entitled to the custody, because the law presumes that where the legal custody is, no restraint exists, and where the child is in the hands of a third person that presumption is in favour of the father."[10] Similarly legal principles show who is entitled to the custody, because the law places the right to custody where it deems that it will be exercised most for

The law itself best safeguards minor's welfare.

[7] *Re Gulbai & Lilbai*, (1907) 32 Bom. 50, following *Bindo* v. *Sham Lal*, (1906) 29 All. 210. *Submitted* : dicta in these cases not quite accurate. Thus *Bhoocha* v. *Elahi Bux*, (1885) 11 Cal. 574, (Garth, C. J., & Macpherson, J., felt bound to declare grandmother guardian, though they thought uncle far preferable); *Kundan* v. *Aisha Begam*, [1938] All. 963 (personal law to which minor is subject cannot be subordinated to what in opinion of Court will be for minor's welfare : mother disqualified by marriage to man not related to minor within prohibited degrees : grandmother preferred); (*Mt.*) *Mehraj* v. *Yar Md.* [1932] AIR (LAH.) 493; *Ansar Ahmad* v. *Samidan*, [1928] AIR (OU.) 220. *Bindo* v. *Sham Lal*, (1906) 29 All. 210 was dissented from in *Audiappa* v. *Nallendrani*, (1915) 39 Mad. 473; see also *Mohideen Ibrahim Nachi* v. *Ibrahim Sahib*, (1915) 39 Mad. 608; *Siddiqun Nissa B.* v. *Nizamuddin K.*, (1931) 54 All. 128. But see *n.* 1.

[8] Some judges have occasionally laid Milton to heart : "Men of most renowned virtue, have sometimes, by transgressing, most truly kept the law."

[9] Note that this expression does not, in this connection, refer to the law, in the Texts, but to that law as applicable in British India, with alterations & limitations imposed on it by Legislature.

[10] Coleridge, J., in *R.* v. *Greenhill*, (1836) 4 A. & E. 624, 643, cited by Lindley, L. J. in *Thomasset* v. *Thomasset*, [1894] P. 295, 298; by Bayley, J., *in re Saithri*, (1891) 16 Bom. 307, 312. Cf. *Audiappa* v. *Nallendrani*, (1915) 39 Mad. 473 (Guard. Act, s. 19 : father or husband must be unfit before another guard. can be appointed); *Mohideen Ibrahim Nachi* v. *Ibrahim Sahib*, (1915) 39 Mad. 608 = 30 M. L. J. 21.

SECTION 262.

the welfare of the minor ; and it is not for the Court to say that it is against the minor's welfare that custody should be taken away from the person (if any such there be) who is by law entitled to the custody, as of right : since, when the law lays down that the custody shall be with a specified person, the law presumes (to adopt Coleridge, J.'s words)[10] that where the legal custody is, there it is the greatest welfare of the minor to be placed. The Court is bound by the provisions of the law in forming its opinion as to whose custody is most for the welfare of the minor. The occasional dicta, therefore, that the minor's welfare is the paramount consideration must be understood (it is submitted) in the sense, that the principle on which the legislature proceeds, is that the welfare of the minor shall be the paramount consideration, and that this fact may be borne in mind in interpreting the words of the enactments. Sometimes the welfare of the minor clearly points who should be selected as the guardian and in the confidence that the ultimate object of the law is the minor's welfare, it is a short cut to consider the law from this aspect rather than through the portals of technicality and over scrupulous interpretation. The dicta must consequently be read with the reservation that judges cannot set their own views above those of the legislator, and if the law does lay down that a certain person is entitled to the custody of a child without any reservation (which, it may be stated, it rarely does)[11] the Courts are bound to give the custody to him in order to safeguard the welfare of the minor in the manner in which the law requires it to be safeguarded : for the Courts cannot put their own ideas of what is to be deemed to be the welfare of the minor, above the behests of the Legislature. Where the law leaves a discretion to the judge, that discretion will of course be exercised primarily with the object of promoting the welfare of the minor in accordance with the judge's understanding ; but in doing so the judge acts in accordance with the law by which the minor is governed,—which requires the judge to exercise his own discretion.[12]

Minor's welfare to be considered in matters left to the discretion of the Judge.

Even the father may lose the right to custody. The law recognizes his prima facie claim, which must be borne in mind, before turning to particular considerations about the welfare of the child in question : for as already stated by giving a prima facie right to custody, it is indicated that the welfare of the minor will prima facie be best safeguarded if he is in the guardianship of that person. The law lays down in regard to some relations what classes of disqualification would displace their right to the custody : see e.g. s. 253.

Here reference might be made to the observation of so ancient an authority as the Daaimu'l-Islam, that in the case of two equal guardians of the same class, that one has the right to the custody of the child who can educate him better ; and in case of equality in this respect, the more advanced in age.

3. WELFARE OF MINOR, HOW CONSIDERED. Age, sex, religion.

In considering what is for the welfare of the minor, his or her age, sex, and

[11] Guard. Act, s. 4(1), cll. (*d*) & (*e*), appear to assume that none except father & husband have absolute right. Cf. *Bhikno Koer* v. *Chamela K.*, (1896) 2 C. W. N. 191 ; *Kristo Kishor Neoghy* v. *Kadermoye Dossee*, (1878) 2 C. L. R. 583 ; *Audiappa* v. *Nallendrani*, (1915) 39 Mad. 473 ; *Mohideen Ibrahim Nachi* v. *Ibrahim Sahib*, *ib.*, 608. Moreover there is power of removal : Guard. Act, s. 39.

[12] Cf. *Bhikno Koer* v. *Chamela K.*, (1896) 2 C. W. N. 191.

religion are to be borne in mind. The texts pay special regard to each of these considerations, and it is presumed, that where no person is pointed out by that law as the one entitled to be the guardian, the Courts will proceed on the analogy of the same principles of preference,—with the possible exception of the consideration of religion as to which there may be some difficulty. Islam naturally favours its own law,[13] but the preference cannot hold in India,[14] there being no established State religion here. The fundamental principles of religion and morality underlying all creeds have, of course, to be accepted.[3]

SECTION 262.

Religion : freedom and equality.

The rule of English law is that the father is entitled to bring up his children in his own religion, and he cannot contract himself out of it by agreement, whether in consideration of marriage or otherwise.[15] After the death of the father, the child is to be brought up in the religion of its father, or according to his directions, unless he has waived or abandoned his rights,[16] or, for some other reason, it is for the benefit of the child to do otherwise.[17]

Father's religion.

" Though there is no case " says a learned author [18] " in which the father has been deprived of the custody of his children purely on the ground of his religious principles, yet, if the father's principles manifest themselves in conduct which the law looks upon as vicious and immoral, and he is likely to bring up his children in the same principles, the Court will interfere.[19] Lord Eldon's decision in " in the case of Shelley, the poet,[20] " has often been the theme of invective. It may be observed, however, that the decision might be justified on other grounds. Shelley had deserted his wife and children and left them for three years to be maintained by her relations. It might therefore well have been held that he had waived his rights by acquiescence.[20] Lord Eldon distinctly disclaims acting on the ground of the father's speculative opinions. His decision was based on the fact that Shelley's principles led him to uphold and practise conduct which the law condemned as vicious, e.g. to uphold the theory that marriage was not a binding institution, to act upon it by deserting his wife and children, and living with another woman, and to declare that he would bring up his children in similar views. It is difficult to see how any judge could, consistently with recognized principles have acted otherwise." [21]

Father : disqualified by religious views.

The Courts do not, as a rule, consider a male child to have attained the age of discretion so as " to form an intelligent preference," before he is 14 years

Preference of minor.

[13] Bail. I. 185 (185-186); II. 865 ; s. 5D, com.

[14] *Mokund Lal S.* v. *Nobodip Chunder S.*, (1898) 25 Cal. 881 ; s. 6, p. 46, *n.* 28.

[15] Cf. *Jamshed* v. *Soonabai*, (1907) 33 Bom. 122, 294 ff. (attitude of Irish Courts on questions of religion, there being no established Church in Ireland).

[16] *Re Boreham R.* v. *Smith*, (1853) 22 L. J. (Q. B.) 116 ; *Andrews* v. *Salt*, (1873) 8 Ch. App. 622 ; *Re Nevin*, [1891] 2 Ch. 299 (C. A.).

[17] *Re Saithri*, (1891) 16 Bom. 307 ; s. 253 (loss of right by father).

[18] Halsb. *Laws of Eng.* XVII. §§. 261-264.

[19] Simpson, *Infants* (3rd ed., 1909), 133-134.

[20] *Shelley* v. *Westbrooks*, (1817) Jac. 266. *Re Besant*, (1879) 11 Ch. D. 508 (mother, Mrs. Annie Besant, not allowed to enforce agreement giving her custody, because she promulgated atheistical opinion : had published, circulated obscene book).

[21] See s. 253. Cf. *Thomas* v. *Roberts*, (1850) 3 De G. & S. 758 ; *Re Curtis*, (1858) 28 L. J. (CH.) 458 ; *Re Meades*, (1871) 1 R. 5 Eq. 98 ; *Re Grimes*, (1877) I. R. 11 Eq. 465.

SECTION 262.

old ; nor a female before 16 years.[22] The Guardians and Wards Act does not fix the age of discretion.

Hanafi and Shafii law :

"The minor cannot be given an option," states the Sharh-i-Viqaya (a Hanafi text),[23] "except according to Imam Shafi [who considers that the child has the option of remaining with either parent, and his view is based on the tradition that the Prophet (on whom and whose descendants be peace) gave the child the choice between its mother and father, and said, 'go to either as you desire,' and said, 'Oh God, direct him (the child) rightly,' and the child chose its mother]." [24]

5. WILLINGNESS OF PROPOSED GUARDIAN.

According to the texts a father may be compelled to take charge of his minor children even against his own wish.[25] This rule is repealed in so far as it comes into conflict with s. 262, proviso (2) of this work. That proviso, however, refers exclusively to the appointment of a guardian by the Court.[26] The duty to maintain, which rests upon the father, is distinct. Again Muhammadan law considers it part of the duty of executors to act as guardians of property.

Consent to act as executor : effect of this as to guardianship of property.

Consent in the lifetime of the testator to act as executor, is said to debar from the option of declining the trust on the death of the testator, either relating to the entire duties of an executor, or in so far as they refer to guardianship.[27] The Courts cannot however force upon an unwilling person such a charge : s. 262, prov. (2). A person who has once accepted a trust, cannot at his own option decline to discharge the duties thereafter.[28]

Court may appoint joint guardians.

263. *Semble,* the Court may appoint two or more joint guardians of the person or property (or both) of a Muslim minor.[29] In that case, on the death of one or more of them, the guardianship continues to the survivor or survivors, until a further appointment is made.[30]

Death of one of several joint guardians.

"Where there are more guardians than one of a ward, and they are unable to agree upon a question affecting his welfare, any of them may apply to the Court for its direction, and the Court may make such order respecting the

[22] In *re Saithri,* (1891) 6 Bom. 307, (great number of English decisions cited ; see also *Thomasset* v. *Thomasset,* [1894] P. 295, (Lindley, L. J.); *Ex p. Hopkins,* (1732) 3 P. Wms. 152 ; *R.* v. *Howes,* (1860) 3 E. & E. 332, 336, 337 ; *Re Agar-Elllis, Agar-Ellis* v. *Lascelles,* (1883) 24 Ch. D. 331, 335, 337 (C. A.); *Re Mac Garth Infants,* [1893] 1 Ch. 143, 150 (C. A.).

[23] Book on *Talaq,* ch. on *Hizanat,* II. 169 (Lucknow, 1313 A. H.).

[24] Hed. 139, "distinguishes" tradition on ground that Prophet's prayer must have directed erring choice of child. *Mohideen Ibrahim Nachi* v. *Ibrahim Sahib,* (1915) 39 Mad. 608, 612 = 30 Mad. L. J. 21.

[25] See s. 267.

[26] On FATHER'S peculiar position his liability to MAINTAIN, see ss. 253, 267, 316-319, also s. 269.

[27] Cf. Hed. 697 ; Bail. I. 666-667 (677-678); II. 250.

[28] Guard. Act, s. 40 ; Ind. Trusts Act, s. 46 ; Ind. Succ. Act, XXXIX. of 1925, ss. 229-231. Cf. *Balkrishna* v. *Vinayak,* (1931) 34 Bom. L. R. 113, 115, citing *Mucklow* v. *Fuller,* (1821) Jac. 198, 201 ; *Booth* v. *Booth,* (1838) 1 Beav. 125, 128.

[29] Guard. Act, s. 15(1); cf. s. 234 of this work.

[30] Guard. Act, s. 38. In Eng. death of one joint guardian terminates guardianship of all : Hals. *Laws of Eng.,* XVII. s. 295. See s. 233 of this work.

matter in difference as it thinks fit." [31] It would seem that they must act jointly, and one of them may not act independently of the other. SECTION 263.

§ 6.—POWERS, DUTIES AND OBLIGATIONS OF GUARDIANS.

264. A guardian of the person of a ward is charged with the custody of the ward and must look to his support, health, and education and such other matters [1] as the law to which the ward is subject requires.[2]

1. GUARDIAN OF THE PERSON : Custody, support, health, education.

The Guardians and Wards Act, s. 25, empowers the Court to have a ward arrested in order to prevent his leaving the custody of his legal guardian. Leave of Court must be obtained before a guardian appointed by the Court (unless he is the Collector, or a guardian appointed by will or other instrument) is authorized to remove the minor beyond the jurisdiction of the Court : s. 26.

Use of force to defend minor.

" The natural duty of a parent to protect an infant child, justifies acts of personal violence in defence of the child, and upholding and maintaining of the child in a law suit." [3]

Suits.

As to instituting suits and taking legal proceedings, see Civil Procedure Code, Order 32 ; whereof r. 4(2) provides that, " Where a minor has a guardian appointed or declared by competent authority, no person other than such guardian shall act as the next friend of the minor ; or be appointed his guardian for the suit ; unless the Court considers, for reasons to be recorded, that it is for the minor's welfare that another person be permitted to act, or be appointed, as the case may be."

Control over marriage of minor.

264A. *Quaere,* whether a ward of the Court may lawfully marry without the consent of the Court.[4]

Court's control over guardian.

264B. (1) The Court may regulate the conduct and proceedings of a guardian of the minor's person, appointed or declared by the Court.[5]

(2) Subject to s. 264B(1) the guardian for marriage is

[31] Guard. Act, s. 43(2): Joint guardians though not appointed or declared by Court have, on diverence of opinion, power to apply to Court, whereas only those so appointed or declared, come under Guard. Act, s. 33(1).

[1] *Salubai* v. *Keshavrao,* (1931) 56 Bom. 71 (minor's MARRIAGE, s. 364B) : *F. A. Shihan* v. *Abdul Alim Abid,* (1930) 58 Cal. 474 (guard. *ad lit.*) ; *Azimunnissa* v. *Sirdar Ali Khan,* (1926) 29 Bom. L. R. 434 (citation in Prob. procdgs.).

[2] Guard. Act, s. 24 ; cf. s. 234.

[3] Halsb. *Laws of Eng.* XVII. s. 265 = s. 1391 (second ed.) citing Blackstone, *Com.* 450.

[4] GUARDIANS FOR MARRIAGE : ss. 59-68 : cf. (*Bai*) *Diwali* v. *Moti,* (1896) 22 Bom. 509 (Hindu case : Court doubted whether getting ward married falls within duties of guardian of person & property). In *Monijan* v. *Dist. Judge of Birbhum,* (1914) 42 Cal. 351 (extreme view that marriage of infant ward of Court may be allowed to take place without sanction or even knowledge of District Judge, not accepted); *Salubai* v. *Keshavrao,* (1931) 46 Bom. 71 (Court's powers discussed).

[5] Guard. Act, s. 43.

SECTION 264B. charged with the duty and has the right of arranging for the minor's marriage.[6]

Ward's marriage.

(3) It is not settled how and to what extent the Court may (by virtue of its powers over the person of the minor under ss. 264B(1), 265) control the arrangements about the marriage of a minor who has a guardian appointed or declared by the Court ; and whether the powers of the guardian for marriage may thus be indirectly controlled by the Court.[6]

Restraint : chastisement. Delegation of their right.

265.[7] The guardian of the ward's person may restrain and control the acts and conduct of the ward ;[8] and the father[9] may by personal and other chastisement to a reasonable extent inflict correction[10] on the child, for disobedience to his orders.[7] These rights may be delegated by the guardian or father respectively to a tutor, or schoolmaster, or other person.[11]

Obligation on father to take charge.

267.[7] Subject to s. 262, the father may be compelled to take charge of his child, after it has attained the age when he becomes entitled to its custody.[12]

The effect of the Guardians and Wards Act may be somewhat doubtful, inasmuch as this duty of the father is allied to his duty to maintain (ss. 316, 319). He may, of course, be ordered to maintain the child while it is placed in the custody of another person. On the other hand, where a father is in straitened circumstances and the child's mother refuses to take charge of it without hire, while its paternal aunt is willing to do so, the aunt is to be preferred.[13]

Moral duty in England to maintain child.

In England " except under the operation of the poor laws there is no legal obligation on the part of the father to maintain his child, unless indeed the

[6] *Salubai* v. *Keshavrao*, (1931) 56 Bom. 71 ; *Laxminarayan* v. *Parvatibai*, (1919) 44 Bom. 690 (seems to assume that in regulating conduct or proceedings of guardian appointed by Court, Distr. Judge has jurisdiction to deal with applications for sanction of RIVAL PROPOSALS FOR MARRIAGE of minor : but actual decision was that there being no appointed guardian, orders as to marriage of minor were without jurisdiction) ; *Bai Mani* v. *Bhailal*, (1929) 31 Bom. L. R. 1120.

[7] Ss. 265 & 266 (now amalgamated in s. 265) taken from Hals. *Laws of Eng.* XVII. s. 252, p. 107.

[8] *Fleming* v. *Pratt*, (1823) 1 L. J. (K. B.), 194 (young lady of 18 visited relation whom guardians had forbidden her to visit : guardians sent officers to bring her back, suit for trespass against guardians : *held*, if these facts had been pleaded & proved they would have justified guardians).

[9] *R.* v. *Hopley*, (1860) 2 F. & F. 202, 206-207 ; *Halliwell* v. *Counsell*, (1878) 3 L. J. 176.

[10] These powers of correction probably slightly less in case of mother ; still less in case of other guardians.

[11] *Ex p. M'Clellan*, (1831) 1 Dowl, 81 ; *R.* v. *Hopley*, (1860) 2 F. & F. 202, 206 ; *Fitzgerald* v. *Northcote*, (1865) 4 F. & F. 656, 686 : see s. 2.

[12] Bail. I. 431 (435).

[13] Bail. I. 435 (439). Cf. s. 253, s. 262, com. heads 3, 4.

neglect to do so should bring the case within the criminal law. Civilly there is no such obligation." [14] But there is a moral obligation on the father to maintain the child,[15] the obligation on the mother being less strong ; [16] and this moral duty is recognized in so far that the Court will not make an allowance to the father for the purpose of maintaining his infant child out of the child's property.[16] Ss. 316-319 supply a curious contrast. SECTION 267.

268. The mother is not compellable to take charge of her child so long as there is any other relative within the prohibited degrees to take charge of it.[17] *Quaere,* whether she is compellable in any circumstances.[18] Obligation of mother to take care of child, how limited.

269. (1) A guardian stands in a fiduciary relation [19] to his ward, and, save as provided by the will or other instrument (if any) by which he was appointed, or by the Guardians and Wards Act, he must not make any profit out of his office.[20] 2. GUARDIAN OF PROPERTY. Fiduciary relation :

(2) The fiduciary relation of a guardian to his ward extends to and affects purchases by the guardian of the property of the ward, and by the ward of the property of the guardian, immediately or soon after the ward has ceased to be a minor, and generally all transactions between them while the influence of the guardian still lasts or is recent.[21]

KORAN AND SUNNA ON MINORS, ORPHANS, LUNATICS :

The Koran repeatedly enjoins "dealing justly with orphans" (IV. 127).[22] It lays down that "it is not righteousness that ye turn your faces to the East and West but righteous is he who for the love of God giveth his wealth to orphans...." (II. 177, XC. 15); it insists on being "good to parents and kindred and to orphans," (II. 83) on "feeding with food the needy wretch, the orphan and prisoner for love of Him," (LXXVI. 8).—"Nay," it protests in another place, "but ye honour not the orphan nor urge not the feeding of the poor, and ye devour heritages with devouring greed and ye love wealth with abounding love." (LXXXIX. 17-20).[22] In consonance with these warnings, it was laid down, "Come not near the wealth of the orphan save with that which is better, till he come to strength," (XVII. 34, VI. 153). These injunctions Exhortations be just and equitable.

[14] *Bazeley* v. *Forder,* (1868) L. R. 3 Q. B. 559, 565, Cockburn, C. J. ; Simpson, *Infants,* (3rd ed.) ,152.

[15] Halsb. *Laws of Eng.,* XVII. s. 266. *Re Moulton, Graham* v. *Moulton,* (1906). 94 L. T. 456 (see s. 286, p. 312, *n.* 17).

[16] *Ibid.* ; Simpson, *Infants,* 240. [17] Bail. I. 431 (435) ; cf. s. 234.

[18] See s. 267, com. ; s. 262 prov. (2).

[19] Cf. *Re Cassumali J. P.,* (1906) 30 Bom. 591 ; *F. A. Shihan* v. *Abdul Alim Abed,* (1930) 58 Cal. 474 ; *Azimunnisa* v. *Ali Khan,* (1726) 29 Bom. L. R. 434.

[20] So guardian must not profit by selling his own property to minor, or buying minor's property : Bail. I. 681 (692) : Hed. 638.

[21] Guard. Act, s. 20, *verbatim.*

[22] See also Koran XCIII. 9 ; LXXXIX. 17 ; LXXVI. 8 ; XVII. 34 ; VI. 153 ; II. 83 ; 177, 220 ; IV. 2 ; 35 ; 6 ; 111 ; 127 ; XC. 15.

SECTION 269. having been interpreted so rigidly as to cause distress and loss to the orphans, the duties of guardians were explained more fully in the verse, "and they question thee concerning orphans. Say: To improve their lot is best.[23] And if ye mingle your affairs with theirs, then (they are) your brothers. Allah knoweth him who spoileth from him who improveth. Had Allah willed He could have overburdened you. Allah is Mighty, Wise." (II. 220).

Traditions about guardianship of property.

All the Koranic injunctions should be read in the light of the following tradition which traces the history of the guardian's duty: "Ibn-'Abbas said, 'When these revelations came down, viz. "Meddle not with the substance of the orphan, otherwise than for the improving thereof,"[24] and "Surely they who devour the possessions of orphans unjustly, shall swallow down nothing but fire into their bellies and shall broil in raging flames,"[25] all those who had orphans in their care went home, and separated their own food from that of the orphans, and also their water, fearful lest they might be mixed. Then, when the orphans left any of their meat or drink, it was taken care of for them to eat afterwards, or spoilt. Then this method was unpleasant to the orphans, and they mentioned it to the Prophet, then God sent down this revelation, "O Muhammad, they will ask thee concerning orphans, answer, to deal righteously with them is best, and if ye mix your things with theirs, verily they are your brethren."[26] Then they mixed their meat and drink together.'"[27]

Under the Muhammmadan law a guardian of the property is entitled to take "the ordinary hire or recompense for his trouble."[28] See Koran, IV. 5, (s. 230, com.) compare s. 344, com.

Father's privileges under Texts.

Muslim texts on law give to the father certain privileges[29] over his minor children's property, such as a preference over other creditors, if the father chooses to pawn or sell the minor's property. In so far as such privileges are in contravention of the rules contained in the present section, they must be taken to be abrogated by the Act, the father being by the definition a guardian whether or not appointed or declared as such. But where the father uses or disposes of the property of his children for their maintenance, he is entitled to do so under Muhammadan law (see ss. 290-292) and there is apparently no breach of trust (see s. 2 and 21 Geo. III. c. 70, s. 18, reproduced in the table of enactments, Chapter II.).

(*b*) Care in dealing with ward's property.

270. The guardian of the property of a ward is bound to deal with it as carefully as a man of ordinary prudence would

[23] Compare with this, Homer, *Iliad*, XXII. *ad. fin.*, Andromache's "description of the utter & hopeless destitution of the orphan boy, despoiled of his paternal inheritance & abandoned by all the friends of his father, whom he urgently supplicates & who all harshly cast him off."—Grote, *Hist. of Greece*, II. 123, ch. xx, *Iliad*, XXII. 490 ff.

[24] I.e. Koran VI. 153.

[25] I.e. Koran IV. 2, 3, 5, 6, 11.

[26] I.e. Koran II. 220.

[27] *Mishcat-ul-Masabih*, Bk. XIII. ch. xvii, part 3; Matthew, II. 142-143.

[28] Bail. II. 252; Guard. Act, s. 22, empowers Court to give allowance to guardian for his care & pains.

[29] Cf. Hed. 639.

deal with it,[1] if it were his own ;[2] and, subject to the provisions of the Guardians and Wards Act, Chapter III., he may do all reasonable[3] and proper acts for the realization, protection or benefit[4] of the property.[5]

SECTION 270. Restrictions on guardian's power how imposed.

The Guardians and Wards Act, s. 28, recognizes the validity of restrictions on the powers of guardians, imposed on them by the instrument appointing them. The Court has power (ss. 28, 32) either to impose or to remove restrictions. General restriction against the guardian mortgaging, charging, selling, making gift, etc., of immovable property : s. 29. If ss. 28 and 29 are disregarded, the disposition is voidable (s. 30); transfers are authorized only if necessary or evidently advantageous, ss. 29, 31 ;[6] the necessity or advantage must be recorded. The Court may, besides, impose conditions requiring its own sanction for the completion of the transfer ; or that it shall be at a public auction ; or as to terms of the lease, payment of proceeds into Court, etc.

271. The guardian of the property of a minor may either exercise[7] or refuse to exercise[8] the right of pre-emption on behalf of the ward.

(c) Guardian's dealings with minor's property : pre-emption :

272.[9] (1) A guardian cannot validly contract in the name of a ward, so as to impose on him a personal liability.[10]

contract : personal liability.

(2) The manager of a minor's estate, or guardian of a minor is not competent to bind the minor, or his estate, by a contract for the purchase of immovable property.[11]

(3) A guardian's powers with respect to the immovable property of his ward, are restricted so that he cannot alienate it unless there is absolute necessity for the alienation, or it is greatly for the benefit of the ward.[12]

Immovable property.

1 (*Syud*) *Lootf Hoosein* v. *Dursun Zall Sahoo*, (1875) 23 W. R. 424.

2 Cf. *Learoyd* v. *Whiteley*, (1887), 12 A. C. 727, 733. See also *Lal Bahadur S.*, v. *Durga*, (1881) 3 All. 437 ; *Umrao Singh* v. *Dalip S.*, (1901) 23 All. 129.

3 *Bodh Mull* v. *Gouree Sunkur*, (1886) 6 W. R. 16 ; *Roushun Jahan* v. *Enaet Hoosein*, (1866) 5 W. R. 5.

4 *Re Cassumali J. Pirbhai*, (1906) 30 Bom. 591 (duty of guardians primarily to preserve, not to add to, property of minor).

5 Sect. 270 = Guard. Act, s. 27, *mutatis mutandis*.

6 Cf. Bail. I. 676 (681): distinctions between cases where there are, & where there are not DEBTS & LEGACIES, between MOVEABLE & IMMOVEABLE property, consent or want of consent on part of heirs who are not minors.

7 *Lal Bahadur S.* v. *Durga*, (1881) 3 All. 437 ; Bail. II. 180 (par. 2, 4).

8 *Umrao Singh* v. *Dalip S.*, (1901) 23 All. 129 (plaintiff's mother & guardian, held to have acquiesced in sale, which taken as sufficient refusal).

9 *Jafferali* v. *Standard Bank*, (1927) 30 Bom. L. R. 762 (P. C.) = p. 302, *n.* 23.

10 *Waghela* v. (*Shekh*) *Masludin*, (1887) 14 I. A. 89 (BOM.).

11 Sect. 272(2) from *Mir Sarwarjan* v. *Fakhruddin*, (1911) 39 I. A. 1 = 39 Cal. 322 ; (1906) 34 Cal. 163.

12 *Imambandi* v. *Mutsaddi*, (1918) 45 I. A. 73, 84, 88, 91 adopted and followed :

SECTION 272. Sale of immovable property.

The following[13] was cited and applied by the Privy Council.[11] "A guardian is not at liberty to sell the immovable property of his ward except under seven circumstances, viz. (i) when he can obtain double its value; (ii) when the minor has no other property and the sale is absolutely necessary to his maintenance; (iii) when the late incumbent died in debt which cannot be liquidated but by the sale of such property; (iv) when there are some general provisions in the will which cannot be carried into effect without such sale; (v) when the produce of the property is not sufficient to defray the expenses of keeping it; (vi) where the property may be in danger of being destroyed; (vii) when it has been usurped and the guardian has reason to fear that there is no chance of a fair restitution."[13]

The Privy Council[14] have enunciated the following propositions :—

De jure guardians : their powers restricted.

(1) No one except the persons in whom the legal guardianship of a minor is vested [viz. (*a*) father, (*b*) his executor, (*c*) grandfather, (*d*) his executor, (*e*) guardian appointed by Court : ss. 257, 258] has any right or power to intermeddle with the property of a minor, except for certain specified purposes, the nature of which is clearly defined (p. 84).[15] [Thus the mother is not competent to refer to arbitration disputes in regard to the immovable property of her minor child][16]

(2) The powers even of de jure guardians are confined within legal limits, being subject to the conditions of necessity for, or benefit to, the infant (pp. 84, 88).[15]

(3) As to the executor-guardian (wasi,)—

Executor-guardian's powers.

(*a*) he may sell or purchase moveables on account of the orphan under his charge, either for an equivalent or at such a rate as to occasion an inconsiderable loss (p. 84);

(*b*) it is unlawful for him to sell immovable property, unless it be evident that it will otherwise perish or be lost, in which case the sale is allowed (p. 85); it is allowed in three (other) cases :

(i) where there is a purchaser willing to give double its value; or

Mohammad Ejaz Husain K. v. *Mohammad Iftikhar Husain*, (1931) 59 I. A. 92; *Hurbai* v. *Hiraji*, (1895) 20 Bom. 116, 121; (*Mt.*) *Bukshun* v. (*Mt.*) *Doolhun*, (1869) 12 W. R. 337; (*Mt.*) *Syedun* v. (*Mt.*) *Syud V.*, (1872) 17 W. R. 239; (*Mt.*) *Bukshan* v. (*Mt.*) *Maldai*, (1869) 3 Beng. L. R. (A. C.) 423; *Bhutnath* v. *Ahmed*, (1885) 11 Cal. 417, 420 (*ll.* 1-2), 421 (*ll.* 4-7); (*Thottoli Kotilan*) *Aliyumma* v. *Kunhammed*, (1910) 34 Mad. 527, 532. *Ayderman K.* v. *Syed*, (1912) 37 Mad. 514, 517 (A. Rahim, J., cases reviewed) overruled by *Imambandi* v. *Mutsaddi*, (1918) 45 I. A. 73; *Abid* v. *Imam*, (1916) 38 All. 92; *Zeebunnissa* v. *Mrs. Danaghe*, (1935) 59 Mad. 945 (within power of father's as guardian of minor daughter to grant lease of minor's property if for minor's benefit).

[13] Macna. *Mooh. Law*, ch. viii. 14, also approved in *Hurbai* v. *Hiraji*, (1895) 20 Bom. 116, 121.

[14] *Imambandi* v. *Mutsaddi*, (1918) 45 I. A. 73 (CAL.) disapproving *Ayderman* v. *Syedali*, (1912) 37 Mad. 514. The statement in present work approved and applied by Lord Cave, L. C. *Jafferali* v. *Standard Bank*, (1928) AIR (P. C.) 135 = 30 Bom. L. R. 762 = 47 Cal. L. J. 292 = s. 273A, *n.*

[15] *Imambandi* v. *Mutsaddi*, (1918) 45 I. A. 73.

[16] *Mohammad Ejaz* v. *Md. Iftikhar*, (1931) 59 I. A. 92. See also *Ghulam Muhammad* v. *Ghulam Husain*, (1931) 59 I. A. 74, 87, 88.

(ii) the sale is necessary to meet the minor's emergencies ; or

(iii) there are debts of the deceased and no other means of paying them (p. 91).[17]

(*c*) The rule in clause (*b*), above, applies to all forms of property which, like aqar,[18] combines both security and permanency. But it does not exclude the discretion of the Judge to sanction varying investments in the interests of the infant (p. 91).[15]

(*d*) With reference to the retention of the share of a minor in an ancestral partnership business : see s. 273A.

(4) As to the executor of a mother, or a brother, viz. where a mother or brother has died leaving a minor son or brother and having appointed an executor,—

(*a*) he may lawfully sell anything but aqar [18] belonging to the estate of the deceased ;

(*b*) he may not sell aqar,[18] except as stated below ;

(*c*) he may not lawfully buy anything for the minor but food and clothing which are necessary for his preservation ;

(*d*) he may not sell anything that the minor has inherited from his father, whether movable or immovable, and whether the property be involved in debt or free from it ;

(*e*) if the estate is involved in debt or legacies, he may sell so much of it as is necessary to defray the debt, the sale of aqar[18] coming within his power, for this purpose.[15]

Powers of de facto guardian.

(5) The following acts of an unauthorized person who happens to have charge of a child (a de facto guardian)[19] are binding on the infant's property : acts arising from the wants of an infant, such as buying or selling for him on occasions of need, or hiring a nurse for him, or the like. The permissibility of these acts depends on the emergency which gives rise to the imperative necessity for incurring liabilities without which the life of the child or his perishable goods and chattels may run the risk of destruction. But there is no reference here to the pledge (mortgage) or sale of immovable property, as the power of dealing[20] with that class of property is confined to the de jure guardians.

(6) A de facto guardian [19] who has charge of the person or property of a minor without being his legal guardian has no power to convey to another any right or interest in immovable property which the transferee can enforce against the minor ; nor can such transferee if let into possession of the property under such unauthorized transfer, resist an action in ejectment on behalf of the minor as a trespasser.[15]

17 See Macn. *Mooh. Law*, ch. viii, cl. 14, cited above.

18 *Aqar* = immoveable property including houses, groves, orchards, &c.

19 See s. 230(3).

20 E.g. *Mohammad Ejaz* v. *Md. Iftikhar*, (1931) 59 I. A. 92 (de facto guardian cannot refer disputes relating to immovable property to ARBITRATION).

SECTION 272. A person who considers it necessary or convenient to act on behalf of a minor, may get himself appointed a guardian, and obtain the sanction of the Court to his act.

"A sale by which the disputes [about the minor's title to the property] were put an end to," the Privy Council held, "looking at the whole of the transaction," to be within the power of the guardian to make.[21]

(*d*) Acknowledgment of debt : Limitation.

273. A guardian has authority to acknowledge a debt on behalf of his ward, so as to give the creditor a fresh start for the period of limitation.[22]

(*e*) Retaining minor's property in partnership

273A. The guardian of a minor (appointed under his deceased father's will) has power to bind the minor to an arrangement admitting him to the benefit of a partnership (originally carried on by his father) : so that the business is thereafter carried on for the benefit of the minor as well as the adult (managing) partners ; and so as to bind the minor's share in the partnership assets and in the estate of his father, (to which share the minor became entitled under a deed of gift, or which, subject to the right of his mother to maintenance, became vested in him on his father's death) ; and so as to make such shares liable for the obligations of the firm. But the minor cannot before he comes of age be made personally liable therefor. After the arrangement any of the managing partners may execute a mortgage binding the partnership property, including the minor's share therein.[23]

Admitting to benefit of partnership

binding his share.

[21] *Kali D.* v. *Abdul Ali*, (1888) 16 I. A. 96 = 16 Cal. 627, 634, 635.

[22] Ind. Limit. Act, s. 21(1), giving effect to (i) *Sobhanadri* v. *Sriramulu*, (1893) 17 Mad. 221, & (ii) *Kailasa* v. *Ponnukannu Achi*, (1894) 18 Mad. 456 ; overruling (i) *Chato* v. *Bilto*, (1898) 26 Cal. 51 ; (ii) *Wajibun* v. *Kadir*, (1886) 13 Cal. 292 ; (iii) *Azuddin Hossain* v. *Lloyd*, (1883) 13 C. L. R. 112. See (*Maharana Shri*) *Ranmalsinghji* v. *Vadilal*, (1894) 20 Bom. 61, 74, 75, (it may be for benefit of minor to have debt acknowledged as he may thereby get time to pay it, Muttusami Ayyar, J.). Cf. Guard. Act, s. 27 = s. 270, above.

[23] "The real question" said Lord Cave, "is whether after his death there was a valid arrangement under which the BUSINESS was CARRIED ON for the BENEFIT OF the six SONS [two of whom, the appellants, were minors] but under the management of the three managing partners. On that point it is of vital importance that immediately after the death of Bhaloo Lakha, a request was signed to the Bank to open an account in the name of the firm & that request contained a statement by Muhammad Ali the guardian of the two minors [appointed under the will of Bhaloo] that all the six sons were partners in the business. If the guardian had power to bind the minor sons, then the request was decisive ; & it appears to their Lordships that both on the law as stated in Mr. Tyabji's book & on the terms of the will appointing him guardian, Muhammad Ali had that power. He had to decide how the business & the business assets in which the minors were interested could best be dealt with for their benefit ; in other words he had to say whether the business should be wound up or whether it should for a time be carried on. He decided in favour of the latter view ; & the profits of the business were divided among all six sons. The effect was that in accordance with [Ind. Contract Act, s. 247], the two sons who were MINORS were ADMITTED TO THE

SECTION 274.

3. WARD'S REMEDIES AGAINST GUARDIAN : as trustee.

274. The ward has all the remedies against his guardian that any other beneficiary has against his trustee ; in particular [23] a guardian may be sued for an account of what he has received in respect of the property of the ward, and ordered to pay the amount found payable by him.[24]

4. GUARDIAN APPOINTED OR DECLARED BY THE COURT. Opinion of Court.

275. A guardian appointed or declared by the Court may apply by petition to the Court which appointed or declared him, for its opinion, advice or direction, on any present question respecting the management or administration of the property of his ward.[25]

Marriage of female ward.

The powers of a guardian of the person of a female appointed or declared by the Court, cease on her marriage, if the Court is of opinion that her husband is not unfit to be guardian of her person : s. 41(1) (*d*) of the Act (s. 256).

The above-mentioned privileges are counterbalanced by the liability to orders regulating the conduct or proceedings of any guardian appointed by the Court on an application under s. 43 ; by the restrictions against removing the ward out of the jurisdiction of the Court, without the permission of the Court, (s. 26); disregarded of which may induce a fine of Rs. 1,000 or imprisonment for six months (s. 44) ; liability to give a bond (s. 34), which may be forfeited (s. 35); to file accounts, and to make payments into Court, in default of which he is liable to be fined (s. 45).

BENEFIT OF THE PARTNERSHIP, & as the result of the admission, while they could NOT before they came of age, be made PERSONALLY LIABLE for the obligations of the firm yet their SHARES IN the PARTNERSHIP property were LIABLE to the obligations of the firm. The document signed by the appellants on 12 June, 1922 in no way affected that liability.....A third question has been raised, namely, whether one of the partners (Husain) had POWER TO MORTGAGE the property to the Bank so as to bind the firm. That question is really not material to the appellants ; for even if the mortgage was ineffective, the house being part of the business assets would be available for the general body of the creditors & no share would come to the appellants. But it appears to their Lordships that upon the terms of s. 251 of the [Ind. Contr. Act] the managing partner had power to execute the mortgage : *Jafferali* v. *Standard Bank*, [1928] AIR (P. C.) 135 = 30 Bom. L. R. 762 = 47 Cal. L. J. 292 = 107 I. C. 453.

[23] Guard. Act. s. 37.

[24] *Ib.* s. 36 ; s. 35 provides for suit on bond into which guardian may be asked to enter ; ss. 36, 37. On death of ward or guardian, their representatives may sue & be sued. *Mahomed* v. *Esmail*, (1924) 51 I. A. 236 affirming 45 Bom. 967 (SALE of minor son's share in property, by Banubai widow, purporting to act as guardian : set aside by decree on terms that son should pay into Court certain sum within 6 months ; son failed to pay, but mortgaged, & subsequently sold, his share : son's mortgagee deposited said amount so that benefit of decree be not lost to son, his vendor. Later conflict arose between (i) appellant, PURCHASER FROM WIDOW (with whom son's mortgagee joined hands), (ii) PURCHASER FROM SON. *Held* son's mortgagee entitled to make deposit for son (so as to save decree from becoming futile): but not allowed unconditionally to withdraw deposit so as to defeat claims of son's vendee ; the latter accordingly allowed to pay off amount of deposit to mortgagee & subject to that, to take property).

[25] Guard. Act, s. 33(1): PROCEDURE s. 33(2): service of copy of petition ; s. 33(3) : PROTECTION OF GUARDIAN if he acts on opinion, advice or direction given to him on facts stated by him in good faith. .

SECTION 276. Guardian enforcing his rights.

276. A person entitled to be the guardian of a minor [26] may enforce his right by suit, or by application for a declaration of his right under the Guardians and Wards Act, s. 7, or for delivery to him of the custody of the child under the Criminal Procedure Code, s. 491.[27]

§ 7.—TERMINATION OF GUARDIANSHIP.

Emancipation of male child.

277. No person has the right to the custody of a male child [28] after the child has attained majority.[29]

1. ATTAINMENT OF MAJORITY OR MARRIAGE.

Under Hanafi law, after a child has attained puberty, "if he is of ripe discretion, and may be trusted to take care of himself, he is to be set free, and allowed to go where he pleases, but if he cannot be trusted to take care of himself, the father should join him to himself or keep him by him, and be his guardian." [30] The Shia law is similar : "When a child has attained to puberty and discretion, the power of the parents is at an end, and he is free to join himself to whomsoever he pleases." [31]

Emancipation of females.

278. (1) No person has under Muhammadan law the right to the custody of a virgin [28] after she has attained puberty [31] and the age of discretion.[32]

Husband's right.

(2) The powers of the guardian of the person of a female ward cease on her marriage to a husband who is not unfit to be the guardian of her person ; provided that where a guardian of her person has been appointed or declared by the Court, his powers do not cease, unless the Court is of opinion that the husband is not unfit.[33]

2. REMOVAL OF GUARDIAN BY COURT.

Act, s. 39.

279. A guardian appointed or declared by the Court, or appointed by will or other instrument, may be removed by the Court [34] under the Guardians and Wards Act, s. 39.[35]

[26] Cf. s. 234.

[27] The procedure under s. 491 simplest, based on *habeas corpus*.

[28] See s. 234.

[29] Guard. Act, s. 41(1)(c); see s. 229 of this work. The texts would substitute puberty [& discretion]" for the word "majority" ; see s. 5A.

[30] Bail. I. 434 (438) (par. 2). [31] Bail. II. 96 (*second*).

[32] Bail. I. 434 (438). If she is not virgin, but "she cannot be safely left to herself, the father *ought* to keep her with himself," if "she may be trusted to take care of herself, the father has no right to retain her." *Quaere*, whether this provision comes under "rights & authorities of fathers of families" (21 Geo. III. c. 70, s. 18), within jurisdiction of certain High Courts. Table of enactments, ch. II. ; s. 2. Right of custody as guardian distinguishable from duty to maintain.

[33] Guard. Act, s. 41(1)(*d*) : s. 256, above.

[34] Cf. Hed. 698 ; Bail. I. 669 (680).

[35] CAUSES FOR REMOVAL OF GUARDIAN : (*a*) Abuse of trust, (*b*) non-performance

280. *Semble*, the High Court has inherent jurisdiction to declare or appoint a person other than the person who is entitled by law to be guardian, where in the opinion of the said Court the person entitled is unfit.[1]

SECTION 280. Inherent power in High Court to set aside unfit guardian.

281. *Semble,* where the person entitled by law to be the guardian of a minor has not been appointed or declared by the Court, nor appointed by will or other instrument, but is in the opinion of the District Court (other than a High Court)[2] by reason of any of the causes referred to in s. 279, unfit to be such guardian, the said Court may declare the said person to be guardian, and then remove him ; and thereafter appoint another person to be such guardian.

Procedure in District court.

It seems necessary for the District Court first to declare the person entitled by law to be the guardian, before it can remove him, as the Guardians and Wards Act, s. 39, empowers the said Courts to remove only such guardians as have been appointed or declared by the Court, or by a will or other instrument ; and only for the causes mentioned in s. 39. The powers referred to in ss. 280-281, may appear to give the Court discretion to choose the guardian for itself, irrespective of the person that is entitled by law. But it is submitted, that under the Guardians and Wards Act, s. 42, and the general policy underlying the Act, the Court does not, on the person entitled to be guardian being declared unfit, get plenary powers to appoint any other person guardian, but it must declare the person next entitled by law to be the guardian provided he is not unfit. There is a great deal of difference between absolute discretion, and a power that can be exercised effectively, only after the claims of a number of persons have first been set aside, by categorically holding that they are unfit.

Application of Guardians and Wards Act, s. 39.

Court must declare person next entitled.

Can the decision in Bindo *v.* Sham Lal[3] be justified on the grounds relied upon in the judgment ? It is there stated : " It is true there is nothing against the father ; " but he had married again, and so " it will be more for the welfare of the minor to live with her maternal grandmother, than with the stepmother." These grounds are not sufficient, it is submitted, to deprive the

Bindo *v.* Sham Lal. 29 All. 210.

of duties, (*c*) incapacity, (*d*) ill-treatment, (*e*) contravention of Act, (*f*) conviction, (*g*) adverse interest, (*h*) residence beyond jurisdiction, (*i*) insolvency, (*j*) guardianship ceasing under law to which minor is subject ; proviso : guardian appointed by will or other instrument must not be removed for (i) adverse interest, unless it accrued after death of person appointing, or appointment made in ignorance of it ; (ii) residence beyond jurisdiction, unless it is at impracticable distance. (*Mt.*) *Atkia B.* v. *Muhammad Ibrahim*, [1916] AIR (P. C.) 250 = 21 C. W. N. 345, 349-350.

[1] See ss. 281, 261, com. *nn.*

[2] See s. 280 as to High Court (which ordinarily included in " District Court " see Guard. Act, s. (4).)

[3] *Bindo* v. *Sham Lal*, (1907) 29 All. 210 : dissented from in *Audiappa* v. *Vallendrami*, (1915) 39 Mad. 473 ; see also *Mohideen Ibrahim N.* v. *Ibrahim S.*, *b.* 608. On AUTHORITY OF PARENTS over person of child, see *Thain, in re* [1926] 1 Ch. 676 ; *Carrot in re*, [1931] 1 K. B. 317.

SECTION 281. father of the custody of the child. The same decision might, perhaps, have been arrived at on the ground that the father had abandoned his right over the child, inasmuch as he had allowed the girl to be maintained by the grandmother for five years, ever since the death of the mother, without apparently contributing to the expense.[4]

Guardian : resignation : discharge : accounts.

282-284. On the resignation of guardians, the cessation of their authority over the minor's person and property, orders by the Court to the guardian or his representative to deliver, as the Court directs,[5] accounts or property belonging to the minor, orders discharging from liabilities (save as to fraud subsequently discovered), and appointing another guardian on the death, discharge or removal of a guardian, see the Guardians and Wards Act, ss. 40-42.

§ 8.—UNAUTHORIZED PERSONS ACTING AS GUARDIANS.

De facto guardian : property.

284A.[6] Where any person[7] other than the legal guardian of a Muslim minor[8] purports to deal with his property, the transaction may be avoided by the minor,[9] notwithstanding that the said property was so dealt with in order to pay the minor's debts, and was beneficial to him or necessary for his interest.[10]

[4] See ss. 253, 259 : *Lyons* v. *Blenkin*, (1821) Jac. 345.

[5] The *Daaimu'l-Islam* cautions guardians against GIVING OVER POSSESSION, to the WARD of his property before he acquires qualification of (i) age of marriage & discretion, or (ii) intelligence & capacity to take care of his property. In view of ardent regard that, in our days, guardians evince for their wards, & anxiety that they should not part prematurely—if at all,—with possession of their ward's property the caution seems unnecessary. The illustrious author adds, however, with shrewdness as well as with seeming foresight of days to come, that Court may compel guardian to hand over possession after ward acquires the said qualifications.

[6] Sect. 284A = s. 260 in first edition. See s. 259.

[7] *Abdul Rahim* v. *Abdul Hakim*, (1930) 54 Mad. 543 (defendant 1 regarded himself as guardian & acted as such, p. 249, not being guardian *de jure* he became GUARDIAN DE FACTO, p. 547).

[8] Sometimes called *de facto* guardian : s. 230(3). See ss. 234, 272.

[9] *Anto* v. *Reoti Kuar*, [1937] All. 195 (F. B.) (DE FACTO GUARDIAN, as defined in s. 230(3), has no power or authority whatsoever to transfer any right or interest in immoveable property belonging to minor). This proposition is mere restatement of definition of DE FACTO GUARDIAN & really implies : (i) law confers upon persons called guardians certain powers over ward's property ; (ii) persons not possessing qualification for being guardians under law cannot acquire powers of guardians merely by assuming them and calling themselves *de facto* guardians. Transfer by such person cannot (it was also held in same case) be RATIFIED BY MINOR on attaining majority : *Karim Khan* v. *Jaikaran*, [1937] Nag. 458 = AIR (NAG.) 390 (= s. 259, *n.*) ; *Md. Sultan* v. *Abdul Rahim*, [1937] AIR (RANG.) 175. See Ind. Contr. Act, ss. 196-200.

[10] *Matadin* v. *Sheikh Ahmed*, (1912) 30 I. A. 49 = 34 All. 213 ; *Imambandi* v. *Mutsaddi*, (1913) 45 I. A. 73, 83, 84 : see on this case s. 272, com. ; in particular propositions (5) & (6). *Sajjad Ali* v. *Muhammad Zulfikar A. K.*, (1916) 51 Punj. Rec. 252 (No. 83) ; (*Mt.*) *Mehr B.* v. *Chaman Din*, (1917) 52 Punj. Rec. 209 (No. 59).

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Manager-guardian distinguished.

De facto guardian.

Without some authority, the Privy Council [11] were unable to accept the view that "there is no difference between the position and powers of a manager, and those of a guardian." [12] In a later case when it was urged "that the elder brothers were de facto guardians of the respondent, and, as such, were entitled to sell his property, provided that the sale was in order to pay his debts and was, therefore, necessary in his interest," [12] they found it "difficult to see how the situation of an unauthorized guardian is bettered by describing him as a de facto guardian. He may, by his de facto guardianship, assume important responsibilities in relation to the minor's property, but he cannot thereby clothe himself with legal power to sell it." [13] It had been held, in India that transactions for the benefit of the minor [14] or lunatic, may be upheld; [15] not other transactions.[16] The law is now settled as stated in s. 272.

[11] *Mir Sarwarjan* v. *Fakhruddin Mahomed*, (1911) 39 I. A. 1 = 39 Cal. 233.

[12] Rampini, J. had, in *Mir Sarwarjan* v. *Fakhruddin*, (1906) 34 Cal. 163, 166, expressed the opinion rejected by P. C.

[13] *Mata Din* v. *Shaikh Ahmed*, (1912) 39 I. A. 49 (ALL.).

[14] Cf. Bail. I. 676 (687); see s. 272, com. par. (5), (6) on powers of *de facto* guardian.

[15] *Ummi B.* v. *Kesho Das*, (1908) 30 All. 462 (wife & MOTHER of lunatic may validly sell his property to pay HIS DEBTS; cases referred to); *Mafazzal Hosain* v. *Basid S.*, (1906) 34 Cal. 36; *Ram Charan S.* v. *Anukul Chanya A.*, *ib.* 65; *Majidan* v. *Ram Narain*, (1903) 26 All. 22). See also *Hasan Ali* v. *Mehdi Hussain*, (1877) 1 All. 533 (adversely commented upon in *Pathummabi* v. *Vitil Ummachabi*, (1902) 26 Mad. 734, 739,—itself overruled by *Abdul Majeeth* v. *Krishnamachariar*, (1916) 40 Mad. 242 (F. B.). *Moyna B.* v. *Banku Behari Biswas*, (1902) 29 Cal. 473 (MOTHER not natural nor *de facto* guardian of her minor children so far as property is concerned).

[16] *Hurbai* v. *Hiraji Bramji S.*, (1895) 20 Bom. 116 (conveyance by MOTHER on behalf of her minor son SET ASIDE when sale shown to be neither necessary nor for benefit of minor); *Fakhruddin* v. *Abdul Hussein*, (1910) 35 Bom. 217; see cases cited in s. 259, com.; also *Moyna* v. *Banku*, (1902) 29 Cal. 973; *Durgoji Row* v. *Fukeer S.*, (1906) 30 Mad. 197; *Ram Charan S.* v. *Anukul Chandra A.*, (1906) 34 Cal. 651; *Mafazzal Hosain* v. *Basid Sheikh*, (1906) 34 Cal. 36.

CHAPTER VIII

MAINTENANCE.

§ 1.—PRELIMINARY.

1. EXPLANATION OF TERMS.

285. In this chapter, unless there is anything indicating a different intention,

Maintenance. (1) "maintenance" includes food, raiment, and lodging ;[1]

Means. (2) a Muslim who is possessed of sufficient means to be prevented, according to the precepts of Islam, from accepting alms[2] is said to have "means to provide maintenance," or to have "the means to maintain ;" by "means" is meant "means to provide maintenance ;"

Indigence. (3) a Muslim who is not possessed of sufficient means to be prevented, according to the precepts of Islam, from accepting alms is said to be "indigent," or "in indigent circumstances ;"[2]

Ability to earn. (4) "ability to earn a livelihood" or "ability to earn" implies that the person is able to work for wages in point of health and strength and in accordance with what is usual among persons of his rank ; females are in no circumstances considered to have the ability to earn ;[3]

Necessitous person. (5) a person who is both indigent and unable to earn his livelihood is said to be "necessitous ;"

Ability to maintain. (6) "ability to maintain" implies (*a*) the present possession of means to maintain ; or (*b*) in the case of a person on whom the law imposes the obligation to earn (if necessary) the means for maintaining another,[4] ability to earn the said means ;

When a person can earn the means.

[1] Bail. I. 437 (441), 442 (446); II. 103 (par. 2). First law of Solon at Athens (594 B.C.) said to have related to ensuring of maintenance to wives & orphans. Plutarch, *Solon* 24 ; cf. Grote, *Hist. of Greece* III. 179, *n.* 2.

[2] Hed. 148 ; Bail. I. 461 (465) (citing *Hidaya, & Kifaya,* II. 393-394). MEANS WHICH MAKE IT UNLAWFUL TO BEG, are "a surplus of 200 *dirhams* (= Rs. 60-80) over one's necessities." On *dirham*, see *Asma B.* v. *Abdul Samad K.*, (1909) 32 All. 167 : s. 95(1) *n.* But see s. 285, com. ; Civ. Pro. Code, O. XXXIII. r. 5.

[3] Bail. I. 458 (462) ; see s. 292, *n.*

[4] E.g. father bound to earn, for providing maintenance for young children : s. 320.

(7) a "minor" is a person who has not attained majority under the Indian Majority Act IX. of 1875 ; and a "major" is a person who has attained it ; SECTION 285. Minor.

(8) a child who being a male, is not more than two years old, or being a female, is not more than seven years old, is said to be an "infant ;" Infant.

(9) a person who has not attained puberty is said to be "young ;" Young person.

(10) a person is said to be "adult," after he or she has attained the age of puberty ; Adult person.

(11) "presumptive heirs" are the relations of a living Muslim, who would inherit his estate if he were immediately to die :[5] "presumptive rights to inherit" refer to the expectations of inheriting which "presumptive heirs" have ; Presumptive heirs. Presumptive rights to inherit.

(12) two persons are said to be "within the prohibited degrees" if the relation between them is such that (i) being of different sexes, they cannot lawfully intermarry ; or (ii) being of the same sex, they could not have intermarried if they had been of different sexes. Prohibited degrees of relationship.

The law of maintenance suffers in point of definiteness, as the Muslim texts had no object in keeping legal rights distinct from obligations of a moral nature. The powers of a Kazi are so different from those of Courts of law in India, that rules sufficient to guide the Muslim courts can at times hardly be stated in a concrete form, without violence to some necessary, but merely implied, reservation or qualification. The whole of the law cannot, however, be said to be of merely imperfect obligation.[6] The present chapter states what seems legally enforceable. Maintenance undefined or of only moral obligation.

In some respects the texts cannot be charged with having left the law undefined. But the details in the texts about the quantum of maintenance, the rules for determining when a person must be considered necessitous, and for fixing the standard of means, the possession of which imposes the obligation to provide maintenance, are hardly applicable to our times and conditions.[7] Quantum of maintenance : means indigence.

The following precepts of the Prophet about begging are relevant, as those persons alone are entitled to maintenance, who are not forbidden to beg : "Verily it is better for one of you to take your rope, and bring a bundle of Begging stigmatized.

[5] *Nemo est heres viventis* applies in Muhammadan law as much as in any other system, cf. Bail. I. 463 (467), 574 (584), (par. 3) ; II. 9-10.

[6] *Mahomed Jusab Haji Adam*, (1911) 37 Bom. 71, 73. Cf. s. 267, com. : example of moral duties affecting legal obligations. It seems to have been seriously argued in this case that a Muslim father's duty to maintain his son should be determined by English & not Muhammadan law.

[7] Cf. *Bosch* v. *Perpetual Trustee Co.*, [1938] A. C. 463, 476-484.

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wood upon your back and sell it, in which case God guards his honour, than to beg of people, whether they give him or not." "Acts of begging are scratches, and wounds by which a man wounds his own face." "It was asked, 'O Prophet, what makes him in no need of asking,—in having which, it is forbidden to beg?' He said, 'Fifty dirhems [8] of silver [Rs. 15 to 20] or the value of that in gold.'" "The Prophet said, 'That property with the possession of which it is not right to beg, is that quantity of things which supports the night and the morning, that is, whoever has food for a day and night, it is prohibited him to beg.'" "That person who has forty dirhems [Rs. 12 to 16] or equal to it in value, then verily he begs in a forbidden way." "Verily it is not for the rich to ask, nor for a strong, robust person." [8]

Having food for a day and night makes begging unlawful.

Age of majority. Indian Majority Act as to maintenance.

The rules relating to maintenance are not excepted from the operation of the Indian Majority Act, as are the rules in regard to marriage, dower, divorce, adoption and religion. Hence it is implied that the Indian Majority Act "shall affect the capacity of any person to act" in regard to maintenance. Nevertheless, it does not follow (as has occasionally been suggested) that wherever in this branch of the law the texts refer to a minor, a minor as defined in that Act is to be substituted. For s. 3 of the Act, it is submitted, contains in the main a definition of terms, and cannot by itself affect the substantive law. The absence of any enactment of the Legislature in India, laying down, as a principle of universal application, the effect of a person being deemed to be a minor, such as there is in regard to contracts,[9] has already been adverted to.[10] A mere definition of English words (like majority and minority) however authoritative cannot, by itself, affect a system of law the expositions of which are contained mainly in Arabic. Such definitions must no doubt act as a warning to translators, that they ought to be careful not to use indiscreetly the words so defined, unless in the originals, which they are translating, the same notions are annexed to the terms as are contained in the said definitions. Thus, in regard to the law of maintenance, the Muslim texts lay down, that until the age when a child is weaned, its rights are of one description, and after it, until the attainment of seven years, different sets of considerations prevail; finally, between seven years and puberty its rights are of a third description. Can the definition of majority in the Act extend the last-mentioned class of rights up to the age when a person is said to have attained the age of 18 or 21 years any more than the said definition can extend the rights given to an infant in arms upto that age? It is true that when the texts wish to refer to the attainment of puberty they occasionally do so by means of Arabic words, the effect of which might be represented in English by the words "reaching the full age" or "attainment of majority"; but, on the other hand, the Indian legislature by adopting a definition of majority not determinable with reference to puberty, cannot have the effect of altering the purport of the Arabic words.

Definition of majority in Act cannot affect divisions of human life

[8] *Mishcat-ul-Masabih*, VI. v. 1, 2. See s. 328 citing Bail. I. 461 (465). Cf. Grote, *Hist. of Greece*, III. 180.

[9] Ind. Contr. Act, s. 11.

[10] See s. 5A.

It might perhaps be urged that by the definition in question the legislature must be supposed to have intended to abrogate the substantive law, relating to the matters referred to. But there is nothing to indicate that the legislature intended to enact that the only division of human life in regard to any law recognized in the Courts shall be that of minority and majority ; and that rights or duties annexed by the law of Islam to any period of life anterior to the age defined in the Act as the age of majority, shall in future be continued to the person in question until he attains the said age. If it were so, it might be argued with equal force that, when a testator gives an annuity to a child to be continued until the child attains puberty, then by reason of the Indian Majority Act the annuity must be continued till the child attains majority under that Act.[11]

SECTION 285. —Nor alter the rights annexed to specific periods of life.

285A. Gifts or contracts expressed to be for maintenance and indefinite as regards duration may be shewn by the acts of the parties or other circumstances to operate in perpetuity ; but prima facie they are limited to the life either of the grantor or grantee.[12]

Gift or contract for maintenance : limited to life.

286. (1) In the circumstances and subject to the conditions and priorities hereinafter mentioned,—

2. RIGHTS AND OBLIGATIONS OF MAINTENANCE.

(*a*) a Muslim is bound to provide, and entitled to receive, maintenance to or from his ascendants and descendants ;[13]

Persons entitled.

(*b*) under Hanafi (but not Shia) law collateral relations by blood within the prohibited degrees of relationship also have rights and duties of maintenance.[14]

Ascendants, Descendants, Collaterals.

[11] Both English & Roman law divide period of human life anterior to attainment of majority into various divisions, annexing distinct rights & obligations to each.

[12] *Karim* v. *Heinrichs*, (1901) 28 I. A. 198, 201 (BOM.) (language pointing that grant LIMITED TO GRANTOR); *Muhammad Siddiq K.* v. *Risaldar K.*, (1926) 2 Luck. 216 ; *Chaudhry Ahmad Azim* v. *Choudhri Safijan*, (1926) 2 Luck. 335 (terms of GRANT may show that it is ABSOLUTE). Cf. *Raja Mohan* v. *Nisar Ahmad Khan*, (1932) 60 I. A. 103 (OUDH) p. 108, last 3 *ll.* ; 110, *ll.* 1-2 ; 111, par. 1, last sent. ; 114, par. 2, sent. 1 (variation of maintenance grant); *Rameshwar Naran Sing* v. *Roknath K.*, (1911) 67 Ind. Cas. 451 (SUBSTANCE OF MAINTENANCE GRANT : rents & profits alienated, but (immovable) property, out of which rents & profits arise, not alienated ; it remains property of grantor & annexed to his estate). Attention of Court in *Khajeh Sajidulla* v. *K. Habibullah*, [1939] AIR (CAL.) 192 does not seem to have been drawn to authorities here cited.

[13] Bail. I. 463 ; II. 103-104. In *Karim Nensy* v. *Heinrichs*, (1901) 28 I. A. 198, 200 (KHOJAS though Muslims have peculiar customs. " It is not shown what is the custom prevailing in their caste with reference to a son's right to MAINTENANCE from his father : " Lord Hobhouse. On father's death his paternal obligation to maintain his son comes to an end & son's share in family property takes its place, p. 202.) In England both parents liable to maintain ILLEGITIMATE CHILDREN. Woman may, in certain circumstances be required to maintain her husband—cf. s. 311, Civ. Code of France, artt. 205-207;—a contingency apparently not contemplated under Muhammadan law.

[14] Bail. II. 102 (par. 4), ss. 334, ff.

SECTION 286. Wife.

(*c*) the wife is entitled to receive maintenance from her husband ; but as a rule no other relation by marriage is obliged to provide maintenance, or entitled to receive it, in his or her own right.[15]

Criminal Procedure Code. Illegitimate children.

(2) Under the Criminal Procedure Code[16] any person[17] having sufficient means,[18] neglecting or refusing to maintain his wife[19] or his legitimate or illegitimate child, who is unable to maintain itself, may be ordered to make a monthly allowance, at a rate not exceeding fifty rupees in the whole.

Suit.

(3) A suit will lie for maintenance when it is due.[20]

Muhammadan law appears to impose no burden upon the natural father of an illegitimate child. The Hanafi law recognizes the relation of the mother to a child begotten out of wedlock, but Shia Ithna Ashari law does not seem to do so. It would, therefore, seem that an illegitimate child is not entitled to maintenance from either parent under Shia law ; and only from its mother under Hanafi law.[21]

Absolute right of—

287. (1) Save as provided in this section, no person who is not necessitous is entitled to maintenance from another ;[22] and no indigent person is obliged to maintain another.[23]

[15] See ss. 294, ff.

[16] Act I. of 1898, s. 488 = Act X. of 1872, s. 536. Under Crim. Pro. Code, s. 488 magistrates may make ORDER OF MAINTENANCE against person who neglects to maintain his wife or legitimate or illegitimate child : order may be enforced like fine : wife may on just grounds refuse to live with husband, but order for maintenance may still be made. See s. 286, below. Words importing masculine gender include females in the Act, can mother be proceeded against ? There seems no precedent.

[17] *Budday Saib* v. *Zoonoo Bee*, (1853) Mad. S. D. A. 199 (STEP-MOTHER not entitled to maintenance : see s. 606(2A).) ; *Mohamed Sultan* v. *Abdul Rahman*, [1937] AIR (RANG.) 175 (minor STEPCHILDREN to be maintained free of charge ; they form "encumbrance" with the widow ; STEP-FATHER not to charge step-children for board & lodging) : cf. instructive case of *Re Moulton, Graham* v. *Moulton*, (1906) 94 L. T. 456 (Fletcher Moulton, L. J., was disallowed his claim for contribution from STEP-DAUGHTERS' private income to household expenses : made to account for income of step-daughters' property without allowance of any sum for their maintenance while they were staying with him).

[18] Definition of "means" in s. 285(2) does not of course apply here.

[19] Does this statutory right inhere in MUTA WIFE ? In *Luddan Sahiba* v. (*Mirza*) *Kamar*, (1882) 8 Cal. 736, held that it does. Cf. s. 25(14) ; s. 215, com. (3rd).

[20] *Mahomed Jusab* v. *Haji Adam*, (1911) 37 Bom. 71, notwithstanding that Magistrate has refused maintenance : *Ghana* v. *Gereli*, (1904) 32 Cal. 479.

[21] See s. 215, com. (3rd head).

[22] See ss. 285(5), 328 ; Hed. 147, 148 ; Bail. I. 455 (459), 457 (461), 458 (462), 461 (465), 463 (467) ; II. 103.

[23] See s. 285(3) ; Bail. II. 103 (par. 2) ; cf. "A poor man shall not be compelled to maintain other than four (classes of persons) : (i) his minor children, (ii) his daughters who have attained puberty, whether virgin i.e. unmarried) or *thayyiba* (married), (iii) his wife, (iv) his slaves,"—Mahomed Yusoof, *Mah. Law of Marr., etc.* II. 329) (transl. from *Fatawa Kazi Khan*). Mayne, *Hindu Law*, 605 (possession of property) ; *ibid.* 610 (personal obligation to maintain wife, independently of possession of property).

(2) The wife is entitled to maintenance from her husband though she may have the means to maintain herself, and though her husband may be without means.[23] SECTION 287. 1. wife.

(3) Parents and grandparents[24] in indigent circumstances are entitled, under Hanafi law, even though they are able to earn their livelihood,[25] to maintenance from their children and grand-children who have means.[26] *Quaere,* whether under Shia law parents and grand-parents are so entitled.[27] 2. necessitous parents.

(4) Young[28] children are entitled (subject to ss. 291, 292) to maintenance from their parents though the latter may be in indigent circumstances.[29] 3. young children.

288. (1) The obligation to maintain a necessitous Muslim rests— 4. PRIORITY IN OBLIGATION TO MAINTAIN.

(*a*) under Hanafi law, first on the children[1] then on the father,[2] then on the mother, then jointly on grand-parents and grand-children, and then on collaterals ;[3] Ascendants. descendants. collaterals.

(*b*) under Shia law, on the nearest descendants jointly with the nearest ascendants :[4] amongst ascendants the father being considered the nearest, then the nearest paternal grandfather (howsoever remote), then the mother, and then the nearest maternal grandfather (howsoever remote).[5]

(2) When the person primarily obliged to maintain is absent, or is unable to maintain, the person next obliged, may be required to maintain ; but the expenses of doing so may be recovered from the person primarily obliged, if and when he is present and|or becomes able to maintain.[6] Primary liability : secondary.

" It is stated in the Siraj that if an indigent person has a wife and she has a brother with means, then the brother will be forced to provide the wife with *Illustration.*

24 Bail. I. 462 (par. 4) (466).
25 Hed. 147-148 ; cf. Bail. I. 462 (par. 2) (466 par. 2).
26 Bail. I. 461 (465) ; II. 103.
27 Bail. II. 103 (par. 2) ; s. 320 *nn.*
28 See s. 285(9).
29 See ss. 285(3), 303 ; Hed. 147-148.
1 Bail. I. 463 (last line) (467).
2 See s. 316 *nn.* p. 329.
3 Bail. I. 457-458 (461-462), referring to paternal uncle.
4 Bail. II. 102 (para. 4) ; 104 (par. 3).
5 Bail. II. 103-104. Shia law obliges no person to maintain any of his collateral relations. Bail. II. 102 (para. 4), adding " though it is becoming & proper for a person to maintain them, also particularly when he is one who would inherit from them."
6 E.g. see ss. 309, 321, 322, 333, 341.

SECTION 288. maintenance, and when the husband obtains means the brother can recover it back from him." [7] (A brother is not legally obliged under Shia law to maintain his sister.)[8]

Priority : mother : paternal grandfather.

The Hanafi and Shia laws differ from each other as to the relative obligations of the mother and the paternal grandfather. The Hanafis consider the mother to be liable in the first instance, and then the grandfathers, both paternal and maternal, and the Shias put the liability on the paternal ancestors in the first instance, and then on the mother and maternal ancestors. It is easy to surmise that the difference of opinion arises from the conflict between the Pre-Islamic customary rules of succession which entirely excluded the mother (as a female),[6] and the Islamic injunction by which the mother gets a share in the estate in all cases. The difficulty is increased in the Hanafi law by the fact that the relative positions of the mother and grandfather vary greatly in that system ; for, while, in some circumstances the mother gets 1/3 of the estate, and the grandfather 2/3, in other circumstances, the mother gets her share in the estate, but the grandfather is excluded by the father.[9] It is, therefore, suggested in the Zahir Riwayat [10] that where the mother and grandfather of a minor co-exist (the father being dead) the maintenance is to be paid in proportion to their rights in the inheritance, i.e. the mother pays a 1/3 [11] and the grandfather 2/3.[12] Abu Hanifa, however, is reported by " Hussun son of Zyad " not to have adopted this view, but to have held that the grandfather alone is responsible for the maintenance. Abu Hanifa's view seems to be based on a precedent set by Abu Bakr.[13]

Shia and Sunni law.

Reason of conflict.

4. PROPERTY LIABLE FOR MAINTENANCE.

289. (1) The Court may order maintenance to be recovered out of the property of an absent person [14] for (*a*) his

[7] *Durr-ul-Mukhtar*, ch. on *Nafaqa, fasl* vi. (Hanafi text).

[8] Sects. 288, 333, ff. on maintenance by sisters & brothers & other collaterals.

[9] See ss. 602, 610, 615, 621(3), 625, 640A, 642 on mother's rights of inheritance.

[10] Bail. I. 464 (468). Mahomed Yusoof, *Mah. Law of Marr. Div.*, etc. II. 338, s 1765.

[11] MOTHER'S share of maintenance would be reduced to 1/6 when her rights of inheritance are similarly reduced : reduction in her share of inheritance takes place (1) where there are two or more brothers or sisters, (2) where person entitled to maintenance has children—an eventuality that cannot occur, as we are speaking of persons who have not attained puberty ; if we assume that propositus has children, then first duty to maintain is on children & not mother or grandfather : s. 288(1). The children may of course be too young to maintain.

[12] See ss. 324 ff. dealing with position of MOTHER & GRANDFATHER.

[13] Another precedent mentioned (K. B. Mahomed Yusoof, *Mah. Law of Marr., Div. etc.* II. 338, s. 1766) : Abu Hanifa's view that where there is mother, brother & grandfather, last alone provides maintenance : this view taken by (first Khalif) Abu Bakr. This instance does not enunciate any new principle. It is merely same opinion as above attributed to Abu Hanifa. Presence of brother makes no difference : for grandfather in any case bound to maintain in priority to brother, who is collateral. Apparently in the instance, taken for adjudication before first Khalif, there were mother, brother, & grandfather co-existing : from decision in that instance, Abu Hanifa draws the general conclusion above referred to.

[14] *Mairaj Fatima* v. *Abdul Wahid*, (1921) 43 All. 673, (Ind. Evidence Act, s. 108 : death presumed of persons not heard of for 7 years : supersedes technical rule of *istishab ul hal* = " continuance of condition.") Bail. I. 459 (463).

parents,[15] (*b*) his young or adult sons who are unable to earn their living, (*c*) her daughters whether young or adult, and (*d*) wife,[16] provided they are indigent. SECTION 289. (*a*) Property of absent persons.

(2) The Court may also authorize the said persons (if indigent) to apply to their own maintenance the property in their hands, belonging to such absent [14] son, father, or husband, as the case may be.[14]

(3) The said persons may (if indigent) lawfully apply such property for their maintenance without any order from the Court ; [14] provided that it consists of such articles as they are entitled to receive for their maintenance.

290.[17] Moveable property [17] of an absent son in the possession of the father, may, without an order from the Court, be sold by the father, and the sale proceeds applied to the maintenance of himself (the father) and of the son's wife and child ; but the son's immovable property may not be so sold, unless the son is young or insane.[18] If the father himself is not in possession of his absent son's moveable property, then the person in possession is not authorized without an order of the Court to apply the property to the maintenance of the father.[19] Father's maintenance from movables.

290A. The Court will not ordinarily create a charge on the father's property for the maintenance of his minor son.[20]

291. The maintenance of a young Muslim may be taken out of his [21] property which may be sold for the said purpose [22] (*b*) Minor's property applied for maintenance,—

15 Hed. 149 ; Bail. I. 459 (463). 16 As to wife's right : s. 294.

17 Sect. 290 = ss. 289(4), 290 in previous editions.

18 Bail. I. 459 (463) one of few points on which Muhammadan law differentiates between MOVABLE & IMMOVABLE PROPERTY ; see s. 641. Cf. s. 2 ; 21 Geo. III. c. 70, s. 18 (table of enactments, ch. II.). See also s. 289.

19 Hed. 149. And if he applies it, he is liable to account for it to the son. *Semble*, the same rule applies where maintenance is due to any other person mentioned in s. 289. See *Durr-ul-Mukhtar*, ch. on *Nafaqa*, *fasl.* vi. : " The FATHER MAY SELL the MOVABLE PROPERTY OF his adult SON who is absent, but not if he is present. His mother & the Kazi & his other relations have no authority to sell. The Imam (Abu Hanifa) & his disciples are agreed that the father may sell ; because the father has, but no one else has, the authority to expend thereout. But the father may NOT sell IMMOVABLE PROPERTY, as, for instance, lands & gardens. So inasmuch as he is prevented from selling the immovable property only of adults, it is evident that he may sell the immovable property of his young & insane children. And there is unanimity on this point." The father must, however, be careful in dealing with the son's immovable property in India : see s. 272, com.

20 *Mahomed Jusab* v. *Haji Adam*, (1911) 37 Bom. 71.

21 " Though the word in the original (*subee*) is masculine, I think it includes

SECTION 291. —not past maintenance.

notwithstanding that his father may have means or may be able to earn ; provided that where the father has already supplied maintenance to his young children, he is not authorized to sell their property to reimburse himself for the expenses of their maintenance, unless he has reserved a right to have recourse to their property.[22]

(c) Earnings of young sons.

292. Where the young sons of a person are able to work and earn their living, the father is entitled to apply their earnings for their maintenance, but is bound to hold the surplus in trust for them.[23] *Semble,* this section is subject to the proviso to s. 291.

(5) Arrears of maintenance : limitation.

293.[24] Where the Court has ordered maintenance[25] for a relative other than a wife[26] [and young child],[27] and a month or more elapses without maintenance being recovered, no arrears of maintenance are recoverable in respect of the time that has so elapsed.[28]

female children also who have property" ; Bail. I. 457 *n.* 1 (461) with a cross reference to Bail. I. 455 (459).

22 Bail. I. 457 (para. 3) (461). In England obligation of father to maintain children arises under Poor Laws : Courts refuse to order maintenance out of children's property where father in position to maintain his infant children : Hals., *Laws of Eng.* XVII. 114 : s. 293, (arrears). Under Fr. Civ. Code, art. 284, parents have " the enjoyment of the property of their children, until the latter reach the full age of 18 years or emancipation."

23 Bail. I. 458 (462) : " Though one is actually able to work, yet if work is not suitable or proper for him he is held to be weak & unable," so it is explained that " the sons of the better orders....are to be treated as weak," i.e. they are not required to earn their living ; " so also students of learning when unable to earn anything ; & their right to maintenance from their fathers does not abate while engaged in legal studies." Father ordinarily guardian of their property (ss. 257, 258) though " if he be a spendthrift....the judge should take it out of his hands, & place it with a trustee to keep for the boy until he arrives at puberty & then deliver it over to him." Bail. I. 458 (par. 1) (462). Legal studies are favoured, as law means religion.

24 Sect. 293 cited & applied : *Jaffar El Edroos* v. *Mahomed,* (1936) 39 Bom. L. R. 77, 282.

25 *Semble,* where Court has not ordered it, *a fortiori* so.

26 Similarly *Daaimu'l-Islam* provides that wife may claim maintenance (if fixed by Court) though she has spent out of her own means.

27 See s. 294, com ; & s. 307.

28 *Durr-ul-Mukhtar,* ch. on *Nafaqa fasl.* vi. " For this REASON that he must have received sustenance during the period that has elapsed : & the maintenance of relatives is due in order to supply them with the necessities for sustaining life, hence when time has elapsed, & their sustenance has actually been supplied, then no maintenance can remain due. And Zail'i has included a young child also with the wife in the exception." *Ali Md.* v. *Fatima,* (1919) 21 Bom. L. R. 713 (Ind. Limit. Act, art. 61, applied, *submitted* rightly : three years' arrears awarded where divorced wife claimed arrears of maintenance for her child). See s. 308, com. ; Bail. II. 103. Mayne, *Hindu Law,* 619 : " Arrears of maintenance used to be refused by the Madras High Court. But this view has now been overruled."

§ 2.—Maintenance of Wife.

294. (1) The regularly [1] married wife [2] who has attained an age at which she can render conjugal rights to her husband,[3] is entitled (while the marriage subsists)[4] to receive from him maintenance,[5] in accordance with s. 295 ; provided that she places, or offers to place, herself in his power,[6] so as to allow him free access to herself at all lawful [7] times ; and obeys all his lawful commands.[8] Where the marriage is irregular merely because of the absence of witnesses,[9] she is entitled to maintenance as if her marriage were regular.

1. NATURE AND EXTENT OF WIFE'S RIGHT. Conditions.

(2) *Quaere,* whether an order for maintenance may be made under the Criminal Procedure Code [10] against a Muslim husband, though the wife has not attained puberty.[11]

Maintenance under Criminal Procedure Code.

(3) An order has been made under the said Code in favour of a muta wife.[12]

After muta.

[1] *Durrul-Mukhtar,* Ch. *Nafaqa fasl,* i. (a Hanafi text) : " Maintenance is due only to wife who has been REGULARLY married, so that if marriage is found to be irregular, as for instance if she is found to be in her *iddat* (at the time of the marriage contract) for another husband, or if the marriage is void on the ground that the woman married turns out to be the foster-sister of the man, then the man may demand back the allowance of maintenance : as is stated in the *Bahr-ur-Raiq.* In an IRREGULAR marriage maintenance can be demanded back, (see s. 293) provided that it had not become obligatory by reason of an order of the *Kazi* ; & if it is paid by the husband without an order from the *Kazi,* then it cannot be demanded back. The same is stated the *Alamgiri* from the *Hashiat-ul-Madani.*" Where no order of Court to pay, maintenance presumed to be voluntarily given, & ranks as gift.

[2] Whether she be Muslim or *zimmi,* poor or rich, enjoyed or unenjoyed, young or old, if not too young for matrimonial intercourse : Bail. I. 437 (441) ; see Bail. II. 99 ; ss. 24, 294, comm. Not *muta* wife : see ss. 16, 25(14), nor " one enjoyed under a semblance of legality : " Bail. I. 440 (444) : nor, of course, a fifth wife : *Abdul Hamid K.* v. *Mussumat Mehr Jan,* (1912) 48 Punj. Rec. 192 (No. 49), still less continuously kept concubine (*avarudh stree*) : (*Mt.*) *Haidri* v. *Narindra Bikramat,* (1926) 1 Luck. 184.

[3] Under Hindu law husband bound to pay for maintenance of immature wife, though she stays with her parents : Mayne, *Hindu law,* 610.

[4] *Shah Abu Ilyas* v. *Ulfat,* (1896) 19 All. 50 ; *Abdool Fatteh Moulvie* v. *Zabunnessa,* (1881) 6 Cal. 631. So order for maintenance by Magistr. drops on divorce : see s. 301 ; s. 294 *ill.*

[5] See s. 294(4), *n.* as regards special arrangement.

[6] Such placing herself in power of husband called *tamkin* in Arabic. Wife must reside in husband's place of residence ; Bail. I. 438 (442) ; II. 97. *Mahomed Ali* v. (*Mt.*) *Ghulam Fatima,* [1935] AIR (LAH.) 90 ; *Yusoof Ali Chowdhry* v. (*Mt.*) *Fyzoonissa,* (1871) 15 W. R. 296 : see *n.* 13 (viii). Right to maintenance under Crim. Pr. Code, 1908, s. 488 is of course different : s. 286(2) above.

[7] See s. 297, s. 308, com. ; Bail. II. 103.

[8] Bail. I. 250 (251), 437-438 (441-442) ; II. 97, 101 (par. 3) ; cf. s. 24, in particular s. 24(2). INABILITY OF HUSBAND to maintain wife, cf. Bail. I. 439 (par. 3) (443). See s. 295, com. Bail. I. 447 (451) ; II. 15-18

[9] Bail. I. 466 (last line) (470).

[10] See s. 286(2).

[11] *Kolashun Bibee* v. (*Sheikh*) *Didar Buksh,* (1875) 24 W. R. (CR.) 44 ; point not decided as wife only 10 years old ; no one examined on her behalf except herself.

[12] See s. 294 *ill.* (3), (4).

SECTION 294. Special stipulation for maintenance in marriage contract.

(4) Stipulations in the marriage contract may render the husband liable to make special allowance to the wife in addition to (or in substitution for) maintenance under the general law ; [13] and/or a third person may be made surety for such allowances.[14]

Illustrations.

(1) H is absent from his wife. She appears before the judge offering to place herself within his power. This does not make him liable for maintenance, till he is apprized of the offer, nor till after the lapse of sufficient time for his coming to her, or sending an agent, together with her actual surrender to him or his agent.[15]

(2) A wife is disobedient to the husband but afterwards returns to obedience ; she is not entitled to maintenance till he is informed of her submission, and the lapse of sufficient time to allow his coming to her or sending an agent.[15]

(Effect of muta on maintenance)

(3) Under the Shia Ithna Ashari law a muta wife has no right to maintenance enforceable in a Civil Court. This does not interfere with her statutory right under the Criminal Procedure Code, s. 488, but the question may be whether the muta between the parties is subsisting or has already expired.[16]

[13] (i) *Nawab Khwaja Muhammad K.* v. *Husain B.*, (1910) 37 I. A. 152 (KHARCH-E-PANDAN *lit.*= expense of betel box, hence pocket money); (ii) *Muhammad Ali Akbar* v. (*Mt.*) *Fatima B.*, (1929) 11 Lah. 85 (allowance of Rs. 25 per month for KHARCH-E-PANDAN, in addition to maintenance to which she would be entitled in law : held wife entitled to it even though she may by refusing to return to her husband, lose her right to maintenance under general law); (iii) *Altaf B.* v. *Brij Narain*, (1929) 51 All. 612 (KHARCH-E-PANDAN is personal allowance : in absence of clear provision, not alienable, even though payment secured on immoveable property) ; (iv) *Banney Sahib* v. *Abida Begam*, [1922] AIR (OU.) 251 (arrears of maintenance according to stipulation for living separate, granted); (v) *Mansur* v. (*Mt.*) *Azizul*, (1928) 3 Luck. 603 (special GUZARA, i.e. maintenance allowance, if she does not live in husband's house upheld); (vi) *Latif Jahan B.* v. *Mohammad Navi K.*, [1932] 30 All. L. J. 9 (*kharch-e-pandan* : arrangement by way of family settlement); (vii) *Sikandar Ara Amina B.* v. *Hasan A. B.*, [1936] AIR (OU.) 196, (MEWA KHORI *lit.* = fruit-eating = *kharch-e-pandan*); (viii) *Yusoof Ali* v. (*Mt.*) *Fyzunnissa*, (1871) 15 W. R. 296 (wife reconveyed property assigned to her by her husband in lieu of *mahr*, husband agreeing to pay her Rs. 600 per month : *held*, though this sum styled allotment for maintenance, suit was not for maintenance in strict sense, but for enforcing terms of deed : no stipulation that wife would remain with husband or that she would forfeit it if she lived elsewhere : hence alleged forfeiture by " rebellion " held irrelevant, cf. Bail. I. 439 (443) *ll.* 1-3); (ix) *Pran Mohan Das* v. *Hari Mohan Das*, (1914) 52 Cal. 425 (ante nuptial promise by bride's father to give her a house became binding by marriage : father estopped from urging that his daughter & her transferees could not, on ground that transfer not evidenced by registered deed, resist his own (father's) claim to possession : application of doctrine that contract cannot be enforced by stranger to it) : see s. 59 ; (x) *Nawab Khwaja Md. K.* v. *Husain B.*, (1910) 37 I. A. 152 ; (xi) *Subbu Chetti* v. *Arunachalam Chettiar*, (1929) 53 Mad. 270 (F. B.); (xii) *Nawab Saiyed Sajjad A. K.* v. (*Mt.*) *Badshah B.*, (1936) 12 Luck. 344 ; s. 59 ; (xiii) (*Mt.*) *Fatima B.* v. *Lal Din*, [1937] AIR (LAH.) 345 ; s. 104 ; (xiv) (*Mt.*) *Fatima* v. *Ahmed Ali*, (1937) 41 C. W. N. 965 (P. C.) (LAH.); s. 104. See also s. 286(2).

[14] See *n.* 13 (xiii), (xiv). Cf. ss. 104 ; 24(4).

[15] Bail. II. 101.

[16] *In matter of Petition of Luddun Sahiba, Luddun* v. (*Mirza*) *Kamar Kudar*, (1882) 8 Cal. 786 = 11 C. L. R. 237 : H. = second son of ex-King of Oudh ; *W* = niece of one of his wives : 14 Cal. 277.

(4) A Shia Muslim may sue for a declaration that he has dissolved the muta between himself and *W*, by making a gift of the unexpired portion of the muta, and that, consequently, he may not be ordered, under the Criminal Procedure Code, to maintain *W*, since *W* is under the muta, in the position of debtor to H, and the gift of the unexpired portion of the term of the muta operates as a release to which the consent of *W* is not necessary,[17]—*sed quaere*.[18] SECTION 294.

Is maintenance due even to a wife who has not attained puberty? Shafii is stated (in the Hidaya) to be of the opinion that she is. This statement conflicts with that in the Fath-al-Qarib [19] where the Shafii law is stated to be the same as the Hanafi and Shia. This contradiction is explained by the fact that Shafii held the opinion attributed to him in the Hidaya previous to his sojourn in Egypt, but afterwards altered it so as to make it conform with the rule prevailing in the other schools.[19] Maintenance not due unless wife has attained puberty. Shafii's views at-first differed from those of Abu Hanifa.

295. The rate at which maintenance is payable by the husband to the wife, is determined under Hanafi law, *semble* by reference equally to the social position of the husband and wife.[20] Under Shafii law the position of the husband is alone considered.[20] Under Shia law the maintenance is to be determined by the wife's requirements in respect of condiments, food, clothing, residence, service, and implements of anointing, a due regard being also had to the custom of her equals, [21] among her own people in the same city.[22] Scale of maintenance, Hanafi law. Shafii law. Shia law.

Many details are given in the texts about the maintenance due, especially from the husband to the wife, e.g. whether one or more servants should be maintained for her, and even as to the quality and quantity of food. She is not entitled to perfumes, nor medical attendance at the expense of the husband.[23] These details are, in their nature, of little use under the changed circumstances of our times; and we find in the Fatawa Alamgiri itself an indication that modern rules may differ on these points from the "older opinions." [24] Particulars. Medical attendance.

Should the condition of the husband alone, or of the wife alone, or of both Social conditions: means of husband or wife.

[17] *Mahomed Abid Ali K. K.* v. *Ludden S.*, (1886) 14 Cal. 276.

[18] Woman's relation to man under *muta* assumed to be entirely analogous to debtor's relation to his creditor: that therefore man entitled to terminate by "releasing" the woman, even without her assent. But s. 25, indicates that *muta* creates rights in favour of the woman also; & analogy cannot be pressed too far.

[19] *Fathal-Qarib* p. 531, *Minhaj-ut-Talibin*, Vol. II. p. 85.

[20] Bail. I. 441-442 (445-446); Hed. 140. See com.

[21] Cf. the *mahr-ul-mithl*, s. 97, note reference to CUSTOM.

[22] Bail. II. 99.

[23] Bail. I. 441-442 (445-446). As to dress: I. 448 (452); residence: I. 448-449 (452-453); II. 99. See also Mahomed Yoosuf, *Mah. Law of Marr., Divorce*, etc. II. 264, ff.

[24] Bail. I. 439 (443) (*ll.* 1-3): OLDER OPINION.

SECTION 295.

i. Fatawa Alamgiri.

ii. The Zahir-Riwayat.

iii. The Hidaya.

iv. The Sharh-i-Viqaya.

be the basis of maintenance? The texts themselves are not unanimous.[25] "When monthly maintenance is decreed and the husband is rich, eating white bread and roast meat, while the woman is poor, or the reverse is the case, the condition of both should be taken into consideration according to one set of opinions. But in the Zahir Riwayat it is said that regard should be had only to the condition of the man, and there are also many opinions in favour of this view; the fatwa, however, is said to be in accordance with the other." The Hidaya lays down that "in adjusting maintenance, regard should be paid to the rank and condition of both her and her husband," and though Shafii is said to hold that the Koran requires only the husband's position to be considered, the Hidaya interprets the Koran in a different way, and supports the interpretation by the authority of a tradition.[26] That view is also accepted by the Sharh-i-Viqaya: "In fixing upon the amount of maintenance the condition of both parties must be regarded. And this is our (i.e. the Hanafi) view, but according to Imam Shafii only the condition of the husband is to be considered. The authority in support of our view is that the Prophet said to Hinda, the wife of Abu Sufian, 'Take from his property what is required for thy needs, and the needs of thy child,' which tradition is reported by Bukhari and Muslim, and refers the quantum of maintenance to the needs of the wife. It will be found explained at length in the Fath-ul-Qadir."[27] The view supported by the Hidaya and Viqaya (that the condition of both of husband and wife should be regarded) would no doubt find favour with the Courts in India, especially as the Fatawa Alamgiri states that the fatwa is in accordance with that view.[27]

Each wife is entitled to a separate apartment.

296. Each wife is entitled to have a separate apartment for herself, free from the intrusion of any person other than her husband.[1]

2. DURATION OF WIFE'S RIGHT TO MAINTENANCE. Lawful refusal of.

297.[2] The wife does not lose her right to maintenance under s. 294, if (*a*) she refuses access to her husband on some lawful ground;[3] or (*b*) the marriage cannot be consummated

25 Hed. 140-141. Tradition given below, from *Sharh-i-Viqaya*, also found in *Mishcat-ul-Masabih*. Cf. Mayne, *Hindu Law*, 617.

26 *Sharh-i-Viqaya, Talaq* : *Nafaqa* (*ad. init.*).

27 *Rondeau, Le Grand & Co.* v. *Marks*, decided 23 Jul. 1917, Sol. Journ. of 4 Aug. 1917, pp. 666-667. In England husband bound to provide wife with necessary APPAREL suitable to her station in life as fixed by that of her husband, but not bound to make her gift of it. Under Ind. Divorce Act, IV. of 1869 which does not apply to Muslims ALIMONY, pending suit, not to exceed 1/5 of husband's net income, for 3 preceding years. *Maneckbai* v. *Nadirshaw*, (1936) 60 Bom. 868, 877, 878.

1 Hed. 143; Bail. I. 443; II. 99-100. Each wife may exclude from her own apartment another wife of her husband.

2 Sect. 297 = ss. 297, 298 in earlier edd.

3 E.g. if she does so for obtaining payment of *mahr*; Hed. 141; Bail. I. 438 (442). Husband not saying his prayers not lawful ground: see s. 50, com. She is entitled to refuse to accompany him in journeys: Bail. I. 439 (443). There may also be SPECIAL STIPULATIONS in marriage contract: see ss. 294(4) & 24.

owing (i) to the husband's not having attained puberty,[4] or (ii) to her absence from him with his permission,[5] or (iii) her illness,[6] or (iv) malformation.[7] SECTION 297.

If the wife has never come into the house of her husband, she is not entitled to maintenance.

299. The wife's right to maintenance ceases on the death of her husband.[8] Widow has no right to maintenance.

In pre-Islamic times the widow was entirely excluded from inheritance in Arabia. To remedy this, an early verse of the Koran—ii. 240—provided that the widow should be given maintenance for a year by way of inheritance.[9] This provision was revoked by a later verse—ii. 234—which gives to the widow more extensive rights,[9] viz. a share in the estate of her deceased husband. That the latter verse revokes the former is a point on which all commentators on the Koran are agreed ; but, in a case[10] that the Privy Council had to decide, this fact was not pointed out to them, and they consequently were unable to understand how it was that the Hidaya and Sharaiu'l-Islam laid down that no maintenance was due to the widow, in direct contravention of the verse of the Koran. They held, however, that they would not speculate as to the causes of the apparent contradiction, but would consider the law to be correctly laid down in commentaries of such antiquity and authority. See ss. 611, 641, comm. Abrogated verse of the Koran requiring the widow to be maintained for a year.

300. (1) Under Hanafi law, on divorce a wife is entitled to maintenance during her iddat,[11] whether the divorce is revocable or irrevocable, whether single or triple, and whether she is pregnant or not,[12] unless the marriage has been dissolved Maintenance after divorce ; during iddat. (Hanafi law.)

[4] Bail. I. 439-440 (443-444); II. 97-8 (dissenting opinion also referred to).

[5] Bail. II. 97-98.

[6] Mahomed Yusoof, *Moham. Law of Marr., Div.*, etc. II. 265-266, gives some details that may occasionally be of use.

[7] "Or," it is added in the *Daaimu'l-Islam*, "old age, or any other circumstances unless she or her guardian prevents the husband having access to her."

[8] Hed. 145 ; Bail. I. 452-454 (456-458); II. 98-99 ; *Aga Mahomed Jaffer Bindaneem* v. *Koolsom B.*, (1897) 25 Cal. 9 = 24 I. A. 196 ; Bail. II. 98-99, 102, 171. According to what *Sharaiu'l-Islam* considers most common or generally received Shia opinion, widow not entitled to any maintenance, though pregnant. Though some Shia authorities give widow right, if, on death of her husband she is pregnant, to maintenance until delivery, out of share in estate of her husband which child borne by her entitled to inherit. Cf. Bail. I. 453. Sect. 299 refers to claims of wife as against her husband. On her claims against her children, see s. 328.

[9] French Civ. Code, art. 205 (amended by law of 9 Mar. 1891) fixes same period for support to widows & widowers.

[10] *Aga Mohomed Jaffer B.* v. *Koolsom B.*, (1897) 24 I. A. 196 = 25 Cal. 9.

[11] But not beyond s. 301 *n*. *Usmanbhai Samadbhai* v. *Bai Sakina*, (1926) 29 Bom. L. R. 106 (*iddat* may be observed by divorced wife wherever she happens to reside); observance of *iddat* consists of a negative, viz. not marrying : legally no other act or omission seems to be required.

[12] Bail. I. 450-451 (454-455); Hed. 145.

SECTION 300. for some cause of a criminal nature, originating from the woman.[13]

(Shia and Shafii law.)
i. during iddat when divorce revocable.
ii. during pregnancy when irrevocable.

(2) Under Shia and Shafii law, (*a*) the wife is entitled to maintenance during her iddat if revocably divorced ; (*b*) but not if irrevocably divorced ;[14] unless an irrevocable divorce is pronounced, during the wife's pregnancy, in which case she is entitled to maintenance until delivery.[15]

Illustrations.

(1) If the wife dissolves the marriage by exercising her option of puberty or of inequality, she is entitled, under Hanafi law, to maintenance during the iddat.[16]

(2) H absents himself from his wife who marries another husband, and her marriage with her second husband is consummated. Then the first husband returns, and the wife is separated from her second husband ; she has then to observe iddat, but she is not entitled to maintenance from either husband :[17] because she was disobedient to her first husband, and her marriage with the second husband was void.[18]

(3) H pronounces three talaqs against his wife. Before the expiration of her iddat, she marries again, and her second marriage is consummated, and then she and her second husband are separated judicially : maintenance is due to her from her first husband according to Abu Hanifa,[19] because she was not disobedient to him (though her marriage to the second was invalid).[20]

No maintenance after iddat.

301. On the expiration of the iddat after talaq, the wife's right to maintenance ceases, whether based on the Muslim law, or on an order under the Criminal Procedure Code.[21]

Apostasy of wife : Is maintenance forfeited ?

302. If the wife is converted from Islam to another religion, the marriage is, under Muhammadan law dissolved, and she loses her right to maintenance.[22] *Quaere,* whether

[13] E.g. APOSTASY on part of wife, or her misbehaviour so as to establish supervenient prohibition ; s. 302 ; Bail. I. 451 (455) ; Hed. 145. See DISSOLUTION OF MUSLIM MARRIAGES ACT, 1939 : pp. 251 f.

[14] Bail. II. 98, 102 (*ll.* 4-5), 169. [15] Hed. 145 ; Bail. II. 98, 170.

[16] Bail. I. 451 (455) ; Hed. 146 (col. i. par. 2) ; for though marriage dissolved by cause originating from wife, yet it was not of criminal nature.

[17] Bail. I. 452-453 (456-457).

[18] Mahomed Yusoof, *Marriage, Divorce,* etc. II. 272-273, s. 1594.

[19] Bail. I. 453 (457).

[20] Mahomed Yusoof, *Marriage, Divorce,* etc. II. 272-273, s. 1595. Hals. *Laws of Eng.,* 2nd ed. XVI. 608, par. 951 ff. on powers of Court of Divorce in England to order maintenance.

[21] So order for maintenance by magistrate drops on divorce : *In re Abdulali Ishmailji,* (1883) 7 Bom. 180 ; *In re Kasam Pirbhai,* (1871) 8 Bom. H. C. R. (CR.) 95 ; *Re Petition of Din Mahomed,* (1885) 5 All. 226 ; *Syed Saib* v. *Meerum Bee,* (1910) 20 M. L. J. 12 ; s. 294, *ill.*

[22] Subject to Dissolution of Muslim Marriages Act, 1939 (in Feb. 1939 the Act was in form of Bill reported on by Select Com., see now pp. 251 f.) *Quaere* : does apostatizing wife retain right to maintenance ? : see ss. 302-304.

this rule has any and if so what effect subsequent to the Caste Dissolution Removal Act, XXI. of 1850. SECTION 302.

303. (1) The wife's right to maintenance if suspended for a cause that does not dissolve the marriage (e.g. disobedience to her husband) revives under Hanafi law by the removal of the cause, (e.g. by her ceasing to be disobedient) though she should in the meanwhile have been irrevocably divorced ; provided that the period of her iddat has not expired.[23] 3. REVIVAL OF RIGHT TO MAINTENANCE. If lost by disobedience, etc.

(2) If a wife is revocably divorced, and she apostatizes,[22] her right to maintenance is lost, and under Hanafi law, does not revive by her subsequent return to Islam,[23] but under Shia law it revives on re-conversion.[24] Apostasy.

(3) *Quaere,* whether the rules contained in this section are affected to any and if so to what extent by the Caste Disabilities Removal Act, XXI. of 1850. Revival.

It is stated that, under Hanafi law, if the divorce is irrevocable and the woman apostatizes, her right to maintenance (during iddat) is not lost, except ('ex necessitate rei') while she is in prison for apostasy. In India she would not be imprisoned for apostasy, and so, on the principle 'cessante ratione cessat ipsa lex,' she would not lose her right to maintenance, even under the Hanafi texts. The Hanafi rule is, however, different where a revocable pronouncement of talaq has been made, in which case if the wife apostatizes, she loses the right to maintenance. Perhaps the reason for the distinction is that the law disapproves of irrevocable divorces, some of which are characterised even as sinful : ss. 135, 162 ; and, therefore, the husband is mulcted in maintenance in all circumstances after such divorces. Apostasy of wife during iddat ; right lost if divorce revocable, but not if irrevocable. Reason.

The Shia law on the other hand allows the divorced wife maintenance if the divorce is revocable, but not if it is irrevocable, (s. 294) and the reason seems to be that the disapproved kinds of divorces are not permitted under Shia law, and a considerable part of the iddat expires before any pronouncement of divorce can become irrevocable under Shia law. Divorces, revocable and irrevocable, stand on the same footing as far as the approval of the Shia law is concerned ; and, as might be expected, a wife is more favoured during the period when the divorce is still revocable, than after it has become irrevocable. Shia law differs : Reason.

304. A wife's right to maintenance, if lost by some cause proceeding from herself and dissolving the marriage, (e.g. No revival when loss of right by act dissolving marriage.

[23] Bail. I. 451 (455), 452 (par. 2) (455), 453 (457) (par. 3).

[24] Bail. II. 1.

SECTION 304.

apostasy [22]) does not revive by the removal of the cause (e.g. by her return to Islam).[25]

4. INCIDENTS OF WIFE'S RIGHT OF MAINTENANCE :

i. Due monthly.

305. Maintenance becomes due and is payable to the wife under Shia law day by day ;[26] the Hanafi texts contemplate payment by monthly instalments,[27] unless otherwise decreed by the Court.[28]

ii. Right to future maintenance not releasable,

iii. Nor transferable.

306. The wife cannot lawfully release [or transfer [29]] her right to maintenance,[30] except after it has become due ;[27] and (under Hanafi law) for one month in anticipation.[31]

Under Shia law, since maintenance becomes due day by day, may it be anticipated for more than a day ? (s. 290). In case of talaq, maintenance for the day on which the talaq is pronounced is expressly stated to be due.[32]

iv. Arrears.

307.[1] (1) Under Shia and Shafii law the wife is entitled to maintenance notwithstanding that she has allowed it to get into arrears without having had the amount fixed by the Court, or by agreement with the husband.[2]

(2) Under Hanafi law arrears of maintenance are not recoverable unless fixed by the Court[3] or by agreement between the husband and wife ; nor even after they have been so fixed, in case of divorce or death of either party ; provided that arrears may be recovered if the Court has decreed maintenance, but not fixed its amount.[3]

25 Bail. I. 451 (455).

26 Bail. II. 100, 102 (*l.* 1, & "*fifth*").

27 *Sattappa* v. *Mahomed Saheb*, (1935) 60 Bom. 516, 543.

28 Bail. I. 449 (453); see s. 306.

29 Texts speak of "releasing" alone : apparently, therefore, transfer is *a fortiori* invalid. Cf. Transf. of Prop. Act, s. 6 ; *Sumsuddin* v. *Abdul Husain*, (1906) 31 Bom. 165 ; (effect of Trans. of Prop. Act, s. 6(*a*) : transfers & releases compared. But see s. 371, com.).

30 *Sattappa* v. *Mahomed Saheb*, (1935) 60 Bom. 516, 543 ; *Altaf B.* v. *Brij Narain*, (1929) 51 All. 612 (where there is document, whether allowance is transferable would depend on intention of parties as expressed in document : KHARCH-E-PANDAN in absence of clear provision not alienable).

31 Bail. I. 446 (450). Similarly in ENGLISH LAW right to maintenance not capable of being assigned or charged : whether it consist of (i) alimony : *Re Robinson*, (1884) 27 Ch. D. 160, or (ii) permanent maintenance after divorce : *Watkins* v. *Watkins*, [1896] P. 222 ; or (iii) allowance made in lunacy to committee of lunatic : *Re Weld*, (1882) 20 Ch. D. 451. On distinction between (i) & (ii) see *Manekbai* v. *Nadirshaw*, (1936) 60 Bom. 868, 877-878.

32 Bail. II. 100 (last line).

1 Sec. 307 cited & approved : *Mahomed Haji* v. *Kalimabi*, (1917) 41 Mad. 211 (rules in s. 307 NOT considered ADJECTIVE).

2 Bail. II. 100 ; Hed. 142-143 ; cf. s. 393 ff., s. 308, com.

3 Bail. I. 443-444 (447-448), 452 (par. 4) (456); *Abdool Futteh Moulvie* v. *Zabunnessa Khatun*, (1881) 6 Cal. 631 (Court's decree can award no arrears of maintenance : past maintenance only from date of decree—but *submitted* it may be awarded from date of suit, not decree); *Sattappa* v. *Mahomed Saheb*, (1935) 60 Bom. 516, 543.

308. (1) Under Shia and Shafii law the husband may claim back from the wife the whole, or such portion of the maintenance received by her as did not become lawfully due.[4] SECTION 308. v. Refund of maintenance

(2) Under Hanafi law, where the husband has, under an order of the Court, paid to the wife maintenance allowance in advance, in respect of a specified future period of time, and the husband dies, or the marriage is otherwise dissolved before the expiration of the said period, a part of the said maintenance allowance (proportionate to the unexpired part of the said period of time) may be reclaimed from the wife, or from the widow, as the case may be, by the husband or by the other [5] heirs of the husband respectively.[3] Abu Hanifa and Abu Yusuf hold that such proportionate part of the maintenance is not reclaimable if the allowance has been voluntarily paid by the husband ; Imam Muhammad holds the said part recoverable even if voluntarily paid, where it exceeds the allowance due for maintenance for one month.[3] (Hanafi law.) vi. Where maintenance paid in advance. (*a*) under order of Court, (*b*) voluntarily.

Illustrations.

(1) H gives his wife, an allowance for maintenance in advance, and then divorces her irrevocably ; or she (after an irrevocable divorce) claims, and is paid, maintenance, falsely stating that she is pregnant : she must refund the maintenance for the period after the divorce.[4]

(2) H says to his wife : " If maintenance does not reach you in ten days you may divorce yourself from me ; " and she is rebellious [6] by going to her father's house without his permission within the period. A dissolution of marriage does not take effect, though H should fail to send her maintenance ; [7] because she was not entitled to it and the option to divorce was based upon it : [8] *semble,* the option to divorce must be interpreted as being subject to a failure on the husband's part to give due maintenance ; and not an absolute undertaking to provide maintenance, whether or not the wife became entitled to it.

(3) H divorces his wife, three times, but intends remarrying her ; and with that object gives her maintenance during her iddat, " and afterwards goes back from his intention ; he may in all cases, according to the most authentic reports, reclaim it, whatever may have been the conditions under which the money was paid, because in such circumstances it is a bribe." [9] Bribe.

" A wife " says Sharaiu'l-Islam " when she has placed herself in the power of her husband is entitled to her maintenance day by day, and if he refuses to Arrears not recoverable.

4 Bail. II. 440, 454 ; Hed. 148.
5 Wife herself being one of husband's heirs.
6 *Nashiza,* in Arab. : Bail. I. 250 (252).
7 Bail. II. 100, 102.
8 Bail. I. 250 (252); cf. ss. 125, 5c.
9 See ss. 128, ff. 442, *ill.* (5).

SECTION 308. give it, and the day passes, her right is confirmed ; and so on for other days in succession, though the judge should never have fixed the amount nor made any order in her favour." [10] "According to the Hanafites," says Baillie in a *n.* to this, "arrears of maintenance cannot be recovered unless it has been fixed by agreement or a judicial decree." [11] The reason assigned for this rule of Hanafi law is : "Because it is due only so far as may suffice according to the necessity (whence it is not so to those who are opulent) and they being able to suffer a considerable portion of time to pass without demanding or receiving it, it is evident that they have a sufficiency, and are under no necessity of seeking a maintenance from others ; contrary to where the Kazi decrees a maintenance to a wife and a space of time elapses without her receiving any ; for her right to maintenance does not cease on account of her independence, because it is her due whether she is rich or poor. What has been observed on this occasion applies only to the cases in which the Kazi has not authorized the parties to provide themselves a maintenance upon the absentee's credit ; but where he has so authorized them, their right to maintenance does not cease in consequence of a length of time passing without their receiving any, because the authority of the Kazi is universal, and hence his order to provide a maintenance upon credit is equal to that of the absentee himself, wherefore the proportion of maintenance for the time so elapsed is a debt upon the absentee and does not cease from that circumstance.[12] The time here meant is any term beyond a month, and if the time elapsed be short of that term, maintenance does not cease." [12]

Reason.

vii. Wife's priority in maintenance.

309. The wife's right to maintenance is a debt [13] as against the husband, and has priority over the rights of all other persons to receive maintenance.[14]

Reason.

The Durru'l-Mukhtar explains as the "reason why the maintenance is due to the wife in priority to the child", that "the wife is the source (asl,) and the child is a branch." [15] The rule is different in the case of persons other than the wife. In their case the sum expended on maintenance can in no case be claimed back by the person who has provided it : "for maintenance is limited to necessities, and does not constitute a debt against the maintainer even if the judge should have actually fixed its amount. True, if the judge should have authorized the person entitled to maintenance to borrow on the credit of the maintainer, the amount so borrowed is a debt as against the latter which is obligatory on him to discharge." [16]

[10] Bail. II. 100. [11] Citing Bail. I. 443 (447).

[12] Hed. 149 (col. ii. par. 2); cf. Bail. II. 100 (*second*), 102 (*fourth, fifth*); Hed. 143 ; cf. s. 293. Cf. *Sattappa* v. *Mahomed Saheb*, (1935) 60 Bom. 516, 543.

[13] Bail. I. 444. But see s. 307(2).

[14] Bail. II. 102 (*sixth*); 103, (par. 2); cf. Bail. I. 462 (*ll.* 28-32) (466); see also ss. 108, *sq.*, on *mahr.*

[15] *Durr-ul-Mukhtar*, book on *Talaq*, ch. on *Nafaqa, fasl* i.

[16] Bail. II. 103 (par. 4): "arrears of maintenance not recoverable." Cf. Mayne, *Hindu Law*, 625, See s. 308, com.

SECTION 310.
viii. Self-help by wife.

310. The wife may apply to her own use articles belonging to her husband which are in her possession, and which she is entitled to claim for her maintenance,[17] but she has no right to sell other property of her husband in order to maintain herself out of the sale proceeds.[18]

Traditions.

The wife's right to self-help probably originates from the following tradition : " Aysha said, ' Verily Hind bint Utbah said, " O Messenger of God, verily Abu Sufian is a miser, and does not give me and my children sufficient to live upon, except what I take without telling him." His Highness said, " Take what will suffice you and your children." ' " [19]

SLAVES and masters are brothers : must have same food and clothes.

" Jaber bin Samurah said, ' the apostle of God said, " When God gives to any one of you great riches, he must first take care of himself, and give to his family and relations what is more than necessary to supply his own wants." ' " " Abudhar Ghaffari said, ' the Apostle of God said, " God has ordained that your brothers should be your slaves, therefore, him whom God hath ordained to be the slave of his brother, his brother must give him of the food of which he eats himself, and of the clothes with which he clothes himself, and not order him to do anything beyond his power, but if he doth order such a work, he must assist him himself in doing it." ' " [19]

ix. Pledge of husband's credit by wife.

311. The wife may pledge the credit of her husband for providing herself with maintenance.[20]

§ 3.—MAINTENANCE OF ASCENDANTS AND DESCENDANTS.

1. PRIORITIES : Children prior to parents.

312. As between parents and children, children have the preferential right to receive the maintenance that their father has the means to provide.[21]

Mother prior to father.

313. (1) Under Hanafi law, as between parents, the mother has the preferential right as against the father to be maintained by her children.[21]

(2) Under Shia law[22] the rights of both parents are equal

[17] I.e. which she requires as part of her maintenance, e.g. money, food & cloth suitable for apparel ; Bail. I. 443 (447) ; cf. s. 285(1).

[18] Bail. I. 443-444 (447-448) ; she cannot give it to another without his permission : Bail. I. 450 (par. 3) (454 par. 3).

[19] *Mischat-ul-Masabih*, Book XVIII, ch. xvii, 2 (Mathew, transl. II. 130.).

[20] Bail. I. 443 (447). Cf. s. 294. Cf. Mayne, *Hindu Law*, 614 : " A wife who is unlawfully excluded from her own home, or refused proper maintenance in it, has the same right to pledge her husband's credit as a wife in England." *Wilson* v. *Glossop*, (1888) 20 Q. B. D. 354 (husband's credit may, in certain circumstances, be validly pledged under ENGLISH LAW by wife for necessaries). Marr. Wom. Prop. Act, 1882 (45 & 46 Vict. c. 75) s. 20 ; Halsb., *Laws of Eng.* XVI. 318 : wife may in England be made chargeable with maintenance of husband, if she has separate property, & he becomes chargeable to any union or parish : Muhammadan law does not seem to contemplate wife maintaining her husband ; but the writ of " the good old rule, the simple plan " prevails everywhere irrespective of law-givers.

[21] Bail. I. 462 (466). [22] Bail. II. 104 (par. 2) (466).

SECTION 313. and the maintenance allowance must, if necessary, be divided between the father and mother equally.[22]

Illustration. A father is infirm, and his son earns something, but is not able to provide maintenance for his father. If there is no surplus food with the son, a judicial order cannot be passed against him, but as a matter of conscience, the son may be required to maintain the father. This is when the son is alone. If he has a wife, and young children, all that he can be compelled to do is to bring his father into his family and maintain him like one of them ; and he is not obliged to provide him with separate maintenance.[23]

Conscience.

Sole liability of children to maintain.

314. The son or daughter of a necessitous person is alone bound to provide maintenance for the parents, and the obligation is not shared by anyone else.[24]

So that if a necessitous person has a son (or daughter) and a father, the son (or daughter) alone is bound to maintain.[24]

Proximity for purposes of maintenance is reckoned on the basis that those who participate in blood, (the ascendants and descendants) are nearer than all others.[25] This principle of proximity is recognized in Shia law also for inheritance.

Grand-children's duty.

315. The duty of grandchildren to maintain a Hanafi Muslim is postponed to the duty of his father.[26]

(1) N has a son's son, and his father, living : the father is bound to maintain and the grandson's liability is postponed to the father's.[26]

[23] Bail. I. 462 (par. 3) (466): (CONSCIENCE : see s. 5D, com.).

[24] Bail. I. 463 (last line) (461); Hed. 14.

[25] Cf. *Durru'l-Mukhtar*, ch. on *Nafaqa*, *fasl* v. : " When the cause of the obligation to maintain is DESCENT & PARTICIPATION (OF BLOOD), then if there are two having such participation, of whom one is nearer than the other,—in such a case maintenance is due only from the nearer, & not from the remoter, irrespective of their rights of inheritance. Thus, if a person has a daughter with the son of a son, or the daughter of a daughter with a brother, then the maintenance is in the first illustration due from the daughter, & not the son's son ; & in the second illustration from the daughter's daughter & not from the brother," [though son's son & brother are respectively heirs under Hanafi law to exclusion of those on whom duty of maintenance is thrown] : " for this reason that rights of inheritance are not the guiding principle here. But, no doubt, rights of inheritance are the index where both are alike as regards proximity. As, for instance, between the father's father & the son's son ; namely, if a necessitous person has a paternal grandfather, and a son's son, then the maintenance is due from both in proportion to their rights of inheritance : that is, the grandfather has to provide a sixth, & the grandson the rest. For this reason, that the relation of both is of the same nature, so that preference cannot be given to one over the other, except on the ground of rights of inheritance ; & when in point of proximity two persons are equal, then the preference of one over the other must be controlled by their rights of inheritance. Here indeed a critic has pointed out that even where proximity is in equal degree the rights of inheritance are a weak index ; & he refers to the case of a necessitous person having a father & a son, both with means, in which circumstances the maintenance has to be provided by the son alone : whereas if rights of inheritance had been the index, the father would have had to provide one-sixth of the expenses." The author then refers to a tradition tracing the son's sole liability to other reasons ; but it is unnecessary to follow the subject further here.

[26] Bail. I. 463 (par. 4) (467); Hed. 147.

(2) N has a daughter and a son's son : the daughter alone is bound to provide maintenance. SECTION 315.

316. The father is solely obliged to provide the entire maintenance of his children until they become adult,[1] including the period of infancy during which the mother or other person is entitled to their custody.[2] 2. OBLIGATION TO MAINTAIN DESCENDANTS. Sole liability of father.

Bare maintenance has been allowed to a minor child who is in the custody of a divorced wife.[3] As stated in a subsequent case[4] ideas as to what may be a bare maintenance may differ. It is submitted, moreover, that there is no authority for the assumption made in the case first referred to. Infant child.

317. (1) If no suitable nurse other than mother can be obtained, or if neither the father nor the infant has any property, then the mother may be compelled by the father to nurse her infant child, otherwise she cannot be compelled.[5] Nursing of infants, mother not compellable.

(2) Under Hanafi law the mother is not entitled in any circumstances to receive any hire for nursing her own infant[6] but under Shia Ithna Ashari law she is entitled to do so.[7]

318. Daughters are entitled to maintenance until they are married, unless they have property of their own.[8] Daughters.

[1] Bail. I. 455 (459). See s. 285.

[2] *Mahomed Jusub* v. *Haji Adam*, (1911) 37 Bom. 71 (see *n.* 3). Hed. 148 ; Bail. I. 455-456 (459-460) : "If confidence cannot be placed in her, i.e. the mother, the maintenance is to be committed to some other person to be laid out for the child's benefit." See ss. 235, 236, 240. Cf. *Durru'l-Mukhtar*, ch. on *Nafaqa, fasl* 5. "The EXPENSES OF A NURSE for infant children, & of the maintenance of the mother, are due from the father to the mother ; & if the mother is absent the infant will be kept in the custody of the person entitled thereto (at the expense of the father).

[3] *Mahomed Jusab* v. *Haji Adam*, (1911) 37 Bom. 71 (minor son, Cutchhi Memon, governed by Muhammadan law in regard to maintenance : father bound to provide maintenance, though minor not in his custody, but divorced mother's : bare maintenance allowed & not made charge on father's property) ; *Allah Rakhi* v. *Kasam Ilahi*, (1933) 14 Lah. 770 (mother divorced : cases reviewed) ; (*Mt.*) *Sarfraz B* v. *Miran Bakhsh*, (1927) 9 Lah. 313 ; (*Mt.*) *Zauhra* v. *Md. Yusuf*, [1930] AIR (LAH.) 1043 ; *Parathy Vallappel Moidin*, (1913) 21 I. C. 469 (MAD. H. C.) ; *Murgesan Mudaliar* v. *Sodiamma*, (1915) 30 I. C. 480 (LOWER BURMA) ; *Emperor* v. *Ayshabai*, (1904) 6 Bom. L. R. 536.

[4] *Esubai* v. *Haji Tar Muhammad H. A.*, BOM. H. C. (O.C.C.J.) (*unrep.*) Suit 232 of 1913, *Cor.* Macleod, J., 21, 22 Jul. 1913 : (Rs. 35 a month allowed).

[5] Bail. II. 94. *Durru'l-Mukhtar*, ch. on *Nafaqa, fasl.* v. "If mothers nurse their children for two full years, then it is like any other household duty, like cooking or sweeping, which is an obligation of only a MORAL nature & not of a legal nature : [cf. s. 5D, com.] that is, if they refuse to perform any of these duties they cannot be compelled thereto." Details given about hiring of nurses for child, including provision that if nurse hired for a month, & after its expiration child will not take milk of another woman, she may be compelled to renew contract.

[6] Bail. I. 455, 456. [7] Hed. 146.

[8] Bail. I. 458 ; see ss. 322-323. Cf. Mayne, *Hindu Law*, 609.

SECTION 319. Necessitous adult sons.

319. Necessitous sons are entitled to maintenance, though they are adult.[9]

Father must earn if necessary.

320. The father's obligation to maintain his children is not affected by his indigence, so long as he has ability to earn.[10] *Quaere,* whether this rule applies in Shia law.[11]

Maintenance from necessitous father.

321. Where the father of necessitous children [12] is himself necessitous,[12] the Court may fix a sum to become periodically due from him as maintenance to his children, which may be recovered from him if and when he is able to repay it.[13]

"If the father and his young child are both without means, then the father must earn it, and if he is unable to work for his living, then he must get it by asking for alms, so that he may provide for the child ; and if his earnings are insufficient, then the paternal or maternal uncle must provide them with maintenance, and recover the expense thereof from the father, if and when, the latter is in possession of means." [14]

There is no claim against the uncles where the parties are governed by Shia law, which does not recognize right of maintenance as against collaterals.

Mother when liable to maintain children.

322. Subject to s. 291, if the father has no property out of which his minor children may be maintained, but their mother has such property, then she may be ordered to maintain her children, with liberty (unless the father is infirm, and unable to earn the means to provide maintenance for his children) to recover the maintenance from the father.[15]

Maintenance of children :
1. during minority : by father alone ;
2. later : by father and mother jointly.

323. The father's obligation to maintain his young children is not shared by any other person ; but the maintenance of adult children entitled thereto under s. 318, or 319, has to be borne 2|3 by the father and 1|3 by the mother.[16]

[9] Hed. 147 ; Bail. I. 458 (462) ; *Durru'l-Mukhtar,* ch. on *Naf. fasl.* iv. : "The obligation to maintain an adult son, who is unable to earn, as for instance if he is lame of leg, is similar to the absolute obligation to maintain a daughter (whether adult or not) so long as she is not married."

[10] Bail. I. 456 (460) ; Hed. 340. Cf. s. 321, com. As to Shia law see Bail. II. 103.

[11] Bail. II. 103 (par. 2) in general terms "ability on the part of the *moonfiq* or maintainer is a condition of the liability to maintenance," : father does not seem to be excepted from this general exemption : see s. 384(4), *n.*

[12] See s. 285(5).

[13] Bail. I. 456 (460) ; Hed. 148.

[14] *Durru'l-Mukhtar,* ch. on *Nafaqa, fasl* iv ; see s. 288(3).

[15] Bail. I. 457 (461) : father may reimburse himself from child's property, but *ex hypothesi* child has none. *Durru'l-Mukhtar,* ch. on *Nafaqa, fasl* iv : "Where the father is without means, and the mother has means, then she may be ordered to provide maintenance, which will be a debt as against the father & may be recovered back when he has means."

[16] Hed. 148. Cf. *Durru'l-Mukhtar,* ch. on *Nafaqa, fasl* iv. : "No one shares with

SECTION 324. Mother and grandparents.

324. Where the mother of a necessitous Hanafi has means, the authorities are divided whether any remoter relation [17] is bound to provide any share of the maintenance.

Quaere : Mother alone bound to provide maintenance when she co-exists with male agnates.

325. Where a necessitous person has both the mother and a grandfather or an agnatic collateral, the maintenance has, according to *semble,* the balance of Hanafi [18] authority, including the Fatawa Alamgiri, to be provided 1|3 by the mother and 2|3 by the grandfather or the agnatic collateral as the case may be.[18] Other Hanafi authorities including the Durru'l-Mukhtar, hold the mother alone to be obliged to provide the entire maintenance.[19]

Sect. 326 is now incorporated in s. 325.

Grandparents' obligation to maintain grandchildren.

327. Where neither the father nor mother of a Muslim has means to maintain him,[1] his grandparents, whether paternal or maternal, having means, are obliged to do so ;

the father (even though the father is indigent) the duty to maintain the following persons : namely, young children, and disabled adult children, and (unmarried) daughters. Thus also the maintenance of necessitous parents is on their children alone ; & this duty is not shared by the uncle or grandfather ; & the wife's maintenance is entirely on the husband, & on no one else ; & the *fatwa* is to the same effect, namely, that the maintenance of the children, etc. is entirely & solely on the father, unless & until he is in great want. When he is in want he is included amongst the deceased, & in that case the maintenance of the young children will be an obligation on those relatives from whom it would have been due if the father had not been living, provided that the expense of the maintenance may be recovered back from the father. But a mother having means, ought to maintain the children ; then, when the father has means, she may recover it back from him. This is from the *Bahr-ur-Raiq.*"

17 I.e. whether grandfather or collateral. See ss. 325, 326, 288, com.

18 Bail. I. 464 (468). As to Shia law see s. 288(1)(*b*). Cf. ss. 324, 325, 337.

19 " As between the mother & the father's father, if both have means, the obligation to provide maintenance is on the mother alone " : *Durru'l-Mukhtar,* ch. on *Nafaqa, fasl.* iv. Secs. 321, 314, comm. *Durru'l-Mukhtar* : " The author of the *Bahr-ur-Raiq* considers it a point of difficulty that the lawyers should have laid down that when the mother & paternal uncle of a necessitous person co-exist, the maintenance is due from the mother & uncle in the proportion of their presumptive rights to inherit, i.e. 1/3 on the mother, 2/3 on the uncle. The point is said to be difficult inasmuch as by participation (of blood), the mother is nearer than the uncle, & therefore the rights of inheritance ought to have no bearing on the obligation to maintain ; & the author raises the question whether, when the mother, maternal grandfather, & the paternal uncle co-exist, then the maintenance will be on the mother alone, or in accordance with the rights of inheritance." Moulvi Khurram Ali commenting on this passage remarks that there really is no difficulty, inasmuch as, in each case, mother alone is liable, i.e. both as against maternal grandfather & uncle, citing *Hashiat-ul-Madani* & tracing difficulty of *Bahr-ur-Raiq* to *Qunia,* which is stated to have been misled by a discredited tradition. The present author has not been able to verify *Hashiat-ul-Madani,* but conceding that view taken by *Durru'l-Mukhtar* more in accordance with principle, the books adopting the view of division of the burden are in India more authoritative : *Fatawa Alamgiri* & *Hidaya* have always been considered paramount Hanafi authorities in India, & there seems no reason to follow different course in this instance.

1 Masculine includes feminine in s. 327.

SECTION 327. provided that, where the person so maintained possesses any property out of which he may be maintained, or is able to earn his livelihood, the grand-parents may recover from the father of the person maintained, the expense of maintenance, and the father may reimburse himself from the said property or earnings.[2]

DESCENDANTS MAINTAIN ASCENDANTS. Each child's liability.

328. (1) The liability to maintain necessitous parents rests in equal shares upon children of both sexes, provided that they have means ; but if some only of them have means, then the parents' entire maintenance must be borne by them, the others being liable to contribute their proportionate shares of such maintenance.[3]

Liability proportionate to means.

(2) The Zakhira[2] suggests that children ought to be ordered by the Court to bear their parents' maintenance, not in equal shares but proportionately to the means of each.[4]

When father able to earn. (Sunni law.)

(3) The Hanafi authorities differ in opinion on whether children are obliged to provide maintenance for a father who is able to earn for himself. The better opinion seems to be

(Shia law.)

that they are so obliged.[5] The Shia authorities also differ. But the better Shia opinion seems to be that no person is obliged to maintain anyone who is able to earn.[6]

Illustrations.

(1) A necessitous person has a son and a daughter, both having means : both children are liable to maintain him bearing the expenses in equal shares.[7]

(2) A necessitous person has a son, who is without means to maintain him and a daughter with means. She is liable to provide his entire maintenance, but has a right to contribution from the son as to half of it.[7]

Son and daughter jointly liable ; bear expenses in equal proportion ?

The Fatawa Alamgiri leaves the question somewhat in doubt whether the son and daughter, though their liability to provide maintenance for their parents is alike, (i.e. joint), are to provide the maintenance in equal shares. But the extracts translated below leave no doubt that their liability is equal.

The author of the Durru'l Mukhtar states, that the principle that the

[2] Bail. I. 457 (461). Father alone may apply property of minor children to their maintenance ; grandfather cannot do it directly : s. 280(4).

[3] Bail. I. 461 (465). Cf. *Kazim Ali* v. *Sadiq Ali*, [1938] AIR (P. C.) 169.

[4] Cited *Fatawa Alamgiri, transl.* in s. 328, com.

[5] *Fatawa Alamgiri* : opinions differ : Bail. I. 462 (par. 3) (466); Hed. 148 (col. i) states (without reference to any difference of view) that maintenance is due from child to parents even though latter able to subsist by their own industry. In case of mother no question of her earning for herself : Bail. I. 462 (465). See next *n.*

[6] Bail. II. 103 : "Is inability to earn anything by one's own exertions also a condition ? It is more agreeable to traditional authority to answer this question in the affirmative."—No specific reference to parents.

[7] Bail. I. 461 (465).

presumptive rights of inheritance should determine the proportionate obligation to maintain, does not apply in the case of persons who participate in blood,[8] i.e. ascendants and descendants,—amongst whom the nearer alone is liable, irrespective of his rights of inheritance. But the rule, even in this form, and with the qualification referred to, does not by any means govern every case that is mentioned in the texts. Illustrations given in the Durru'l-Mukhtar itself [9] break the rule. Still, it will be found to be a useful guide : and where this rule is broken, there generally are differences of opinion.[10] SECTION 328.

Right of father to "steal" property for maintenance.

The father's rights are placed on a very high footing in a passage : "A necessitous father may steal from the property of his son having means sufficient for his (the father's) maintenance, in cases where the son does not consent to maintain him, and where the Kazi is absent ; and such theft is no crime. But if the Kazi is present, the theft is not permissible ; he must in that case make an application to the Kazi who will make an order in his favour. It is so stated in the Hashiat-ul-Madani." The rule can have no

[8] As to participation in blood, cf. ss. 35, 314, comm.

[9] Cf. s. 326, *n.* 22.

[10] E.g. doubtful whether mother solely or jointly liable when she co-exists with grandparent, or uncle : [That question cannot arise amongst Shias who hold that no collaterals are obliged to provide maintenance.] Cf. (A) *Sharh-i-Viqaya*, 183 (Book on *Talaq*, ch. on *Nafaqa*) comment (*Sharh*) enclosed [ ]; the rest consists of text of *Viqaya* : "If a person has sufficient means to necessitate payment by him of the poll-tax, he is under an obligation to provide maintenance for his principal relations, [viz. the father, mother, grandfather & the like]. A son & a daughter are in the same position ; [in this regard] proximity of relationship is to be regarded, & not the right of inheritance. For instance, if a person has a daughter & a son's son, the whole expense is payable by the daughter. In the case of his having the child of a daughter & a brother, the former has to bear the expense [although the inheritance goes (in the first illustration) to the daughter & the grandson half & half ; & (in the second illustration) the whole estate is taken by the brother to the exclusion of the issue of the daughter]." "If a necessitous person has two children, & one is in better circumstances than the other, the second one barely possessing '*nisab*,' [which word is explained below] then maintenance will be obligatory on both children in equal portions ; & if one of the two is a Muslim, & the other a *zimmi*, still the obligation will be the same on both. This is in the *Fatawa Kazi Khan*." "The *nisab* in question is that, the possession of which forbids the acceptance of alms, or, in other words a surplus of 200 dirhams [Rs. 60-80] over one's necessities ; Bail. I. 461 (465) ; citing *Hidaya*, & *Kifayah* II. 393-394 ; cf. s. 285(3), com. on SOLICITING ALMS. (B) *Fatawa Alamgiri*, Vol. II. 219 (*Talaq*, ch. xvii. *fasl.* v.) (This passage omitted by Baillie. Its proper place is at Bail. I. 461 (465) (par. 2, *ll.* 3 ff.) : "Shams-ul-A'imma has stated that our Shaikhs have said that the obligation on both will be in equal shares only when the wealth of each varies only in a slight degree, but that if the wealths of the two differ greatly, then it is incumbent that there should be a similar difference in the share of maintenance that each is required to provide. This is in the *Zakhira*." (C) *Durru'l-Mukhtar*, ch. on *Nafaqa*, *fasl.* v. "The maintenance of ancestors is an obligation upon such descendants as are bound to give the legal alms," [i.e. descendants not having means not bound to work & earn for providing maintenance for their ascendants]. "The maintenance of parents is due in equal shares, so that if a necessitous father has a daughter & a son, then half the maintenance is due from each of them. This is the true doctrine, & the *fatwa* is in accordance with it, as stated in the *Fathu'l-Kadir* & the *Khulasa*, & the reason is that the cause of the obligation to maintain, in this instance, is descent, in which both (the son & daughter) are alike. There is a less authenticated opinion in favour of the view that the son should provide 2/3 of the expenses & the daughter 1/3. This latter is the view adopted by Shafii. Shamsu'l-A'imma has stated that children must bear the maintenance of their parents in equal shares only if the difference in the means of the children is negligible."

SECTION 328. application in British India, where the Kazi is always present : *quaere*, whether apart from this the right of the father to "steal" in the circumstances would be safeguarded under the head of "rights of fathers of families"—cf. s. 2, and "Your parents or your children : Ye know not which of them is nearer unto you in usefulness"—Koran, iv. 11.

Children unable to provide maintenance should take parents to live with them.

329. Children who are unable to provide separate maintenance [11] for their parents, may be compelled to take their parents to live with themselves. But a son whose earnings leave a surplus over his own maintenance, is considered able to provide separate maintenance for his parents, unless he has a wife and young children.[12]

(*b*) Maintaining Grandparents.

330. Grandparents, both paternal [13] and maternal [14] are entitled to maintenance from their grandchildren on the same conditions as parents.[13]

Grandchildren : collaterals being presumptive heirs.

331. If a necessitous person has a grandchild and also a collateral relation, the grandchild alone is bound to provide maintenance, though the collateral may be presumptive heir.[15]

Illustration.

N has a daughter's daughter, or a daughter's son, also a full brother. The daughter's daughter or daughter's son alone is liable to maintain N.

(*c*) grandchildren : grandparents.

332. Where grandparents and grandchildren are jointly obliged to maintain, their obligations are in the proportion of 1|6 by the grandparents, and 5|6 by the grandchildren.[16]

Illustration.

N is necessitous, and has his father's father, and a son's son : the grandfather pays 1/6 of the maintenance and that the grandson 5/6.[16]

Baillie refers only to the case of the grandson and grandfather, but granddaughters must be in the same position. It is unnecessary to consider the case

[11] See s. 285(6); merely "food" in Bail. I. 462 (*l.* 24) (466).

[12] Bail. I. 462 (466); Plutarch, *Solon*, 22-24 : "If a father had not taught his son some art or profession, Solon relieved the son from all obligation to maintain him in his old age : "Grote, *Hist. of Greece*, III. 180.

[13] Bail. I. 462 (par. 4) (466).

[14] *Fatawa Alamgiri* does not mention maternal grandfather ; but principle is same ; rules applying to him must be similar to those applying to mother : & *Durru'l-Mukhtar*, ch. on *Nafaqa fasl.* v. specifically mentions him : "A descendant having means is bound to maintain his indigent ascendants, including a MATERNAL GRANDFATHER, as stated in the *Zakhira* ; even though such ascendants are able to earn. Amongst the ascendants are included the father & mother & the PATERNAL & MATERNAL GRANDPARENTS ; but the son's son is bound to provide maintenance for his paternal grandfather only when his father is dead, or indigent ; & similarly with reference to the maternal grandfather, when the mother is dead or in want ; & the obligation to maintain ancestors in want is irrespective of the ancestors' ability to earn."

[15] Bail. I. 463 (467). See ss. 314, 315. [16] Bail, I. 464 (468).

of remoter descendants. Even the *ill.*[16] postulates the co-existence of persons removed five generations from each other in the direct line. SECTION 332.

§ 4.—MAINTENANCE OF COLLATERALS UNDER HANAFI LAW.

333. Where the lineal descendants[17] and ascendants of a person governed by Hanafi law are unable to maintain him, his collateral relations, who are within the prohibited degrees, and who have means, are, subject to s. 326, obliged to maintain him ; provided that where the person so maintained possesses any property, or is able to earn his livelihood, the said collateral relations may recover the expenses of maintenance from the father of the person so maintained, and the father[18] may reimburse himself by having recourse to the said property or earnings.[19] HANAFI LAW : Obligation on collaterals.

N, a Hanafi Muslim is necessitous, and has a maternal aunt and also a paternal uncle's son, both having means ; the aunt is alone obliged to maintain, as the other is not within the prohibited degrees.[20] *Illustration.*

334. No person who is without means, is under any obligation to maintain any collateral relation.[21] No means.

335. Subject to the Caste Disabilities Removal Act, 1850,[22] rights to maintenance do not arise under Hanafi law, between collaterals who profess different religions.[23] Difference of religion.

Collaterals are entitled to maintenance only under the Hanafi law : s. 28(1)(*b*). But even under Hanafi law collaterals are deprived of the right of maintenance by a difference of religion. It does not however affect the rights of ascendants or descendants, or the wife.[24]

17 Bail. I. 458 (462) refers only to ascendants,—minors alone being contemplated.

18 See s. 289, com.

19 Bail. I. 458 (461); s. 333, com. COLLATERALS ENTITLED TO MAINTENANCE (Hanafi law).—Baillie refers only to paternal uncle as being obliged to maintain but following makes clear that ALL COLLATERALS ARE OBLIGED :—" Maintenance is due to the sister, paternal & maternal aunts, & to the daughter of paternal & maternal aunts, whether they are young or have reached puberty, whether in health or in illness : provided that they are indigent & unmarried, for if they are married then their maintenance will be on their husbands. So maintenance is also due to a male relative (who is a collateral) though he has attained puberty ; provided that he is unable to earn, being permanently disabled, as if he is lame or blind or an idiot or paralytic : " *Durru'l-Mukhtar,* ch. on *Nafaqa, fasl* v.

20 Hed. 148.

21 Bail. I. 463 (par. 2, last sent.) (467 par. 2, last sent.) i.e. one is not obliged to earn in order to maintain a collateral.

22 Set out in com. to s. 1. 23 Hed. 148. Bail. I. 466 (470).

24 I. As to SHIA LAW *Sharaiu'l-Islam,* makes no mention of DIFFERENCE OF RELIGION in regard to any relations, though it expressly refers to the fact that wife's rights are

SECTION 335.

Caste Disabilities Act applies only when apostasy penalized.

The law of Islam generally penalizes apostasy from Islam, and favours those who adopt Islam. But in regard to maintenance the rule is on different basis.[25] Hanafi law does not impose a penalty on the renunciation of Islam, but it imposes the obligation to maintain and confers the right to receive maintenance, only between persons who profess the same religion. The rule is the same whatever be the cause, and whoever is responsible for the difference between the religions of the parties concerned, and whether it arises from either of them embracing or renouncing Islam. The Caste Disabilities Removal Act, 1850, in terms only applies so as to relieve from penalties annexed to the renunciation or exclusion from any religion. This point is concerned not merely with the interpretation to be put on the words of an Act. There is a general principle underlying the rule of Hanafi law : viz. that a person ought not to be bound to maintain another, when the two do not profess the same faith, and the way of life followed by the one may be quite different from the other's.

Principle.

Defendant's law to govern suit.

Assuming that the Act does apply in respect of this rule of Hanafi law, its effect has to be considered in connection with another set of principles, viz. the rules as to the law that has to prevail where the personal law governing the parties before the Court is not the same. In such cases, (see s. 8) the legislature requires either that the law of the defendant should be applied, or that the Courts should act in accordance with justice, equity and good conscience. Thus where a Hanafi sues a non-Hanafi for maintenance, the defendant may take the defence under his own law. This is a point that must be determined apart from the Caste Disabilities Removal Act, and apparently before giving any consideration to that Act, inasmuch as the question to be dealt with in the first instance is in accordance with which system of law the suit must be decided.

1. Muslim suing non-Muslim for maintenance.

The Court may, apparently have to consider whether, where the defendant is a convert to a non-Muslim religion, his conversion was genuine. If the conversion was not genuine, *semble* the Court will not permit him to commit a fraud upon the law (s. 9).

2. Non-Muslim suing Muslim.

(*a*) When plaintiff has apostatized.

On the other hand, where the plaintiff, belonging to a religion other than Islam, sues a collateral for maintenance, and the defendant is a Hanafi, the Hanafi law, as the defendant's law, would probably be held to govern the

irrespective of her being a *Muslim*. Bail. II. 99. II. As to HANAFI LAW (1) *Fatawa Alamgiri* states : "Maintenance is not due where there is a difference of religion except to a wife, both parents, grandfathers & grandmothers, a child, & the child of a son." Bail. I. 466 (470), 437 (441) as to wife. (2) *Hidaya* refers to children & grandchildren, & explains that "between the child & parent exists a common participation of blood ; & he who participates of another's blood, is in fact the same as the participator himself, & as a man's infidelity is no objection to his providing his own maintenance out of his own property, it follows that the same circumstance can be no objection with respect to one who is a part of him." Hed. 147. (3) *Durru'l-Mukhtar, Nafaqa, fasl* vi. : "Maintenance is not due where there is a difference of religion except that to the wife & the ancestors & descendants, maintenance is due,—whether ancestors are high like the grandfather or great-grandfather, or the descendants are remote like the grandson & great-grandson."

[25] Wife, who is of different religion, is entitled : see s. 294, *n.* 2. But she loses right by APOSTASY.

case, and then the question would arise whether the Caste Disabilities Removal Act displaces the rule by which rights of maintenance are restricted to cases where the parties profess the same religion. If the plaintiff was originally a Hanafi, and he has been converted to another religion, then the Caste Disabilities Removal Act protects his rights of maintenance, unless it is held that the loss of right was not a forfeiture caused by apostasy within the Act. SECTION 335.

Where, however, the defendant is a convert to the Hanafi school from another religion or school of Islam, then can he be allowed to contend that the Hanafi law should not be applied to him seeing that he has chosen to place himself under that law? But is the Hanafi law altered on this point by the Caste Disabilities Removal Act, so as to oblige him to maintain a non-Muslim? These questions await decision. (*b*) When defendant convert to Islam.

336. No liability arises to maintain any relative not related within the prohibited degrees by consanguinity.[1] Remote relations.

(1) N has a maternal uncle and a paternal uncle's son. The maternal uncle is alone bound to maintain N, though the paternal uncle's son is the presumptive heir to the exclusion of uncle.[2] *Illustrations.*

(2) In the last *ill.*, if, instead of the paternal uncle's son there were the foster-brother of N, he also would be free of obligation to maintain N,[2] though the foster-brother is within the prohibited degrees,—the reason being that the prohibition is not by consanguinity, but by fosterage.

337. (1) No person, having any descendant or paternal ascendant, able to maintain him, can claim maintenance from any collateral. Collaterals.

(2) The obligation of collaterals to provide maintenance when they co-exist with the mother (or a maternal ascendant [2]) is subject to the difference of opinion referred to in s. 326.

338. Collaterals bear their joint obligation to maintain proportionately to their presumptive rights to inherit. Proportionate liability.

N is necessitous, and has a full, a consanguine, and a uterine sister : all three will have to bear jointly the expense of maintaining N : paying 3/5, 1/5 and 1/5 respectively.[3] *Illustration.*

339. Where any of several presumptive heirs of a Muslim is unable to provide his share of maintenance due under s. 338, or is relieved from the obligation to maintain under s. 336, Presumptive heir if unable to maintain.

[1] I.e. (*a*) relation must be within prohibited degrees; (*b*) cause of prohibition must be consanguinity, i.e. blood relation.

[2] Bail. I. 464 (468). [3] Hed. 148.

SECTION 339. the other presumptive heirs must provide his share[4] in proportion to their respective presumptive rights.[5]

First set of presumptive heirs able to maintain.

340. Where all the presumptive heirs[4] of a Muslim are unable to provide maintenance under s. 338, or relieved from the obligation to maintain under s. 336, the obligation to maintain devolves upon those collaterals who would become presumptive heirs if none of the existing presumptive heirs were living.[6]

Sharing in proportion to rights.

341. The collaterals obliged to maintain under s. 340, do so in the proportion of the presumptive rights to inherit, that they would have if all the existing presumptive heirs[4] were deceased, provided that the said collaterals may reclaim the said expenses from the presumptive heirs (who are liable to maintain) if and when they have the means to pay back.[7]

Right of recourse.

Illustrations.

(1) N is a person entitled to maintenance, and has a paternal uncle, and a paternal and a maternal aunt ; then the uncle alone is obliged to maintain N ; if the uncle has no means, then the aunts are both liable.[8]

(2) N[9] is necessitous and has—

(*A*) a son, who is unable to maintain N ; or
(*B*) a daughter, who is indigent and unmarried ;

} and N has also,—

(1) a full brother, a consanguine half-brother, and a uterine half-brother ; or

(2) a full sister, a consanguine half-sister, and a uterine half-sister—

(*A*)(1) When the son and the brothers co-exist, 5/6 of N's maintenance must be provided by his full brother and 1/6 by the uterine ; but the maintenance of N's son is to be paid by N's full brother alone.

(*B*)(1) When N and his daughter co-exist with his brothers, N and his daughter must be maintained by N's full brother alone.

(*A*)(2) When N and his son co-exist with N's sisters, N must be main-

[4] Sect. 285(11). In ss. 339-341 singular includes plural, & *vice versa*.

[5] Hed. 148 ; Bail. 464 (468). *Semble*, same rule applies if a presumptive heir is "absent" or cannot be found ; s. 341, com.

[6] Bail. I. 464 (par. 2) (468).

[7] "It is stated in the *Qunia*, on the authority of the *Hashiatu'l Madani*, that when the nearest relations within the prohibited degrees, on whom the obligation to provide maintenance rests, are absent, then the next in degree who is present, may be ordered to provide maintenance, with liberty to recover the expenses thereof from the nearer when he returns ; so that if a necessitous person has a full brother & a consanguine brother, & the full brother is absent & cannot be found, then the authorities may order the consanguine brother to provide maintenance, and then when the full brother returns, the consanguine brother will be able to reclaim what he had expended : *Durru'l-Mukhtar*, ch. on *Nafaqa*, *fasl.* vi.

[8] Bail. I. 464 (468).

[9] Bail. I. 464-465 (468-469) ; s. 338.

tained jointly by his sisters, who have to provide respectively 3 parts, 1 part and 1 part ; but his son is to be maintained by the full sister alone. SECTION 341.

(*B*) (2) When N and his daughter co-exist with N's sister, both N and his daughter are to be maintained by the full sister alone.[9]

Sect. 342 is now incorporated in ss. 339, 340 : see s. 341, *ill.* (2).

§ 5.—MAINTENANCE OF RELATIONS BY AFFINITY.

343. A Muslim is not bound to maintain his son's wife, unless the son is young and has neither the means nor the ability to earn :[10] s. 285(2), (4). SON'S WIFE not to be maintained.

344. A Muslim is not obliged to maintain his father's wife, who is not his mother, unless the father is weak and infirm, and without the means to maintain her.[11] NOR STEP-MOTHER.

Sectt. 343, 344 illustrate the broad principle that only blood relation gives title to maintenance. The daughter-in-law or step-mother has to be maintained only in so far as the father or son has respectively to provide the other's necessaries : since it is the duty of the husband to maintain his wife, it is supplying part of the son's or father's necessities to maintain the daughter-in-law or step-mother.[12] Only blood relation gives right.

[10] Bail. I. 458 (par. 3) (462). See s. 344, com., explaining principle underlying ss. 343-344. *Fatawa Alamgiri* not as definite on s. 343 as on s. 344 ; relevant portion Bail. I. 458 (463) : "It is also incumbent on a father to maintain his son's wife when the son is young, poor or infirm. It is stated however in the *Mubsoot* that a father cannot be compelled to maintain the wife of his son."

[11] Bail. I. 461 (par. 2). Cf. *Durru'l-Mukhtar, Nafaqa, fasl* iv. : "It is stated in the *Mukhtar* & the *Multaqa* that MAINTENANCE is due TO THE WIFE OF THE SON from the father of the son, if the latter is a minor & indigent or disabled ; & if the husband is absent, his father will be ordered to provide the wife with maintenance." [Liberty to have recourse to husband seems to be implied : see ss. 288, 309-311] "In the same way the mother will be ordered to provide maintenance, with LIBERTY TO RECOVER it from the father, when he returns ; & in the same way the son will be ordered to provide maintenance for his mother, with liberty to recover it from her husband, when he returns after his absence, whether he be his own father, or step-father ; & similarly a brother will be ordered to maintain the CHILD OF HIS ABSENT BROTHER with liberty to recover it from the absentee when he returns ; & in the same way maintenance will be ordered as against the REMOTER RELATIVES, when the NEARER are ABSENT, with LIBERTY TO RECOVER from the [nearer] absentee when he returns."

[12] In ENGLISH LAW also liability to maintain poor relations applies to blood relations only : Poor Relief Act (1601), 43 Eliz. c. 2, s. 6 ; Campbell, *Rul. Cas.* XXI. 337 : "a man is not bound to maintain his wife's mother." *Rex* v. *Munden*, (1718) 1 Strange, 190 : ("By the law nature," said Pratt, C. J., "a man was bound to take care of his own father & mother, but there being no temporal obligation to enforce that law of nature it was found necessary to establish it by Act of Parliament, & that can be extended no further than the law of nature went before, & the law of nature does not reach to this case.") *Re Moulton, Graham* v. *Moulton*, (1906) 94 L. T. 455 (= p. 312, *n.* 17) ; FRENCH Civ. Code, artt. 205-207, (transl. by Henry Cachard) : sons-in-law & daughters-in-law owe support to their father-in-law & mother-in-law "who are in want," but right "ceases on a second marriage by the mother-in-law," etc. ; right is reciprocal. But "a judgment in accordance with this provision having been recently obtained from the French Courts, the American Courts refused to give effect to it in the United States, as being contrary to the policy of the laws in that country." Holland, *Jurispr.*, 218, citing *Journ. du Droit Int. Prive*, VI. 22.

§ 6.—Maintenance of Executor.

Maintenance of 'wasi' or executor.

344 A. The texts refer to the right of an executor to be maintained out of the property of a minor, but this right cannot, it is submitted, be asserted in India.[13]

[13] The following is from *Durru'l-Mukhtar, Nafaqa, fasl.* i. "If a person is engaged in the affairs of another, then the maintenance of the former, is due from the latter, as for instance the maintenance of the *Kazi* & *Mufti* & their families is due from the public treasury....& in the same way the maintenance of an executor (*wasi*) is due from the estate of the deceased during the period that the executor is engaged in the affairs of the minor : So it is stated in the *Zaili.*" Rule of Hanafi law that *wasi* may take expenses of his maintenance from minor whose property is in his charge, cannot have any effect in India : his capacity both as guardian & as executor is fiduciary : as such he is not allowed to derive any sort of benefit from his office : Ind. Trusts Act, ss. 50, 51. See *Aga Mahomed Jaffer B.* v. *Koolsom B.*, (1897) 24 I. A. 196, 203 (CAL.); *A. E. Salayjee* v. *Fatma B.*, (1922) 1 Rang. 66; *Mahomed Hussein* v. *Aishabai*, (1934) 36 Bom. L. R. 1155 (provision in will for commission as remuneration to executor who was heir of testator held invalid under rule in s. 579(6).)

CHAPTER IX.

GIFTS.

§ 1.—Preliminary : Explanation of Terms.

I. Hiba defined.

345. (1) When a person governed by Muhammadan law signifies his willingness to make to another, an immediate and unconditional [1] transfer, without consideration,[1] of the ownership [2] of existing and specified property, he is said to make "a declaration of hiba." [3]

Transfer of rights in property or "manafi" or "usufruct" or "use" or "produce" or "benefit" of the property.

(1A) If a transfer is made without consideration but (i) it refers to rights that do not arise immediately, or (ii) if the transfer is subject to a condition annexed to the use of the property, or (iii) if the transfer effects not the full ownership

[1] Hed. 482 (col. i); Bail. I. 507 (515); II. 203; *Mohammad Abdul Ghani* v. *Fakhr J. B.*, (1922) 49 I. A. 195, 209 (ou.). If there is HIBA, CONDITION attempting to bind donee of *hiba* not enforceable,—conditions being repugnant to HIBA. If *hiba* is made from pious or RELIGIOUS MOTIVE, that circumstance is deemed to introduce consideration into the transaction so that it becomes *sadaqa* : s. 437 ; religious motive therefore does not make gift less valid, but has effect of making it irrevocable : dicta of Beaman, J., in *Jainabai* v. *R. D. Sethna*, (1910) 34 Bom. 604, 609 ; (see also s. 406, com.) & *Cassamally* v. *Currimbhoy*, (1910) 36 Bom. 214 = 13 Bom. L. R. 717, 771, 772, do not appear therefore to be unexceptionable. Cf. *Sadiq Ali* v. (*Mt.*) *Amiran*, (1929) 5 Luck. 406, 409. See also s. 11c.

[2] OWNERSHIP = full ownership : see p. 345, *n.* 12 ; p. 488, *n.* 2.

[3] (i) Great deal of confusion has arisen in law of gifts from misapplication of terms. The term HIBA is applicable only where donor—having absolute OWNERSHIP (TAMLIK) of subject of gift i.e. the bundle of all the undefined rights that a subject may exercise over land or any determinate thing : *Metrop. Ry.* v. *Fowler*, (1891) 60 L. J. (Q. B.) 518, 525 (p. 345, *n.* 12); s. 382A, com. *n.* ; s. 443— transfers its substance, or *ayn* or *corpus* in its entirety to donee. (ii) Strictly speaking, term *hiba* ought not to be applied to transfer (without consideration) of rights not amounting to *dominium*, though donor transfers all interest in subject of gift owned by him. (iii) Texts consider any physical object (including land) to be given or transferred only when ownership in it is transferred : & ownership means full ownership : see p. 345, *n.* 12 ; but being invested with some rights over any physical object (land or moveable property) is not properly spoken of as owning it : so that saying that a thing is given = that absolute & entire ownership (unlimited in point of time & unrestricted in respect of rights of transfer) is transferred. (iv) When rights short of (viz. which do not make up in the aggregate) such complete & absolute ownership, are transferred (e.g. when the rights are not unlimited in duration but restricted to life of transferee) then according to terminology of Muslim texts, proper way of expressing oneself is not to say that ownership is transferred for limited time, (e.g. that transferee is owner for life) but to specify what particular rights are transferred,—the rights granted being limited in duration. If the rights granted are limited in duration that limitation prevents the transferee being called (under this terminology) "the owner" as much as any other limitation of his rights. (v) Corpus (*ayn*) & usufruct (*manafi*): ss. 366A, 348, 352, 362, 366 ff. 369, 394, 395A, 408 expl., 443 f. 446, comm. (vi) The words "with a view of obtaining the assent of the donee to such transfer," are now omitted from definition as not warranted by common experience : donor's attention is on his own bounty, not on donee's assent : though of course, "nothing enters the proprietorship of man, without his option (consent)"—*Ashbah un Nazair*—cited *Jafri B.* v. *Amir M. K.*, (1885) 7 All. 822, 833. See s. 443, p. 480, *n.* 4.

SECTION 345. of specified existing and tangible property but only rights therein ;[4] it is not a hiba, but it may be a valid[5] transfer, and being without consideration, may be called a gift. Such a transfer may or may not fall under the specifically named transactions mentioned in the texts.

Donor. Donee. Subject of gift.

(2) The person making the declaration of gift is called the "donor," the person in whose favour the gift is declared is called the "donee," and the property or rights of which the gift is made is or are called the "subject of gift."[6]

Acceptance of gift.

(3) When the donee signifies his assent to the declaration of gift, he is said to "accept the gift."

Valid gift.

(4) A declaration of gift is said to be "valid" when the transfer of property or rights purported to be made, is capable of being given effect to in accordance with law, so that after the completion of the gift, the donee is entitled to retain [or to be placed in] possession of the said property, or has the rights vested in him, which are so purported to be transferred.[7]

Void gift.

(5) A gift is said to be "void" when though a transfer of property or rights is declared, or purported to be made, it is of no effect in law.

Incomplete or ineffectual gift.

(6) A gift is said to be "incomplete," or "ineffectual" when the gift fails, because, though the declaration of gift is valid (and the transfer that the donor intended to make was such as could effectually be made in law), yet the intention of the donor has not been so carried out as to be effective in law.[8]

[4] In most cases s. 345(1A) (i) & (ii) would in fact fall within (iii). If the rights do not come into operation immediately, it means that some out of the total rights (viz. those rights which operate immediately) are excluded from the grant : similarly as to conditions having reference to the use of the subject of gift.

[5] Bail. I. 507 (515); II. 203 : declaration or proposal of *hiba* may be in past tense, as in *ill.* (1) : s. 345, com. See also s. 437 ; thus gift is wider term which includes *hiba* : main distinction may generally be referred entirely to the subject of gift, viz. to that which is intended to be transferred without consideration : transfers with which law is concerned are transfers of rights : law is not concerned with things but with rights & liabilities relating to things : see s. 348, com. ; *Musharraf B.* v. *Sikandar J. B.*, (1928) 51 All. 40, 52.

[6] In Arabic *wahib* (= donor); *mauhublahu* (= donee); *mauhub* (= subject of gift) respectively.

[7] Note that s. 345(1) is restricted to *hiba*, other subss. refer to gifts generally. Bail. I. 507, 508 (515, 516); II. 204 ; Hed. 482. POSSESSION being essential, it seldom happens that donee entitled "to be placed in possession," but it may happen where gift has been accepted (with possession) by one person on behalf of another or where donor asks donee to take possession, or where "property" consists of rights (not capable of being corporeally taken possession of).

[8] KEY TO ILLUSTRATIONS in this chapter : letter D generally stands for donor ; R for donee (recipient); H for husband ; W for wife ; F for father ; S for son.

'HIBA' AND 'IWAZ': THEIR INCIDENTS AND STAGES.

D = donor; R = recipient (donee); G = subject of gift; I = *'iwaz*;
GS = subject of gift in a *hiba ba shart ul iwaz*; IS = iwaz in a *hiba ba shart ul iwaz.*

HIBA	HIBA BIL 'IWAZ	HIBA BA SHART UL 'IWAZ	
(1) D makes a declaration of the hiba of an article, G, to R,—		(1) D makes a declaration of the hiba of an article GS, to R,— stipulating, that R should give by way of iwaz, an article, IS, to D.	
(2) R accepts the hiba of the article G, and,—		(2) R accepts the hiba of the article GS. on those terms.	
(3) D transfers the article G to R,—		(3) D transfers the article GS, to R,—	
(A) *the transfer is revocable, and the article* G *remains in the hands of R as the subject of a hiba, and,—*		(A) *the transfer is revocable, and the article* GS *remains in the hands of R as the subject of a gift, and,—*	
(B) *R is not bound to make any return to D,—*		(B) *R is not bound*[1] *to make any return to D (either of the article* IS *or of anything else),—*	
(4) and if R does not make any return,—	(4) still, if R offers to make the gift of the article I, as a return for the article G,—	(4) and if R does not offer to make the stipulated return,—	(4) but if he offers to make the stipulated return,—
the article G *remains in R's possession as the subject of a simple hiba.*		*the article* GS *remains in R's possession as the subject of a simple hiba, which may consequently be revoked.*	
	(5) *D is not bound to accept the article* I, *as a return for the article* G,—		(5) D *is not bound*[1] *to accept the article* IS *as an iwaz for the article* GS,—
	(6) If D does not accept the article I, as a return, then,— *the article* G *remains in R's possession as a simple hiba.*		(6) If D accepts the article IS as a return,—
	(6) If D accepts the article I, as a return then,—		
	(7) After R takes possession of the article I,—		(7) and R gives possession of the article IS to D,—
	the articles G *and* I *belong to R & D irrevocably*: G *as the subject of a hiba mu'awwaza*[2] *and* I *of an iwaz, and the transaction as a whole is called a hiba bil 'iwaz.*		*the articles* GS *and* IS *respectively, belong to R and D with the incidents of a sale.*[3]

[1] See s. 415 (2) p. 459 *n.* 11.
[2] *Hiba mu 'awwaza = hiba* for which return has been made.
[3] *N.B.*—The incidents of sale result only after whole transaction completed; until completion, incidents very different from incidents of agreements to buy and sell or of agreements to barter.

SECTION 345. *Illustrations.*

(1) D says to R, I have given you this, or made you the proprietor of this. This is a valid declaration of hiba.[9]

(2) The following are express forms of valid declarations of hiba ("which have been appropriated to the purpose"): [10]

"I have given this thing to thee;"

"I have invested thee with the property of it;"

"I have made it to thee;"

"This is to thee." [10]

(3) The following are implied and valid forms of declarations of hiba:

"Thy garment is this piece of cloth;"

"I have invested thee with this mansion for thy age."

(4) D says to R, "I have mounted thee on this beast." This is an ariyat (s. 443), unless D intends thereby to make a hiba.

1.—Definition of gift examined.

It is not easy to give a complete or satisfactory definition of gift. The following observations may serve to make up for the shortcomings of the definition adopted. (1) It is often assumed that the expression gift is the exact equivalent of hiba; and, without consideration, hiba is taken, like gift, to include all transfers of property without consideration. Gift, however, is a word of much wider connotation than hiba.[9] (2) Frequently, in oversight of the effect of ss. 406-419, and 437-455 and sometimes even of the law relating to wakf, it is supposed that all voluntary transfers of property in Muhammadan law must fall under the designation of, and be subject to the law applicable to, hiba; and consequently, that any attempted transfer without consideration, which does not satisfy the rules relating to hiba, must be ineffectual. (3) The expressions property and transfer have very different meanings associated with them in different stages of the development of law. Primitive notions on which so much of the present-day law is based, tended to recognize only one person as having rights over one object at one time. The tribe or family as a whole was no doubt the owner of property in early times. Yet, where a body of persons hold property in common, there is no splitting up of the notion of ownership; the body of persons is considered as one unit according to common notions, and consequently in the eye of the law. The law is not faced with problems caused by "confusion" of rights, or "participation in the ownership" of the same corporeal object. The notion or device of property being held per mie et per tout removes the difficulty. (4) Law finds itself forced, in time, to recognize the existence of rights short of full ownership over property. But the recognition is at first restricted to cases where circumstances make it impossible to overlook the splitting up of the component parts of ownership, so that voluntary acts which place the law face to face with problems requiring delicate adjustments are discountenanced.[11] The time comes when the law is

Hiba narrower than gift.

Splitting up of ownership of single physical object.

Rights short of ownership.

[9] Bail. II. 203; *Kuvarbai* v. *Mir Alam Khan*, (1910) 7 Bom. 170.

[10] Bail. I. 509, (*ll.* 7-10) (517); II. 203, (*ll.* 7-10); see s. 5c. Note that in each declaration the *thing* (corpus) is given: see s. 366A on distinction between corpus & usufruct; also ss. 348, 352, 362, 366 ff., 369, 394, 395A, 408 *expl.* 443, 444, 446, comm.

[11] E.g. *Jainabai* v. *R. D. Sethna*, (1910) 34 Bom. 604 is full of obiter dicta, many of which proceed on basis that creation of limited interests must be governed by law

administered both by and for persons, whose minds not only comprehend questions of such delicacy, but welcome them as attractive exercises : the temptation of grappling with them can scarcely be resisted. It is only at this stage that the law recognizes the existence of the notions themselves. (5) Considered from another aspect, it may be said that the notions of property and its " ownership " [12] themselves develop through many stages. At first " property " is taken to mean some physical object like land or a house. Then it is dimly felt that law concerns itself with rights and liabilities and not directly with physical objects. These notions develop slowly. It takes long before it is completely realized and acknowledged that so far as law is concerned " property " itself is a convenient name for a group of rights and liabilities : [12] that so far as the purposes and aims of law in an abstract sense are concerned, such groups of rights and liabilities (*a*) may or may not consist of rights and liabilities all concerned with one physical object, and (*b*) they may or may not consist of the sum-total of rights and liabilities appertaining to that one object. Law may find it convenient to group together certain rights and liabilities and deal with them as a unit, though

SECTION 345.

2.—Development of notion of property and ownership.

Property and ownership refer to groups of rights.

of hiba ; on p. 614 learned judge takes upon himself to describe Muhammadan law " as the extremely crude & simple notions of primitive people." See s. 11c, com. Questions of trusts & other matters in Muhammadan law to which he refers with (*submitted*) equal inaccuracy (p. 616) are dealt with under ss. 345, 387, 423, 437, & elsewhere. In *Moosa Adam* v. *Ismail*, (1909) 12 Bom. L. R. 169, 183, same learned judge : " At the time the Mahomedan law was codified or reduced, at any rate to learned treatises, the society for the regulation of whose rights & conduct it was enacted was still very largely in the nomadic state." After these observations had been respectfully taken exception to in this work, same learned judge made handsome amends in *Tajbi* v. *Mowla Khan*, (1917) 41 Bom. 485, cited s. 11c, com.

[12] OWNERSHIP : POSSESSION : PROPERTY : " OWNERSHIP is a convenient name for a BUNDLE OF UNDEFINED RIGHTS, comprising all the rights which a subject may exercise over land. Where these rights are separated & divided amongst different persons, the person who has some special rights allotted to him, is said to have an easement," [cf. *manafi* or USUFRUCT] " while the person who retains the residue of the bundle of rights is " [in English law] " said to be the owner subject to the easement " : Cave, J., *Metropolitan Ry. Co.* v. *Fowler*, (1891) 60 L. J. (Q. B.) 518, 525—affmd. [1902] 1 Q. B. 165. " At the present day " says Prof. W. S. Holdsworth, " we know well enough that OWNERSHIP MEANS SIMPLY A BUNDLE OF RIGHTS. Early law,"—he is speaking of development of rule of law in the reign of Edward I.—" regards it as control over a thing—hardly conceivable apart from that thing. The distinction, in fact between a right & the subject of a right is a feat of abstraction of which it is quite incapable."—*Hist. of Eng. Law* (3rd Ed.), Vol. II., p. 351. " Englishmen are accustomed to hear it said that 'our....law knows no absolute OWNERSHIP OF LAND' "—Poll. & Maitl., *Hist. of Eng. L.*, II. 151 (—though " absolute " is an " unnecessary expletive " when the word is used to qualify ownership " : *ib.* II. 6, cited s. 443A *n.*)." The nearest approach to *proprietas* or *dominium* or ownership in English land law is that of the *tenant in demesne*." But yet Poll. & Maitl., observe that it would have been pedantry (on the part of Bracton) to refuse to speak of the *tenant in demesne* as 'the OWNER of the thing' or to refuse to treat his rights as essentially similar to the 'OWNERSHIP' of a moveable : *ib.* II., 4-6. " 'ABSOLUTE OWNERSHIP' was a new term in Coke's time. In the past the place of 'owner' & 'ownership' seems to have been filled in common discourse by such terms & phrases as 'possessor' 'possessioner,' 'he to whom the thing belongs or pertains,' 'he who has the thing.'....The things that a man owned were often described as his 'possessions.' Instead of property in the vaguer of the two senses which it now bears, men used 'possessions' & 'estate.' In a narrower sense property was used as an equivalent for best right (e.g. Coke, *Lit.* 145 *b*) : 'But there be two kinds of properties, a general propertie which every absolute owner hath & a special propertie.' " *ib.* II. 151, *n.* 2.

SECTION 345. the group may not have reference to any determinate physical object, or though the group of rights may consist only of some out of the total rights and liabilities connected with or appertaining to a physical object. But the selecting of certain rights and liabilities, and forming them into a unit, which may be dealt with as a unit, is a process only partly of deliberate choice. The Legislator analyzes, pede claudo, the notions with which law is concerned, and slowly becomes conscious of what has been stated above. Many rights and liabilities form themselves into groups and become units for the purpose of the ordinary dealings between men. The grouping being based on the common dealings of mankind, it is impossible for the legislator to ignore it. It is on the other hand extremely difficult to create and legislate for a unit that is not so recognized : and legislation dealing with such artificially created units may be futile, and no transactions may come within its terms.

Grouping together certain rights as a unit.

Gift and property.

All these developments directly affect gifts, which consist of transfers of property. It is very necessary for the purposes of jurisprudence to resolve the notion of property, and to recognize it as a unit formed by such a grouping of rights and liabilities. The group of rights and liabilities consisting of the total rights and liabilities appertaining to a particular physical object is so natural, that it is recognized everywhere as property. Austin's definition [13] is as follows : " property taken in its strict sense denotes a right, indefinite in point of user, unrestricted in point of disposition and unlimited in point of duration over a determinate thing." This strict sense is apparently adhered to by Muslim texts : no group of rights short of this definition is recognized as OWNERSHIP. So in Muslim law to speak of owning for life is a contradiction in terms. Instead for owning for life, the texts speak of having a USUFRUCT, or having rights of user, or of enjoying the benefits, (whether with or without power of disposition over the right of user) for life. Ownership on the other hand must be unlimited in point of duration : if the duration of the rights is limited, the rights grouped together do not constitute ownership.[14] Usufruct may vary in regard to duration.

3.—Austin's definition of property.

Ownership is of unlimited duration.

Usufruct of varying duration.

Muslim law has passed through many of the stages above referred to. Even texts so much admired for lucidity as the Hidaya, and compilations intended so definitely for practitioners as the Fatawa Alamgiri, delight in dialectics. But side by side with subtleties, there are archaisms and seeming crudities. Nothing can be abrogated. The whole law is part of the religion. This supplies a key to the position and ought never to be lost sight of.

Law and religion.

II. CONSTITUENTS OF GIFT
1. Declaration.
2. Acceptance.
3. Possession.

346. On the donor making a declaration of gift,[15] the donee accepting the gift,[16] and the donor transferring

[13] Austin, *Jurispr.* Lect. 47, pp. 817-820 (1873).

[14] See also Holland, *Jurispr.* (1916) 12th ed., 208 ff. USUFRUCT = " The right of temporary possession, use or enjoyment of the advantages of property belonging to another so far as may be had without causing damage or prejudice to this." *Oxford Dict.* See pp. 481 (*n.* 9, Justin's defin.) 380 (*n.* 1), 533 (*n.* 14).

[15] *Bona fide* intention to make gift necessary : s. 346A.

[16] ACCEPTANCE UNNECESSARY BY MINOR : see s. 400 : a gift not valid without verbal ACCEPTANCE. Bail. I. 545 (*l.* 17), which explains effect of Bail. I. 507 (*l.* 6);

possession [17] of the subject of the gift to the donee without any consideration, the gift is complete.[18] SECTION 345.

D purports to make a gift of two houses, but transfers possession of only one of them : the donee becomes the owner of the house of which possession is transferred ; but D, the donor, remains the owner of the other house.[19] *Illustration.*

Confusion is caused if a gift is referred to as having been made, when what is meant is that a declaration of gift has been made, or that a person has purported to accept a gift (in regard to which a valid declaration may or may not have been made), or that a transfer of possession is purported to be made (with or without a valid declaration or acceptance). It is only when all the three elements, viz. declaration, acceptance, and transfer are present, that a gift can be said to be made.[20] Incohote or imperfect gifts.

"Even when the declaration and acceptance are not expressed in words, so long as the intention is evidenced by conduct, it would be sufficient." [21] If a man gives a thing to another saying, 'I give to thee,' and the donee takes possession without saying a word, it is valid." [22] Implied declaration and acceptance.

Where the declaration is in the form of a hiba in futuro, it may be invalid as such, but may operate as a will.[23] But if the words are "I have adopted A B to succeed to my property," it is neither a deed of gift nor a will.[24] The possibility of an apparent sale having been intended as a gift has been considered, and in the particular case rejected.[25] See mahabat : s. 441A. Gift and bequest.

346A. Where there is no real and bona fide intention to transfer the ownership of the subject of gift, an alleged gift may be of no effect, and no property transferred from the donor to the donee.[26] III. REAL INTENTION to make gift necessary.

Bail. II. 204 (*ll.* 1-2). See however on implied acceptance s. 345, com., also *Sadik Husain Khan* v. *Hashim Ali K.*, (1916) 43 I. A. 212 = 38 All. 627, 646, *et passim* : acceptance of "gift" was there important as it purported to be in lieu of *mahr.*

17 Where possession (see s. 383) of subject of gift not transferred to donee, gift void, & there is no transfer of ownership from donor to donee.

18 Hed. 482, 383 ; Bail. I. 507-8 ; II. 204 ; *Mohammad Abd. Ghani* v. *Fakhr J. B.*, (1922) 49 I. A. 195, 209 (OU.); *Amjad Khan* v. *Ashraf K.*, (1929) 56 I. A. 213, 218, 219 ; *Kamarunnissa B.* v. *Husaini B.*, (1880) 3 All. 266, 271 ff. (P. C.).

19 *Mahomed Farid* v. *Mahomed Abdul Gafur*, (1912) 15 Cal. L. J. 14.

20 Cf. *Rameshwar Naran S.* v. *Riknath Koeri*, (1922) 67 I. C. 451.

21 Ameer Ali, 62 (110) citing *Raddul Muhtar*, IV. 777.

22 Ameer Ali, I. 63 (111) citing *Raddul Muhtar*, IV. 781 ; cf. *Jami-ush-Shittat* passage translated s. 410, com.

23 *Kasum* v. *Shaista Bibi*, (1875) 7 N. W. 313.

24 *Jeswunt Singjee Ubby S.* v. *Jet Singjee Ubby S.*, (1844) 3 Moo. I. A. 245. See s. 593 (on form of will).

25 *Muhammad Ikramuddin* v. *Najiban*, (1898) 25 I. A. 137 = 20 All. 447.

26 See s. 400(4) *nn.* ; *Ameeroonissa* v. *Abedoonissa*, (1875) 2 I. A. 87 = 15 Beng. L. R. 67 = 23 W. R. 208 ; *Mohammad Sadiq* v. *Fakhr Jehan*, (1931-2) 59 I. A. 1, 11 ; *Sughrabai* v. *Mahomedalli*, (1933) 36 Bom. L. R. 51 ; *Sultan Miya* v. *Ajiba Khatoon*, (1931) 59 Cal. 557 ; *Watson & Co.* v. *Ramchand Dutt*, (1890) 17 I. A. 116, 117 (par. 2, 3). See ss. 352, 462, comm. *Sadik Husain K.* v. *Hashim A. K.*, (1916) 43 I A. 212, 221.

SECTION 346A.
a.—IMPORTANCE OF DONOR'S INTENT.
1.—Sham gifts.
2.—Donor may be estopped.
3.—Creditor's interests.
4.—Gifts absolute and pure.
5.—Colourable transactions.
6.—Benami transactions :
7.—Family settlements.

The point might seem too clear to be controverted, that though a gift might be purported to be made, and every overt action taken for its completion, yet if there is no real and bona fide intention to make a gift, the whole transaction is nugatory. Or, a transaction having all the outward and visible form of a transfer for consideration, may in reality,—" according to the spirit of the contract and not the mere words,"—be a colourable attempt to conceal what was in substance a gift.[27] At times the donor or his successor in interest may be estopped and cannot be heard to deny a real and bona fide gift.[27] The significance of the donor's real desires is greatly enhanced where the absence of any intention to make any gift emerges in the unhallowed companionship of a desire to defraud or defeat creditors. The intention of the donor is clearly important even in cases where there is no desire to defraud or defeat creditors.

Ameeroonissa's case[28] is considered below in some detail, as the significance of important observations seems to have been buried in complicated facts :

" The mode in which the father (the donor) dealt with the profits (after the ostensible completion of the gift) would be important as regards the bona fides and completeness of the gift, as throwing light upon the intention : " [29]

" These iqrars, if genuine, modified the operation of the three hiba namahs, or deeds of gift....containing ostensibly absolute gifts." (p. 101). " If the hibas are to be construed as they (their Lordships) think they should be, by the light reflected upon them by the iqrars, absolute and pure gifts of the property were not intended ; and therefore the principles of law governing such gifts are not applicable to the transaction." (p. 106).

" It is enough to say there are circumstances in the case which favour this contention,"—viz. " that the transfers were colourable, and only with the view to making the son the ostensible owner ; or if not purely benamee, that they were not intended to operate exclusively for the son's benefit, but were made subject to a future settlement." (p. 104). But their Lordships did not think it " necessary to go at large into this question." The circumstances favouring this contention are thus stated : " although all proceedings relating to the estate were subsequently to the hibas in the son's name, the father remained in actual possession and receipt of the profits of the properties and in the uncontrolled management of them." (pp. 103-104).

" Their Lordships....are disposed to adopt the opinion of the judge that an absolute gift was not intended and that the transaction was either purely benamee or more probably to be followed by a FAMILY SETTLEMENT." (p. 111). " The rights of the parties ought, therefore, in their Lordships' opinion, to be

[27] *Rujabai* v. *Ismail Ahmed*, (1879) 7 Bom. H. C. R. (o.c.) 3, 8, 27, 30, 31 ; *Townend* v. *Toker*, (1866) L. R. 1 Ch. App. 446, 459 ; (*Ranee*) *Roshan Jehan* v. *Raja Syud Enaet H.*, (1866) 5 W. R. 4, 19-20 ; *Rameshwar Naran S.* v. *Riknath Koeri*, (1922) 67 Ind. Cas. 451.

[28] *Ameeroonissa* v. *Abedoonissa*, (1875) 2 I. A. 87 (= *n.* 26).

[29] *Ameeroonissa* v. *Abedoonissa*, 2 I. A. 87, 98 ; *Ibrahim Ali Khan* v. *Ummatul Zohra*, (1896) 24 I. A. 1, (ALL.) ; *Sultan Miya* v. *Ajiba Khatoon*, (1931) 59 Cal. 557, 567, 568 ((*a*) no mutation, (*b*) no entry in record of rights, but possession shown in father, (*c*) appropriation of rents & profits by father, donor).

governed by the provisions contained in the hibas....and in the three iqrars, read and construed as a whole ; *and may be declared and enforced, if necessary, in a suit properly framed for that purpose.*" [30] SECTION 346A.

b.—DONOR'S CONDUCT after gift completed.

These extracts bring out the following subsidiary points : (1) In determining what the intention of the donor was, his acts and conduct after the completion of the ostensible gift were taken into consideration. (2) A transaction, in which a gift which is not absolute and pure [31] is intended to be made, is referred to. (3) A gift with provisions for the possession and control of the property by the donor during his lifetime could, it is stated, have been declared and enforced, in a suit.[32] (4) The actual possession and control of the donor after the gift, did not, in the particular circumstances, make their Lordships jump either to the conclusion that the gift and the transaction as a whole were altogether void, or to the other extreme that such possession or control and the agreements (iqrars) explaining the state of affairs and the intentions of the donor, were to be entirely ignored and the gift enforced as though it were an absolute one : they refused to declare that the iqrars were void. On this last point see s. 352, (Nawab) Umjadally's case.[32]

Donor retaining possession of gift.

IV. ORAL GIFT.

347.[1] Neither the declaration nor acceptance of a gift [2] governed by Muhammadan law need be made in writing, whether the subject of the gift is movable or immovable.[3] But registration is necessary,[4] where (*a*) there is an instrument of gift [5] (*b*) of immovable property (*c*) situate in a district

Gift may be made orally.

Exception.

[30] Form of the suit did not allow of these rights being so declared or enforced : only prayer in plaint to have the *iqrars* set aside as fabricated, & plaintiff put into possession, with mesne profits : prayer to set *iqrars* aside could not, of course, be granted, as they were held to be genuine ; nor could father's possession be treated as wrongful, so as to justify claim of son to remove him. *Iqrars* clearly provided that father should have possession & control during life ; & any right, therefore, which others may have under them to any share of profits accruing in his lifetime could only be enforced in suit charging him in character of manager : present suit treating him as trespasser liable to mesne profits, could not be sustained, (2 I. A. 111, 112). See also (*Nawab*) *Ibrahim Khan* v. *Ummat-ul-Zohra*, (1896) 24 I. A. 1 = 19 All. 267 more fully referred to in ss. 405, 462, comm., s. 400(4).

[31] I.e. not a *hiba*.

[32] See (*Nawab*) *Umjadally* v. *Mohumdee B.*, (1867) 11 Moo. I. A. 513 ; s. 352. ENGLISH LAW : three modes in which gift *inter vivos* may be perfected : (1) by deed or instrument in writing, (2) by delivery, in cases where subject of gift admits of delivery, (3) by declaration of trust (which is equitable equivalent of gift); Halsb. *Laws of Eng.* : XV. 409, s. 873.

[1] Sect. 347 cited with approval : *Kulsum B.* v. *Shyam S. L.*, [1936] 34 All. L. J. 1027, 1031.

[2] GIFT of immovable property in LIEU OF MAHR : see s. 347, com., p. 351.

[3] I.e. there need not be written instrument of gift : though immovable property is the subject of the gift. Macn. 198-199 (case 2), *Kamarunnissa B.* v. *Husani B.*, (1880) 3 All. 266 (P. C.) = s. 404 *ill.* ; *Jabedanessa* v. *Nazib-al-Islam*, (1910) 15 Cal. W. N. 328 ; *Kulsum B.* v. *Shyam S. L.*, [1936] 34 All. L. J. 1027 ; *Khalil* v. *Ewaz Ali*, [1923] AIR (OU.) 214 ; *Abdul Hamid* v. *Abdul Ghani*, [1934] AIR (OU.) 163.

[4] Registered instrument duly attested necessary in BURMA (except within O. O. C. J. of High Court) : *Ma Asha* v. *B. K. Haldar*, (1936) 14 Rang. 439 (F. B.) : Burma Laws Act, XIII., 1898, s. 13(1), (3).

[5] See Ind. REGISTRATION Act, XVI. 1908, ss. 17, 49. "Instrument" & "document" retained to conform to phraseology of Act. The instrument must be (i) non-testa-

SECTION 347. in which any of the Acts[6] relating to Registration has come into force,[7] if such document[5] has been executed on or after the date on which such Act came into force in the said district : no such document,[5] unless it has been registered, will affect any immovable property comprised therein, or be received as evidence of any transaction affecting such property.[5]

Oral gift of immovable property.

" It is firmly settled that under the Muhammadan law, a gift of immovable properties can be made verbally without recourse to a written and registered document." [8] A verbal gift of landed property, if followed by a transfer of possession, has been held to be valid.[9] The Transfer of Property Act, s. 123, no doubt, requires that a gift of immovable property must be effected by a registered instrument signed by or on behalf of the donor and attested by at least two witnesses ; but s. 129 makes an exception in favour of gifts effected under any rule of Muhammadan law.[10] The gift in Kamarunnissa Bibi's case [9] was originally made without a registered document. But about six weeks afterwards a mukhtar-nama was executed, which contained a reference to the gift,—not merely a cursory mention—" it was intended to carry into effect the gift which it alleged that he (the donor) had made a short time before." (p. 272). This mukhtar-nama was registered : p. 273. But the Indian Registration Act, (ss. 17, 49) does not require a registered instrument for the validity of a gift. All that the Act requires is that where there is an instrument, it should be registered.[11] Attestation is in no case necessary.[12]

Registration.

mentary & (ii) purport or operate to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of value of Rs. 100 or upwards, to or in immovable property : Ind. REGISTRATION ACT, s. 17(1)(*b*) : *Nasib Ali* v. *Munshi Wajid Ali*, (1926) 44 C. L. J. 490 (= *n.* 11). *Chhotu Miya* v. *Papa Miya*, First appeal 142 of 1929, *unrep.* (*per* Baker & Nanavati, JJ. 24 June, 1931, Bom. H. C., combined effect of Ind. Registr. Act, s. 17, & Ind. Ev. Act, s. 91 considered) : on which see also *National Bank of India* v. *R. C. Nazir & Co.*, (1931) 34 Bom. L. R. 748 (though writing not obligatory, if terms once reduced to writing, no other evidence of terms of grant admissible except the writing.—If gift made orally & completed by possession, & document merely subsequent recital of gifts, no registration necessary). See also *Bashir Ahmad* v. (*Mt.*) *Zubaida K.*, [1926] AIR (OU.) 186.

6 Following Acts, specified in Ind. Regstr. Act, s. 17, intended to be referred to & no others, viz. Act XVI of 1864 ; XX. of 1866 ; VIII. of 1871 ; III. of 1877 ; XVI. of 1908.

7 I.e. falling under Ind. Registr. Act, ss. 2(3), 5.

8 *Jabedanessa* v. *Nazibal Islam*, (1910) 15 Cal. W. N. 328. See also *Karam Ilahi* v. *Sharfudin*, (1916) 38 All. 212.

9 *Kamarunnissa B.* v. *Husani B.*, (1880) 3 All. 266 (P. C.) = s. 404, *ill.*

10 *Jabedanessa* v. *Nazibal Islam*, (1910) 15 Cal. W. N. 328.

11 *Nasib Ali* v. *Munshi Wajid Ali*, (1926) 44 C. L. J. 490 (deed of gift by Muslim is not instrument effecting, creating or making gift, but mere piece of evidence not requiring registration : first gift was declared, accepted & completed by transfer of possession, then deed was made : *held*, on principle, such deed does not require registration : it would be ineffective—without transfer of possession—to convey even if registered : can be considered merely one step leading to transfer, not instrument effecting transfer : what effects transfer is transfer of possession after declaration & acceptance). Still *submitted* it would be very unsafe not to register the deed ; see Ind. Ev. Act, s. 91 ; *Kulsum B.* v. *Shyam S. L.*, [1936] 34 All. L. J. 1027, 1034.

12 *Karam Ilahi* v. *Sharfuddin*, (1916) 38 All. 212.

It is, however, clear that unless there is an instrument of gift, if disputes arise, there must be great difficulty in proving it. SECTION 347.

A transfer of immovable property (A) made by agreement in discharge of mahr, though it may purport to be a gift, is in reality a transfer in discharge of a debt : s. 103B. It is therefore a transaction for consideration,—a sale and not a gift. (B) On the other hand (i) the husband may make a gift of immoveable property to his wife, and (ii) the wife may remit her mahr,—and these two acts may be transactions independent of each other, with a long interval of time between them, having no such connection between themselves as to form mutual considerations. Each may be an independent gift.[13] Intermediate between the two categories (A) and (B), the transaction may take many forms,[14] and it is not always easy to determine whether any particular case falls under category (A) or (B). To state it over again, in

Gift of immovable property in lieu of mahr.

[13] Treated as *hiba bil iwaz* : s. 408, *ill.* (5) : *Jami-ush-Shittat* : see also s. 410, com. *Muhammad Esuph* v. *Pattamsa Ammal*, (1889) 23 Mad. 70 (*bona fide* transfers), *Mogulsha* v. *Mahamad Sahib*, (1887) 11 Bom. 517 (validity of gift will depend upon whether possession given); *Rujabai* v. *Ismail Ahmed*, (1870) 7 Bom. H. C. R. (O. C. J.) 27, 32 ("if gift thrown into form of *hiba bil iwaz* or virtually sale." But, with all respect *hiba bil iwaz* is not virtually a sale). See *n.* 14, I. (vi).

[14] Cf. s. 103 B. I. Oral GIFT OF IMMOVABLE PROPERTY IN LIEU OF MAHR held valid (i) *Kulsom B.* v. *Sham S. L.*, [1936] 34 All. L. J. 1027 : Is such transaction gift, or is it transfer for consideration ? Niamatulla, J. put it on ground of two mutual but independent gifts : (*a*) gift of property by husband, (*b*) gift of *mahr* by wife, see p. 1036. Between an ordinary creditor & debtor, Court would probably be disinclined to accept such interpretation of situation, viz. as consisting of independent gifts : & would rather consider each transfer to be in consideration for the other : but relation of husband & wife, & PECULIAR NATURE OF MAHR AS DEBT, —its payment being seldom pressed except on dissolution of marriage, & what is most important, its being able to remain unpaid, without being barred in three years,—might make difference : (ii) see *Mohammad Sadiq A. K.* v. *Fakhr J. B.*, (1931) 59 I. A. 1 (OU.) = s. 103B, *ill.* (*debitor nor praesumitur donare*, how far applicable); (iii) *Musahar Sahu* v. *Hakim Lal*, (1915) 43 I. A. 104 (CAL.), on which reliance is placed, assumes consideration & registration : as extract set out in 34 All. L. J. 1027 shows : 43 I. A. 106, 107 ; (iv) in *Kamarunnissa* v. *Husani B.*, (1880) 3 All. 266 (P. C.) gift, no doubt, oral, & in lieu of *mahr* : but decided prior to Trans. of Prop. Act, 1882 : question of registration not before Court ; (v) see also *Ma Mi* v. *Kallander A.*, (No. 1), (1926) 54 I. A. 23 ; (vi) *Saburanessa* v. *Sabder Sheikh*, (1934) 38 C. W. N. 747, where (*a*) *hiba bil iwaz* described as sale [but neither of the two gifts making up *hiba bil iwaz* is "consideration" in sense of law of contract]; (*b*) marriage also deemed sale. But, no doubt, what is in fact a sale may be wrongly called *hiba bil iwaz* in instrument ; (vii) H purports to transfer his whole property to wife, in lieu of *mahr*, but does not put her into possession : thereafter he executes deed purporting to convey property to another. If first transfer was made in lieu of *mahr*, it was contract with valid consideration, & enforceable without transfer of possession : but if it was mere gift, then possession was necessary to perfect it : Macn. 216-219 (case 15); (viii) *Ghulam Mustafa* v. *Hurmat*, (1880) 2 All. 854 ; (ix) *Khamrunnissa alias Bibi Janbi* v. *Shah Hazarath S.*, (1911) 21 M. L. J. 958 ; (x) *Sarifuddin Muhammad* v. *Muhiuddin Mohammad*, (1927) 54 Cal. 754 (authorities fully discussed); (xi) see also *Sadiq Ali* v. *Mt. Amiran*, (1929) 5 Luck. 406 (gift to wife in lieu of *mahr* during *marz-ul-maut*, held not to be ambulatory or testamentary); (xii) *Nasib Ali* v. *Munshi Wajid Ali*, (1926) 44 C. L. J. 490 (= *n.* 11). II. TRANSFER IN CONSIDERATION OF MAHR HELD NOT GIFT BUT SALE. (i) Macn. *Moohum. L.* 272 (case 21); (ii) *Fateh Ali S.* v. *Md. Bakhsh*, (1927) 9 Lah. 428 ; (iii) *Abbas Ali Shikdar* v. *Karim Bakhsh S.*, (1908) 13 C. W. N. 160 ; (iv) *Khamrunnissa, alias Bibi Janbi* v. *Shah Hazarath Saib*, (1911) 21 Mad. L. J. 958 (transfer of property in lieu of *mahr*, may operate as sale, inasmuch as wife gives up her legal rights to receive her *mahr*, & in consideration thereof obtains property); (v) *Ghulam Mustafa* v. *Hurmat*, (1880) 2 All. 854 ; (vi) *Chhotu Mia* v. *Papa Mia*, (First App. 142 of 1929) = *n.* 5 : see also s. 525, *ill.* (1) (*d*) com. ; citing Hed. 559 ; Bail. I. 475 (479), 483, (488), Bail. II. 177, com. ; (vii)

SECTION 347. other terms : There may be (1) the gift of the mahr by the wife to the husband : see s. 442 ; and (2) there may be a gift by the husband to the wife, just as he might make a gift to any other donee. It may be of property moveable or immoveable ; and (3) these gifts may either (i) be quite independent of each other, or (ii) form mutual considerations for each other ; (iii) they may be separated by a long interval, or (iv) take place at the same time.

§ 2.—LEGAL INCIDENTS OF HIBA.

I. HIBA.
(A) Interest transferred under.

348. (1) The legal effect of a hiba [15] is that the immediate and absolute ownership of the subject of the hiba is transferred to the donee ; [16] and where the property is purported to be transferred by way of hiba with conditions, or restrictions, as to its use, or disposal, or alienation,[17] the conditions or restrictions may be void, and the hiba absolute.[18]

(Hanafi law.) Donor presumed to transfer all his interest in subject of hiba.

(2) The Hanafi law has been slowly emerging from a too narrow and (it is submitted) erroneous interpretation : but its effect under the decisions as they stand, need not be stated more rigidly than that the donor, by making a declaration of hiba,[15] may be presumed by the use of the word hiba to have intended to transfer the whole of his interest in the property transferred, so that any restriction purported to be annexed to the donee's full ownership in the subject of hiba may be held to be void as being repugnant to the expressed intention of the donor.[19]

Mirza Md. Hasan v. *Safdar Mirza*, (1932) 14 Lah. 473, 481 ; (viii) *Esahaq C.* v. *Abedunnessa*, (1914) 42 Cal. 361. See ss. 103 B, 600, 408, ill. (5) ; s. 556, *n.* 15.

15 See ss. 345, 348, 366A, comm. Unless immediate & absolute ownership of specific property intended to be transferred, use of word HIBA is inappropriate : in other cases appropriate form of grant is to transfer not the property itself, nor its ownership, but specific rights in the property or its USUFRUCT for period in question.

16 So that creation of limited estates (see ss. 369, 444 ff.) cannot be called making *hiba* ; nor can *hiba* be said to be made where donor does not own *dominium* over subject ; where he consequently cannot transfer the *dominium*,—even though he transfers all rights he possesses. See also s. 446, com., p. 501.

17 RESTRAINT ON ALIENATION, see ss. 418, 369, 444, 445, comm. (citing *Tagore case*, L. R. I. A. SUPP. VOL. 47). (*Nabob Amiruddaula Muhammad Kakya*) *Hussain K. B.* v. *Nateri Srinivasa Charlu*, (1871) 6 Mad. H. C. R. 356 (absolute restraint void. "Nothing could be more INEQUITABLE than to allow the VISIBLE MEANS OF A MAN, to whom CREDIT HAS BEEN GIVEN to be narrowed by a SECRET CONTRACT with the person who has given the debtor the opportunity of appearing as owner"); *Babulal* v. *Ghansham Das*, (1922) 44 All. 633 (prohibition against transfer void) ; *Amjad Khan* v. *Ashraf K.*, (1929) 56 I. A. 213 (gift to wife as to Rs. 10,000 without power of alienation upheld) : see s. 369, com. (x).

18 Bail. I. 508, 509 (*ll.* 1-5) ; *Pandit Krishna B.* v. *Mt. Ahmadi*, (1935) 11 Luck. 199 (condition that DONEE SHALL BE LIABLE FOR PAYMENT OF ALL DEBTS OF DONOR, is void : Transf. of Prop. Act, s. 128 relied upon).

19 Bail. I. 508 (516), 590 (600) Hed. 488, 489 ; cf. *Muhammad Shafi Khan* v. *Mt. Lalijan*, 11 Ind. Cas. 702.

SECTION 348. (Shia law.) Donor may transfer part of his interest in subject of gift.

(3) Under Shia law, the intention of the donor is gathered from the whole of the declaration : rules of construction being designed to assist in ascertaining intention :[20] and if any limitations are imposed on the donee's ownership of the subject of gift, they are as far as possible given effect to, unless they are opposed to any law.[21]

Illustrations.

(1) D makes a gift of a house, for the residence of the donee and their heirs, generation after generation, declaring that if the donees sell or mortgage the house, the donor and his heirs will have a claim on the house, but not otherwise. *Held*, that under both Hanafi and Shia law the donee takes an absolute estate.[22]

(2) D says to R, "this mansion is to thee UMRI [i.e. for thy age, umr], or HYATI [for thy life, hyat], and when thou art dead, it reverts to me,"— in which case, in Hanafi law, the gift is construed as a hiba, with a void condition, so that the mansion is considered to be transferred absolutely with a condition that is void.[23] In Shia law it would be construed as a life-estate.[24]

(3) D says to R, "this hiba is to thee, and to those that follow after thee." In Hanafi law it would be a gift of an absolute estate to R, "the latter words being treated as a surplusage."[25] In construing the grant under Shia law, it would be considered that since the word hiba is used, the words "to those who follow after thee are unnecessary :" consequently the grant is not accurately worded. If there is anything sufficient to indicate that R was intended to take only the usufruct for life, and his heirs were to take the usufruct after him, the intention of the donor would be given effect to.[24]

(4) D makes a hiba on condition that he has an option of cancelling the hiba for three days : the hiba is valid, but the option void.[26]

(5) D makes a hiba of a female slave, stipulating that the donee should not sell her ;[26] or that he should sell her to a particular person, or restore her to the donor after a month. All these gifts would be absolute gifts under Hanafi law.[27] Under Shia law the last would be a valid grant for a limited period.[28]

[20] *Bhagabati Barmanya* v. *Kali Charan Singh*, (1911) 38 I. A. 54, 64 (Lord Macnaghten adopting Wilson, J.'s words in *Ramlal Sett* v. *Kanai Lal Sett*, (1886) 12 Cal. 666, a noteworthy judgment) ; *Dinbai* v. *Nusserwanji Rustomji*, (1922) 49 I. A. 323, 329. Cf. s. 11(3). RESTRAINT ON ALIENATION : ss. 369, 418, comm.

[21] See s. 348, *ill.* (7), com.

[22] *Nasir Husain* v *Sughra B.*, (1883) 5 All. 505 ; cf. *Suleman Kadr* v. *Darab A. K.*, (1881) 8 I. A. 117 = 8 Cal. 1 ; cf. s. 408, *ill.* (2) (stipulation that income be retained by donor) ; see *n.* 17.

[23] Bail. I. 509 (517) ; II. 203 ; cf. *Suleman Kadr* v. *Darab Ali*, (1881) 8 I. A. 117, 121, 123 ; Hed. 309. But if instead of giving the mansion, he gives usufruct of mansion for life of donee, case might be different. See s. 5c.

[24] Bail. II. 226-227 ; *Banoo B.* v. *Mir Abed A.*, (1907) 32 Bom. 172.

[25] Bail. I. 510 (518). But see s. 5c.

[26] Bail. I. 538 (547). This *ill.* occurs twice in *Fatawa Alamgiri*, omitted in Bail. I. 509 (*l.* 1) (517, *l.* 1) : see *n.* 17. Of course D has general powers of "revocation" (as distinguished from "cancellation") : see ss. 420 ff. about *mahr*, s. 442. Muslim law as to release of debt differs naturally from law of gifts ; release of debts governed in India by Ind. Contr., Limit., & Transf. of Prop. Acts.

[27] Hed. 488 ; Bail. I. 538 (547). [28] See ss. 447.

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(6) D says: "my mansion is thine RUQBA," meaning thereby, "if thou diest it is mine, if I die it is thine,[29] [i.e. that it will belong to the donee if he survives the donor.] This may be interpreted (*a*) as a suspension of a hiba upon a contingency, viz. upon the decease of the donor, in which case the hiba is void (as Abu Hanifa and Imam Muhammad hold), or (*b*) as a hiba of a house with the condition of ruqba, "in which case the hiba is valid absolutely and the condition void" (so Abu Yusuf holds)[30] or (*c*) as a special class of limited interests which the Shia law permits,[31] or (*d*) it may be so worded that there is no difficulty in holding it as an ordinary bequest which is to lapse in case the legatee does not survive the testator, preceded by a grant of the use of the mansion during the joint lives of the grantor and grantee.

(7) A Shia text states regarding the forms in which limited interests (SUKNA UMRA and RUQBA) may be created: "The contract implies the utterance of any of the following formulæ: 'I give you the house....for your life....by sukna or umra or ruqba' or the utterance of any of the following formulæ: 'I have made hiba to you of the corpus of this house, on condition that if you die before me, the same shall revert to me, and that if I die before you the same will continue to be yours.' It has been said that this (last formula) must obviously (be interpreted to) mean, that the corpus of the property is permanently settled, as is related....on the authority of the Sunni jurists."[32]

1.—THE TERM HIBA EXPLAINED: DISTINGUISHED:

Hiba, "is of two kinds, tamlik and isqat, which latter means literally to cause to fall or extinguish."[33]

Grant of absolute estate implied.

"When," says Syed Sahib Ameer Ali,[34] "a grant is made with the word hiba, it implies, generally speaking, the grant of an absolute estate: for hiba is defined to be an act by which one person transfers to another, gratuitously, without the motive of qurbat,[35] i.e. of pleasing God, accompanied by immediate transfer, constructive or actual, the entire and absolute property (milk[36]) in a certain thing. Such a transfer in the Arabic language is also constituted by the words an-nahila[37] (a present) and al-atiyya. In Hindustani the word

[29] Bail. I. 58 (*ll.* 4-7).

[30] Hed. 488 (col. i., par. 3).

[31] See s. 446 ff.

[32] *Jawahiru'l Kalam* IV. 618. Point is whether reference to *corpus* & *hiba* in the grant is to be taken as showing intention best, (viz. that out & out transfer intended,) or whether paramount desire is to restrict donee's interest to limited period of time: in latter case in spite of word *corpus*, grant of usufruct for period stated must be construed. See s. 366 A. The same point is dealt with in somewhat more explicit terms in *Jamiu'sh-Shittat*, cited s. 445, com., p. 517.

[33] Bail. I. 508 (516). *Sainuddin* v. *Latifannessa B.*, (1918) 46 Cal. 141 (*istabat* = acts that create rights; *isqatat* = acts that only extinguish existing rights including release, divorce emancipation of slaves, etc.; *tamlik* = making another *malik* or owner & includes ordinary cases of sale, gifts & similar other transactions. "In cases of *tamlik*, *taliq* is not valid, i.e. it is not valid to make such transaction dependent on any condition or contingency). See Abdur Rahim, *Mdan. Jurispr.*, 192.

[34] *Mahom. Law* I. 112 (180) (in chapter dealing with Shia law of gifts).

[35] Literally "approach (to God)."

[36] MILK, cf. s. 366. *Hiba* is defined as conferring a "right of property" (*tamlik* from *milk* ownership); *hiba* "in its literal sense signifies the donation of a thing from which the donee may derive a benefit," Hed. 482.

[37] Spelt *nuhulut* the final *t* is not necessarily vocal in some Arabic words. Bail. II. 203, *nuhla*, Bail. I. 91: more correctly *an-nihla*, *an-nuhla*.

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atiyya is equivocal, and so are the words dena and bakhshnâ. When grants are made with these words, the intention of the grantor must be examined from the context of the deed and surrounding circumstances, viz. whether he intended an absolute gift, or to convey only a limited interest." [38]

Milk explained.

The meaning of milk, is given by Richardson, Arabic & Persian Dictionary as "possessing, having dominion." Kasimirski is clear and explicit about the absolute and physical nature of the dominion : "Tenir une chose, apres l'avoir saisir avec la main (av. acc.) 2. Contenir quelque chose, se rendre maître de quelque chose. 3. Posséder quelque chose, etre en possession de.... (av. acc. de la ch,)" etc. Then as regards tamlik Richardson explains it as "constituting possessor, appointing master, or chief, giving in perpetuity," and Kasimirski "I. Mettre quelqu'un en possession de quelque chose, (av. acc. de la p. et acc. de la ch.) 2. Faire quelqu'un roi." [38] Malik etymologically means one who has milk (dominion). The word malik, however, has become common in the vernaculars of India ; and in its ordinary use it is not a term of art, it does not necessarily define the quality of the estate taken, but the ownership of whatever that estate may be.[39]

Tamlik.

Malik.

Not every transfer without consideration is hiba.

These definitions show that hiba cannot be taken to be the generic term for transfers without consideration : see s. 345.

It would have been more appropriate had the term hiba been restricted in India to such transfers without consideration alone, as had reference to tamlik or full ownership. Other voluntary transfers might also have been given as far as possible their specific designations. The nomenclature of Muslim lawyers has, however, been ignored, and hiba is taken as the exact equivalent of "gift" : see s. 345, com.

2.—THEORY OF LAW OF HIBA : REVOCABILITY. Gifts are voluntary. Donor cannot be compelled.

The theory of the Muhammadan law of hiba is simple, and the inter-dependence of one rule in it on another, close. The whole of it may, indeed, be apparently summed up in the words "Hiba is a voluntary [40] transfer of the ownership of property." [41] Four corollaries may be drawn : (1) no donor can be forced to take any step towards the completion of a hiba,[42] whether that

[38] Cf. also Bail. I. 507 (515) *n.* 3 ; 508 (516) *n.* 2 ; *Saiad Kasum* v. *Shaista Bibi*, (1875) 7 N. W. 313 (*tamlik* = assignment of ownership).

[39] *Bhaidas Shivdas* v. *Bai Gulab*, (1921) 49 I. A. 1, 6 (BOM.) ; *Bishunath Prasad S.* v. *Chandrika P. S.*, (1932) 60 I. A. 56 (*malik mustaqil*). See also (*Mt.*) *Abbas Bundi B.* v. *Saiyad Muhammad Raza*, (1929) 4 Luck. 452, 470 ff., affirmed *Mohammad Raza* v. *Abbas Bandi B.*, (1932) 59 I. A. 236, 244.

[40] See s. 420, com., for connection in Muhammadan law between VOLUNTARY TRANSACTION AND REVOCABILITY : *lazim* is the word used in contrast to revocable.

[41] OWNERSHIP = absolute ownership : see p. 345, *n.* 12, s. 443 A, *nn.*, pp. 489 ff. PROPERTY = *ayn*, as distinguished from usufruct : see s. 366 A. Gift in Roman law = alienation "which is made without the law compelling you to do it,"—quod nullo jure cogente conceditur. Digest 50. 17, 82 : Hunter, *Rom. Law*, 318 : "They are completed when the giver has openly declared his intention whether in writing or not ....If no delivery took place, they should be fully & completely valid ; the necessity of delivery should rest upon the giver," Justin. II. vii. 2. USUFRUCT : see p. 346, *n.* 14.

[42] *Mahomed Buksh Khan* v. *Hoosein Bibi*, (1888) 15 I. A. 81, 95 (CAL.) citing *Kalidas Mullick* v. *Kanhya Lal Pundit*, (1884) 11 I. A. 218, 233 (law of GIFT rests on principles having nothing to do with FEUDAL RULES : European analogy to be found rather in voluntary contracts or transfers, where IF DONOR HAS NOT DONE ALL he could, to perfect his contemplated gift, he CAN NOT BE COMPELLED to do more, cf.

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Why gifts are normally revocable.

Contingent gifts.

step consists of giving possession, or of any act necessary to transfer possession (as a partition and division of the property); (2) the donee cannot be forced to do anything even though he may have promised to do it in return for, or in consideration of, a hiba—for the promise to make the hiba being not enforceable, the consideration for the donee's promise fails, and the donee's promise is as much a bare agreement without consideration, as the original hiba ;[43] (3) a person declaring that he will make a hiba in future, is free to make the hiba on the future occasion, or not, as he pleases (see s. 349). But, (4) where the voluntary nature of the hiba (*a*) is altogether taken away, either by the act of the parties, or by external circumstances, it no more remains revocable, and (*b*) where there is any return or consideration for the transfer, it can no more be considered voluntary. The first kind of consideration or return that is mentioned is (i) the return from God, or " approach to God." It is this that makes a sadaqa or a waqf irrevocable. The importance of this principle can only be realized when it is remembered that the primary mission of the Prophet was to destroy superstition, and to bring about a spirit of reverence and religion amongst the ungodly Arabs ; this rule is but an exemplification of what was sought to be impressed upon them—that no return can be greater than that of being brought nearer to Allah,—of whom they were constantly taught to say there is no God but ' The God,' that from Him we come and to Him we return and that an act done with His name on one's lips cannot be considered as a light or informal act. (ii) Secondly, gifts become irrevocable where the return consists in the loose ligaments of family relations that prevailed amongst the Arabs becoming closelier tied,—hence gifts between relations may not be revoked. (iii) Finally, where there is what would be called valuable consideration in English law, the gift may be transformed into a sale or something resembling it. The consideration may be stipulated for at the time that the hiba is made, or it may be an after-thought.[44]

CONSIDERATION :

Why some gifts irrevocable :

3.—CONDITIONS ANNEXED TO GIFTS.

The statement is frequently made crudely that where any condition whatever is annexed to a gift, the condition is void, and the gift valid absolutely. Grounds seem to be furnished for the statement by such passages as the following : Hiba " is not cancelled by vitiating conditions ; so that if one should give his slave on condition of his being emancipated, the gift would be valid, and the condition void." [45] " Gift [read hiba] is a contract by which the property of a substance [see s. 366A] is transferred immediately and unconditionally without any exchange, and free from any pious or religious purpose on the

s. 443A) : *Hariram Serowagee* v. *Madan Gopal Bagla*, (1928) 31 Bom. L. R. (P.C.) (CAL.) 711, 714 (if gifts not completed, Court will NOT CONSTRUE intended transfer as DECLARATION OF TRUST : series of acts which might, if carried far enough, have amounted to completed gifts, but in fact stopped short of completion : Brij Comari always retained power to cancel all that she had done, whenever she changed her mind : that change did eventually take place,—*per* Lord Summer) ; *Ebrahim* v. *Bai Asi*, (1933) 58 Bom. 254, 257. See also pp. 380, 402, 416 f.

[43] Clearly pointed out by A. Rahim, J., *Fakir Nynar* v. *Muhamed Rowther*, (1911) 35 Mad. 120, 128, 129, citing Hed. 482, col. ii.

[44] See s. 383, com. : rules as to transfer of possession important in theory of law.

[45] Bail. I. 509 (517).

part of the donor." [46] But in the same texts we find : " When a gift is made on a condition of an iwaz or exchange, all the conditions of a gift attach to the iwaz in the beginning." [47] Again, " if a person gives something to another on condition of that other giving something to him in exchange for it. . . . a deed of this nature is in its original a gift." [48] And it is said that " if again a reciprocal gratuity were actually stipulated for at the time of the contract, the condition would be valid." [49] SECTION 348.

Conditions of some kind may be annexed to gifts.

It is submitted that such conditions in a hiba are invalid as are referred to in s. 348. Such conditions as can be brought under the terms of a stipulation for a return are valid. Moreover the distinction between (i) the grant of specific rights under the name of manafi or usufruct, and (ii) the transfer of the sum total of rights exercisable over a determinate physical object cannot be overlooked without giving rise to grave errors : ss. 345, 366 A. The owner may at his choice do one of two things : (i) transfer only some of the rights that together make up the bundle of rights called ownership. When such a transfer is made, the transferee not having the rest of the bundle transferred to him cannot claim to exercise those other rights. But (ii) the owner may transfer the whole bundle of rights (as he does when he makes a hiba of the property), and if after having done so he attempts to control the transferee in the use or disposition of the property, the tables are turned, and the transferee being in this case, at the time in question (viz. after all the rights over the thing have been transferred to him) the absolute owner, can disregard the attempts of the former owner. It is submitted that the difficulties arise when the meanings of the terms are not kept clear : (1) hiba does not connote all gifts, but is restricted to the complete transfer without consideration of the full ownership of a determinate thing ; (2) ownership [41] means having rights unlimited in duration (consequently heritable) and unrestricted in respect of transfer and user, therefore there cannot be a hiba transferring limited ownership : to speak of a hiba for a limited period is a contradiction in terms ; (3) if rights limited in respect of their duration are intended to be transferred then what has to be transferred is the manafi or usufruct, or specific rights, not the ownership of the property : see ss. 366A, 443 ff., comm.

Transfer of— (i) complete ownership, (ii) usufruct.

349.[1] A declaration purporting to transfer some property by way of hiba to the donee at a future time, or contingently on the happening of a future event, is of no effect.[2]

HIBA.

(B.) Time when it comes into operation.

[46] Bail. II. 20.

[47] Bail. I. 534 (543).

[48] Hed. 488 (col. i.).

[49] Bail. II. 208 : the gift remains revocable, while the donee is not bound to give the stipulated return.

[1] Sect. 349 cited & applied : *Mirza Hashim Mishkee* v. *A. A. A. Bindaneem*, (1918) 6 Rang. 343.

[2] Bail. I. 508 ; Macn. 50 ; *Amtul Nissa Begam* v. *Mir Nurudin Hussein K.*, (1896) 22 Bom. 489 ; *Yusuf Ali* v. *Collr. of Tipperah*, (1882) 9 Cal. 138 ; *Chekkone Kutti* v. *Ahmed*, (1886) 10 Mad. 196 ; *Abdoola* v. *Mahomed*, (1905) 7 Bom. L. R. 306 ; *Roshun Jahan* v. *Enaet Hossein*, (1866) 5 W. R. 4, affirmed as *Khajoorroonissa*, widow of *Enayet Hossein* v. *Rowshan Jehan*, (1876) 3 I. A. 291 = 2 Cal. 184.

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1.—Contingent gift explained and distinguished.

There is ambiguity in the expression conditional or contingent hiba, the former of which may mean (i) that the transfer of property by way of hiba is purported to be suspended on a condition, and is not to take effect unless that condition is fulfilled—which class of hibas are of no effect under Muhammadan law,[3] or it may mean (ii) that there are certain conditions and restrictions as to the use or disposition of the property forming the subject of hiba, or that obligations are annexed to the ownership of the said property,[4] or (iii) that the transfer in fact consists of some rights that are to arise in future. Each of these requires some consideration. On ownership see s. 345, com., p. 345, *n.* 12.

a.—Reason why contingent gift void.

A contingent or conditional hiba, in sense (i), viz. the transfer of the ownership of a determinate thing, which transfer is not to take place at all unless some contingency or condition is fulfilled, is as above stated, of no effect under Muslim law. The reason is this. Revocability is normally an incident of all gifts, though there are so many exceptions to that general rule that a gift is seldom revocable in actual working. But the conception of a gift is that it is voluntary, and that, as there is no compulsion to make it, so there is no obligation to let it (so to say) continue in force, after it has been made. Where, therefore, the donor purports to make a hiba at some future time, or on the happening of a future event, it may consist of or amount to a mere promise, or even less than that, a mere expression of an intention to make a hiba in future, or on the happening of the event; ex hypothesi, the promise in question is (1) gratuitous and therefore not enforceable; and (2) the promise has reference to making a transfer of determinate property, which transfer could have been revoked, even if it had actually been made. Hence a contingent or conditional hiba can have little effect in Muhammadan law.[5]

b.—Bequest a contingent gift.

Being the expression of a mere intention to make a hiba in future, if that intention is persevered in, the law requires it to be given effect to when the time comes for it to take effect.[6] Where the condition on which the operation of the gift is suspended is the death of the donor, the disposition constitutes a particular species of gift, namely, a bequest[7] and it may operate as such.[8]

[3] The law regards it as mere declaration of intention to transfer in future, pp. 355 f. theory of *hiba*: where rights are concerned which will arise in future they must be transferred as such future rights—as *manafi* or usufruct: s. 366 A, 443 ff.

[4] GIFTS are of three kinds—those which convey PRESENT title & interest & PRESENT right of enjoyment: those that are VESTED, that is, present in interest but in which enjoyment is DEFERRED; & those which are CONTINGENT that is to say in which neither title nor right of enjoyment is given at present, but both depend upon certain events—*Ram Lal Sett* v. *Kanai Lal*, (1886) 12 Cal. 663, 668 (*per* Wilson, J.)

[5] Cf. Trans. of Prop. Act IV. 1882 (amended by Acts XX. 1929, v. 1920) s. 126: "A gift which the parties agree shall be revocable wholly or in part at the mere will of the donor, is void, wholly or in part, as the case may be."

[6] ENGLISH LAW similar: instrument merely expressing desire that a person should have a chattel without delivery, will not, in England, pass any property therein: *Douglas* v. *Douglas*, (1869) 22 L. T. 127.

[7] *Jotindra Mohan Tagore* v. *Ganendra Mohan Tagore*, "TAGORE CASE," (1872) L. R. I. A. (SUPP. VOL.) 47.

[8] See below on WILLS: *Kasum* v. *Shaista B.*, (1875) 7 N. W. 313; cf. *Jeswunt Singjee Ubby S.* v. *Jet Ubby S.*, (1844) 3 Moo. I. A. 245.

It is pointed out in the Jami'u'sh-Shittat that when a return has been stipulated for in the following manner : " I give you this to be your property, on condition that you do this work," it being meant that there is a contract " dependent on a stipulation, then in such a case the gift may become void because the contingency made originally is necessary to be given effect to." [9] The importance of this is that though, if the complete ownership is transferred, and then a condition imposed, the transfer will be effective and the condition void, yet, the intention may be unskilfully expressed, and stated in the form of a condition following a complete transfer, whereas the real intention was that no transfer should take place at all until something happens or is done : in which last case (see s. 348, com.) the attitude of the law is : wait and see : let the contingency happen : if then the donor wants to make the gift, let him do so. SECTION 349.

With reference to a conditional hiba in the second sense above referred to, —(ii), viz. where the use or disposition of the subject of hiba is purported to be restricted by obligations sought to be imposed on the donee, s. 348, and the rules about " stipulations for a return " in s. 407, should be compared. But there is another important aspect from which such a transaction has to be considered. The real effect of the transaction may be to give with one hand and to take away with the other. For initially the total bundle of rights constituting ownership (p. 345, *n.* 12) is transferred and then restrictions are placed over the transferee's use of the thing, i.e. some of the rights already granted are sought to be taken away. Therefore the question presents itself, ought not the grant initially, and not only finally, to consist merely of a grant of the group of rights which it is intended that the transferee should ultimately be allowed to exercise? Why first give and then attempt to take away? Instead, why not deduct from the total bundle what is not intended to be given, why not give only the balance that the transferee is really intended to enjoy? Thus nothing will need to be taken away. If the transaction is susceptible of this version, it comes under the transfers numbered (iii) above, which are considered below. 2.—Conditions restricting use or disposition of subject of hiba.

The transfers that fall under head (iii) above, may now be taken into consideration. The texts restrict the term hiba to the transfer in lump of the sum total of rights in respect of a determinate physical object, in other words of the full ownership of the subject of transfer. But the texts recognize also transactions by which one person authorizes another to derive a specified form of benefit from a physical object : see ss. 443 ff. This is nothing else than saying that specific rights over determinate objects not constituting their full ownership, may be transferred. The transfer without consideration of such specific rights obviously cannot be called hiba. Yet a person may intend to transfer merely a portion out of the sum total of rights over a determinate object, those rights being such as will arise in future, and may inaccurately describe his grant as a hiba at a future time, or a hiba of rights that are to arise 3.—Transfer of rights not amounting to ownership,—

[9] *Jami'-ush-Shittat*, 381.

SECTION 349. in future. To take an example. A person owning a fruit garden may wish to transfer the right to take the fruit that will be produced a year hence. He is entitled to transfer to-day the right to take the fruit that will arise a year hence. The accurate way of giving effect to his intention is to say that he now and immediately grants the right to take the fruit a year hence. But the form of his declaration may be so defective as to make it ineffectual : he may say that he makes a *hiba* of some property that is not yet in existence or not in a form permitting of its being given as hiba. If he declares his intention clearly enough and in the proper form, of transferring the present right to take some benefit out of the property which is derivable in future, his intention will be given effect to. If however his intention is declared in such inapt, unskilful terms that he must be construed to be making a mere contingent hiba, it will fail to have any effect.

—in form of hiba with restrictive conditions.

(C) Donatio Mortis cause or gift in contemplation of death.

349A. A Muslim cannot make a gift in contemplation of death in the mode and with the effect provided by the Indian Succession Act XXXIX. of 1925, s. 191.[9]

A donatio mortis causa may take effect either as a gift (provided that the transfer has been completed),[10] or as a legacy,[11] and the incidents of one or the other must be annexed to it. It may fail as a contingent gift, or have effect only as to 1/3 of the estate (as a legacy).

(D) Possession of invalid gift : responsibility.

350. Subject to the Indian Contract Act, ss. 151 and 152, the donee of an invalid gift while holding possession is, under Hanafi law, responsible to the donor for the loss, destruction, or deterioration, of the subject of gift.[12]

Illustrations.

(1) D gives 9 dirhams to R, to whom he owes 3 dirhams, and says, " Three of them are in payment of your right, three as a gift, and three in sadaqa." R loses them all : he is under Hanafi law responsible for the 3 that were a gift ; because the gift was invalid (being considered a gift of an undivided part of a whole : but see s. 382), but not responsible for the sadaqa, as alms of an undivided share is valid.[13]

(2) D gives half a mansion by way of gift, and delivers it (without dividing the subject of gift); its sale by the donee would be valid according to the Mabsut of Imam Muhammad.[13]

Apart from the Indian Contract Act, the principle does not seem to be very

[9] *Meer Ashraff Ally* v. (*Musst.*) *Nusseebun B.*, (1863) 2 Hay, 163 = Marsh, 315. See s. 349A, com. Succ. Act XXXIX. of 1925, s. 191 = Succ. Act X. of 1865, s. 178.

[10] *Sharifa B.* v. *Ghulam M. Dastagir K.*, (1892) 16 Mad. 43.

[11] See s. 359B (gifts in *marz-ul-maut*); (*Syed Shah*) *Ashadoollah* v. (*Musst. Beebee*) *Shaeba Jhasors*, (1863) 2 Hay, 345.

[12] Bail. I. 518 (par. 2) (526) ; s. 381 (gift of *musha* validated by division & possession).

strictly observed in the Fatawa Alamgiri either.[14] "Yet if possession were taken of land, given by an invalid gift, and it were then made a wakf, it would be lawful, the donee being responsible for its value."[15] SECTION 350.

351. Where the declaration and acceptance of a gift are (1) expressed in writing, registered under the law for the time being in force for the registration of documents, (2) made on account of natural love and affection, (3) between parties standing in a near relation to each other, and (4) if there arises therefrom an agreement as defined in the Indian Contract Act, 1872[16] such an agreement is not void for want of consideration.[17] The Muhammadan law of gifts governs such an agreement in so far as is provided by s. 1 of the said Act, but not further.[17] II. INCIDENTS OF GIFTS IN INDIA. (A) Effect of Contract Act, s. 25. Natural love and affection.

Illustration. H puts his wife in possession of a property, with the conditions, (*a*) that she should collect the rents and profits of the property during her lifetime in lieu of her mahr, (*b*) that if she predeceases him, the mahr debt, shall be deemed to be paid up (no matter what portion may have been realized by that time), and the property shall revert to him, (*c*) that if he predeceases her the property will be hers absolutely. He predeceases her. *Held*, that this was neither a hypothecation nor a will nor a mahabat, and that the property belonged absolutely to her.[18]

Gifts in consideration of natural love and affection. Past favours. The validity of a gift purported to be made "in consideration of the natural love and affection which Muhammad Hasan bears, as well as for all the past favours and indulgence shown by him," it being stated that the said Muhammad Hasan was standing in a near relation to the donor, was decided "upon the principles of the Muhammadan law of gift, which it was stated admittedly governs this case."[19] It does not appear whether the deed of gift was registered. The Transfer of Property Act, s. 54, is referred to in the judgment but not the Indian Contract Act.

Promised subscriptions when recoverable. What may appear a gift, may in fact be subject to the law of contract ; thus subscriptions promised for a public or charitable object (if on the strength of the promise, liabilities are incurred by the promoters of the object), may be recovered by suit.[20] If there is a compromise and there is consideration for

[14] Bail. I. 520 (*ll.* 17-21) (529). [15] Bail. I. 554 (*ll.* 15-17) (562).

[16] Ind. Contr. Act, s. 25(1): connection between making of GIFT & making of AGREEMENT. *Sadik Husain K.* v. *Hashim A. K.*, (1916) 43 I. A. 212 = 38 All. 627 (deed examined to see whether it could take effect as agreement : pp. 643 & 644). Cf. *Raja Mohun* v. *Nisar Ahmad K.*, (1933) 60 I. A. 103 (OU.) (settlement varied according to FAMILY ARRANGEMENT : *sanad*).

[17] Ss. 4, 6A ; *Mahamad* v. *Hasan*, (1906) 31 Bom. 143, 149, 150 ; *Rahim Baksh* v. *Muhammad Hasan*, (1888), 11 All. 1, 2, 4 (par. 4), 8 (*ll.* 1-3).

[18] *Mubarakunnissa* v. *Mansab Hasan K.*, (1911) 33 All. 421.

[19] *Rahim Baksh* v. *Mahammad Hasan*, (1888) 11 All. 1.

[20] *Kedar Nath* v. *Gurie Mahomed*, (1886) 14 Cal. 64.

SECTION 351. Compromise.

the transfer of property which is given the form of a gift, or wakf [12] it is a contract and the conditions will be enforced.[22] A dispute between a Shia husband and wife about mahr is referred to arbitrators. They transfer the absolute ownership of the husband's property in præsenti to the wife under a registered award, though the husband does not give possession to her, reserving (as the award permits him to do) the use of the property to himself during his life; the wife becomes owner of the property.[23]

(B) Effect of the law of trusts.

352. Where the donee undertakes to do something in return for the gift, the undertaking and the gift may form valid considerations for each other, and may be enforceable as an agreement raising a trust,[24] and constituting a valid obligation to perform the undertaking.[25] The undertaking may be given either at that same time as, or after the execution of, the deed of gift.[26]

Undertaking by donor enforceable as trust.

Umjad Ally's case, 11 Moo. I. A. 517.

The ground of decision in Umjad Ally's case [25] is marginally noted with some detail. The Nawab of Oudh had made a gift of Government promissory notes to his son, with the condition that, during the donor's life-time, the interest accruing from time to time on the notes should be made over to the donor by the donee (s. 383, *ill.* 3, p. 413). It was argued that the gift was invalid. Both the gift and the condition were held enforceable.

Gifts of produce,—
Q. 1. Incomplete?
A. Produce distinguishable from corpus; reservation of produce does not affect completion of gift of corpus.

Their Lordships "considered whether a real transfer of property by a donor in his lifetime under the Muhammadan 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

[21] (*Khajeh*) *Solehman Quadir* v. *Salimullah*, (1922) 49 I. A. 153, 166 (CAL.).

[22] *Abubekar* v. *Maibibi*, (1869) 6 Bom. H. C. R. (A. C. J.) 77; cf. *Mahammadunissa Begum* v. *J. C. Bachelor*, (1905) 29 Bom. 428 (heir relinquishing share in estate in favour of minor with view of facilitating appointment of Collector as guardian, constitutes consideration: transfer of possession not necessary to make agreement binding); *Ashidbai* v. *Abdulla*, (1906) 31 Bom. 271 (paternal grandmother & father of minors relinquished their shares in favour of minors; relinquishment by each held mutual consideration).

[23] *Muhammad Talib* v. *Inayati*, (1911) 33 All. 683; cf. *Angan* v. *Md. Husain*, (1891) 13 All. 409.

[24] *Sadik Husain K.* v. *Hashim A. K.*, (1916) 43 I. A. 212, 221 (ALL.) (gifts though medium of TRUST included in "gifts" in Oudh Laws Act, XVIII. of 1876, s. 3); *Musharraf R.* v. *Sikandar J. R.*, 51 All. 40, 53; cf. *Raja Mohan* v. *Nisar Ahmad K.*, (1933) 60 I. A. 103, 106, 107 (letters published by government declaring certain rights which "constituted the Rani & her two nephews tenants in common:" then *sanad* granted in name of Rani alone: though under Oudh Estates Act, s. 10, only persons entered as *taluqdars* to be recognized as such: (p. 110), yet *held* p. 111, that *sanad* could not cancel rights already conferred by government & the Act could not divest rights already granted. "The latter contention stated in the abstract cannot be controverted"); *Mohammad Abdussamad* v. *Kurban Husain*, (1903) 31 I. A. 30 (OU.).

[25] (*Nawab*) *Umjad Ally* v. (*Mt.*) *Mohumdee Begum* (1867) 11 Moo. I. A. 517, 547 f. = 19 W. R. (P. C.) 25 = s. 383, *ill.* (3); *Khajeh Solehman Quadir* v. *Salimullah Bahadur*, (1922) 49 I. A. 153, 167 (CAL.).

[26] *Ameeroonissa* v. *Abedoonissa*, (1874-5) 2 I. A. 87; (*Nawab*) *Ibrahim K.* v. *Ummat-ul-Zohra*, (1896) 19 All. 267 = 24 I. A. 1 = s. 405, *ill.* p. 441.

his lifetime,[27] is an incomplete gift by the Muhammadan law. The text of the Hidaya seems to include the very proposition and to negative it. The thing to be returned is not identical, but something different. See Hidaya tit. Gifts, Vol. III., Book XXX., p. 294,[28] where the objection being raised that a participation of property in the thing given invalidates a gift, the answer is, 'The donor is subjected to a participation in a thing which is not the subject of his grant, namely, the use[29] [of the whole indivisible article]; for his gift related to the substance of the article, not to the use of it.' Again, if the agreement for the reservation of the interest to the father for his life is to be treated as a repugnant condition, repugnant to the whole enjoyment by the donee, here the Muhammadan law defeats not the grant, but the condition. Hidaya, tit. Gifts, Vol. III., Book XXX., p. 307. But as this arrangement between the father and the son is founded on a valid consideration,[30] the son's undertaking is valid, and could be enforced against him in the Courts of India as an agreement raising a trust, and constituting a valid obligation to make a return of the proceeds during the time stipulated.[31] The intention of the parties, therefore, is not found to violate any provision of the Hidaya and the transfer is complete. The Muhammadan law authority whom Mr. Campbell consulted, supported it. His opinion is treated somewhat lightly as a nude opinion, unsupported by authority; but it is to be observed, that unless some authority had been cited to show the transaction invalid, effect should have been given to the manifest intention of the parties."[32] See s. 11(3), p. 78.

SECTION 352.
Q. 2. Gift with repugnant condition?
A. (*a*) If so, condition defeated not gift.
(*b*) But consideration valid: agreement enforceable.

Unless authority cited to show that intention invalid, it must prevail.

The decision of the Privy Council must influence the law of gifts in many directions,[33] which will be considered in due course. Observe that the Privy Council rely upon the Hidaya for meeting the argument that the gift was bad, because (1) it had not been completed, and (2) that in its terms it was such that it could not have been completed;—not for meeting the second objection, viz. that the gift ought to be treated as conditional. To this second objection their reply is that (*a*) the Muhammadan law would defeat the condition, and

The passage from the Hidaya applicable on general principles.

[27] Observe the contrast between CORPUS & PRODUCE: see ss. 366A, 345(1A).

[28] Hed. 483 (col. ii. par. 3): This passage refers to exception from doctrine of *musha* (Hanafi law) that notwithstanding that doctrine gift of undivided part of property not capable of division, is valid: to this exception objected, (i) that reason why undivided parts of property not allowed to form subject of gifts, under *musha* doctrine is that donor incurs participation in property; (ii) this reason applies to indivisible property as much as divisible property (therefore objected that there is no ground for allowing the exception). *Hidaya* replies to this objection in words cited by P.C. Note pointed contrast between (1) the *tamlik-ul-manfaat* = transfer of USUFRUCT or produce, & (2) *tamlik-ul-ayn* = transfer of SUBSTANCE or corpus: see s. 366A, p. 380.

[29] MANAFI = PRODUCE: see ss. 366A, 345(1A) & p. 346, *n.* 14.

[30] Neither Ind. Contr. Act I. of 1872 nor Ind. Trusts Act II. of 1882 had been enacted at time when the judgment pronounced.

[31] This view was apparently in Sir John Edge's mind: *Mohammad Abdul Ghani* v. *Fakhr J.*, (1922) 49 I. A. 195, (ALL.).

[32] (*Nawab*) *Umjad Ally* v. (*Mt.*) *Mohumdee B.*, (1867) 11 Moo. I. A. 517, 548. Cf. s. 11(3): parties were Shias: but decision based on Hanafi text *Hidaya*: same principles applied in Sunni case of *Mohammad Abdul Ghani* v. *Fakhr Jahan*, (1922) 49 I. A. 195, reservation of usufruct does not by itself make gift void, p. 208. See p. 413.

[33] This has taken place since these words were written in 1912, & the case has been repeatedly followed & its principles extended: see Desai, *Index of cases.*

SECTION 352.

not the gift, (*b*) in India the condition would be enforceable as raising a trust. (3) a third objection is also dealt with in the Hidaya that arises in the course of the discussion of the first two objections, viz. that where there is a condition with reference to the produce the donor is subjected to participation, in a divisible object, and that this renders the gift obnoxious to the rule of musha, (see ss. 374-382). The answer to the third objection is that the participation is not in the corpus of the thing, which is granted,[27] but in the produce of the thing " which is not the subject of his grant." [28]

The decision considered.

The judgment of the Privy Council, had prior to the first edition of this work, been subjected to unmerited criticism. With all respect, the decision could not have been different. The legal title in the promissory notes was undoubtedly in the donee ; the question whether the stipulation (to return the interest to the donor) was valid, was not before their Lordships. Nor can exception be taken to their lordships' observations that the stipulation was valid and enforceable. These observations form an integral part of the reasoning by which the gift was upheld. Their argument is two-fold : (1) if the condition is assumed to be invalid even then an invalid condition does not affect the gift ; but (2) the condition itself was valid, and so the gift was not capable of attack even on the ground that a part of its terms was unenforceable.

Misconceived criticism.

It is submitted that criticism against the reasoning of the Privy Council upholding the enforceability of the stipulation to return the proceeds is based on misconception.[34] Granting that the Muslim text writers had felt themselves unable to surmise how certain kinds of rights could be enforced, it would not follow that those rights could not be recognized in India, in our times.[35] Several kinds of wide and indefinite powers were exercised by the Kazi in regard to which the Courts in India cannot help renouncing jurisdiction.

Powers of Kazi different from powers of Court.

There is, on the other hand, no reason why the Courts should renounce the powers over rights and liabilities arising from the law of contracts and trusts, because the Kazi could not exercise those powers, or on the unwarranted assumption that the transaction must be governed by the more restricted law of hiba. The definition of consideration in the Indian Contract Act, s. 2, does not require that the act or abstinence which is promised should have no reference to property that is transferred by the promisee. Similarly [36] an agreement has been enforced which was made in compromise of litigation by members of a family in whose favour certain wakfs had been made. Under the law then prevailing those wakfs used to be held void. The compromise required the mutawalli to pay certain allowances to named members of the family and their heirs. The compromise was held to be for consideration and enforceable by the heirs as constituting a valid charge though the wakfs were invalid.[36] As regards family settlements or arrangements, see s. 457A, com. Transactions tend to increase in complexity. So do methods of their

[34] *Tavakalbhai* v. *Imtiyaj Begam*, (1917) 41 Bom. 372, 376.

[35] *Kazim Ali K.* v. *Sadiq A. K.*, (1938) 65 I. A. 219, 232, *ll.* 5-9 (OU.) (no remedy under Muslim law : by no means follows that Indian Court would afford no remedy).

[36] *Khajeh Solehman Quadir* v. (*Nawab*) *Sir Salimullah*, (1922) 49 I. A. 153 ; *Naim-ul Haq* v. *Muhammad Subhanullah*, (1918) 41 All. 21 (par. 2).

legal recognition and enforceability. Each must support the other, unless grounds of policy intervene. SECTION 352.

The stipulation for the return of the income of the subject of gift to the donor while he is living, may in certain circumstances take another form ; or the entire transaction, may by analysis be considered to fall under three heads : (i) an immediate transfer of the corpus from the donor to the donee ; (ii) retention by the donor himself for his own use of the usufruct or income accruing during his life time ; (iii) transfer of that portion of the (recurring) usufruct which will accrue after the death of the donor. In other words when the donor stipulates for the return to himself of the income or usufruct for his life time, he may be deemed to dispose of the usufruct only after his death. So considered, though there is an immediate transfer of the corpus, yet the transfer so far as the usufruct is concerned is of a testamentary character : see s. 395 A, *ill.*, pp. 427 f., and s. 590 on bequest of usufruct.

The transaction further considered.

Usufruct accruing after death.

The decision in Ameeroonissa *v.* Abedoonissa[37] is also very important. There the question to be decided was whether three iqrars[38] between the donor and the donee (father and son) were valid : the donee (son) was the plaintiff, and he prayed that the iqrars should be set aside ; and that he should be put into possession of the subject of the alleged gift. (*a*) The Judge of Dacca held (i) the transfers to the son to be purely nominal ; (ii) that the father did not intend that any property should pass under the gifts, at least while he lived ; (iii) that the gifts were invalid for want of acceptance and seizin. [On this point the Judge's view was held by the Privy Council to be erroneous.] (*b*) The High Court held, (i) that the transfers were not colourable [this was doubted by the Privy Council, but not decided : see p. 348] ; (ii) that they were intended to operate as real gifts ; [the Privy Council doubted whether there was any real and bona fide intention to make the gifts (see s. 346A) but without deciding or going into that question at large, they proceeded on the basis that the gifts had been made ; holding (1) that the rights of the parties must be determined on the basis of the combined operation of the hibas and iqrars ; and (2) that the father (donor) who in his defence to the suit, set up the iqrars as valid instruments, could not be allowed to aver that the hibas to which the iqrars related, were intended to have no operation or effect, p. 104]. The High Court lastly held (iii) that " when the guardian of the minor is himself the donor, and in possession of the property, no formal delivery and seizin is required." [Approved by the Privy Council : see s. 400.]

Ameeroonissa *v.* Abedoonissa. 2 I. A. 87.

In the result the Privy Council decided : (1) as to bona fide intention to make a gift : there were indications that there was none, but the point was not

[37] *Ameeroonissa* v. *Abedoonissa*, (1874-5) 2 I. A. 87 = 15 Beng. L. R. 67 (see s. 346A, com.) owing to absence of this case in I. L. R. series, (case decided prior to commencement of that series) referred to in detail : (1) original plaintiff = Wahid Ally = son of Abdool Ally & Nooroonissa = the donee, attained majority 1854 ; on Wahid's death his widow Abedoonissa = respondent. (2) Moulvi Abdool Ally = father of Wahid Ally = donor of gifts I & II ; married three wives : (*a*) Nooroonissa, mother of Wahid (viz. of donor of gift III) ; (*b*) Eftekharunissa ; (*c*) Ameeroonissa : on occasion of whose marriage to Abdool Ally third *iqrar* executed ; brought on record as legal representative of Abdool Ally = appellant, before P. C.

[38] *Iqrar* = confirmation, settlement, acknowledgment, admission.

SECTION 352. open to the donor ; (2) completion of gift : assuming (as the Privy Council held itself bound to hold) that the gift was intended to be operative, change of possession was not necessary ; (3) legal effects of the transactions : the rights of the parties had to be determined on the basis of the combined operation of the gifts and the subsequent iqrars. This third point was the only question of law before the Privy Council, and it is of great importance. For, though there were deeds (hiba-namas) purporting to be absolute and present gifts (p. 103), though transfer of possession was held to be unnecessary, and though the donor could not be allowed to aver that the gifts were not intended to be operative, yet they held that the donee was not entitled to possession. The way in which the father (donor) dealt with the profits (it was held) threw light on the bona fides and completeness of the hibas which were ostensibly absolute : construed in the light of the iqrars (under which the father was to have possession and control of the property during his life) absolute and pure gifts. were not intended : the transactions were either purely benami or more probably to be followed by a family arrangement : the father's possession could not therefore be treated as wrongful nor could the son's claim to remove the father from possession be justified : the son had only the right to charge the father in the character of manager. See s. 346 A, com., pp. 348 f.

(C) Effect of the Transfer of property Act.

353. No rule of Muhammadan law is affected by the Transfer of Property Act, 1882, ss. 5 to 53 and ss. 122 to 129 inclusive ; but the rest of the Act applies to Muslims.

The Privy Council referred to the Transfer of Property Act, ss. 122, 123 and 125 in a case governed by Muhammadan law, without direct reference to s. 129 of that Act, pointing out that a "transfer" (viz. without consideration and governed by Muhammadan law) in s. 122 thereof "would prima facie mean a valid transfer, and would therefore, require the transfer to be accompanied by delivery." [2] (Sect. 129 of the Act saves ss. 122-128 from affecting any rule of Muhammadan law). See s. 439, below.

(D) Effect of Crown Grants Act.

353A. Grants by the Crown take effect according to their tenor, in regard to all their provisions, notwithstanding any rule of law, statute or enactment of the legislature.[3]

[1] I.e. Ch. II. on *Transfer of Property by Act of Parties*, (ss. 5-53) & Ch. VII on Gifts (ss. 112-129) respectively. See ss. 2 & 129 of the Act (saving Muslim law).

[2] *Sadik Husain K.* v. *Hashin Ali K.*, (1916) 43 I. A. 212 = 38 All. 627, 647.

[3] See CROWNS GRANTS ACT XV. of 1895 ; it extends to whole of British India ; s. 2 : "nothing in the Transfer of Property Act, 1882 contained shall apply or be deemed ever to have applied, to any grant or other transfer of land or any interest therein, heretofore made, or hereafter to be made, by or on behalf of H. M. the Q.-E. her heirs or successors, or by or on behalf of the Sec. of St. for India in Council, to or in favour of any person whomsoever ; but every such grant & transfer shall be construed & take effect as if the said Act had not been passed." Sect. 3 : "ALL PROVISIONS, restrictions, conditions & limitations over contained in such grants or transfer as aforesaid shall be valid & take effect ACCORDING TO THEIR TENOR any rule of law, statute or enactment of the legislature to the contrary notwithstanding." *Nisar Ali Khan* v. *Md. Ali K.*, (1932) 59 I. A. 268, 273, 280 (grant by Government for life successively to A, B & C, then to such male heirs of named common ancestor of A.

SECTION 353A.

Many grants by the British government and by the Mughal emperors[4] have come before the Courts. Documents containing such grants are often called sanads. Frequently there are forms laid down by the Government in accordance with which sanads are granted.[5] The forms themselves may be based on previous legislation,[6] or directions by the ruling power, or agreements.[7] Their interpretation, therefore, is in some ways special.[6] The purpose with which grants are made, may also have a bearing on their interpretation.[8] Even where lands have been resumed and regranted, there might subsist pre-existing trusts which would continue after the regrant.[9]

SANADS.

Common forms.

353B. The gift of a policy of life insurance or the money secured thereby is governed by the Insurance Act, IV. of 1938, ss. 38, 39 : see s. 440 below.

(E) Effect of Insurance Act.

354. The subject of gift may become impressed with the incidents of any special law by which the donee is governed.[10]

(F) Donee's law.

B & C, as they may elect to be fittest ; & on failure to agree to elect, to person that Lt.-Gov. may deem fittest : alleged agreement between members of family that effect should be given to will of B in respect of property granted, *held* three fatal objections to such alleged agreement : (1) not pleaded or proved ; (2) defendant not born at time & would not be bound by it ; (3) effect could not be given to it at any rate as against Government as it is inconsistent with terms of the grant). GRANTS by MUGHAL EMPERORS in favour of HINDU RELIGIOUS institutions : *Rajendra Bahadur S.* v. *Rani Raghubans R.*, (1928) 45 I. A. 134, 143 (subject cannot make his property descendible in a manner not recognized by ordinary law, or subject it to a rule of descent such as primogeniture) ; *Appakoth Kombi A.* v. *Kottayi Matha*, (1934) 68 M. L. J. 289 (see s. 354 *n.*) ; *Sakina Begum (Mt.)* v. *Shahar Bano B. (Mt.)* (1934) 10 Luck. 443, 450 ; *Puran Atal* v. *Darshan Das*, (1912) 9 All. L. J. 709 = 11 Ind. Cas. 166 ; *Basdeo Bax* v. *Sri Krishen*, [1910] 13 Oudh Cas. 79 ; *Mohammad Abdussamad* v. *Kurban Husain*, (1903) 31 I. A. 30, 35 (par. 3) ("SANAD i.e. GRANT" per Lord Lindley) ; *Ishtiaq Ahmad* v. *Sayid Massaod Ahmad*, (1908) 6 All. L. J. 632 (grant prior to 1748 to perpetuate memory of Shah Abul Mauli).

[4] E.g. *Sayad Mahomed Ali* v. *Sayad Gobar Ali*, (1881) 6 Bom. 88 = s. 458, *ill.* (4) ; *Muhammad Raza* v. *Yadgar Husain*, (1924) 51 I. A. 192 = s. 460, *ill.* (2).

[5] *Mohammad Abdussamad* v. *Kurban Husain*, (1903) 31 I. A. 30, 35 (par. 3) (OU.) Mughal SANADS APPOINTING KAZIZ set out in (1938) XVI. Bom. L. J. 258.

[6] *Sattappa* v. *Mahomed S. A.*, (1935) 60 Bom. 516, 534-540, (ANALYSIS OF INAM ACT, Bom. Act XI. 1852, & its schedule under which SANAD granted : "each expression a Code word") ; *Syed Shah Muhammad K.* v. *Syed Abi S.*, (1931) 11 Pat. 288, 312 (reference should be had to CUSTOM of country & sense attached by COMMON USAGE to expressions).

[7] *Raja Mohun* v. *Nisar*, (1933) 60 I. A. 103, 104, 107, 109 (*ll.* 15-21) 110, 111.

[8] *Muhammad Raza* v. *Yadgar Husain*, (1924) 51 I. A. 192 (CENTR. PROV.) (*mohasa* = personal grant subject to condition) ; *Haidar Alli G.* v. *Sayad Gulam M.*, (1934) 58 Bom. 623 (MADAD-E-MAASH = *maintenance* : see ss. 285A, 294 ; KHARCHE PANDAN). In *Syed Mahammad Mazaffar al Musavi* v. *Bibi Jabeda K.*, (1929) 34 C. W. N. 462 (P. C.) (MUQARRARI or ISTIMRARI LEASE by *mutawalli*) ; *Jewun Doss Sahoo* v. *Shah Kubeeroodeen*, (1940) 2 Moo. I. A. 390 (ALTAMGHA or ALTAMGHA INAM does not itself convey proprietary right to grantee : from general tenor *wakf* may be inferred) ; *Venkata Subbarayadu* v. *Haji Silar S.*, (1929) 58 M. L. J. 524, 529 ; *Sec. of St.* v. *Girjabai*, (1927) 54 I. A. 359 (BOM.) (SARANJAM = temporary assignment of revenue from villages or lands for support of troops or for personal military service, usually for life of grantee).

[9] *Muhammad Esuf Sahib* v. *Moulvi Abd. Sathur*, (1918) 42 Mad. 161.

[10] TAGORE CASE, (1872) L. R. I. A. SUPP. VOL. 47, 64, 65 (inheritance rule laid down by State) ; citing *Soorjo Monee D.* v. *Dinobundoo M.*, (1857) 6 Moo. I. A. ;

SECTION 354. Property cannot be made inheritable in novel way, at donor's will.

Inheritance does not, like transfer, depend upon the will of the individual owner. Inheritance is a rule laid down (or in the case of custom recognized) by the State, not merely for the benefit of individuals but for reasons of public policy. It follows that a private individual cannot by gift or will make property inheritable otherwise than as the law directs: he cannot create a new form of estate, or alter the line of succession allowed by law, for the purpose of carrying out his own wishes or views of policy: that would be assuming to legislate: such a gift must fail and the inheritance take place as the law directs.[10]

Joint family property.

Though "the principles applicable to a purchase by one member of a joint Hindu family from another, are not applicable to Muslims"[11] yet property, held by Muslims who are governed by Hindu law may be subject to Hindu or Marumakkattayam and not Muhammadan law.

(G) Equitable doctrines: e.g. of defective execution.

355. Equitable doctrines and principles prevailing in England,[12] such as that by which the defective execution of a deed is aided, may be applicable to a gift governed by Muhammadan law, especially where it is made through a trust.[13]

Illustration.

On the 7 Jan. 1886, JP. a Khoja Muslim, executed a deed of TRUST with a life-interest to himself, without impeachment for waste; after himself upon trust to pay the net income to N (then the settlor's only son), subject to certain rights of residence, and payments of allowances to his wife and daughters. In the event of the only son having a son, there was to be a re-arrangement in respect of all that followed in the settlement; failing male issue to that son, then the corpus was to be divided into ten portions, which were given to various donees, 4/5 being directed in that event to charity. At the end of the settlement there was the usual revocation clause in common form appropriate to all

Pattatheruvath Pathumma v. *Mannam K. Abd.*, (1907) 31 Mad. 228 (Uttotti Muslim, governed by Marumm. law, for making gift to wife & children, purchased property in name of wife Ayissa alone: gift found to be intended for her children as well: held, that, she being governed by Marumm. law, property became her & her children's exclusive property, but with incidents of *tarwad* property); *Kunhacha Umma* v. *Kuthu Mommi*, (1892) 16 Mad. 201, 204 (par. 4), 206, 207 (F. B.); *Koroth Amman K.* v. *Perungottil Appu N.*, (1906) 29 Mad. 322; *Abdurrehman* v. *Husain*, (1919) 42 Mad. 761 (*tarwad* carrying on trade); *Muhammad Kunhi* v. *Pakrichi Umma*, (1923) 46 Mad. 650 (F. B.) (*strisothu* = women's property: female members not authorized to sell family property otherwise than for necessity); *Mothiyan Kutti* v. *Ayissa*, (1928) 51 Mad. 574; *Dasa Naicken* v. *Puligalath Kunha Ahmad Koya*, (1925) 51 M. L. J. 69; *Appakoth Kombi A.* v. *Kottayi Matha*, (1934) 68 M. L. J. 289 (ATTEMPTS TO CONSTITUTE NEW LINE OF SUCCESSION, or a new group of persons not known to personal law of parties, invalid); (*Chaudhri*) *Ahmad A.* v. *Ch. Safijan*, (1926) 2 Luck. 335, 349 following *Mata Prasad* v. *Nageshwar S.*, (1925) 52 I. A. 398. *Nabi Bakhsh* v. *Ahmad K.*, (1924) 51 I. A. 199 (LAH.) (inheritance concerned).

11 *Mahamad* v. *Hasan*, (1906) 31 Bom. 143. Cf. pp. 255 ff. (no joint family).

12 *Hamira B.* v. *Zubaida B.*, (1916) 43 I. A. 294, 301 (EQUITY & EQUITABLE CONSIDERATIONS recognized in Court of Chancery in Eng. not foreign to Muslim system, but in fact often referred to & invoked in adjudication: see s. 12, p. 88).

13 *Cassamally Jairajbhai Pirbhai* v. *Sir Currimbhoy Ebrahim*, (1911) 36 Bom. 214; 13 Bom. L. R. 717; J. P. represents Jairajbhai Pirbhai; N. Nur Muhammad, his elder son; C, his second son, Cassamally, the plaintiff.

English voluntary settlements, the settlor or donor, reserving to himself full power of revocation during his lifetime, by writing signed, and also power to declare new trusts by such signed or any other writing. On 28 Oct. 1886, a second son, C (the plaintiff), was born to the settlor, who then became desirous of altering the trusts, and a new trust deed was prepared on 21 July 1887, approved on the 24th, engrossed on the 29th, and taken on that day for execution. A blunder was discovered in the engrossment, and it was to be re-engrossed, but before this could be done and executed, the settlor died, i.e. at 7-30 p.m. on the 29th. By the new deed, after the death of the settlor the two sons were to hold the trust properties as members of a joint and undivided Khoja family. During the lifetime of the settlor and his first son, they were respectively in possession of the trust properties : it was alleged by the defendants that they were in possession as trustees, but the Court held otherwise. The second son Cassamally the plaintiff on coming of age, sued for a declaration that either the first deed was altogether void, or he was entitled to be placed in the same position, as that in which he would have been if the new trust had been declared. *Held* (*a*) the life-interests in favour of the settlor and the first son were valid ; (*b*) the general rule is that the power of revocation is inherent in the donor of every gift, with " innumerable exceptions ; " (*c*) that the gifts following the first son's death were contingent, and therefore void : *sed quaere* ; (*d*) that the defective execution of the new trust should in this case be aided, as it was defective not through any fault on the part of the person intending to execute it, but by reason of an act of God, and that therefore, the second deed ought to be effectuated by the Court to the extent of making it binding upon the conscience of the trustees.[13] SECTION 355.

It is *submitted* that (1) the assumption in the *ill.* above that all dispositions relating to rights in property empowering its enjoyment in the future are void if they are contingent, must be reconsidered and if necessary revised in view of a clearer appreciation of dispositions of usufruct as distinguished from substance : s. 366A ; (2) that in the case of voluntary dispositions the question is not whether (in the opinion of the Court) there is any fault on the part of the person intending to make them, but whether his intention has, in the eye of the law, been so given effect to that—bearing in mind that gifts may be oral and no writing is necessary—action may be taken upon his intention without any step being taken by or under the direction of the Court, which the person himself might have decided not to take : s. 365 com., p. 380. (3) Certain observations in the judgment were respectfully taken exception to in this work : and five years after were tacitly withdrawn : see s. 11 C, com., pp. 84-88.

Contingent gift of usufruct.

Court cannot compel donor to do what he resolves not to do.

356. Where land is given to several persons and it is not stated in what shares they are to take, each takes an equal divided share, and on the death of each, his share devolves on his heirs.[14]

(H) Tenancy in common :

[14] *Kasam* v. *Gokarnaya*, (1903) 5 Bom. L. R. 701 ; contra. *Valimia A.* v. *Gulam*

SECTION 356.
Joint tenancy.

It has been argued that property may be bequeathed to the legatees as joint tenants.[14] But the principle of joint tenancy as understood in English law is unknown to the law of Islam.[15] Under English law a conveyance or an agreement by one joint tenant to convey his personal interest operates as a severance.[16] See pp. 255-257.

Vested remainder.

Sect. 357[17] is now placed as s. 444 A.[17]

§ 3.—PARTIES TO GIFT.

I. DONOR.
(A) Competence

358. No person may make a valid gift unless he has attained majority, and is sound of mind.[18]

K. M., (1869) 6 Bom. H. C. R. (A. C.) 25 (where deed construed as crediting joint tenancy—*sed quaere*); see s. 374; cf. *Musa* v. *Badesaheb*, (1937) 39 Bom. L. R. 1108.

[15] *Golam Jafar* v. *Masludin*, (1880) 5 Bom. 238, 239 (*l.* 7 of par. 4).

[16] *Jogeshwar* v. *Ram Chund*, (1896) 23 I. A. 37 = 23 Cal. 670; *Mooriyat P. K.*, v. *Mooriyat P. K.*, (1908) 32 Mad. 315; see also [1912] Mad. W. N. 932.

[17] Sect. 357 in 2nd ed. was cited & applied 57 Bom. 737. It ran: "It has in one case, been assumed by the Privy Council that a Muslim may by deed confer a definite estate like what would be called in English law a VESTED REMAINDER in succession to a previous life estate. The contrary is implied in another case;" *nn.* were as follows: "*Umes Chunder Sircar* v. (*Mt.*) *Fatima*, (1890) 17 I. A. 201 = 18 Cal. 164. The case has been followed in *Banoo Begum* v. *Abed Ali*, (1907) 32 Bom. 172; see s. 368, *ill.* I am indebted to Mr. J. D. Inverarity of the Bombay Bar for drawing my attention to the fact that in this case both parties contended that the vested remainder was good: and the only question at issue was whether it was capable of attachment. The question of limited interests is considered at length below. See s. 444 *et seq.*" [I seem in this note to have misrepresented the late Mr. Inverarity's point: unfortunately he can no more be consulted. What I have attributed to him is not free from some confusion of thought—which is sufficient for concluding that I could not have represented him correctly. If remainder once admitted to be vested, it would presumably be capable of attachment. Facts of *Umes Chunder's* case extremely complicated; not fully stated in available reports. But it seems (after closer study) not correct to state that both parties admitted vested remainders to be good. One of parties certainly asserted & other denied, that the remainder in question was similar to vested remainder in respect of transferability during continuance of particular estate. The transfer set up was involuntary. The whole question was whether the transfer of that interest was good: see *Rasoolbibi* v. *Usuf Ajam*, (1933) 57 Bom. 737, 766, *arg.* Position of parties stated in 17 I. A. 203: crucial facts: (i) appellant's attachment during lifetime of Sultan Ali (holder of particular estate); (ii) respondant's attachment, after Sultan Ali's death. What was decided was (1) remainder in favour of donor's son (judgment debtor) had become vested in father's lifetime: (2) true position was not that son had *inherited* from father. If that had been case then, during father's lifetime son would have had no attachable interest. Some strictures on this case are coloured by (submitted, erroneous) notion that under Hanafi law there can be no limited interests at all: if so, of course, there can be no remainders. In discussion of question whether remainder under consideration could be deemed to be vested, unconscious (but, submitted, unfounded) prejudice against remainders of any sort whatsoever asserts itself, & what is really kept uppermost in mind during discussion is not whether remainder was vested, but whether there can be remainders at all: it is asserted that there can be no vested remainder, when what is intended is to deny that there can be remainders of any sort whatsoever. It may, however be that before the Privy Council both parties relied upon remainders in their favour & that neither denied that remainders could be created. Still it seems that one of the parties alternatively did deny that remainders could be created, & set up that son took by inheritance, & not under the grant. But in any case, one asserted & other denied that during continuance of particular estate, remainders could be treated as vested. The case referred to in the other *n.* to s. 357 in earlier editions was *Abdul Wahid Khan* v. (*Mt.*) *Nuran Bibi*, (1885) 12 I. A. 91, 102 = 11 Cal. 597. This case is dealt with in s. 444 A, pp. 507 ff.

[18] Hed. 525 (col. ii): Bail. I. 508; II. 203 (*ll.* 10-13): *Amtul Nissa* v. *Mir*

SECTION 358A.

(B) Gift by married woman.

358A. Gifts by or to a woman are subject to the same incidents whether the woman is married or not.[19]

(C) Insolvent donor.

359. Gifts by a person in insolvent circumstances with intent to defraud,[20] defeat or delay his creditors, are voidable at the option of any person so defrauded, defeated or delayed.[21]

(D) Pardanishin lady donor.

359A. The ordinary presumption is that a person of competent capacity signing a deed, understands the instrument to which he affixes his name. But where a gift is purported to be made by a pardanishin lady,[22] that presumption does not arise ; and it is incumbent on the donee to satisfy the Court that the transaction was explained to the lady and that she knew what she was doing.[23] The most usual mode of dis-

Nurudin H., (1896) 22 Bom. 489 (gift by minor, ratified on majority. See s. 5A on Ind. Maj. Act : age of competence as to various matters). Under ENGLISH LAW gift by infant is merely voidable, by idiot or lunatic so found, is void : under Muhammadan law gifts by infants & lunatics are alike void. *Zouch* d. *Abbot* v. *Parsons*, (1765) 3 Burr. 1794 ; *Allen* v. *Allen*, (1842) 2 Dr. & War. 307 ; *Alliot* v. *Ince*, (1875) 7 De. G. M. G. 475 ; *Re Walker*, [1905] 1 Ch. 160 (C. A.).

[19] I.e. marriage does not confer special status on wife, nor does a woman become subject to any peculiar disabilities by marrying. Cf. s. 24(8) ; *Luteefoonissa* v. (*Syud*) *Rajaoor Rahman*, (1867) 8 W. R. 84 ; *Nichhabhai* v. *Issekhan*, (1866) 2 Bom. H. C. R. 297. Cf. (*Lala*) *Kundan Lal* v. (*Mt.*) *Musharrafi B.*, [1936] AIR (P. C.) 207 = 40 C. W. N. 1093 (LUCK.) (mortgage to secure money for husband).

[20] GROUNDS on which deeds generally impeached for FRAUD : evidence that donor was in debt at time of making gift, & that he executed it in contemplation of insolvency, or with view to defraud creditors : *Doe d. Ramtono Mookerjee* v. *Bibee Jeenut*, (1843) Fulton 152, 154. *Mohinudin* v. *Manchershah*, (1882) 6 Bom. 650, 657, 659 (quite different views of transaction taken by the two judges).

[21] See, however, Macn., 217 (case 15) APPX. p. 441, No. 45 ; *Azimunnissa* v. *Dale*, (1871) 6 Mad. H. C. R. 456, 468, 469. Trans. of Prop. Act, s. 53, applies to prior as well as subsequent transferees ; but s. 53 does not apply to Muslims : cf. (*Nabob Amiruddaula*) *Hussain K.* v. *Nateri*, (1871) 6 Mad. H. C. R. 356 ; ("Nothing could be more inequitable than to allow the VISIBLE MEANS of a man to whom CREDIT has been given, to be NARROWED by a secret contract with the person who had given the debtor the opportunity of appearing as owner.") *Doe, dem. Ramtonoo* v. *Bibee Jinut*, (1843) Fulton. 152. Cf. *Chunder* v. *Ameer*, (1876) 25 W. R. 119 (fact that there are other CREDITORS does not make a sale necessarily fraudulent, if sale is for valuable consideration). See also *Sadik* v. *Hashim*, (1916) 43 I. A. 212 = 38 All. 627, 647, 648 (P. C.).

[22] *Muhammad Shafi* v. (*Mt.*) *Kalsum*, (1923) 4 Lah. 467 (who is *pardanishin* ?) ; *Fayyazuddin* v. *Kutab-uddin*, (1928) 10 Lah. 761 (woman of rank living secluded) ; cf. *Price* v. *Price*, (1852) 1 De G. Mac. & Gor. 308 (wife's suit on ILLTERATE DONOR'S gift to her of all his property : dismissed : court not satisfied that effect of what he was doing sufficiently explained to donor & that he knew what he was about). Cf. (*Mt.*) *Abbas Bandi B.* v. *Saiyid Muhammad Raza*, (1929) 4 Luck. 452, 460 ff., 467 affmd. *Muhammad Raza* v. *Abbas Bandi B.*, (1932) 59 I. A. 236.

[23] *Faridun-Nisa* v. *Mukhtar Ahmad*, (1925) 52 I. A. 342 (OUDH) (*wakfnama* set aside : onus of proof : its nature & extent) ; *Kamawati* v. *Dijbijai*, (1921) 48 I. A. 381, 384 (ALL.) ; *Fazal* v. *Har Parsad*, [1929] A. L. J. 620, 629 (WAKF.) ; *Sikandar Ara B.* v. *Hasan A. B.*, [1936] AIR (OUDH) 196 ; *Asghar* v. *Delroos*, (1877) 3 Cal. 324, 327 (STRIPPING DONOR BARE of all property, for no consideration & without any equivalent : s. 405, p. 442 : *Geresh C. L.* v. *Bhuggobutty*, (1870) 13 Moo. I. A. 410 ; *Fuzzul H.* v. *Amjud A. K.*, (1872) 17 W. R. 523 ; *Tacoordeen* v. (*Nawab*) *Syed Ali*, (1874) 1 I. A. 192 (CAL.) ; *Annoda Mohun Rai* v. *Mohini*, (1901) 28 Cal. 546, 548 ; *Sumsuddin* v. *Abdul Hoosein*, (1906) 31 Bom. 165 (= s. 371, *ill.* 1) ; *Mariam B.* v. *Sakina*,

SECTION 359A. charging the onus, is for the donee to show that the donor (the lady) had good independent advice in the matter, and acted therein at arm's length from the donee.[24]

Origin of the rule.

Sect. 359A is based on the protection extended by the Court of Chancery in England to the weak, ignorant and infirm, and to those, who, for any other reason, are specially likely to be imposed upon by undue influence. On the relation between the parties being shown to have been such that one of the parties is in a position to dominate the will of the other it is presumed that undue influence was exerted, unless the contrary be shown.[24] The rule is not applicable to a woman who is not of the pardanishin class, even though it be alleged that she is so close to them in kinship and habits, and so secluded from ordinary social intercourse, that a like amount of incapacity for business must be ascribed to her. Outside the class of pardanishins it must depend in each case, on the character and position of the individual woman whether those who deal with her are, or are not, bound to take special precautions that her action shall be intelligent and voluntary, and that it was so, in case of dispute.[25]

Degree of protection.

(E) Gifts in death-illness on same footing as will.

359 B. The capacity of a Muslim while in marz-ul-maut [26] or death-illness,[26] to make a gift of his property, is subject to

(1891) 14 All. 8 ; *Mulka Mukadarah Khas Mehal* v. *Adm.-Gen.*, (1900) 5 C. W. N. 505 (will in question); *Kali B. S.* v. *Ramgopal*, (1914) 19 W. N. 172 ; *Hassanalli* v. *Ruhulla*, (1924) 27 Bom. L. R. 184 ; *Muhammad Shafi* v. *Mt. Kalsum Bi*, (1923) 4 Lah. 467 ; *Lala Kundan Lal* v. (*Mt.*) *Musharrafi B.*, (1936) 40 C. W. N. 1093 (P. C.) (not so as to make it impossible for *pardanishin* to give security for her husband's benefit : if deed explained sufficiently & she obtains advice independent of mortgagee, then advice independent of husband not necessary : but burden not discharged by merely proving that story of deception set up by her was false) : cf. s. 461B ; (*Mt.*) *Abbas Bandi B.* v. *Saiyid Muhammad Raza*, (1929) 4 Luck. 452, 464 ff.

[24] Cf. Ind. Contr. Act, s. 16. *Rakhun* v. *Ahmed*, (1871) 22 W. R. 443 ; *Kanai Lal Johari* v. *Kamini Debi*, (1867) 1 Beng. L. R. 31 (O S.) *n.*; *Manohar Das* v. *Bhagabati Dasi*, (1867) *ib.* 28, 33 ; *Khatija* v. *Ismail*, (1889) 12 Mad. 380 (*onus* discharged). Rule must be followed intelligently : *Hassanalli* v. *Ruhulla*, (1924) 27 Bom. L. R. 184 ; cf. *Lala Kundan Lal* v. (*Mt.*) *Musharrafi B.*, (1936) 40 C. W. N. 1093 (P. C.); (*Mt.*) *Abbas Bandi B.* v. *Saiyid Muhammad Raza*, (1929) 4 Luck. 452, 464 f.

[25] *Hodges* v. *Dehli & Lond. Bk. Ltd.*, (1900) 27 I. A. 168 = 23 All. 137, 145 (so-called *quasi-pardanishin* not recognized).

[26] See ss. 461, 600. To establish existence of MARZ-UL-MAUT or DEATH-ILLNESS there must be present at least four conditions : (*a*) the illness must have caused death ; (*b*) there must have been proximate danger of death, so that there was preponderance of apprehension of death ; [i.e. that at given time death more probable than life. Cf. "the most valid definition of death-illness is, that it is one, which it is highly probable, will issue fatally" : Bail. I. 543 (552)] ; (*c*) some degree of subjective apprehension of death in mind of sick person ; (*d*) some external indicia, chief among which are inability to attend to ordinary avocations. (A.) (i) *Sarabai* v. *Rabiabai*, (1905) 30 Bom. 531 (paralysis is not death-illness) followed in (ii) *Rashid* v. *Sherbanoo*, (1907) 31 Bom. 264 (rapid consumption is death-illness); DEATH-ILLNESS was held PROVED in (iii) *Fazl Ahmed* v. *Rahim Bibi*, (1917) 40 All. 238 (rapidly progressing illness : consumption, death apprehended); (iv) *Wazeerjan* v. *Saiyid Altaf*, (1887) 9 All. 357 (tumour in stomach, death on day of gift) ; (iv) *Jahar Ali Khan* v. (*Sm.*) *Nasimannessa*, (1936) 65 C. L. J. 34, 45 (condition very bad : apprehension of death); (vi) *Karimanissa Bibi* v. *Hamidulla*, (1923) 30 C. W. N. 129 (very old man : attacked by paralysis of lower limbs in Febr. 1895 : helpless invalid : could not perform ordinary offices of nature without assistance, or leave bed for prayers : *wakfnama* executed in March ; death in Nov. : though bed-ridden for nine months : held death-illness); (vii) *Muhammad Ayub K.* v. (*Mt.*) *Gauhar B.*, (1932) 7 Luck. 105

the same restrictions with reference to the proportion of his property that he may so dispose of, and to the persons who may benefit thereby,[27] as his capacity to make a will. A gift in death-illness is, to the extent to which the said restrictions are disregarded, of no effect.[28] The Shia law has been held to be to the same effect.[29] SECTION 359B.

Origin of the rule.

Sect. 359 B is intended to prevent the evasion of the restrictions on testamentary capacity. Whether the operation of the gift or other transaction is expressly postponed till after death, or the transaction is intentionally undertaken at a time when its operation must necessarily come into effect only after death, the result is the same. If, however, the transaction is given the form of gift, there must be transfer of possession for it to operate at all. But even with transfer of possession it will—if made in death-illness—be operative only to the extent to which a bequest would be operative.[30]

Death-illness.

Whether or not a particular illness is marz-ul-maut, is a mixed question

(seventy years old : stricture of oesophagus = narrowing of food pipe); (viii) *Khurshed Hussain* v. *Faiyaz H.*, (1914) 36 All. 289 (Shia law examined : 80 years old : dotage : asthma for several years : but unexpected attack & death four days after gift ; though under Shia law if person dies of disease of more than one year's duration not considered death-illness, but if illness increases to such extent as to give, or another illness supervenes which gives, an apprehension of death in mind of donor, such increase or new disease is death-illness, pp. 294,295); (ix) *Musi Imran* v. *Ibn Hasan*, [1933] 31 All. L. J. 53 (tuberculosis : final stages : death apprehended); (x) *Sajjad Husain* v. *Muhammad Sayid Hasan*, [1934] AIR (ALL.) 71, 73 (tuberculosis last stage). (B.) In following cases disease held NOT DEATH-ILLNESS : (i) *Fatima B.* v. *Ahmed*, (1903) 31 Cal. 319; 35 I. A. 67 = 35 Cal. 271 (albuminuria = escape of albumen through kidney, for a period of 1 year); (ii) *Labbi B.* v. *Bibban B.* (1874) 6 N. W. 159 (asthma); (iii) *Hassarat B.* v. *Golam J.*, (1898) 3 Cal. W. N. 57 (asthma); (iv) (*Mt.*) *Zamro* v. *Sha Mohammad*, [1934] AIR (PESH.) 91 (asthma); (v) *Muhammad Gulshere K.* v. *Mariyam B.*, (1881) 3 All. 731 (boils or carbuncle of long continuance—over a year—causing no apprehension of death); (vi) *Ibrahim* v. *Saiboo*, (1907) 34 I. A. 107 = 35 Cal. I. (sudden bursting of blood vessel in stomach) : (vii) *Hassanalli* v. *Ruhulla*, (1925) 27 Bom. L. R. 184 (chronic diarrhœa, or kindred diseases of sprue : no evidence that death caused by this disease nor that death apprehended); (viii) *Abdul Ahad K.* v. *Ahmad Nawaz K.*, (1931) 12 Lah. 683 (diarrhœa); (ix) *Bibi Jinjira K.* v. *Mohammad Fakirulla*, (1922) 49 Cal. 477 (Mookerjee, J., collects authorities : journey by cart of 12 or 14 miles : ability to arbitrate & settle disputes); (x) *Sarabai* v. *Rabiabai*, (1905) 30 Bom. 531 (paralysis).

[27] E.g. Hanafi law & Shia Ismaili law do not permit legacy to heir : but Shia Ithna Ashari law does : *Sharof Ali* v. *Safiaboo*, (1935) 71 M. L. J. 247.

[28] Masculine includes feminine. See ss. 579, 581, f., 600 referring to disposition (*a*) of over 1/3 estate, (*b*) in favour of heirs. *Sadiq Ali* v. (*Mt.*) *Amiran*, (1929) 5 Luck. 406.

[29] *Khurshed Husain* v. *Faiyaz H.*, (1914) 36 All. 289 (Shia law) = *n.* 26(A)(*viii*). (LONG CONTEMPLATION OF GIFT : very learned judgment to which Rafiq, J. was party : under Shia law gift made in *marz-ul-maut* good to extent of only bequeathable third, in spite of delivery of possession prior to donor's death, though Shia authorities are divided ; it was unsuccessfully argued that gift had been intended long before actually made, & donor's death-illness at time when made, did not affect it : *held* that delay in making gift indicated that donor intended not so much to benefit donee, as to deprive his other heirs, that, in any case, donor did not intend to part with his property while he expected to live, nor to place himself at mercy of donee by parting with all his property to him, cf. s. 405, p. 442, on STRIPPING ONESELF BARE); *Musi Imran* v. *Ibne Hasan*, [1933] All. L. J. 53 = *n.* 26(A)(*ix*); *Sajjad Husain* v. *Muhammad Sayid Hasan* [1934] AIR (ALL.) 71.

[30] Bail. I. 542 (551).

SECTION 359B. of law and fact. Pains of childbirth are considered by the texts as prima facie death-illness, whereas lameness, gout, paralysis, consumption, a withered or palsied hand, after they have continued for a long time, and have no immediate danger of death, are not considered to constitute death-illness.[31]

1.—Hidaya on marz-ul-maut.

The following is a literal [32] translation of the passage from the Hidaya dealing with marz-ul-maut : " Paralytic, gouty or consumptive persons when their disorder has continued for a length of time [the length of continuance is to be measured by one year,[33] and the meaning of fear is that which takes hold of the mind, not the cause of it,] [34] and they are in no immediate danger of death, do not fall under the description of sick, hence deeds of gift executed by such take effect to the extent of the whole property ; because when a long time has elapsed, the patient has become familiarized to his disease, which is then not death-illness. The reason being that that which brings on a change in the matter of management is the sickness of death, viz. such an illness as is generally fatal ; and an illness cannot be so considered except when the patient is in a condition which increases (in virulence) from stage to stage till it ends in death. Where, however, it has become chronic, and such that it does not increase, and there is no fear of death from it, then it cannot be the cause of death—as blindness and the like. This cannot be regarded as death-illness in the beginning of his illness ; and a consumptive man until he becomes bed-ridden cannot be regarded as mariz (sick) because a man is seldom free from little illnesses. Hence, so long as he can go out for his necessary purposes, and is not bed-ridden, he cannot be popularly considered to be in his death-illness. So Kazi Khan says."

2.—Shia authorities.

The Shia authorities describe marz-ul-maut similarly. Thus in the Sharaiu'l-Islam [35] it is laid down that every disease which is usually accompanied with apprehension of death is said to be dangerous,[36] and has the effect of restraining a man from disposing of more than a third of his property ; that diseases from which there is usually recovery [37] have no other effect on a man's disposal of his property than if he were in a state of health. " It were, however, better to ascribe the effect under consideration to all diseases which are in fact accompanied by, or terminate in, death, whether they are customarily dangerous or not."

[31] Bail. I. 543 (552); Hed. 684 ; *Minaj*, 262 (Bk. 29, s. 3). See *n.* 26.

[32] Commentary on *Hidaya*, given in editions of 1280 A. H., (Bom. *Matba-e-Hydari*) & of 1304 (*Mustafai Press*), enclosed in [ ] to distinguish it from text. In Hamilton's transl. (Hed. 685, col. 1, par. 3) certain words (enclosed in parentheses) are interpolated by translator, which do not occur in original.

[33] " This limit of one year does not constitute a hard & fast rule, & it may mean a period of about one year :" *Fatima B.* v. *Ahmed Bakhsh*, (1903) 31 Cal. 319, affirmed (1907) 35 I. A. 67 (= 35 Cal. 271.

[34] I.e. subjective apprehension of death, so that if man is actually in fear of death, it does not matter if really there was no reason to fear, & presumably *vice versa.*

[35] As translated by Baillie.

[36] Bail. II. 257. Hectic fever, consumption, hæmorrhage, bilious or bloody swellings, fetid purgings, & such as are mixed with oleaginous matter, or black excrement, given as examples.

[37] Temporary fever, headache, whether with continued augmentation or not, ophthalmia & tubercle on tongue, mentioned as examples : Bail. II. 257.

SECTION 360. II. DONEE OF GIFT.

360. Any person capable of owning property may be the donee of a gift.

(A) Competence.

(B) Gift to heirs, and children.

361. (1) The legal incidents of a gift, are not affected by the donee being presumptive heir of the donor.[1]

(2) It is lawful[2] but abominable for a Muslim to prefer one child over another in making gifts,[3] unless preference is given to a child who is superior in religion or learning, without any intention of injuring any other child. A gift by a Muslim of the whole of his or her property to one child, is lawful judicially, but sinful.[4]

Alienation to defeat succession.

Design to alter disposition property.

In law the gifts referred to in s. 361 are valid, and as the law allows alienation so as to defeat succession, "the design to alter, and so in one sense to defeat the disposition of property, is simply a design to conform to the law, while working out an unforbidden design." [5]

The question may sometimes be whether the mention of the donee as say, adopted son, was merely descriptive of the person to take under the gift, or whether the assumed fact of his adoption was the reason and motive of the gift, and indeed a condition of it.[6]

(C) Gift to unborn person.

362. A hiba to a person not in being is void,[7] but limited interests[8] may be created in favour of a grantee who is not in being; provided that he is in being when his interest opens out.

Disposition usufruct.

As hiba refers to the immediate transfer of all the rights constituting complete ownership (s. 345), there cannot be a hiba in favour of one who is not yet in being to take the immediate transfer. But the case is different where the

[1] *Meyajee Alleebhoy* v. *Metha Nuthoo*, (1832) Rep. of Sel. Cas. S. D. A. Bom. (reprint 1862) (No. 21) pp. 88-101 (decided 20 June 1826 to 8 May 1832) = Morl. Dig. I (1850-1852) 267 (§ 46), referring to Sel. Cas. 80.

[2] *Gulam Jafar* v. *Masludin*, (1880) 5 Bom. 238, 242-243, (intention to "disinherit" one son).

[3] Bail. II. 205 (*ll.* 6-8) 26-27; I. 529.

[4] Bail. I. 529 (538). Cf. s. 5D, com., p. 44, *n.* 16. *Nandram* v. *Mangalsen*, (1909) 31 All. (Hindu law: where equitable reliefs are asked for, s. 361(2) may be of some applicability); *Nizamuddin* v. (*Mt.*) *Zabeda B.*, (1874) 6 N. W. 338, 340, 341. Cf. *Cassamally* v. *Sir Currimbhoy*, (1911) 36 Bom. 214.

[5] (*Nawab*) *Umjad A. K.* v. (*Mt.*) *Mohumdee B.*, (1867) 11 Moo. I. A. 517, 546 f. = 10 W. R. (P. C.) 25; *Mahomed Zuheerul Huq* v. *Butoolun*, (1864) 1 W. R. 79; *Khajooroonissa* v. *Rowshan Jehan*, (1876) 3 I. A. 291 = 2 Cal. 184 = 26 W. R. 36, affirming 5 W. R. 4.

[6] *Fanindra Deb Raikat* v. *Rajeswar Dass*, (1885) 12 I. A. 72, 89 (CAL.).

[7] *Checkkonekutti* v. *Ahmed*, (1886) 10 Mad. 196; *Abdul Cadur* v. *Turner*, (1884) 9 Bom. 158; *Mahomed Shah* v. *Official Trustee of Bengal*, (1909) 36 Cal. 431. See ss. 449, 485. ENGLISH LAW: on ground of public policy, future illegitimate children cannot be donees of gifts. *Hill* v. *Crook*, (1873) 6 H. L. 265; *Crook* v. *Hill*, (1876) 3 Ch. D. 573; *Ebbern* v. *Fowler*, [1909] 1 Ch. 578 (C. A.).

[8] See ss. 443-455 = pp. 479-529, 518, 524 f.

SECTION 362. future usufruct or produce is in question. The notion of time or duration is annexed to usufruct : the right to take the recurring produce or profits or to use the property from day to day must be determined in respect of its duration. Hed. 44, col. ii. Whereas full ownership does not permit of its being cut up into periods, since full ownership implies that it is unlimited in duration : s. 366A, com. If, therefore, what is dealt with is the usufruct and the usufruct is granted to A for life, and then to B in succession to A, there is no inherent difficulty in respect of the grant to B taking effect, so long as B will be in being at the time when the usufruct becomes available to him : he need not be in being when the grant is made. This rule accordingly prevails in respect of interests made under wakfs in all schools. The Sharaaiu'l-Islam (Shia law) favours the same rule being applied to grants that are not valid as wakfs because they are in favour of persons that will probably fail.[10] The law of the other schools is extremely doubtful and ought (submitted) to be allowed to develop on principle. The Courts in India have however lain upon the development of Hanafi law in this respect a "weight heavy as frost and deep almost as life," and it is extremely doubtful how long it will take to assert itself.[7] It has been with the greatest difficulty that life-interests are now being recognized. The difficulties are enhanced by grants being drafted in terms that take no account of the conceptions on which expositions of the principles of law in the Muslim texts are based, and by the grants being interpreted in disregard of what is explained by Pollock and Maitland, and the Tagore judgment, that life-tenants (and other holders of limited interests) are in fact usufructuaries : ss. 443A, 366A, comm.

Donee of usufruct not in being.

(D) Gift to Mosque or other Institution.

363. A gift may be made to an institution like a mosque.[10a]

"A man gives money for the repairs of a masjid, and for its maintenance, and for its benefit. This is valid ; for, if it cannot operate as a wakf, it operates as a transfer by way of gift to the masjid and the establishing of property in this manner to a masjid is valid, being completed by taking possession.... If he says, 'I have given my mansion to the masjid,' it is valid as a transfer requiring delivery. If he should say, 'this tree to the masjid,' it would not belong to the masjid until delivery to the manager of the masjid."[11]

Must trustees accept gifts ?

The question whether the mutawalli, or other trustee, of an institution is legally bound under Muhammadan law to accept a gift offered to him, on behalf of the institution, does not seem to have come before the Courts. Though prima facie the acceptance or refusal of a gift must be at the option of the donee, yet in the case of trustees some peculiar considerations may come into operation.[12]

[9] Bail. II. 218, *ll.* 12, 19.

[10] *Md. Ayub Ali* v. *Amir Khan*, [1939] AIR (CAL.) 268 (*musha* doctrine inapplicable where undivided part dedicated for upkeep of existing mosque or tomb).

[11] Bail. I. 607 (par. 2) (618) ; *Minhaj*, 259, 260 (Bk. 29, s. 1). Cf. *Ismail* v. *Mahomed Ghous*, (1893) 20 Cal. 834 ; *Banubi* v. *Narsingrao*, (1906) 31 Bom. 250 ; (penult, par.) ; *Jinda* v. *Husain*, (1914) 49 Punj. Rec. 197, 200 (No. 97).

[12] E.g. *Elayalwar Reddiar* v. *Namberumal Chettiar*, (1899) 23 Mad. 298.

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(E) Gift to persons holding fiduciary relation.

364. Where the donee stands in a fiduciary relation to the donor, or the relation between the parties is such that the donee is in a position to dominate the will of the donor,[13] the Court will not (unless the donee can show to its satisfaction that the donor had competent and independent advice in making the gift)[14] give effect to the gift, but will declare it void.[15]

(F) Gift to a daughter on marriage-Jahez.

364A. A daughter's marriage may be an occasion either for a gift of the ownership of articles (hiba) to her, or of their use (ariyat).[16] The law laid down in the Shafii authorities is that, in the absence of appropriate words indicating a gift to a daughter from his father, the property in the jahez [17] does not pass absolutely to her, but only for her temporary use, to be held by her by way of ariyat [during her life-time].[18]

III. AGENTS OF PARTIES.

365. An agent may be validly authorized by the donor to make a gift, and to transfer possession on his behalf.

Discretion to executor.

A Khoja lady, Rahimatbai, devised "one-fourth to be disposed of in charity as my executors shall think right" : the disposition was held valid, and a scheme directed to be framed.[19]

13 Cf. see Ind. Contr. Act, ss. 16, 19A & decisions thereon.

14 *Rujabai* v. *Ismail*, (1870) 7 Bom. H. C. R. (O. C. J.) 27 (gift by lady to CONFIDENTIAL ADVISER & two other persons, of house in which she dwelt: no independent advice : deed read over & explained to her, by clerk who acted for donor as well as donee ; deed set aside at instance of heirs of donor), *Sumsuddin* v. *Abd. Hoosein K.*, (1906) 31 Bom. 165 (release by daughter of right to inherit). Cf. also *Nizamuddin* v. *Zabeda*, (1874) 6 N. W. 338 ; (*Moulvie*) *Wajeed* v. (*Moulvie*) *Abdool Ali*, [1864] W. R. 121, 127 (col. ii. par. 1). On difference between reserving legal rights & PRESSURE BY THREATS of CRIM. PROCDGS. ; see *Williams* v. *Bayley*, (1866) L. R. 1 H. L 200 ; *Wallace* v. *Hardacre*, (1807) 1 Camp. 45 ; *Lingo* v. *Dattatraya*, (1937) 39 Bom. L. R. 1233 (point at which pressure becomes undue) ; *Khas Mehal* v. *Adm.-Gen.* (1901) 5 C. W. N. 505 (will).

15 It is not in England void *ab initio* : *Allcard* v. *Skinner*, (1887) 36 Ch. D. 145.

16 See ss. 443 (*ariyat*), 97, 366A, 409 ; (*Bibi*) *Kulsom's* case, (1863) 1 Hyd.

17 JAHIZ or JAHEZ = woman's property, whatever she takes with her to her husband's house, as vestments, jewellery, furniture, &c.; dowry, marriage portion. It also occurs as an Arabic noun, *jahaz* or *jihaz* (Wilson, *glossary*). Vestments & furniture of every description which a bride brings to her husband's house (Richardson, *Pers. & Ar. Dict*). The root word is *jahz* = to equip (a ship), to prepare, to fit out : & the Arabic form is *jahâz* = provision, equipment, outfitting of a bride, rigging of a ship, household furniture (*Alfaraid-ud-durriyya*).

18 *Mahomed Casim C.* v. *Zahiroodin*, (1902) 5 Bom. L. R. 8, 11, 15, 17. On evidence held that law had not become obsolete nor been superseded. GIFTS FROM HUSBAND TO WIFE must be distinguished from JAHEZ. Cf. "the husband demanded & received from her the jewellery which he had given her on his marriage—" *Rahima B.* v. *Fazil*, (1926) 48 All. 834, 836, *ll.* 1-2.

19 *Gangabai* v. *Thaver*, (1863) 1 Bom. H. C. R. 71 (Sausse, C. J.). To a similar effect : *Haji Usman Haji Esmail* v. *Mariambai*, (1921) *unrep.* but referred to in *Mahomed Haji Haroon*, (1934) 59 Bom. 424. *Fatawa Alamgiri, Hiba*, ch. XI. giving instances & details, which seem unnecessary, or inapplicable. Cf. *Mohinudin* v. *Manchershah*, (1882) 6 Bom. 650, 662.

§ 4.—SUBJECT OF GIFT.

I. WHAT MAY BE TRANSFERRED BY WAY OF GIFT.

(A) Any property.

366. A gift may be made of any existing property,[20] whether or not it is capable of manual delivery.[21] When the donor's rights over a determinate thing constitute ayn or full ownership,[22] and the full ownership is immediately and unconditionally transferred without consideration, the transfer is a hiba. If the donor's rights do not amount to full ownership, the question whether he is entitled to transfer those rights depends upon the nature of those rights.[23] When it is intended to transfer with or without consideration, the right[24] to take some benefit that will accrue or something that will be produced in future, the appropriate form of transfer is to give to the donee the manafi[25] or produce or the usufruct of the thing whose benefit it is intended that the donee should take : the usufruct may be particularized and|or restricted by the rights being specified, with which the donee is intended to be invested, by virtue of the gift.

Hiba one form of gift.

Illustrations.

(1) D purports to make hiba of "the fruit that may be produced by my palm tree"; "what is in the udder of this sheep"; "the butter in milk"; "the oil in sesame"; or "the flour in wheat,"—the donor authorizes the

20 Bail. I. 508 (516), 529 (538); PROPERTY = thing over which dominion or right of property can be exercised or anything which can be reduced into possession or which exists either as specific entity or enforceable right, or anything in fact which comes within meaning of word MAL : *Mirza Abid H.* v. *Munnoo B.*, (1927) 2 Luck. 496 ; *Ahmadi B.* v. *Abdul Aziz*, (1927) 49 All. 503 = 25 All. L. J. 407 (fact that suit has to be brought not obnoxious to this rule). But not services, nor natural love & affection : *Rahim* v. *M. Hasan*, (1888) 11 All. 1, 5 (par. 2), 6 (par. 2, 3). Special attention is necessary to the TWO FORMS OF PROPERTY mentioned in s. 366A, p. 380 : (i) AYN (or substance or corpus) & (ii) USUFRUCT,—as subjects of gift, respectively.

21 *Mullick Abdool Guffoor* v. *Muleka*, (1884) 10 Cal. 1112 (zamindaris : shares in zamindaris let out to tenants; lakhiraj properties let out to tenants; malikana rights); *Anwari B.* v. *Nizamuddin Shah*, (1898) 21 All. 165, 171 (*ll.* 1-7); & cf. *Kekewich* v. *Manning*, (1851) 1 De. G. M. & G. 176 (C. A.) (Knight Bruce L. J.) 187, 188 ; *Muhammad Faiz Ahmed K.* v. *Ghulam A. K.*, (1881) 3 All. 490 ; 8 I. A. 25 ; *Sahibunnissa* v. *Hafiza B.*, (1887) 9 All. 213 (gift of pension under Pensions Act, s. 7(2) valid); *Tavakalbhai* v. *Imtiyaj B.*, (1916) 41 Bom. 372 ; *Lalijan* v. *Mudammad Shafi Khan*, (1912) 34 All. 478 ; *Ahmad-uddin* v. *Ilahi Bakhsh*, (1912) 34 All. 465 ; *Amlul Nissa B.* v. (*Mir*) *Nurudin Hussein K.*, (1896) 22 Bom. 489 (ANNUITY of Rs. 4,000 charged on jahgir villages *held* invalid,—*submitted* with great respect erroneously. ANNUITIES are recognized subjects of gifts : as to bequests they are clearly stated; Bail. I. 658 (669). There is no reason why bequests should be allowed & not gifts during life : but special mention has to be made of bequests for explaining in regard to recurring payments like annuities, operation of rule of bequeathable third (s. 496(3).) : how they are, so to say, to be capitalized).

22 FULL OWNERSHIP : see s. 345, com. *n.* 12.

23 *Mahomed Noor K.* v. *Hur Dyal*, (1866) 1 Agra 67 (widow, holding possession of husband's property in lieu of *mahr* has no right to make gift of it). The rights may explicitly be rendered non-transferable by the grant or by operation of law.

24 It is important to bear in mind that what is transferred is *right* to take produce or other benefit accruing from property.

25 Here again, what is transferred is *right* to take *manafi* or produce or to enjoy usufruct.

donee to take possession of the subject of the hiba.[26] These are not proper subjects of hiba. SECTION 366.

(2) D says to R, "I give thee the pearl which I have lost; recover and take it." According to Abu Yusuf this is a void gift,[27] being the gift of a mere speculation. Zuffer, however, holds it to be valid.[28]

(3) On 1 Jan., D purports to make hiba of a house to R, and puts him in possession of it. On the said date the house does not belong to D, but to X. On 1 Feb. X dies, and D inherits the house. On 1 Mar. D sells the house to Y. The sale is valid because the hiba was void.[29]

(4) In the last illustration if D had made the hiba on 2 Feb. believing that X was living, and that the house belonged to X, the gift would have been valid, and the sale to Y void.[29]

Transfer of rights in property.

The illustrations are given for showing what are fit subject of hiba: as hiba refers to the out and out transfer of a determinate thing, it is obvious that what is not in existence cannot be the subject of hiba. That is very different from saying that the present right to take something that will come into being in future is incapable of being transferred. Thus it is stated in the Fatawa Alamgiri and Hidaya that "as the profits (manafi)[30] of a thing may be transferred by a person during his life-time, with or without consideration, so they may in like manner be transferred after his death."[31]

Donor must own and possess subject of gift.

With reference to the law in England, it has been said: "'At common law a man could not grant what he had not': Perkins' Profitable Book (translated 1642), where the doctrine is stated in all its crudity;"[32] similarly in Muhammadan law hiba cannot be made of property, not at any time in the possession of the donor, but in that of a trespasser (and consequently never delivered by the donor to the donee).[33] The fact that the donor had brought an action to recover the lands forming the subject of the hiba (pending which action, he died) was held not to make the hiba valid.[34] It has also been

[26] Bail. I. 508 (516) (*ll.* 10-15); Hed. 484 (col. i., par. 1) flour not yet ground, or oil not yet pressed, being not in existence at the time, cannot be subject of *hiba*; they are not susceptible of being treated like determinate physical objects whose ownership is transferred by delivery of possession; whereas gifts of milk in udder, of wool on goat's back, of grain upon ground, & of fruit upon trees, are gifts of undefined parts (*musha*): hence capable of being validated by subsequent division & possession. Doctrine of *musha* not known to Shia law.

[27] Macn. 201, (case 6); *Abadoonnissa K.* v. *Ameeroonnissa K.*, (1868) 9 W. R. 257; *Rahim Bakhsh* v. *Muhammad Hasan*, (1888) 11 All. 1, 3 (par. 2), 8 (par. 3), 9 (par. 2, 3), 11 (par. 2) (donor must have possession, if property susceptible of it).

[28] Ameer Ali, I. 87 (140), citing *Fatawa Kazi Khan*, IV. 235.

[29] Bail. II. 207.

[30] See pp. 346 (*n.* 14), 355, 359 f., 380.

[31] Bail. I. 652 (663); Hed. 692.

[32] *Tailby* v. *Official Receiver*, (1883) App. Cas. 523, 525 (arg. of Counsel).

[33] *Rahim Baksh* v. *Muhammad Hasan*, (1888) 11 All. 19 (per Mahmood, J.); *Fakir Nynar Muhamed Rowther* v. *Kandaswamy Kulathu V.*, (1911) 35 Mad. 120, 129: ("unless subject-matter of gift in possession of trustee or agent of donor whose custody is regarded in law as custody of donor, the owner of a property if not in possession cannot make valid gift of it, or rather a gift made by him will not pass ownership of property to donee until donee takes possession by donor's consent." (per A. Rahim, J.).

[34] Macn. 201 (case 6).

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held that the execution of a deed of gift, the subject of which are lands in the possession of a third party, claiming them adversely to the donor, does not give to the donee a right to sue for them after the death of the donor.[35] But where a mother makes a gift of her 1/6 share of inheritance in her daughter's estate, to the children of the daughter, and authorizes the donees to take possession, and "in fact they do take possession," the fact that the mother herself has never been in possession, does not invalidate the gift.[36] In so holding Lord Macnaghten pointed out that "the principle on which the rule" that possession must be given "rests, has nothing to do with feudal rules, and that the European analogy is rather to be found in the cases relating to voluntary contracts or transfers: where if the DONOR has not done all he could to perfect his contemplated gifts he CANNOT BE COMPELLED TO DO MORE. In this case it appears to their Lordships that the lady did all she could to perfect the contemplated gift and that nothing more was required from her. The gift was attended with the utmost publicity, the hibanama itself authorizes the donee 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."

Principle on which possession must be given: donor cannot be compelled to do more than he has done.

1.—Substance (corpus): 2.—Distinguished from manafi or usufruct.

366A. A leading distinction in Muhammadan law is that between (*a*) ayn, or mal, or the substance of a thing, or its corpus, or the thing itself, (viz. a determinate physical object such as a plot of land or a camel or house or horse) and (*b*) the manafi of such a thing, or its produce, or fruits, or usufruct, or use, or the right to take its benefits, or its services, or what it produces.[1] Gifts of these two forms of property fall under different categories.

[35] *Meherali* v. *Tajudin*, (1883) 13 Bom. 156. But see *Anwari Begam* v. *Nizamuddin Shah*, (1896) 21 All. 165, 170, 171. See *n.* 36.

[36] *Mahomed Buksh Khan* v. *Hosseini Bibi*, (1888) 15 I. A. 81 = 95 f. Cal. 689, 702; *Husseinbhai* v. *Adv.-Gen.*, (1920) 22 Bom. L. R. 846; & cf. *Kalidas* v. *Kanhya*, (1884) 11 I. A. 218 = 11 Cal. 121, 131; *Mirza Abid Husain* v. *Munnoo Bibi*, (1927) 2 Luck. 496 (gift of property by purchaser in execution sale, before sale confirmed: held valid); *Ebrahim* v. *Bai Asi*, (1933) 58 Bom. 254, 257. See also pp. 402, 416 f.

[1] The distinction alluded to in almost every connection,—transfer, partition, marriage, *mahr*, wills, pre-emption. (A) DISTINCTION between (1) SUBSTANCE of property or *corpus*, or "thing itself, or *ayn*" & (2) "USE," or "PRODUCE," (*ghallat*), Bail. I. 652 (663), or "BENEFIT," or "USUFRUCT" (p. 346, *n.* 14) *manfaat*, plural *manafi* (= advantage, utility, use, from *nafaa yanfau* = to profit, to be useful) of the property. *Ghallat* (= corn, grain, fruits, harvest, produce, seed-produce; return of an estate, rent income): Bail. I. 652 (663); cf. *Hidaya* (Naval Kishore ed.) II. 612; Bail. I. 652 (663); *Fatawa Alamgiri* (Cal. ed. II. 454) *hasil* (= produce); Hed. 693, col. I. (referring to EARNINGS or HIRE of SLAVE); (3) MILK or ownership contrasted; MALIK (= owner); TAMLIK (= being owner) explained & distinguished from or contrasted with MANAFI: ss. 348, 443, 366A, comm.; splitting up of ownership ss, 345, 366A; 443, com.; USUFRUCT, ss. 348, 352, 362, 444, 359, comm. (B) This DISTINCTION between SUBSTANCE & USUFRUCT (i) formed basis of reasoning of P. C. in (*Nawab*) *Umjad Ali* v. *Mohumdee B.*, (1867) 11 Moo. I. A. 516, 550 = s. 383, *ill.* (3); s. 352, com. (ii) *Mahayat* = PARTITION OF USUFRUCT as distinguished from PARTITION OF PROPERTY ITSELF: Hed. 572, 576-8; 693; (s. 489, com.). *Hidaya* has interesting chapter, in book on *qismat* or partition, under heading of *mahayat*,.

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Usufruct connected with notion of duration.

Transfer of *a*.—full ownership.

One point of distinction between (i) corpus or ayn or mal, and (ii) manafi or usufruct is, that with the latter, the notion of duration is connected. For manafi refers to recurring rights that are to accrue in future from day to day.[2] Hence when the benefit or usufruct of some object is transferred, the period of the usufruct has to be determined.[2] On the other hand the ownership of the object itself (of the corpus) cannot be transferred merely for a limited period. As soon as the ownership of the object its transferred, it becomes—this is

Several particulars given : " partition of usufruct is sometimes effected by means of time & sometimes by means of place," which latter is pronounced to be more equitable than former. Partition of use of two slaves, of two houses & of two quadrupeds then dealt with. As partition is agreement for consideration, Ind. Contr. Act, s. 187 applies. But chapter in Hed. interesting as illustrating importance of distinction between property itself & its usufruct. (iii) As to MARRIAGE : Bail. I. 15, 16, 93 (*mal* or property & *manafi* pointedly distinguished) ; Hed. 26 ; Bail. II. 1-3 ; *Sharh-i-Viqaya*, Vol. II. Book on *Nikah, init.* ; (iv) *Sharh Luma*, I. 96 (cited in s. 106, com.) as to MAHR. (v) Abdur Rahim, *Muh. Jur.* 262, 263 : USUFRUCT & RIGHT TO CONJUGAL society, removed from category of *mal*, which has much narrower significance than property, & is " applicable only to objects which have a perceptible existence in the outside world, i.e. to things corporeal & tangible. Future produce or *manfa'at*, e.g. may be the subject of ownership but is not called *mal*. (vi) Ib. p. 288 ALIENATION of PROPERTY is different from alienation of USUFRUCT : cf. Bail. I. 93. (vii) *Sharh Luma* contrasts SUBSTANCE & USUFRUCT (cited s. 106 p. 184) (viii) *Jami-ush-Shittat*, cited s. 445, p. 517 (GRANT ostensibly of CORPUS must be interpreted as grant of USUFRUCT to give effect to INTENTION). (ix) *Ghayat-ul-Bayan*, s. 457A, com. (x) *Bikani Miya* v. *Shuk Lal Poddar*, (1892) 20 Cal. 116, 140 ; WAKF : Arkam disposed of USUFRUCT in charity so that CORPUS may not be sold nor inherited : *Fathul Qadir* cited *Meer Mahomed Israil Khan* v. *Sashti Churn Ghose*, (1892) 19 Cal. 412, 427. (xi) Life tenant is a USUFRUCTUARY : Poll. & Maitl. : cited s. 443 A, com. (xii) " An equivalent for the use, is, in fact, the same as the use itself, so far as relates to the TESTATORS' object." Hed. 693. (xiii) Hed. 694, col. ii. ; Bail. I. 657 (668) : contain details which (*submitted*) refer to CONSTRUCTION : s. 5c ; their gist is that grant of SUBSTANCE ordinarily carries with it right to take USUFRUCT : therefore expression " substance " may be used in two senses : (*a*) stricter or narrower sense (= bare corpus) ; (*b*) broader sense = corpus together with right to usufruct or profits. In *Amjad Ally's* case 11 Moo. I. A. 516, corpus was used in narrower sense. See also *Tagore* case L. R. I. A. (SUPP. VOL.) 47. (xiv) AYN & MANAFI are both specifically mentioned in DEFINITION OF WILL in *Fatawa Alamgiri & Hidaya* at the beginning chapter vii. & v. respectively of the book, *Wasaia* (WILLS). *Fat. Al., Wasaia, Ch.* vii. VI. 188 is entitled " On *wasiat* by way of *sukna* (residence), *khidmat* (service), *thamrat* (fruits) & advantage (*ghallat*) of slaves, & of gardens, & lands & *zahrad dabah* (backs of beasts, viz. riding on backs of beasts) & other such matters." This long title is translated " USUFRUCTUARY WILLS : " Bail. I. 652 (663) ; Hed. 692. (xv) PRE-EMPTION : *sharik* (= partner in SUBSTANCE) is preferred to *Khalit* (= partner in RIGHTS (or use or usufruct) only, as of water, or of way) : Bail. I. 476 (481), 480 (486), *Hidaya* IV. 1 (413) ; Bail. I. 470, *n.* 1 (481). See s. 545, com.

[2] Or as it is put in Hed. 478 : " the produce or use of the thing becomes property particle by particle, as it is brought into being." Hed. 441, col. ii. § 5 : " it is requisite that the PERIOD OF RIGHT to the usufruct be fixed." This is obvious, & it is only by chance that this is found expressly stated : see s. 443, *n.* Hed. 478 : (col. ii. § 3) has great significance which is obscured by use of words *investiture & lending* for rendering into English the notion of transference of right to enjoy usufruct (*tamliku'l-manafi*). (See s. 443, pp. 479-487, *nn.* 3, 11, on difficulties caused by this translation). " The produce or use of the thing lent," the translation runs, " becomes property particle by particle, merely according as it is brought into being ; hence with respect to such part of the produce as is not yet brought into being, there is merely an investiture, but no seisin : retraction with respect to such part is therefore valid." The gist is that when the right to the usufruct is granted, the grantee becomes entitled to take the produce, particle by particle, as it (produce) comes into being ; the transaction progresses towards complete execution by series of acts, as particle after particle is taken possession of : thus grant of usufruct is a present transfer of series of future rights,—future in the sense that they entitle grantee to become owner of physical objects which are to come into being, particle by particle, in future, or of

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merely restating the same proposition—the property of the transferee.[3] The transferor accordingly ceases to be the owner. He cannot (on the ground of having been its former owner) any more exercise any rights over the property (which now belongs to the transferee).

Importance of distinction.

It is difficult to state all the implications of this distinction. The difficulty is enhanced by the expositions of Muslim law in India being steeped in the phraseology and notions imbibed from English law. The omission to keep in mind the distinction between (i) corpus or substance, and (ii) manafi or usufruct as understood in the texts, however, leads to frequent misconceptions.

Illustrated by disposition by way of wakf.

As an illustration, reference might be made to the carefully considered judgment of the Privy Council which had held family wakfs to be void.[4] The decision is now overruled by the Wakf Acts, 1913, 1930. But it is instructive to understand the reasoning on which the decision is based, and to make the Muslim law bear upon it. The reasoning was that simple gifts by a private person to remote unborn generations of descendants, successions that is of inalienable life-interests are forbidden ; and that the same dispositions which are illegal when made by ordinary words of gift, cannot become legal if only the settlor says that they are made as a wakf in the name of God, or for the sake of the poor. This reasoning, with great respect, is founded on wrong

Hiba and gift.

premises. (i) Hiba does not mean the same as "simple gifts." Gift is a wide term, applicable to all transfers without consideration : hiba is much narrower. The connotation of hiba includes within its scope only transfers (without consideration) of the full ownership of determinate objects,—of the

a.—Hiba a disposition of corpus.

ayn : s. 345. Hence once a person makes a hiba, the property passes out of his control : he cannot exercise any further control over it. He cannot lay down how property which he has placed beyond his own control, shall be utilized. He cannot provide for a succession of transfers commencing with

b.—Gift may be disposition of usufruct.

a hiba, because by the first transfer he parts with all his power and

rights to enjoy, at future time, succession of benefits each capable of being treated as separate unit. With regard to such "future property" or "future rights" it is said that there may be "investiture" (i.e. the relative appropriate rights may vest in the grantee) but there cannot be *seisin* at time of grant. Seisin can take place only after the objects come into being & are physically taken possession of, or, by an extension of the meaning of seisin (to cover cases where usufruct consists of making use of the property), seisin may be deemed to be effected by making the use or deriving or enjoying the benefit or advantage in question. Significance of this passage in present context is, that in it is involved & recognized the basic conception from which USUFRUCT may be DESCRIBED as something that comes into being particle by particle ; & therefore it has the notion of duration naturally annexed to it. Since law concerned with rights to be exercised over the particles not with the particles themselves, we reach the conclusion that usufruct consists of succession of rights of ownership, or, in appropriate cases, of a succession of rights of user, or enjoyment, accruing seriatim, as the produce comes, particle by particle, into being or as the occasion to enjoy or use, arises, or presents itself. In connection with another principle it is important to note the distinction, that usufruct being resolved into a succession of units, that which is granted & that which is not granted, each consists of a set of such units, & each set can be kept distinct from other : conditions & stipulations with reference to these two sets stand on different footings : ss. 406 ff.

[3] See s. 345, com. on OWNERSHIP = bundle of undefined rights. Poll. & Maitl. *Hist. of Eng. Law*, on ABSOLUTE OWNERSHIP : s. 345, p. 345, *n.* 12.

[4] *Abul Fata* v. *Rasamaya*, (1894) 22 I. A. 76 (CAL.); see also *Mahomed Ahsanulla* v. *Amarchand*, (1899) 17 I. A. 37 (CAL.).

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control over the subject of transfer. From this it does not follow that in no way can interests limited in duration be created. Subject to what is stated below such interests can, under the principles of Muslim law, be created by grants of the usufruct for successive periods : under a grant of the usufruct for life the same rights may be given to the grantee as are enjoyed by a life tenant.

Usufructuary for life is a life tenant.

(ii) Secondly, (reverting to the judgment of the Privy Council) wakf is primarily a disposition of usufruct : [5] it is true it is also secondarily and in a manner to be explained below, a disposition of the corpus. This dual character of the disposition by way of wakf, requires to be analyzed and understood. Wakf and hiba must be put under two entirely distinct categories by reason of the latter being purely and absolutely a disposition of the corpus, and the former primarily of the usufruct. They may, no doubt, be both called gifts : but a gift of corpus must (for reasons that have been stated) stand, in regard to its incidents under Muslim law, on an entirely different footing from a gift of usufruct.

Wakf effective disposition of usufruct.

It is necessary to deal with some preliminary notions before concluding this discussion.

With reference to the fixing of the duration of the period during which the usufruct is disposed of, the effect upon each other of certain well recognized provisions of the law have next to be considered. The first of these rules of law is that a Muslim has power during his lifetime of transferring in praesenti the full ownership of any part, or the whole, of his property : after his death (or during death illness) he may deal only with the bequeathable 1/3. His "property" may or may not consist of rights of a species with which the notion of duration is necessarily associated. It may or may not include sets of rights that accrue from time to time or at intervals of time. If the property consists of rights entitling him to the enjoyment of the manafi or usufruct or produce, then the property does consist of rights that arise from time to time. His power of disposition over such rights falls under two heads corresponding to the periods during which such rights arise : (i) one portion of such rights will arise in his lifetime : he can presently dispose of the entirety of that portion, viz. he can dispose of the whole of the usufruct for the period of time while he is living ; (ii) secondly, another portion of such recurring rights will, or may, accrue after his death : he can dispose of this second portion only subject to the limitations that the law imposes over his testamentary dispositions, including the limitation that bequests shall not

Rule of bequeathable third.

Usufruct : part accruing :
i—during lifetime.
ii—after death,—subject to testamentary limitations.

[5] *Hiba* is a disposition of the corpus. *Wakf* is an effective disposition of usufruct, the substance is made *wakf* of i.e. "tied up" ; cf. Bail. II. 217, *ll.* 9-17 : "*wakf* is a transfer of property & is like a permission [to the beneficiary] to take the usufruct" (par. 1) or a mandate to the *mutawalli* to place it at disposal of beneficiary (s. 357A, com.) ; so far as corpus of property dedicated by way of *wakf* is concerned, effect of dedication is to render it incapable of being transferred or of devolving on heirs, cf. Arkam's *wakf* set out in *Bikani Mia* v. *Shuk Lal Poddar*, (1892) 20 Cal. 16, 140 ; *Fathu'l Qadir* cited *Israil K.* v. *Sashti*, (1922) 19 Cal. 412, 427 ff. ; cf. interesting analogy of expression *mortmain* = condition of lands held inalienably by ecclesiastic or other corporation (*Oxford Dist.* ; Wharton, *Law Lex.*) & doctrine inculcated that whatever given to or purchased by monks was consecrated to God himself, Blacks. *Com.* IV. 108. See also s. 444, p. 501 : (i) transfer of *ayn* (*hiba*), (ii) of usufruct (gift other than *hiba*).

SECTION 366A. exceed 1/3 of his estate : [6] consequently portion (ii) of these recurring rights must be valued, and a disposition of them will be valid if the bequests come within the bequeathable 1/3. In other words when he disposes of the usufruct for the period succeeding his death, the disposition dealing with this portion of the usufruct will be treated as a testamentary bequest, and will be subject to the law of wills.

Transfer of *a.*—full ownership : *b.*—usufruct.

From these rules it follows that the transfer of the immediate full ownership of a determinate object must be governed by totally different considerations from those applicable to the transfer of the series of rights called usufruct.

To proceed a step further, take first the proposition that the transfer of the usufruct which will accrue during the second period,—during the period that follows after the grantor's death—is subject to testamentary limitations. This proposition must obviously be so understood as not to conflict with the other proposition that the owner may part with the full ownership of any portion of his property by transferring it away in praesenti. If he transfers the full ownership of a determinate thing, the transfer (it is clear) carries with it the right to the usufruct of that thing, not only for the transferor's life time, but for all time, whether prior to or after his death. The two propositions may be verbally reconciled : it may be said that the corpus may be transferred immediately and entirely, and the usufruct only for the period of the owner's life-time. But when the real effect of these propositions is considered they seem to lead to contradictory results. For the usufruct may include practically all the rights that the owner (for the time being) enjoys,—in which case the transfer of the usufruct may differ in no way except in form, from the transfer of the ownership ; and yet according to these propositions it would seem that though the ownership of the property can be transferred for all time, a part of the bundle of rights constituting its ownership—its usufruct—cannot be transferred for all time.[7] It is true that this apparent difficulty need not as a matter of jurisprudence be considered insuperable. In every system of law (from historical and other reasons) form plays an important part : and what cannot be done in one form may be done in another. It may be that what can unquestionably be done in the form of hiba, can as unquestionably not be done in the form of transfer of the usufruct. The fact that the terminology of English law considers the two forms as interchangeable, must not be allowed to complicate the position by verbal fallacies.

i—Practical effect of both may be same.

But it would be wrong to let the matter rest in the position last stated. Muslim law is based and developed on reason : and each instance in which the mere form given to a transfer, is admitted to govern its validity, is a concession against this position. It is submitted that in the present instance such a concession need not be made : the real distinction between the transfer of the mere usufruct as understood in Muslim law, and of the entire interest in the property, furnishes the key-note. The grant of the usufruct is distinguished from the transfer of the full ownership, in that when the usufruct is alone transferred, the original owner retains the residual rights. These residual

ii—The two transfers distinguished juristically.

[6] Bail. I. 652 (663) ff. ; Hed. 692 ff. [7] See p. 380, *n.* 1 (B) (xiii).

rights may or may not include the right of controlling (in respect of duration or otherwise) the enjoyment of the usufruct ; but they do include in every case, the power of alienating by his own act while living, and, of transmitting after his death (by operation of law) to his heirs, the ownership of the thing,—subject to the rights of enjoying the usufruct which he may have validly granted to a third person. These residual rights are retained over the corpus of the property in respect of which the rights of usufruct alone are transferred. It is only if he parts with these residual rights, as well as with the usufruct, that he parts with the whole. So long as he does not part with the whole bundle of the rights making up ownership, he retains in himself the position of the owner. He does not (so long as he has parted merely with those particular rights connected with the property which are styled the rights of enjoying the usufruct) attempt anything so futile as does the person who, having made a hiba, thereafter attempts to control the use of the subject of hiba. He does not attempt to control the use of a thing after having parted with all power of control,—after having parted with the full ownership of the thing itself.

SECTION 366A. Residual rights in corpus.

These conflicting considerations have been stated at length so as to lead to the problem raised by the judgment before referred to (from the point of view of jurisprudence) whether a wakf as understood in Muslim law may be created consistently with the general principles stated above. The problem therefore is,—can a scheme of disposition be devised (1) under which the owner may dispose of the usufruct—and (2) may deal with the usufruct not only for the period of his life but for the whole period succeeding his death, without the disposition having to be classed as testamentary ? The answer to this qusetion must be given in view of the two propositions with which we started,—viz. (1) that he can deal with all his property in praesenti ; (2) but if he wishes to deal with it after his death he will be subject to the limitations over testamentary dispositions. He is permitted to make a disposition, if, taken as a whole, there results from his disposition as complete an alienation of the entire ownership of the property as results from a hiba : so that the disposition taken as a whole must be treated as a present parting with the entire ownership of the property, and not as a disposition to come into operation on his death. (3) The disposition must obviously be given the form of a disposition of the usufruct, if he desires that a succession of persons may be enabled to benefit. Can he avoid the objection that he is purporting to direct how the property shall be utilized after his death, and that therefore the disposition is testamentary ? The answer to this will be in the affirmative if it can be asserted first that he has parted entirely with the property immediately, at the very time of the disposition, and that therefore the disposition taken as a whole—the whole is one transaction—is not testamentary. Secondly, he has also to meet the other objection that he has parted away with his rights and therefore cannot exercise any control over the subject of the disposition. He can meet this second objection if he so acts that though after the disposition he has no right of control left in him, yet at the time when the disposition was being made, he had not parted with his power of control. He has to select the form

Genesis of wakf.

1.—Disposition of usufruct in perpetuity,—

2.—But also,—

all rights in property dedicated must be parted with.

SECTION 366A.

of his disposition : the form must be such that, at the time when he makes the disposition, he has the right to exercise control over the property in the manner in which he exercises it : and the form of disposition must be such that, as its result, the whole of his rights in the property are parted with (so that the disposition as a whole is a complete transfer in praesenti of the ownership of the property). The disposition will then prevail as the act of the owner for the time being. But it will also be such that after that act of disposition comes into operation—but not till then—he ceases altogether to be the owner.

3.—Bearing upon wakf.

What has been stated above may now be made to bear upon the law of wakf. As wakf is a disposition governing and controlling the use to which the property will be put from time to time—so that a succession of persons may benefit under the disposition—therefore the disposition must have reference to the usufruct of the property with which duration is associated (cf. s. 497A). Secondly as the disposition controls the property not only for the life time of the wakif (the author of the wakf) but for all time, the disposition must result in his parting with all his interest in the property, and no residual rights must be retained in himself.

4.—Rule against wakif reserving any interest in wakf to himself.

This last point makes the reason clear for the rule prevailing under all schools except the Hanafi, the rule namely which prevents the wakif from reserving any interest to himself under a wakf. The exception under the Hanafi law itself explains the rule that the dedicator of the property should reserve no benefit to himself in the property he is dedicating. The Hanafi law permits the wakif to benefit under the wakf : it does so on the basis that the wakif benefiting under the wakf, does not take any benefit in his capacity either as wakif or as the original owner : that in fact he does not reserve anything for himself : but that he parts with all his rights in the property, and that after the dedication the property is to be dealt with by the mutawalli solely in accordance with the dedication : that if, under the dedication, the former owner takes any benefit, he does not take it by reason of his having reserved this right to himself : he takes it not as the owner, but in a new capacity, as a beneficiary under the wakf-nama. Under all schools of law if a wakf is made for the poor, and the wakif afterwards becomes poor, he may take his share of the benefit with other poor. The Hanafi law recognizes this principle as applicable to all provisions of the dedication : the dedication must dispose of and provide for the exercise of complete ownership over the usufruct of the dedicated property : no rights outside the terms of the dedication shall prevail : whosoever is entitled under the dedication shall have the rights given to him,—albeit it is the original owner of the property ; the original owner passes out of consideration : it is now the beneficiary under the dedication who appears.

Exception under Hanafi law explained.

It is not suggested that the whole of the subject will be found reasoned out in the manner in which it has been expatiated. But the explanation seems clear. The text writers had to commence the study of law by memorizing each conception underlying it. They were thoroughly permeated with their subject. To them it seemed almost an indecent condescension to explain every detail. Si quis capere potest, capiat.

SECTION 366A. Leading transactions compared.

A comparison of some of the leading transactions based on (i) the distinction in s. 366A ; (ii) the presence or absence of a religious motive (s. 5D), or (iii) of some other valuable consideration, illustrates what has been said above :

HIBA is a transfer of the full ownership of the substance, without any religious motive or any other valuable consideration.

SADAQA is such a transfer with a religious motive.

BAI' (sale) is such a transfer with consideration.

IWAZ is a species of hiba (Bail. I. 543).

HIBA BIL IWAZ consists of two transfers (i) originally a hiba, and (ii) a subsequent reciprocal hiba by the original donee : the second hiba not being antecedently stipulated for, prior to the completion of the first hiba.

HIBA BA SHART UL IWAZ consists of two such hibas but the second hiba having been antecedently stipulated for.

IJARA (lease or hire) is a transfer for consideration, of the usufruct for a definite period.

ARIYAT is the transfer of the usufruct without consideration for a definite or indefinite period.

WAQF is a two-fold transfer simultaneously made : perpetual in both its aspects with a religious motive pervading : the transaction as a whole consists of a transfer (i) of the usufruct in favour of the beneficiaries or object of the wakf, and (ii) of the substance,—in reality a renunciation of the substance, metaphorically spoken of as a transfer of the substance to God : on such renunciation there is no one who can exercise the rights of ownership over the substance.

HABS (see s. 446, p. 518) is a transfer of the usufruct not necessarily in perpetuity, without any religious motive.

WASIAT is a testamentary disposition either of the substance (ayn) or the usufruct.[7]

MARRIAGE is comparable to bai (not ariyat &c.) : Bail. I. 12, (par. 2), 15, 16.

MUTA may be compared to a transfer of the usufruct ; but see Bail. II. 39 (*first*).

III. Donor's powers not restricted by expectant heirs' rights.

367. A Muslim may give the whole of his property by way of gift to any person ;[8] and his expectant heirs[9] cannot avoid the gift, even though the gift may have the effect of evading the Muhammadan law of succession.[10]

Gifts made in death-illness are governed by the law of wills : s. 600.

[7] See p. 381, *n.* 1, part (B)(xiv).

[8] Cf. *Mt. Saheebun* v. *Sheik Khoda Buxsh*, (1835) 6 S. D. A. R. (CAL.) 44 = Morl. I. 268, s. 50.

[9] Cf. s. 285(11) defining synonymous expression "presumptive heirs."

[10] (*Nawab*) *Umjad Ally Khan* v. *Mohumdee Begum*, (1867) 11 M. I. A. 517, 546 ; *Khajooronissa* v. *Rowshan Jehan*, (1876) 3 I. A. 291, 307 = 2 Cal. 184, 197 ; *Chaudhri Mehdi Hasan* v. *Muhammad Hasan*, (1905) 28 All. 439, 449 = 33 I. A. 68, 75 ; *Sadik Husain* v. *Hashim Ali*, (1916) 43 I. A. 212, 221 ; *Gulam Jafar* v. *Masludin*, (1880) 5 Bom. 238.

SECTION 367. Stripping oneself bare.

The question whether there could have been an intention on the part of an alleged donor to give away all his property has been considered in many cases,[11] see s. 405, *ill.* (2).

IV. GIFT OF RIGHTS IN PROPERTY : Limited interests.

368. The grantor or grantee under s. 446, of a limited interest in property may validly dispose of, or transfer, his interest (even though it be deferred) in the subject of the grant by way of sale or gift or other mode of alienation :[12] but so as not to affect any limited interest in the property which has become vested.[13]

Illustration.

By a consent decree a certain house was to be held and enjoyed by *U* for life, and after her death to be sold and the proceeds divided amongst RA, RB, RC, RD, RE and RF. RA purported to take a transfer of the interests given by the decree to RC and RD on 11 Jan. 1898, of RE and RF on 11 Jun. 1903, and of RB on 27 Mar. 1905. The last transfer alone was made after the death of *U* (who died on 2 Dec. 1903). *Held*, (*a*) that a vested remainder may be created under Muhammadan law, (*b*) that life estates are known to Shia law, (*c*) that during the period of the life-interest the deferred interest can be dealt with by way of sale, gift, or otherwise, provided that there is no interference with the particular estate, and (*d*) that it would seem to follow that the purchaser or donee could deal with the interest so acquired by him.[12]

(*a*) Gifts of rights less than full ownership.

369. Gifts may be made of rights in property not amounting to its full ownership.[14]

To collect share of rents.

Gifts of the following nature have been held valid : (i) of the right to collect a specified SHARE OF[15] the RENTS of undivided land ;[16] (ii) of SHARES IN VILLAGES under attachment by the Collector for arrears of revenue ; (iii) of RIGHTS in zamindari lands ;[17] (iv) of zamindaris, shares in zamindari lands let out to tenants, lakhiraj property let out to tenants, MALIKANA RIGHTS,[18] and

[11] E.g. *Kerwick* v. *Kerwick*, (1920) 47 I. A. 275, 285 (LOWER BUR.) ; *Ameeroonissa* v. *Abedoonissa*, (1875) 2 I. A. 87, 111 (par. 3) (par. 6 from end of judgt.).

[12] Bail. II. 227 (par. 2) ; *Banoo Begum* v. *Mir Abed Ali*, (1907) 32 Bom. 172, 178. (Exhibits 4, 5, 9).

[13] *Banoo B.* v. *Mir Abed A.*, (1907) 32 Bom. 172. (Exhibits 6, 7, 8).

[14] Several cases referring to gifts of rights falling short of full ownership, many of which cannot be classed as *hibas*, are mentioned in s. 366, com. *nn.* Expression *usufruct* is avoided unless it occurs in judgments cited.

[15] Sect. 375 is not obnoxious to such gifts.

[16] *Ameeroonissa* v. *Abedoonissa*, (1875) 2 I. A. 87 = 5 Beng. L. R. 67 = 23 W. R. 288 (lakhiraj lands charged with religious trust ; 10 as. share of zamindaris) ; *Jiwan B.* v. *Imtiaz*, (1880) 2 All. 93 ; *Kasim* v. *Sharifun Nissa*, (1883) 5 All. 285 (1/12 share in *muafi* estate ; dwelling house ; share in stair-case, privy & door ; gift of all : reserving income of share in *muafi* for life, STIPULATING AGAINST ALIENATION : gift valid) : on RESTRAINTS AGAINST ALIENATION, see s. 418, com. ; *Mullick* v. *Muleka*, 10 Cal. 1112, 1115, 1126. Cf. Bail. I. 521 (par. 1, 2) ; also *Mahomed Buksh* v. *Hosseini*, (1888) 15 I. A. Cal. 81 ; *Rahim* v. *Md. Hasan*, (1888) 11 All. 1. See *nn.* 24, 30.

[17] *Sajjad Ahmad* v. *Kadri Begum*, (1895) 18 All. 1 (shares in zamindaris : *hibanama* authorized donee to take possession).

[18] *Mullick Abdool Guffoor* v. *Muleka*, (1884) 10 Cal. 1112 (subject of gift :

rights TO COLLECT RENTS and profits; (v) of a right to RECEIVE RENTS of shares in revenue-paying villages;[19] (vi) of a right to receive 1/3 SHARE OF THE PROFITS of certain villages after payment of Government revenue, village expenses and costs of collection,[20] (vii) a gift FOR the donee's LIFE of the RENTS AND PROFITS of the estate, charged upon the estate in the hands of the first respondent.[21] (viii) Hiba-namas ostensibly containing absolute gifts may have to be read and construed in the light of iqrarnamas; the latter may provide that the donor shall have possession and control during life, others having in his life-time rights to share the profits with him: and on reading and construing the provisions contained in the hiba-namas and iqrarnamas as a whole, it may appear that absolute and pure gifts of the property were not intended; and their effect may be declared and enforced if necessary in a suit properly framed.[22] (ix) The dominant intention may be that the property should pass to three persons in succession.[23] (x) The donor being entitled to inherit 1/6 share from her daughter's estate, a gift may be made of that share to the children of that daughter, authorizing the donees to take possession;[20] (xi) gifts of the movable and immovable property and all zamindari and lambardari estate of the donor who reserved to herself for HER LIFE the USUFRUCT of certain properties (styled "exempted properties") WITHOUT POWER TO her TO ALIENATE by mortgage, sale or gift;[24] (xii) of immovable property with a STIPULATION that the donee shall give to the donor,[25] or a third person,[26] or

SECTION 369.

Share of profit.

For life.

Gift subject to donor's control for life: others sharing profits with donor.

Alienation restricted.

Usufruct for life.

zamindaris & shares of zamindaris, let out to tenants & ryots; good many lakheraj properties, also let out to tenants; several malikana rights of some value; variety of house property in Patna & elsewhere consisting of houses, sheds, roads, gardens, etc.). [MALIKANA right = right to receive from government sum of money representing *malik's* share of profits of revenue-paying estate, when from his declining to pay revenue assessed by government, or from any other cause, his estate is taken into *khas* possession of Government, or transferred to some other person who is willing to pay rate assessed: 10 Cal. 1125]. Cf. *Rameshwar Singh* v. *Sec. of State for India*, (1911) 39 Cal. 1, 20-24 (P.C.).

[19] *Muhammad Mumtaz Ahmed* v. *Zubaida Jan*, (1889) 11 All. 460 = 16 I. A. 205 (gift of *musha* validated by possession, viz. receipt of rents & profits, p. 216).

[20] *Jiwan Buksh* v. *Imtiaz B.*, (1878) 2 All. 93 (definite share in estate); *Tavakalbhai* v. *Imtiyaz*, (1916) 41 Bom. 72; *Muhammad Talib* v. *Inayati Jan*, (1911) 33 All. 683 (see s. 351, com.).

[21] *Krishna Kumari Devi* v. *Bhaiya Rajendra Sinha*, (1929) 56 I. A. 156, 167 (par. 3) (Hindu parties): see s. 393 A, p. 424 = s. 593 A, *ill.* (1).

[22] *Ameeroonissa* v. *Abedoonissa*, (1875) 2 I. A. 87 (see extracts, pp. 348 f. 365 f.). *Iqrarnama* = document containing admission.

[23] *Nisar* v. *Md. A. K.*, (1932) 59 I. A. 268 = s. 447, *ills.* (4), (5), pp. 520 f.

[24] *Muhammad Abdul Ghani* v. *Fakhr J. B.*, (1922) 49 I. A. 195, 203 (ALL.) = s. 395 A, *ill.* p. 427 (I shall keep the lands for my life-time WITHOUT POWER OF ALIENATION); *cf. Kasim* v. *Sharifun*, (1883) 5 All. 285. See *nn.* 16, 30.

[25] *Mahomed Buksh K.* v. *Hosseini B.*, (1888) 15 Cal. 689, 702 = 15 I. A. 81 (one of 3 co-sharers gives undivided share to either of other two). Cf. "a gift by A to B of a certain property without any restriction on the power of disposition, but subject to the condition that B should pay periodically to A, or A & his heirs, a *part* of the usufruct of the property. In such a case both the gift & the condition would be valid." "And if B should alienate the property the assignee would take it subject to the condition": Ameer Ali, *Mah. Law*, I. 78 (136), (citing *Nawadir*: no detailed reference); *Muhammad Talib* v. *Inayati Jan*, (1911) 33 All. 683 = s. 383, *ill.* (1), p. 412; (see s. 351, com., p. 362).

[26] *Tavakalbhai* v. *Imtiaz* (1916) 41 Bom. 372=387, *ill* (2) p. 420; *Anwari Begum* v. *Nizamuddin*, (1896) 21 All. 165 = s. 383, *ill.* (1), p. 412; *Ghulam Muhammad* v.

SECTION 369. Income to be returned to donor.

to stated charities [27] a fixed sum out of the rents and profits annually ; [28] or shall pay the donor's debts ; [26] (xiii) of government promissory notes transferred to the donee with the CONDITION that the donee shall from time to time during the life time of the donor MAKE OVER to him the INTEREST accruing on the notes : the donee's undertaking being enforceable against him ; [29] (xiv) of zamindari and lambardari estates disposed of subject to the reservation for the DONOR'S USE DURING HIS LIFE-TIME of the USUFRUCT of the property ; [30] (xv) of an ANNUITY (or other recurring payments) charged on immovable property.[31] (xvi) A Shia may, under a contract compromising a suit, be made the permanent owner (malik mustaqill) of property WITHOUT POWER TO TRANSFER IT TO A STRANGER, the ownership to devolve as family property.[32] (xvi) A settlor may give the FULL INTEREST to his wife IF SHE BEARS A SON to him, but if she bears no child, then only a LIFE-INTEREST TO THE WIFE and the existing sons to take the property.[33] (xviii) A fifth of the estate may be given to a son " for the expenses of the male and female slaves and the other dependants &c." (p. 81), who are to remain

Reservation of usufruct during life.

Annuity.

Restriction against transfer to stranger.

Contingent full interest.

Ghulam Husain, (1931) 59 I. A. 74, 85 (ONEROUS GIFT & TRUST compared by Sir George Lowndes : ownership subject to provision for slaves : latter to have no proprietary interest in property) ; *Bishen Chand Basant* v. *Syed Nadir Husain*, (1887) 15 I. A. 1 (CAL.) (trust : Rs. 1,412 for performance of religious duties, Rs. 100 monthly payments to son, Rs. 60 to daughter, Rs. 40 trustees' allowances & other wages) ; *Pandit Krishna B.* v. (*Mt.*) *Ahmadi*, (1935) 11 Luck. 194 (gift of all donor's property, on CONDITION that all his DEBTS PAID) ; *Raja Mohan* v. *Nisar Ahmad K.*, (1933) 60 I. A. 103 (OU.) (Rani sole taluqdar subject to her providing maintenance & guaranteeing their succession as heirs : last 5 *ll.* of judgment : possession for life).

[27] *Ma Mi* v. *Kallandar Ammal* (No. 1), (1926) 54 I. A. 23 ; *Bikani Mia* v. *Shuk Lal Poddar*, (1897) 20 Cal. 166.

[28] *Pandit Krishna B.* v. (*Mt.*) *Ahmadi*, (1935) 11 Luck. 199. See *n.* 26.

[29] (*Nawab*) *Umjad Ally K.* v. (*Mt.*) *Mohumdee*, (1867) 11 Moo. I. A. 517.

[30] *Muhammad Abd. Ghani* v. *Fakhr Jahan B.*, (1922) 49 I. A. 195, 208 (life usufruct reserved to donor ; but no right to transfer ; donee required to pay & did pay govmt. reven.) ; *Muhammad Talib* v. *Inayati Jan*, (1911) 33 All. 683 (see s. 351, com.).

[31] This seems elementary & to follow from s. 369, com. (xiii) : see *Naimul Haq* v. *Md. Subhanullah*, (1918) 41 All. 1, 21 (par. 2). Texts clear with reference to bequest of ANNUITIES : Bail. I. 669-672 ; II. 241 ; Hed. 692. Both texts refer to such testamentary gifts as being analogous to gifts during life : " as the PROFITS OF A THING MAY BE TRANSFERRED by a person DURING HIS LIFE-TIME, WITH OR WITHOUT CONSIDERATION, so they may, in like manner be transferred AFTER HIS DEATH.— Bail. I. 663. *Mahomed Hosain K.* v. *Mahomed Nehaluddin*, (1883) 13 Cal. L. R. 330 (P. C.) (agreement for MONTHLY ALLOWANCES by way of MAINTENANCE upheld) ; *Khajeh Solehman Quadir* v. *Sir Salimullah Bahadur*, (1922) 49 I. A. 153, 166, 167 (agreements for consideration following invalid *wakfs*) ; *Bishen Chand Basawut* v. *Syed Nadir*, (1887) 15 I. A. 1, 6 (MONTHLY PAYMENT to son & daughter) ; *Tavakalbhai* v. *Imtiyaj*, (1916) 41 Bom. 372 ; (*Mt.*) *Surtaj Fatima* v. *Syed Muhammad Jawad*, (1930) 6 Luck. 423 (gift of *guzara* for life-time with continuance in favour of male heirs of donee, offends no principles of Muslim law).

[32] *Muhammad Raza* v. *Abbas Bandi*, (1932) 59 I. A. 236 (LUCK.) Oudh Laws Act, s. 3, requires justice, equity & good conscience to govern contracts : RESTRICTION being PARTIAL only, is not under s. 3 repugnant to absolute estate. Transf. of Prop. Act, 1882, s. 10 recognizes partial restrictions. *In re Macleay*, (1875) 20 Eq. 186 ; *Nawab Khajeh Habibullah S.* v. *Raja Janaki Nath Roy*, [1930] AIR (P. C.) 38 = 34 C. W. N. 313 (suit for setting aside *wakf* compromised : annuity fixed) ; *Nisar Ali Khan* v. *Muhammad Ali K.*, (1932) 59 I. A. 268 = s. 411, *ill.* (4) (Shia case, wills showing dominant intention to create life-estate).

[33] *Umes Chunder Sircar* v. (*Mt.*) *Zahoor Fatima*, (1890) 17 I. A. 201 = 18 Cal. 164. See also *Rasoolbibi* v. *Usuf Ajam*, (1933) 57 Bom. 737, 766 (arg.).

in his control and to get from him expenses for food and clothing but not to be in possession of the land and if disobedient to get nothing. This makes the son OWNER SUBJECT TO THE OBLIGATION TO THE MAINTENANCE. To hold that this created a trust for slaves is more correct than to consider it an onerous gift (p. 85)—but the son is not a bare trustee for the slaves.[34] (xix) An occupancy tenant who has acquired the interest of a grove-holder, which interest is transferable and of a permanent character has been held to have power to make a wakf of his interest.[35] (xx) A gift may be made of the EQUITY OF REDEMPTION of mortgaged property : s. 370. (xxi) RENT may be REMITTED by way of gift.[36] (xxii) A gift may be made of a PENSION.[37] (xxiii) Anything over which DOMINION or RIGHT OF PROPERTY may be exercised or anything which can be reduced into POSSESSION, or which exists as a separate entity or as an ENFORCEABLE RIGHT, or anything that comes within the meaning of the word MAL, may form the subject of gift.[38] (xxiv) A CONTRACT FOR INADEQUATE CONSIDERATION is dealt with in s. 441A. (xxv) A gift made by a Muslim in Ceylon to his son who agreed to certain terms and conditions on which he would hold the property, was held by the Privy Council to create a valid fideicommissum and not to be subject to the law of hiba.[39] (xxvi) Transfers of SUYURGHAL[40] grants.[41] (xxvii) Construing device of corpus as gift for life of rents and profits only : s. 393 A, *ill.* (1) (P.C.). (xxviii) Jamiush Shittat cited s. 445, p. 517 below. (xxix) Wakf of Musha &c. : s. 478, *nn.*

SECTION 369.

Grove holder.

Equity of redemption.

Pension.

Rents and profits for life.

Where the subject of gift consists of rights in property not amounting to full ownership, the donor must have authority to transfer the rights in question.

Trend of decisions.

It is not perhaps easy to reconcile all the decisions. The difficulty generally arises from a failure to keep in mind the exact significance of hiba and the distinction between hiba and gift. The exposition of the law relating to hiba is inadvertently applied also to gifts by which what is transferred without consideration, is not the sum total of rights exercisable over a determinate object, but only rights not amounting to full ownership. As

[34] *Ghulam Mohammad* v. *Ghulam Husain*, (1931) 59 I. A. 74, 73-85.

[35] *Amir Ahmad* v. *Muhammad Ejaz Husain*, (1935) 59 All. 464.

[36] *Enaet Hossein* v. *Khoobunnissa*, (1869) 11 W. R. 320.

[37] See s. 438A : Pensions Act, XXIII. of 1871, s. 7(2) : *Sahibunnissa* v. *Hafiza*, (1887) 9 All. 213.

[38] *Mirza Abid Husain* v. *Munnoo B.*, (1927) 2 Luck. 496, 501, citing Ameer Ali (4th ed.) 64 ; see also *Bashir Ahmad* v. (*Mt.*) *Zubaida K.*, [1926] AIR (OU.) 186.

[39] *Weerasekera* v. *Peires*, [1933] A. C. 190 (gift : under first part of which land & premises assigned absolutely : but in *habendum* or second part donor was to hold subject to conditions & restrictions, which donee accepted : (p. 198) : held not to be a gift (*hiba*) necessitating donee taking possession, but a valid *fideicommissum* as recognized by Roman Dutch law : I am unable to find out whether under Roman Dutch law incidents of a *fideicommissum* are different from those in Roman law : under latter *fideicommissum* = testamentary disposition by which person who gives thing to another, imposes on him obligation to transfer it to third person : Wharton *Law Lex.* ; s. v. Cf. Justin. II. xxiii. f., Gai. ii., 246 ff. : with this cf. definition in Ind. Trusts Act, II. of 1882, s. 3 (obligation annexed to ownership of property).

[40] SUYURGHA'L = assignment of land-revenue for charitable purposes ; a *jahgir* or grant of land-revenue without any stipulation of military service or other condition.

[41] Ameer Ali, *Mahom. Law*, I. 28 (36) ; *Gani Mia* v. *Wajid Ali*, (1935) 39 C. W. N. 882, 885-888 (whole question discussed).

SECTION 369. Technical objections discouraged.

may be surmised the application of the texts relating to hiba occasions great difficulties in the recognition of the commonest of such other transactions. But these difficulties are generally overcome by the tendency to discountenance mere technical objections in the way of making gifts, raised on the basis of the law relating to hiba, and to uphold gifts where there is a real bona fide intention to transfer property or rights, provided the donor does all that may be expected to be done for effectuating his intention. A desire on the part of the Courts to prevent gifts from being used as an engine of oppression, or for depriving creditors or others who ought in fairness or on the ground of their relations with the donor, to benefit from the subject of gift, supplies the needful correction as occasion arises. In the result decisions have generally been arrived at which are neither unjust, nor opposed to the texts. A misapprehension of the meaning and effect of the texts, it is submitted with the greatest respect, does exist. But it is in most decisions rectified by a deep-rooted loyalty to justice, equity and good conscience : s. 12.

(B) Share of offerings.

369A. A gift may, it has been held [1] be made of the right to receive a definite share of the offerings [2] that might be made at a shrine.[3]—*Sed quaere.*

(C) Mortgaged property.

370. The gift of property which is mortgaged and in the possession of the mortgagee is valid, if constructive possession of the mortgaged property is transferred to the donee : s. 395. A gift may be validly made of the equity of redemption by the donor completely transferring it.[4]

1 ***Ahmad*** v. ***Ilahi,*** (1912) 34 All. 465 (subject of gift held to be not future offerings, but present right to receive them—offerings are voluntary : see *n.* 2).

2 OFFERINGS : ***Muhammad Hamid*** v. ***Mian Mahmud,*** (1922) 50 I. A. 92, 105-106 ; ***Zoolekha Bibi*** v. ***Syed Zunul Abedin,*** (1904) 6 Bom. L. R. 1058 ; ***Adv. Gen.*** v. ***Yusufalli,*** (1922) 24 Bom. L. R. 1060 (offerings received by DAUDI MULLAJI are in trust for community) ; ***Mahomed Oosman*** v. ***Essack S. Mahomed,*** [1938] Bom. 184 = (1935) 39 Bom. L. R. 502 [pages of both reports of this case mentioned below : of 39 Bom. L. R. in ( )] 205, 208-210 (517-519) (position in law of OFFERINGS AT DARGAH ; 214-216 (522-523), 229 (531) issues vi(*b*), viii, x(*b*), xiii, xiv, xvii, 231 (532), 233, 234 (533) issue xxiii, 237, 238 (535) issues xii-xv, xx, xxiii, xxiv ; ***Adv.-Gen. ex rel. Daya Muhammad*** v. ***Muhammad Husain,*** (1879) 12 Bom. H. C. R. 323 ; ***Haji Bibi*** v. ***H. H. Sir Sultan Md. Shah, Aga Khan,*** (1909) 11 Bom. L. R. 409 (OFFERINGS made to AGA KHAN by his followers held to be intended for his own personal use & benefit & his absolute property : made from feeling of veneration & to reap benefit of temporal or spiritual character).

3 See ***Puncha*** v. ***Bindeswari,*** (1915) 43 Cal. 28 (Hindu law).

4 Cf. Bail. I. 555 (563-4) ; s. 477, *ill.* (4) ; ***Harnam*** v. ***Sajawal,*** (1910) 45 Punj. Rec. 246, (No. 86) ; ***Tara Prasanna Sen*** v. ***Shandi Bibi,*** (1921) 49 Cal. 68 ; ***Gani Mia*** v. ***Wajid Ali,*** (1935) 39 C. W. N. 882, 886 ; ***Muhara Bibi*** v. ***Maharulla Mondal,*** [1933] AIR (CAL.) 785 ; ***Chand Saheb*** v. ***Gangabai,*** (1921) 45 Bom. 1296 (when lands are mortgaged & in possession of mortgagee, execution of deed not enough for completing gift, " unless something more had been done " than the mere " execution of the deed of gift." Gift included mortgaged as well as unmortgaged property : possession of unmortgaged property was transferred : then donee sued for redemption & accounts ; held the gift need not be split up into its component parts & the gift of property (i) of which possession could not be given as well as (ii) of which possession could be given, considered as a whole, & plaintiff allowed redemption) ; ***Mohammad Abd. Ghani*** v. ***Fakhr J.,*** 49 I. A. 195 (POSSESSION OF PART of zamindari held as CONSTRUCT-

SECTION 370. Gift of mortgaged property : nature of transfer.

The gift of mortgaged property may be completed by the donor conveying the equity of redemption to the donee, giving notice to the mortgagee that the legal estate had been transferred by him, and letting the donee exercise all the rights of the legal owner : see s. 393 B, p. 425.

In the earlier editions of this work two Bombay decisions were considered in detail. That course is unnecessary in view of later decisions, the result of which agrees with the view submitted in s. 370.

V. SPES SUCCESSIONIS CANNOT BE SUBJECT OF GIFT.

371.[5] A gift of the expectation of succeeding to the estate of a living person[6] is not valid ;[7] provided first that under Shia Ithna Ashari law the expectant heirs of a living person may empower him to dispose by will of property exceeding the bequeathable third of his estate ;[8] and secondly that a contract not to claim any inheritance out of the estate of a

IVE POSSESSION OF WHOLE) ; *Hashimbi* v. *Ajmatbi*, (1924) 48 Bom. 396 (possession of part of subject of gift transferred, & donee got possession of mortgaged property after donor's death : held valid). View taken in *Mohinudin* v. *Manchershah*, (1882) 6 Bom. 650 (that property in possession of mortgagee can not be subject of gift) must be considered to be overruled. In *Ismal* v. *Ramji*, (1899) 23 Bom. 682 : nothing was done to transfer possession : but if & in so far as it agrees with *Mohinudin's* case it has not been followed. *Ismal* v. *Ramji*, 23 Bom. 682 referred to constructive possession as an alternative—see headnote (1899) 1 Bom. L. R. 177, 178 ; whereas in *Mohinudin* v. *Manchershah*, (1882) 6 Bom. 650, 651 : "the possession which she obtained" said to be "only such symbolical possession as could be obtained under s. 224 of Act VIII. of 1859," i.e. Civ. Pro. Code, 1859, viz. delivery of land in occupancy of ryots by Court ordering copy of warrant to be affixed in some conspicuous place, proclaiming, by beat of drum, substance of decree. Cf. *Ismal* v. *Ramji*, 23 Bom. 684 (*ll.* 6-7) ; *Rahim* v. *Md. Hasan*, (1888) 11 All. 1, 10, Mahmood, J. : "cases where from nature of gifted property itself, actual possession could not be given to donee," distinguished from cases "where such possession might be given to donee, or actual possession held by donor." 6 Bom. 650, & 23 Bom. 682 were adversely criticized also by Syed Sahib Ameer Ali, *Mahom. Law*, 61 ; *Anwari Begam* v. *Nizamuddin*, (1896) 21 All. 165, 170 = s. 383, *ill.* (1), p. 412.

[5] Sect. 371 cited & applied (pp. 295 & 568 of first ed. being referred to) : *Asa Beevi* v. *Karuppan Chetty*, (1917) 41 Mad. 365, 368.

[6] EXPECTATION of succeeding to living person must be distinguished from the interest of heir after death of last owner & after heir's INTEREST has become VESTED in him. *Muhammad-un-nissa B.* v. *J. C. Bachelor*, (1905) 29 Bom. 428 (contract, not gift) ; *Lakhman* v. *Babani*, (1931) 34 Bom. L. R. 366 (what is meant by CHANCE or EXPECTANCY ; distinction between actual & expectant heir) ; *Davis* v. *Angel*, (1862) 4 De G. F. & J. 524 ; *Stockley* v. *Parsons*, (1890) 45 Ch. D. 51, 57.

[7] Transf. of Prop. Act, 1882, s. 6(*a*) ; (*Mt.*) *Khanumjan* v. (*Mt.*) *Beebee*, (1827) 4 S. D. A. (CALC.) 210 (renunciation of inheritance in life-time of ancestor, null & void) ; *Latafat Husain* v. *Hidayat H.*, (1936) 58 All. 834 ; *Sumsuddin* v. *Abdul Husein*, (1906) 31 Bom. 165 (purporting to be transfer for consideration) ; *Mahangami R.* v. *Nagar M. L.*, (1913) 24 Mad. L. J. 258 ; *Asa B.* v. *Karuppan C.*, (1917) 41 Mad. 365 over-ruling *Kunhi Mamod* v. *Kunhi Maidin*, (1896) 19 Mad. 176 ; cf. *Abdul Wahid K.* v. (*Mt.*) *Nuran B.*, (1885) 12 I. A. 91, 101 : see s. 444 A, pp. 510 514. *Abdool Hoosein M.* v. *Goolam H. A.*, (1905) 7 Bom. L. R. 742, 749, 750 (difficulties in REGISTERING document referring not to any estate in remainder, or in reversion, but to *spes successionis*) ; *in re Ellenborough, Towry Law* v. *Burn*, [1903] 1 Ch. 697, 701 ; *Nana bin L.* v. *Anant Babaji*, (1847) 2 Bom. 353 ; *Brahmadeo* v. *Harijan*, (1898) 25 Cal. 778 ; *Hasan A.* v. *Nazo*, (1889) 11 All. 456 ; (*Mt.*) *Hurmut-ool Nissa B.* v. *Allahdia Khan*, (1871) 14 W. R. 108 (P. C.) (renunciation of right to inherit, either expressed or implied from desisting from prosecuting a claim—the claim here had already come into existence).

[8] See ss. 579, 579C : the power would avail only as against persons empowering.

SECTION 371. Family settlement.

living person on his death may validly be made for good consideration. Where such a contract is in the nature of a family arrangement the Court may look upon it with favour.[9]

Consent to bequest.

Explanation.—A vested remainder in succession to a previous interest, though it may be liable to be displaced by the happening of some future event, is not such an expectancy in succession by survivorship, or other merely contingent, or possible, right or interest, as cannot be transferred.[10]

Illustrations.

Sumsuddin *v.* Abdul Husein, 31 Bom. 165.

(1) *D*[11] executed a document in the life-time of her father signed by herself alone, addressed to him, reciting that she had (i) a right of inheritance in his (viz. her father's) property, and (ii) a claim to receive ornaments which her mother had directed him to give her; and purporting, in consideration of Rs. 9,000 credited to her name by her father in his account books, (A) to relinquish the said rights and claims. The document also provided (B) that she would have no right or claim on the property of her father on his death, (C) that she was to receive Rs. 250 every year during the lifetime of her father as interest on the said sum of Rs. 9,000, (D) that though she may withdraw portions thereout for urgent purposes, the principal could be demanded only on his death for the purpose of purchasing property yielding income, or of depositing the same with interest; and (E) that the father "may give to his heirs" the whole of his property subject to a charge for the said Rs. 9,000. The father died intestate. Then the daughter sued for her share in his estate, contending that she was not bound by the said document because: (i) it was

[9] *Muhammad Raza* v. *Abbas Bandi B.*, (1932) 59 I. A. 236, 246, par. 1 (OU.) (FAMILY ARRANGEMENT specially FAVOURED); *Latafat Husain* v. *Hidayat H.*, (1936) 58 All. 834 (relinquishment of inheritance by presumptive heir is invalid, but "nothing to prevent an HEIR from NOT CLAIMING a share in the property which has devolved on him, or from so acting as to ESTOP HIMSELF from claiming it:" wife agreed not to claim inheritance if husband executed *wakf*: *wakf* created & wife acted as *mutawalli*: thereafter not allowed to resile); *Nasir-ul-Haq* v. *Faiyaz-ul-Rahman*, (1911) 33 All. 457, 462, *ll.* 5-16 (wife sues husband for *mahr*: compromise: wife accepts in lieu of *mahr* life-estate in portion of property; husband accepts life-estate in other property: subject to these life-estates properties settled on their children: both husband & wife renounced inheritance: *held* valid); *Ghulam Muhammad* v. *Ghulam Husain*, (1931) 59 I. A. 74, 87 (par. 1), 88; *Mohammad Hashmat A.* v. *Kaniz Fatima*, (1915) 13 All. L. J. 110 (person may for good consideration contract not to claim in event of becoming entitled on decease of living person); *Kanhai Lal* v. *Brij Lal*, (1918) 45 I. A. 118, 123, *ll.* 22-23 (ALL.) (conveyance, or agreement to convey, future right or expectancy, or agreement to relinquish any future right or expectancy, was held to be in question in *Sumsuddin* v. *Abdul Husein*, (1906) 31 Bom. 165: & that that decision not in point where question is whether person by his acts has DEBARRED HIMSELF FROM CLAIMING AS REVERSIONER): *Asa Beevi* v. *Karuppan Chetty*, (1917) 41 Mad. 365 f.; *Barali Lal* v. *Salik Ram*, (1915) 38 All. 107; *Kanhai Lal* v. *Brij Lal*, (1918) 45 I. A. 118 = 40 All. 487 (reversioner precluded from claiming as such by compromise); *Mahadeo Prasad* v. *Mata P.*, (1921) 44 All. 44; *Fateh S.* v. *Rukmini*, (1923) 45 All. 339 (F. B.); *Moti Shah* v. *Gandharp Singh*, (1926) 48 All. 637, 641.

[10] See s. 37.1, *ill.* (2); ss. 357, 444.

[11] *Sumsuddin* v. *Abdul Husein*, (1906) 31 Bom. 165; Jenkins, C. J. & Beaman, J. reversing 8 Bom. L. R. 252 *per* Chandavarkar, J. Kalimuddin Amiruddin's estate was in question: his daughter was Fatmaboo, wife of Gulam Husain Abdul Ali.

SECTION 371.

void ab initio under Muhammadan law, and otherwise under the general law of India, as she purported to give up a mere expectancy; or (ii) was voidable (*a*) being an unconscionable bargain by reason of its gross inadequacy of consideration, (*b*) because she was an ignorant pardanishin woman, and (*c*) her father misused his paternal authority. *Held*, that she was entitled to succeed to her father's estate on three grounds :—(i) The Transfer of Property Act, s. 6(*a*) provides that the chance of an heir-apparent cannot be transferred ; though s. 6(*a*) does not apply to Muslims, the Muhammadan law does not conflict with it.[12] By parity of reasoning there cannot be a release of such chance ;[13] nor can the principle that equity considers that to be done which ought to be done, apply, where applying it would defeat the provisions of the law (Ind. Contr. Act, s. 23); and to hold, by an application of that principle of equity, that the chance had in this case been effectually transferred, would be to defeat the provision of law contained in the Transf. of Prop. Act, s. 6(*a*), which consists of a special exception made with reference to such chances : such chances being the first and only exception made in the Act to the general law laid down that future property may be transferred.[14] The chance cannot be bound any more than it can be transferred.[15] (ii) *D* being a pardanishin lady it was requisite that the document should be explained to her ; but it was never explained to her, nor (as her acts showed) was it understood by her ; she did not understand either that she got the Rs. 9,000 only conditionally, or that the document purported to deprive her of Rs. 25,000 which she would otherwise be entitled to receive as inheritance ; she had no independent legal advice, nor had she received any benefits under the document, with an understanding of its terms. (iii) There was undue influence, and abuse of parental authority on the part of her father.[10]

(2) On 26 Jan. 1871 the donor purported to grant property to his second wife, on the terms that (i) if she had a child by himself it was to be taken as a perpetual mokurruri[16] (ii) in case of no child being born to her by him,

Umes Chunder Sircar *v.* Zahoor Fatima, 17 I. A. 201.

[12] Citing (*Mt.*) *Khanum Jan* v. (*Mt.*) *Jan B.*, (1827) 4 S. D. A. 210 ; *Abdul Wahid K.* v. (*Mt.*) *Nuran Bibi*, (1885) 12 I. A. 91, 101.

[13] Citing *Kemp* v. *Kelsy*, (1720) Prec. Chan. 545. On this point, (*submitted*) the decision may require reconsideration. See s. 371, com., pp. 396, 397.

[14] "There is nothing fantastic in this ; though future property could be bound in equity, yet we find Lord Eldon in *Carleton* v. *Leighton*, (1805), 3 Mer. 667, 671, saying that the expectancy of an heir-apparent was not capable of being made the subject of an assignment" : *Sumsuddin* v. *Abdul Husein*, (1906) 31 Bom. 173. FUTURE PROPERTY is rather ambiguous. It may mean (i) physical objects that will come into existence in future (e.g. next year's crop, or cloth that will be manufactured in the ensuing season). (ii) Possibly it may also mean existing physical objects that will become the property of person concerned in future. (iii) *Spes successionis* is on other hand mere hope or expectancy of acquiring some rights in future. Dealings with such expectancies are discountenanced for special reasons, such as preventing catching bargains with young & inexperienced expectant heirs.

[15] *Sham Sundar* v. *Achhan Kunwar*, (1898) 25 I. A. 183, 189 ; *Nand Kishor* v. *Kanee Ram*, (1902) 29 Cal. 355 ; *Manickam Pillai* v. *Ramalinga*, (1905) 29 Mad, 120 ; *Balkrishna Trimbak* v. *Savitribai*, (1878) 3 Bom. 54.

[16] Or *muqarrari* = "properly a tenure held at a fixed rate of assessment, but applied in the upper province of Bengal to tenures of which the revenue rate is permanent only for the life of the holder :" Wilson, *Glossary*.

SECTION 371. she was to take only a life mokurruri ; and (iii) after her death it was to go to two sons of the donor (by a previous wife). During the life time of the donor and his second wife, a creditor of the donor's first son attached that son's right, title and interest in the said property (no child having been born to the donor's second wife by him). Soon after the donor died ; on 22 Sept. 1879, the said interest of the said first son was sold. *Held* that the said first son had a definite interest [17] in the property like what is called in English law a vested remainder, which did not fall within the description of an expectancy, or of merely a contingent, or possible right or interest.[18] Their Lordships also wished to guard themselves against being supposed to concur in an argument....to the effect that if between the time of attachment, and the time of sale, events should happen which would have the effect of accelerating or enlarging the interest of the first son (the judgment-debtor), as it stood at the time of attachment, that augmented interest would not pass by the sale, which purported to convey all that the judgment-debtor had at the time.[18]

1.—Can release operate as consent to will ?

The reasoning on which Sumsuddin's case [11] has been decided has been summarized : s. 371, *ill* (1). Attention must be drawn to the fact that Kalimuddin (R, the releasee) left no will. Where a will co-exists with a document purporting to be a release, the latter may, in certain circumstances, operate as a consent to the will, under Shia Ithna Ashari law : see s. 579 c(*a*). Under that (though not under Hanafi) law the heirs may during the lifetime of the testator, consent to a will so as to validate it, though the will bequeaths more than the bequeathable third. This, however, may involve a question which has still to be decided : can such consent be validly given in general terms, authorizing any testamentary disposition that the testator pleases to make, or must the consent make specific reference to a will already made ?

2.—Causes exclusion of heir.

Such a release, if taken as a general consent to the will, has a double effect. For it not only enhances the portions of the other heirs, but also excludes the releasing heir from inheritance. (i) So far as bequests to an heir (within the bequeathable third) are concerned, they do not under the Ithna Ashari law, require the consent of the other heirs, but (2) exclusion of an heir from inheritance is strongly opposed to the policy of the law. The judgment makes no reference to the distinction between the Hanafi and the Ithna Ashari law in that the latter system permits the chance of succession to be "bound" in

[17] First son's interest was of this nature : he took share in a remainder if interest of second wife was only life interest, viz. if she had no children by donor : but if she had any children then first son's interest was displaced.

[18] *Umes Chunder Sircar* v. (*Mt.*) *Zahoor Fatima*, (1890) 17 I. A. 201, 208, 209 = 18 Cal. 164 ; cf. s. 357, *nn.* At time of attachment donor was still living &, in contemplation of law, there might be child (born to second wife), to take : but it was held that deed conferred upon son definite interest like what we should call in Eng. law VESTED REMAINDER,-- only that it was liable to be displaced in event of there being a son of donor by second wife. Between attachment & sale—very soon after attachment—donor died : then the contingency, such as it was, entirely put an end to. True, parties might not know whether second wife was with child by donor or not, but the fact was determined at that time ; & there was no longer any contingency in eye of law : it does not very much signify whether donor was alive or dead at time of sale : 17 I. A. 209, *ll.* 38 ff.

one particular manner, viz. by the heir consenting to the ancestor bequeathing more than a third. That circumstance could not—by reason of the consideration above referred to—have altered the decision in Sumsuddin's case ;[11] but in other cases it may affect the result. SECTION 371.

On the other hand the Hanafi law does not empower any person to make a testamentary disposition (*a*) of more than the bequeathable third, (*b*) or so as to disturb the relative shares that his heirs take under the general law. What appears to be under Hanafi law an exception to this rule is none in reality, for the heirs' consent to a will after the death of the testator, at which time they have already become entitled to the estate, may operate to all intents and purposes as a gift by the heirs. In any case in view of the provision that an Ithna Ashari Shia may consent to his ancestor making a will of more than the bequeathable third, and in derogation of the consenting heir's expectant rights, is it accurate in regard to Ithna Ashari law, to say that the right of an expectant can not in any circumstances be bound, and that there is no provision of that law which prevents the Transfer of Property Act, s. 6(*a*) from being given effect to ? 3.—Does heir's power to consent to will in lifetime of testator make his expectant rights transferable ?

Finally, with reference to the statement that what cannot be transferred, cannot, by parity of reasoning, be released, attention may be drawn, *first* to the other clauses of the Transfer of Prop. Act, s. 6 : clause (*b*) in terms excepts (from the rule prohibiting a transfer of a right to re-entry) the release of such a right. Under clause (*c*) an easement cannot be transferred apart from the dominant heritage. Can it be urged, that by parity of reasoning, the owner of the dominant heritage cannot release the easement, and that an easement can only be extinguished by transferring the dominant heritage to the owner of the servient heritage ? Again, "a mere right to sue cannot be transferred" : clause (*e*);—but it can certainly be compounded for ; and is that different from releasing for a consideration ? Similar observations would seem to apply to some of the other clauses of s. 6. *Secondly,* Muhammadan law does seem to differentiate between the release and transfer of rights, and the rules applying to the one are different from those applying to the other.[19] *Thirdly,* it was said by a greatly respected judge, "A man may validly renounce rights which have not even accrued and of which the accruing is altogether doubtful." [20] 4.—Release and transfer not always the same.

For these reasons it is submitted that the difficult task of introducing into the framework of Muslim law an exotic doctrine like that which renders attempts to deal with the chance of succeeding to a living person as his heir, nugatory, may require careful reconsideration. In cases where the circumstances are not exactly similar to these in s. 371, *ill.* (2), the distinctions between Ithna Ashari and Hanafi law and between transfers and releases may have to be kept more prominently in view.

A mere expectancy, such as a spes successionis to property cannot be 5.—English law.

[19] Cf. Bail. I. 522 (531); 523 (532), II. 203 ; Hed. 382, 448, 451, 489.

[20] *Subbiem Pillay* v. *Arnachala Irungot Pillay,* (1870) 5 Mad. H. C. R. 444, 450 ; Holloway, J. citing *Wachter,* II. 648.

SECTION 371. transferred in England by way of gift (either at law or in equity);[21] but an assignment of it for value is upheld in equity as a contract.[22]

VI. SERVICES.

372. Services cannot form the subject of a gift;[23] provided that a gift may be made of mahr, notwithstanding that its subject consists of services : s. 94.

VII. NATURAL LOVE and affection.

373. Natural love and affection cannot form the subject of a gift.[23]

The proposition seems to be too plain to require to be stated, except for certain dicta[24] and for the fact that natural love and affection take the place of consideration under the Indian Contract Act, s. 25 (see s. 351, above).

§ 5.—THE GIFT OF MUSHA.

VIII. MUSHA cannot be subject of gift on ground of imperfect possession.

The objection under Hanafi law to the gift of an undivided part of property (musha) which is capable of division, is not so much that such part is not a proper subject of gift. The objection is based on the transfer of possession being necessarily incomplete owing to the property being undivided. Hence the somewhat complicated rules relating to musha are treated under a special head, midway between the law relating to the subject of gift, and to transfer of possession. See s. 382, com.

(A.) GIFT OF MUSHA (or undivided part of property) invalid if the property capable of division except in cases provided in ss.369, 377-379.

374. Under the texts on Hanafi law,[1] the gift[2] of a musha[3] or undivided part of a thing capable of division is not complete and valid,[4] unless the part of which gift is made is

[21] *Re Ellenborough Towney Law* v. *Burne*, [1903] 1 Ch. 697 ; *Meek* v. *Kettlewell*, (1842) 1 Hare 464, affirmed (1843) 1 Ph. 342 ; *Re Tilt, Lampet* v. *Kennedy*, (1896) 74 L. T. 163, 164. Cf. *Pestonji B.* v. *P. H. Anderson*, [1939] Bom. 40 (P. C.) (SIND).

[22] *Tailby* v. *Offl. Rec.*, (1888) 13 App. Ca. 523, 548.

[23] *Rahim Baksh* v. *Muhammad Hasan*, (1883) 11 All. 1, 5 (par. 2), 6 (par. 2, 3). (per Mahmood, J.). Cf. *Ussud Ali Khan* v. (*Mt.*) *Olfut B.*, (1868) 3 Agra 237.

[24] *Solah Bibee* v. *Keerun Bibee*, (1871) 16 W. R. 175, 176 (*per* Paul, J.) A *hiba bil iwaz* is, as so often, the stumbling block.

[1] Sects. 374-376 must be read subject to s. 382, see summary of law relating to gifts of *musha* : s. 382, com., pp. 405 f.

[2] *Sadaqa* and *musha* : see s. 437, com., pp. 471 f. *Musha* doctrine applies only to gifts : argument applying it to a transfer for consideration futile : *Nadir Husain* v. *Sadiq Husain*, (1934) 47 All. 324, 326 (par. 3).

[3] From *sha* = to spread. hence to leave undivided, etc. *Shuyu'a* = CONFUSION, being term used to denote objection to gifts of *musha*, viz. confusion arising from what has been given away as gift being undetermined. See s. 374, com.

[4] See s. 374, *expl. I. Ameeroonissa K.* v. *Abedoonissa K.*, (1875) 2 I. A. 87 (*musha* doctrine inapplicable to definite shares in zamindaris, nature of right in which is defined & regulated by public Acts of the Govt. so that they form, for revenue purposes, distinct estates, each having separate number in Collector's books, & each liable to Govt. only for its own assessed revenue, proprietor collecting definite share of rents from raiyats, & having right to this definite share & no more : may form subject of gift) ; *Sajjad Ahmad K.* v. *Kadri B.*, (1895) 18 All. 1 ; *Kasim Hossein* v. *Sharifunnissa*, (1883) 5 All. 285 ; *Abdul Aziz* v. *Fateh Md.*, (1911) 38 Cal. 518 ; *Jiwan* v. *Imtiaz*, (1878) 2 All. 93 ; *Sahibunnissa B.* v. *Hafiza B.*, (1887) 9 All. 213 (definite share in pension under Pensions Act, XXIII. of 1871, s. 7(2) can be assigned). Cf. *Rahim Bakhsh* v. *Muhammad Husen*, (1888) 11 All. 1, 12.

divided off,[5] and separated from the rest, [6] and possession of the separated part given to the donee ; [7] provided that a gift of undivided property is valid, where one of the donees is a minor son of the donor.[8] SECTION 374.

Explanation I.[9]—The gift of a part of a thing which is incapable of division, or of such a nature that some kind of benefit or advantage can be derived from it so long as it is undivided, which cannot be derived from it after division, may be validly completed without the said part being divided off.[10] Indivisible property.

Explanation II.—Under Shafii [11] and Shia [12] law the gift of musha or undivided property is valid, provided that possession of the subject of gift is given to the donee by the donor vacating it, or withdrawing his control and permitting the donee to exercise control over it.[11] Shafii and Shia law.

(1) D [12] purports to make a gift of his share in a house, the share being unknown ; the gift is invalid under Hanafi texts ; [12] but see decisions.[12] *Illustrations.*

[5] DIVISION or separation need not be by donor himself : "If the donor authorizes the donee to make the division with his partner, this makes the gift complete (*kamil*)" : *Raddul Muhtar*, IV. 780, cited Ameer Ali, I. 44. This refers primarily to gift to two persons jointly.

[6] *Abdul Aziz* v. *Fateh Md. Haji* (1911) 38 Cal. 518 (gift of (i) 2 as. share in *taluk*, demarcated, & separate possession ; (ii) 4 as. share not separated but donee let into joint possession : both gifts upheld).

[7] Hed. 483 ; Bail. I. 512 (*ll.* 11-12) (520), 515 (par. 2) (513), 516 (524), 517 (par. 3) (525), & *n. Valimia A.* v. *Gulam K. M.*, (1869) 6 Bom. H. C. R. (A.C.) 25 (gift held invalid as interest of each donee not defined : *sed quaere*). The case does not seem to have been referred to except in *Mahomed* v. *Bai Cooverbai*, (1904) 6 Bom. L. R. 1043, 1050 & in s. 356 of this work where its correctness is questioned. It was held in *Casam* v. *Gokarnaya*, (1903) 5 Bom. L. R. 701, that shares not being specifically stated to be unequal, each donee takes equally : cf. e.g. Ind. Contr. Act, s. 253(2) now Ind. Partnp. Act, s. 13(*b*), Macn. Ch. VI. § 14 expressly restricts rule to legacy left to two persons indiscriminately one of them dying before legacy payable (viz. before death of testator) ; *Ebrahim* v. *Bai Asi*, (1933) 58 Bom. 254. See also s. 350, *ill.*

[8] See s. 376, *ill.* (1) *nn.* ; *Wajeed Ali* v. *Abdool Ali*, [1864] W. R. 121 ; *Nizamuddin* v. *Zabeda Bibi*, (1871) 6 N. W. 338 : contrary to proviso it is (*submitted*, wrongly) stated : "It appears from a passage in the *Durru'l-Mukhtar* & a passage in the *Fatawa Alamgiri* that in a special case like the present, in which one of two donees is an adult & the other an infant son, a gift of undivided property is absolutely invalid, not merely *fasid* but *batil*." Court, however, strongly impelled to decide against validity of gift by equity.

[9] *Expl. I.* cited & applied : *Fayyazuddin* v. *Kutbuddin*, (1928) 10 Lah. 761, 770.

[10] Hed. 480, 483 ; Bail. I. 512, (*ll.* 4-7) (520), e.g. "a small house or a small bath," Bail. 512 (*l.* 7) (520). *Kasim Husain* v. *Sharifunnissa*, (1883) 5 All. 285 (right to use staircase, privy & door in common by occupants of several adjoining houses, is not capable of being divided : gift may be made of shares in said right together with one of said houses). Cf. *Sharifa Bibi* v. *Ghulam Mahomed D. K.*, (1892) 16 Mad. 43.

[11] Hed. 483 ; Bail. II. 204 (par. 6) ; *Gulam J.* v. *Masludin*, (1880) 5 Bom. 238 ; (*Mt.*) *Hayatunnissa* v. *Sayyid Md. A. K.*, (1890) 17 I. A. 73, 76 (Lord Watson : Shias not governed by *musha* doctrine).

[12] *Ill.* (1), (7), (11), & indeed whole doctrine of *musha* must be taken subject

SECTION 374. (2) D makes a valid gift of a house. Subsequently he revokes the gift to the extent of half or other undivided share in it. The gift remains valid to the extent that it is unrevoked.[13]

(3) D makes a gift of half of his horse. The gift is valid.[13]

(4) D gives his house with all its rights and boundaries, which includes a party-wall or a right of way, held in common with others. The whole gift is valid.[14]

(5) D makes a gift of a share in a malikana. The gift is valid as the malikana is incapable of division.[15]

(6) Two persons jointly make a gift of a house to one man : the gift is valid according to all schools.

(7) A gift to two or more persons jointly is valid.[16]

(8) D[12] makes a gift of half of his property to the widow and daughter of his predeceased son. If the subject of gift was indivisible, the gift is valid, but if it consists of divisible property, the gift in invalid,[17] unless it was divided off and the share of each donee given to him/her. But see decisions.[17] If the donees were paupers, or in indigent circumstances, the gift would be valid in any circumstances.[17]

(9) A[12] partner makes a gift of his own share in the partnership stock, capable of division to a partner : the gift is stated to be invalid in the Hidaya[17] but it would seem to be valid.[18]

(10) Milk[12] in the udder, wool upon the back of a goat, grain or trees upon the ground, or fruit upon trees are all invalid subjects of hiba under Hanafi texts.[19] But (submitted) the right to milk the goat, &c may be transferred without consideration :[12] ss. 369, 366A.

(11) D makes a declaration of gift of half of a mansion which can be divided off ; and purports to give the donor possession of the half ; then to make a gift of the other half, and again to give possession of that half : both the gifts are said to be invalid,[20]—*sed quaere*.[21] If, however, both declarations had been made first and after both declarations possession had been purported

to s. 382, p. 405. See also Bail. I. 515 (523); Hed. 483 (col. ii); Macn. 211. *Emnabai* v. *Hajirabai*, (1888) 13 Bom. 352 (even gift of undivided moiety held void)—*Sed quaere* : *contra* : *Ebrahim* v. *Bai Asi*, (1923) 58 Bom. 254 (gift to two or more donees jointly valid, though shares not divided off nor separate possession given); applied *Musa* v. *Badesaheb*, (1937) 39 Bom. L. R. 1108; Hed. 484 (col. I.). Abu Hanifa holds otherwise : Bail. I. 515 (last *l.*) (524 *ll.* 8, 9). See also *ill.* (7); s. 369, com. See *Sahiba Begum* v. *Atchamma*, (1868) 4 Mad. H. C. R. 115 (gift of undivided share, but in lieu of *mahr* held valid as contract for consideration); & ss. 382, 379.

[13] Bail. I. 517 (525). Cf. *Cochrane* v. *Moore*, (1890) 25 Q. B. D. 57 (C. A.) (gift of quarter of horse).

[14] Bail. I. 518 (526); *Kasim Husain* v. *Sharif-un-Nissa*, (1883) 5 All. 285 (staircase, privy & door held in common).

[15] *Mullick Abdool Gaffoor* v. *Muleka*, (1884) 10 Cal. 1112, 1126.

[16] *Ebrahim* v. *Bai Asi*, (1933) 58 Bom. 254, (see *n.* 12); *Musa* v. *Badesaheb*, (1937) 39 Bom. L. R. 1108.

[17] Hed. 483 (col. ii); Macn. 211. [18] See s. 377 ; s. 369, com.

[19] Hed. 484 (col. i.); Macn. 205 (citing *Sharh-i-Viqaya*).

[20] Bail. I. 517 (*ll.* 13-20) (525-526). [21] See s. 382 ; *nn.* 12, 18.

to be given under both declarations at the same time, then it is admitted that there would have been a valid gift of the whole of the mansion.[20] SECTION 374.

(12) D was possessed of a large number of shares in 6 limited liability companies, and of 19 pieces of freehold land, and buildings thereon ; he notionally divided the whole of his property into 1000 shares and gave to four donees, 100 of such shares, each ; and to two others 25 shares, each : *held* the gifts valid without actual division as the property could not be considered to be divisible.[22]

Musha in Arabic means undistributed or common ;[23] in legal language it refers to undivided portions of property, and, in particular, to such property with reference to its forming the subject of a gift. Musha doctrine explained.

Sect. 374 in one sense and if it were not for the doctrine having been developed very technically in Hanafi texts, merely lays down how possession must be transferred when the subject of gift consists of undivided property : it might have been placed amongst the group of sections (ss. 390 ff.) dealing with different modes of transferring possession as affected by the character of the subject of gift. How must the gift be completed,—by what mode of possession,—when the subject of gift is undivided property ?

The underlying principle is, shortly, that the subject of gift must be transferred as completely as possible, and that when it is capable of division from other property, (provided that by division no advantage is lost) the transfer of possession is not complete unless it is divided off.[24] The rules about musha have become technical, but they are based on a principle that is of universal application : the donor cannot be compelled to do anything that he has left undone,[25] which is necessary for completing the gift.[26] E.g. where a donor, purports to give to the donee, half a field, possession of the half of the field ought to be given : and this cannot properly be done unless the half is first divided off, and separated from that, of which gift is not made and possession given. " If the gift of part of a divisible thing without separation were lawful, it must necessarily follow that a thing is incumbent upon the giver, 1.—General principle : donor must do every thing— 2.—he cannot be compelled to take any step for perfecting gift.

[22] *Ibrahim Goolam Ariff* v. *Saiboo*, (1907) 34 I. A. 167 = 35 Cal. 1, 11 par. 1), 17 (par. 4) 23.

[23] See s. 374, *n.* 3 " *musha.*"

[24] So that, in eyes of Hanafi texts, a *sine qua non* of valid transfer of possession is that *musha* should be divided off. This seems to be lost sight of when rule that " gift of *musha* may be validated by subsequent possession " is considered. (See e.g. *Mahomed* v. *Bai Cooverbai*, (1904) 6 Bom. L. R. 1043, 1050). For transfer of possession being taken to imply division, when division is said to be effected, it is no more *musha* (undivided). Rule just cited in reality means : fact that at time of declaration of gift, its subject is *musha*, does not necessarily mean that declaration of *hiba* of *musha* is inoperative since that part which is to form subject of *hiba*, may be subsequently divided off & possession thereof transferred to donee (see s. 381); cf. s. 383. The texts contemplate division & separate possession as normal course.

[25] Hed. 483 (col. ii. *ll.* 2-10) ; and cf. s. 383, *explan.* I. (donor must do everything to transfer possession). Cf. *Mahomed Buksh K.* v. *Hoseini B.*, (1888) 15 I. A. 81, 95 = 15 Cal. 689, 702 ; *Rahim Bakhsh* v. *Muhammad Hasan*, (1888) 11 All. 1, 9 (par. 1); *Husseinibhai* v. *Adv. Gen., Bom.*, (1920) 22 Bom. L. R. 846 ; *Alamanaya Kunigari Nabi Sab* v. *Murukuti Papiah*, (1915) 29 M. L. J. 733 ; *Allah Rakha* v. *Ali Muhammad*, (1928) 9 Lah. 567, 574 ; *Ebrahim* v. *Bai Asi*, (1933) 58 Bom. 254.

[26] *Gulam Jafar* v. *Masludin*, (1880) 5 Bom. 238, 240.

SECTION 374. which he has not engaged for, namely, a division."[27] This principle would seem to be applicable in most cases to all Muslim schools of law, and would not have been confined to the Hanafi law,[28] but that that school has refined the doctrine far beyond its original limits. For, though the donor cannot be compelled to take any step that he has not taken, yet there is no reason why the steps that he has already taken should be considered nugatory. In other words, where such possession as can be given of undivided property, has already been given, why should the donor be considered not to have taken those steps, any more than the donee be permitted to compel the donor to do what he has not done? See s. 382, com.; see also pp. 355 (*n.* 42) 380, 416 f.

3.—Gifts as between joint owners.

But where there are two or more persons jointly entitled to the subject of the gift, and "they combine in making a gift of it entire to one person," none of the objections apply, and the three exponents of the Hanafi law unanimously hold the gift valid.[29]

As a corollary, if two persons are joint owners, and one of them makes a gift of his share to the other, thus making the donee owner of the entire subject of gift, the gift must be valid. As an extension of this rule, a gift amongst joint owners is valid though the donee does not become by the gift the sole owner of the property, part of which is the subject of the gift.[30]

(B.) Subject of gift alone must be transferred.

375. Under Hanafi law,[1] the subject of gift must be separated, or removed so as not to be joined to what is not given.[2] Transfer of the possession of the subject of gift joined to something not intended to form part of the gift, is not valid as a transfer of the possession of the subject of the gift.[3]

(C.) Gift of contents without container is valid: not vice versa.

376. The subject[1] of gift may be validly delivered to the donee contained in a thing belonging to the donor and not forming part of the gift; but under Hanafi texts delivery of possession is not valid where the subject of the gift is delivered

27 Hed. 482 (col. i., ii).

28 Hanafi exponents agreed on this point; Bail. I. 516 (*ll.* 8-9) (521), 517 *n.* (525). E.g. when fruit on a tree is subject of gift, Hanafi texts hold its gift invalid, because it is an "undefined portion," Hed. 484 (col. par. 1). Under other systems *hiba* would be invalid because possession of fruit would be held not to have been given. Of course, if the fruit were unripe, case might be different; in which case, under Hanafi law, unripe fruit would not be considered to be capable of division from tree. Moreover in modern conditions gift of unripe fruit would probably take form of authority to pick it: the authority could be given in such form as to be valid & enforceable,—treating the transaction as a mode of dealing with *manafi* (future produce): ss. 366 f. 443 ff.

29 Bail. I. 517 (525).

30 See s. 377 *n.*

1 Sect. 375 must be read subject to s. 382, cf. *musha*, summary s. 382, com.

2 Bail. I. 508 (*ll.* 18-20) (516); Macn. 213 (case 22); Hed. 483 (col. i. last *ll.*); compare rules about *musha*, ss. 374, 380-383.

3 Bail. I. 520 (528-529). But see s. 376, com.; Bail. I. 530 (*ll.* 2-4) (539). distinction between gift of "palm tree in bearing without its fruit," which is invalid: Bail. I. 508 (*l.* 21) (516) & of fruit without tree, which is valid if donee asked to take possession: Bail. I. 520 (*ll.* 7-18) (528-529), see *n.* 8.

containing something that does not form part of the gift.[4] SECTION 376.

(1) D makes a gift of his mansion and gives possession of it, leaving in it effects belonging to himself. The gift is not valid, unless the donee is the donor's minor son,[5] or husband, or wife[6] [or the donor is otherwise the legal guardian of the donee.[7]] *Illustrations.*

(2) The gift of (*a*) land without the crop then standing on it, (*b*) a palm tree in bearing, without its fruit, or (*c*) vice versa, (*d*) a house or vessel in which there is something belonging to the donor, without the contents of the house or vessel, are all stated to be invalid ;[8] but that if the donee is directed to reap or gather the fruit, and he does so, the gift of the fruit is valid.[9] (*e*) The gift of a leathern bag in which there is food of the donor's or of a pitcher without the water in it, is not valid, (*f*) while a gift of the food in the bag or of the water without the pitcher is valid.[10] The ancient texts relating to the strictness of possession are, however no more applicable : these illustrations show how the law would operate if the law were not governed by s. 382.

The technical rule in s. 376 seems to be based on (*a*) its being necessary for the donor to deliver the subject of gift in some container ; but (*b*) in the converse case, it is suspected that if the donor wished to make a gift, he would not leave his own property within that which he transfers to the donee : the gift of a receptacle may not be complete, if the alleged donor continues to use it, by keeping in it his own belongings. These considerations would no doubt have their weight when it is being considered whether there is as complete a transfer of possession as, in the circumstances, might be expected. But their real significance is whether they furnish any indication that the allegation of a gift having been intended and completed is well founded. Reason of rule. Was gift intended ?

The Minhaju't Talibin (a Shafii text) states that whether the receptacle is to be considered part of the subject of gift, depends upon the "custom."[11] Shafii law, custom.

377. An undivided part of property capable of division may form the subject of a gift where the donor and donee are joint owners of the said property.[12] (D.) Gift where parties are co-owners. (1) Gift from one co-owner to another valid.

[4] Bail. I. 519 (527-528); cf. Bail. II. 238 (par. 3) as to bequest of box or vessel (which carries bequest of contents).

[5] Sect. 375 proviso ; Bail. I. 520 (528), 530 (*ll.* 2-4), (539 *ll.* 2-4); Macn. 231, Prec. Gifts, xxii.

[6] *Amina B.* v. *Khatiza B.*, (1864) 1 Bom. H. C. R. 157.

[7] Cf. s. 400 : is transfer of possession by legal guardian other than father or grandfather unnecessary ? *Allah Rakha* v. *Muhammad Ali*, (1928) 9 Lah. 567, 574 ; *Subramania Aiyar* v. *Mulla V. Assan Koya*, (1919) 35 Mad. L. J. 541 ; *Rahiman Bi* v. *Mahomed* [1915] M. W. N. 430 = 15 M. L. T. 345 = 23 I. C. 651 ; *Muhammad Sulfalia S.* v. *Yajihuddin S.*, [1915] M. W. N. 876 = 2 L. W. 1018 ; *Alamanayakunigari* v. *Murkuti*, (1915) 29 Mad. L. J. 733. Cf. s. 462, *ill.* (1).

[8] Bail. I. 508 (*ll.* 20-24) (516), 519 (*ll.* 18-24) (528 *ll.* 1-7). But when crop or fruit not yet ripe, & cannot be gathered, gift valid : s. 374, *expl. I.* Bail. I. 530, (539).

[9] Bail. 520 (*ll.* 16-21) (529, par. 1)—"on a favourable construction."

[10] Sect. 375, last *n.*

[11] *Minhaju't-Talibin*, 235.

[12] *Mahomed Buksh K.* v. *Hosseini B.*, (1888) 15 I. A. 81, 95 = 15 Cal. 684, 701 ; *Jabedanessa B.* v. *Nazibal Islam Molla*, (1910) 15 Cal. W. N. 328. But see Hed.

SECTION 378.

(2) Joint owners may give to one donee.

378. Two or more persons entitled to the whole of a property in undivided shares, may validly make a joint gift of the whole to a single donee.[13]

(3) Gift to two or more in undivided shares valid

379. A gift to two or more persons jointly is valid, notwithstanding that the donor has not divided the shares of the donees, nor given separate possession to each of his respective share ; provided that the interest of each donee is defined in the declaration of gift.[14]

(E.) INCIDENTS OF DOCTRINE OF MUSHA.

(i) Supervenient "confusion."

380. A gift is not invalidated by its subject becoming musha, after the gift has been completed.[15]

Illustration.

A complete and valid gift is made of a property, and then (*a*) the donor revokes it as to half, or (*b*) the right of a third person is established in the subject of gift after the gift is completed. The gift remains valid to the extent that it is unrevoked,[16] or to which no third party's right is established.[17]

(ii) Subsequent division and possession validate gift.

381. A gift invalid in its inception because of its subject not being divided off, may be validated by its subject being subsequently divided off from the rest of the property of which it forms part, and by possession being given to the donee of the divided part.[18]

483 (col. ii. par. 5); Macn. 212 r. 1, 214 r. 4, (restricting validity to case where no other person possesses proprietary right in property, except donor & donee). This must be considered over-ruled by *Mahomed B. K.* v. *Hosseini B.*, (1888) 15 I. A. 81. *Ameena* v. *Zeifa*, (1860) 3 W. R. (CIV. RUL.) 37 ; *Ebrahim* v. *Bai Asi*, (1933) 58 Bom. 254 ; *Musa* v. *Badesaheb*, (1937) 39 Bom. L. R. 1108.

[13] Bail. I. 517 (par. 9, *ll.* 7-8) (525 par. 1, last *ll.*); Macn. 215 ; Bail. I. 516 (*ll.* 8-10) (524 last *ll.*), 517, *n.* (525 *n.*): Abu Hanifa & two disciples agree that "confusion on both sides in property susceptible of partition prevents the legality of gift," (confusion here means that the part belonging to donor or donee or both is not divided off from what does not belong to him or them : see s. 374, *nn.* 4, 24.).

[14] Bail. I. 516-517 (524-525): *Ebrahim* v. *Bai Asi*, (1933) 58 Bom. 254 ; *Musa* v. *Badesaheb*, (1937) 39 Bom. L. R. 1108, following opinion of Imam Muhammad. Abu Hanifa holds such gift invalid, unless it is *sadaqa* : s. 437. Abu Yusuf holds gift valid only if (i) it is *sadaqa*, or (ii) donor expressly states that donees are to take in equal shares or (iii) if their shares are not specified ; so that according to him gift invalid if shares unequal. *Rujabai* v. *Ismail Ahmed*, (1870) 7 Bom. H. C. R. (o. c.) 27. Opinion of disciples "generally adopted," s. 140 & *nn. Jabedanessa B.* v. *Nazibal Istam*, (1910) 15 Cal. W. N. 328 ; ss. 11A, 382, comm.

[15] Bail. I. 517 (525): *Gulam Jafar* v. *Masludin*, (1880) 5 Bom. 238, 240. Ameer Ali, I. 3rd ed. 56, (4th ed. 106) citing (*Raddu'l Muhtar*, IV. 783. Sect. 380 may be thus stated : "Supervenient confusion (see *n.* 13) does not invalidate a gift."

[16] Bail. I. 517 (par. 2) (525, par. 2); see, however, Bail. I. 520 (528-529).

[17] Macn. 208 & *n.*

[18] Hed. 483 (col. ii. par. 6); Bail. I. 512 (*ll.* 11-12) (520), 517 (par. 3) (525-526); *Muhammad Mumtaz Ahmed* v. *Zubaida Jan*, (1889) 6 I. A. 205 = 11 All. 460; *Mahomed Buksh Khan* v. *Hosseini Bibi*, (1888) 15 I. A. 81, 91 (CAL.); *Ahmadi B.* v. *Abd. Aziz*, (1927) 49 All. 503 (s. 381 seems to have been overlooked in observation (p. 505) that this work does not agree with the statement quoted from Ameer Ali); *Mahomed* v. *Cooverbai*, (1904) 6 Bom. L. R. 1043 ; *Mohib Ullah* v. *Abdul Khalik*, (1908), 30 All. 250 (not clear whether possession given by dividing property);

Sect. 381 is really another aspect of s. 381(1)(*b*): see p. 412. The subsequent partition and possession in effect amount to a new gift. Possession without division would, under the texts, be "with responsibility" (as stated in s. 350, p. 360), but since the donor seems willing to make a fresh gift, he would presumably not hold the donee responsible for deterioration. See also s. 374, *n.* 24. SECTION 381.

382. The doctrine relating to the invalidity of gifts of musha is unadapted to a progressive state of society, and will be confined within the strictest limits.[19] Devices to avoid its operation are not looked upon with disfavour.[20] (F.) DOCTRINE of MUSHA to be strictly CONFINED.

A gift of a four anna share in a kaimi rayati without demarcating it or giving separate possession held valid and operative;[21] it would be extremely inequitable to let the donor question the validity of the gift after the lapse of about fourteen years, during which he had ratified and acknowledged the gift, and permitted the donee to be in joint possession with himself. *Illustration.* When not applied.

The doctrine of musha was declared to be opposed to justice, equity, and good conscience, and not applicable at all in Madras,[22] where the Muhammadan law of gifts is not made expressly applicable. But this was not followed in later cases.[23] Is the doctrine opposed to equity?

The Hanafi lawyers were themselves astute to avoid the doctrine: "A gift of a moiety of a house (which otherwise would be bad for musha) may validly be effected in this way (according to the Bazazia), that is, the donor should sell it first at a fixed price, and then absolve the debtor of the debt that is the price."[21] See also s. 380, *ill.* Device to avoid it.

It is submitted, though the Courts have not expressly said so,[25] that the RESULT OF DECISIONS summed up.

Jabedanessa B. v. *Nazibal Islam M.*, (1910) 15 Cal. W. N. 328; *Danoo Darjee* v. *Momatajoddi Bhuiya*, (1909) 17 Cal. L. J. 85; (*Mt.*) *Zaibunnissa* v. *Irshad Husain*, [1925] AIR (OU.) 504 (defect due to *musha*, cured by donee taking possession).

19 (*Sheikh*) *Muhammad Mumtaz A.* v. *Zubaida J.*, (1889) 16 I. A. 195, 205 = 11 All. 460, 475, applied: *Ibrahim Goolam Ariff* v. *Saiboo*, (1907) 34 I. A. 167 = 35 Cal. 1. "The attitude of the law towards this doctrine of *musha* does not involve any constructive application of the doctrine." "The doctrine which in its origin applied to very different subjects of property" "cannot be applied to shares in companies & freehold property in a great commercial town: (*per* Lord Robertson); *Ebrahimbhai* v. *Fulbai*, (1902) 26 Bom. 577; *Ebrahim* v. *Bai Asi*, (1931) 58 Bom. 254; *Musa* v. *Badesaheb*, (1937) 39 Bom. L. R. 1108; (*Mt.*) *Zahuran* v. *Abdus Salam*, (1929) 5 Luck. 597; (*Mt.*) *Bibi Bilkis* v. *Sheikh Wahid Ali*, (1927) 7 Pat. 118 (though *musha* doctrine not favoured, it cannot be ignored or repudiated).

20 DEVICE = *hila*, pl. *hiyal*: s. 382, com.: *Ahmadi Begam* v. *Abdul Aziz*, (1927) 49 All. 503.

21 *Abdul Aziz* v. *Fateh Mahmed*, (1911) 38 Cal. 518 (= p. 399, *n.* 6).

22 *Alabi Koya* v. *Mussa Koya*, (1901) 24 Mad. 513; cf. *Bava* v. *Mahomed*, (1806) 19 Mad. 343 (the opinion was *obiter* & not concurred in by the other judge).

23 *Vahazullah Sahib* v. *Boyapati Nagayya*, (1907) 30 Mad. 519; *Fakir Nynar M. R.* v. *Kandasaumy K. V.*, (1912) 35 Mad. 120, 128, followed *Abdul Rahiman N.* v. *M. Nurdin M.*, (1914) 23 Ind. Cas. 547.

24 Ameer Ali, I. 55 (106).

25 Courts have now expressly approved of this paragraph: (*Mt.*) *Bibi Bilkis* v. *Sheikh Wahid Ali*, (1927) 7 Pat. 118; *Ebrahim* v. *Bai Asi*, (1933) 58 Bom. 254; *Nazir Din* v. *Mohammad S.*, [1936] AIR (LAH.) 92.

SECTION 382. Result of decisions.

true result of the authorities applicable in India is, that the validity of a gift of musha must be tested in the same way as of any other gift. There must be as complete a transfer of the possession of the subject of gift as the circumstances permit ; and the donee is not entitled to claim anything to be done in his favour that the donor has not done. The Courts are inclined to uphold a gift of musha, i.e. of an undivided part of property, except where the omission to separate the portion of the property which is the subject of gift from the rest of it, is taken as an indication that there has been, in effect, an incomplete transfer, which the donor would have completed by partition, had he intended to complete the gift.[26]

§ 6.—POSSESSION OF SUBJECT OF GIFT.

I. POSSESSION DEFINED

382 A. A person [1] is said to be in possession of a thing, or of immovable property, when he is so placed with reference to it that he can exercise exclusive control over it, for the purpose of deriving from it such benefit as it is capable of rendering, or as is usually derived from it.[2]

1.—Connotation of possession

Possession is so commonplace an expression that it may seem to require no elucidation. It is perhaps for that very reason that the greatest difficulty is encountered in an attempt to give it a definition.[3] The definition in s. 382 A is consequently framed rather with the intention of bringing into prominence the elements involved in the important question, whether a gift has been completed by transfer of possession than with any hope of or pretence of finality or completeness.[4] Attention may be drawn to four stages leading up

2. —Importance.

[26] And this in fact follows from the terms of s. 374 : rule of *musha* applies only to such an undivided part as is capable of division, in the sense that by division no benefit or advantage is lost which would accrue if it were left undivided. The omission to divide may be attributable (*a*) to desire to retain that benefit or advantage which would be lost by division (in which case s. 374 does not apply), or (*b*) to a failure to carry the desire of making a gift into effect : in which case on general principles the gift would be incomplete ; or (*c*) finally it may even be indicated that in fact no gift was intended to be made, pp. 355 (*n.* 42), 380, 402, 416.

[1] "Person" includes "body of persons."

[2] ACTS OF OWNERSHIP : see p. 440, s. 404 : (*a*) right to be in or to obtain possession, distinct from fact of being in possession ; (*b*) power to assume possession distinct from being or having been in possession ; (*c*) "possession through another" implies that possession is held by some person on behalf of another, the latter having power to assume possession if he chooses.

[3] Cf. Pollock & Wright, *Possn. in Comm. Law*, 1. POSSESSION IN LAW = "The VISIBLE POSSIBILITY OF EXERCISING over a thing such CONTROL as attaches to lawful ownership (but which may also exist apart from lawful ownership) ; the detention or enjoyment of a thing by a person himself or by another in his name ; the relation of a person to a thing over which he may at his pleasure exercise such control as the character of the thing admits, to the exclusion of other persons ; especially the having of such exclusive control over land, in early instances sometimes used in the technical sense of SEISIN."—*Oxford Eng. Dict.*

[4] Cf. Pollock & Wright, *Possn. in Comm. Law*, 1-3, 6-9 : "It [POSSESSION] IMPORTS something which at an earlier time constantly made the difference between having the benefit of prompt & effectual remedies, or being left with cumbrous & doubtful ones ; which in modern times has constantly determined & often may still determine the existence or non-existence of a right to restrain acts of interference with property [*Coverdale* v. *Charlton*, (1878) 4 Q. B. D. 104 ; *Eardly* v. *Granville*,

to the conception of possession : (1) Possession is a state of circumstances, or condition of things ; (2) The state of circumstances is regarded from the point of view of the relation (*a*) borne by a particular person or body of persons, (*b*) towards a thing ; (3) The particular point in respect of the relation between the person and thing to which attention is directed, is his ability to exercise control over it. Possession regards the actual (existing) ability to exercise control,—ownership refers to the right to exercise it.[5] The exact control contemplated in each particular case admits of the greatest variation, depending as it does on two elements capable of infinite variety : (*a*) the thing itself and (*b*) the person. (4) The nature or mode of the control exercised or sought to be exercised is determined by the benefit (*a*) which has to be derived from the particular thing, and this in turn depends upon the nature of the thing itself, and (*b*) the person who is to benefit by it.[6] "Ownership," said Baron Parke, "may be proved by proof of possession, and that can be shown only by acts of enjoyment of the land itself."[7] The significance of the word only in a dictum of so great and cautious a judge, should not be overlooked.[8]

3.—Acts of enjoyment the only evidence.

The "thing" that is transferred may consist not of a determinate material object, but of rights. There is however some inaccuracy implied in the last statement. For law is always concerned with rights, not with material objects. It is more accurate to say that the "things" of which gift is made may comprise not the whole bundles of rights which are comprised in the notion of owning a determinate object, but may consist of one or more of the rights making up that bundle, isolated out of it—which rights the law permits so to be isolated out of the whole bundle, and to be transferred without consideration. In such cases the difficulty in determining whether control is exercised by one person or another, is greatly enhanced : when the rights in question are of such a nature that they must be exercised by a constant series of overt acts, this difficulty is diminished.

4.—Where the subject of gift consists of rights over property.

1. Possession, it has been said, "primarily, denotes a state of fact, but this fact carries with it legal advantages, and so is the source of rights. If the state of fact could always be ascertained with certainty, and if it always

Possession denotes a state of fact : difficulties.

(1876) 3 Ch. D. 826 (relative priority of claims of competing CREDITORS) ; *Ancona* v. *Rogers*, (1876) 1 Ex. D. 285 (incidence of public burdens) ; *Allan* v. *Liverpool &c.* (1874) L. R. 9 Q. B. 180, 191 ; cf. Publ. Health Act, 1875, s. 257] ; & which for centuries has been & is still capable of being [*R.* v. *Ashwell*, (1885) 16 Q. B. D. 190], of critical IMPORTANCE in defining boundary between civil wrongs & crimes," *ib.* p. 1.

[5] OWNERSHIP : s. 345, com., p. 345, *n.* 12. [6] See s. 376, *ill.* (1) *nn.*

[7] *Jones* v. *Williams*, (1837) 2 M. & W. 326, 331. *Baron Parke's* entire judgment is very suggestive.

[8] *Ebrahim* v. *Bai Asi*, (1933) 58 Bom. 254 (most satisfactory method of dealing with question whether possession transferred is to inquire : does donor continue to TAKE BENEFIT of subject of gift by reaping harvest, collecting rents, or actually occupying? If so, then possession not transferred) : *Allah Rakha* v. *Ali Muhammad*, (1928) 9 Lah. 567, 574 ; *Subramania Aiyar* v. *Mulla V. Assan Koya*, (1919) 35 M. L. J. 541 ; *Qamaruddin* v. (*Mt.*) *Hassan Jan*, (1934) 16 Lah. 629, 639 (definition of possession Wharton, *Law Lex.*). See also p. 440 (s. 404, com. *nn.*) *Sadik Husain Khan* v. *Hashim A. K.*, (1916) 43 I. A. 212, 222, *ll.* 3-4 (receipt of appropriate portion of rent or income only form that possession could assume).

SECTION 382A. Who controls? —for whose benefit?

produced the normal effects, the subject of possession would present little difficulty; but it is frequently uncertain to whom the actual control of a thing is to be attributed, and when this question is settled, the law may credit the advantages of possession to some person other than the apparent possessor. Hence arises the distinction between actual and legal possession. Actual possession denotes the state of facts, but the person to whom are credited the advantages of possession has the legal possession." [9]

Ambiguity of possession.

2. "As the name of possession is... one of the most important in our books, so it is one of the most ambiguous. Its legal senses (for they are many) overlap the popular sense, and even the popular sense includes the assumption of matters of fact which are not always easy to verify. In common speech a man is said to possess or to be in possession of any thing of which he has apparent control, or from the use of which he has the apparent power of excluding others." [10]

Complete seisin.

3. As to the meaning of 'qabz-ul-kamil' (complete seisin) "with reference to moveables, it depends on their nature, and with reference to immoveable property, as is suitable to its nature, as the taking of the key of a house, which is equivalent to its seisin." [11] Compare: "By possession is meant possession of that character of which the thing is capable." [12]

Kinds of possession:

a.—Removing moveables.

4. "Possession in the case of moveable things, like an animal, or pieces of cloth, or a thing that can be measured or weighed or numbered, is by removing it, and with reference to other things, it is to leave it alone between the thing and him (the transferee) after raising the hand from it." [13]

b.—Customary control.

5. "Possession [14] and its kinds" [15]....What is meant by it (i.e. by qabz or possession) in all places where the shari (jurist) has considered it regarding its validity, its binding force, or other effects, is as follows: The transfer of the customary control (urfiya [16] sultanat) from the transferor to the transferee,—equally whether the legal (shar'iya) control has permanently accrued to him by a contract (as in the case of sale and the like), or not, (as in the case of wakf and hiba and the like).[17] There is no doubt regarding its accruing (i.e. possession accruing or being deemed to be transferred) in the case of immoveable property by vacating ('takhliat'), in the sense that all obstructions are removed [13] from the way of the transferee, and also that the hand of the transferor is raised,[18] and his permission is given to the transferee: for this is necessary, in order that he (the transferee) may,

c.—Vacating immoveables:

[9] J. M. Lightwood, *Encyc. Laws of Eng.* XI. 319.

[10] Pollock & Wright, *Possession in Comm. Law.* See also Hals., *Laws of Eng.* under PERSONAL PROPERTY.

[11] *Majmau'l Anhar*, 342, cited Ameer Ali, I. 42, (90).

[12] *Lord Adv.* v. *Young*, (1887) 12 App. Cap. 544, 556, (*per* Lord Fitzgerald).

[13] *Sharh-Luma'a* 295 (Shia text) "Raising the hand" = ceasing to exercise any control: apparently analogous to English "hands off."

[14] *Jawahiru'l Kalam, Kitabu'l Tijara,* IV. 136, *ll.* 18 ff. (Shia text).

[15] This heading is in the original.

[16] From *'urf* custom: see ch. I. p. 18 ff.; s. 10, com.

[17] Gift being revocable, "legal control" arising from gift, distinguished from "legal control" permanently (viz. irrevocably) transferred by sale.

as regards taking possession of landed property, become thereby like the transferor : and it is not then necessary for the transferee to get at the property by himself, or through his agent, or by his dealing with it : indeed there is no necessity even for the lapse of time,[17] although it (the property) may be remote from the transferee, because of its absolute validity without it (i.e. the lapse of time), like the validity of the property coming under his possession (qabz) control (wilayat) and power (istita'at) thereby in the same manner as it was under the transferor." [14]

d.—lapse of time not necessary.

"'Takhliat' or vacating (a property) means giving up all dealings with it, and placing it entirely at the disposal of the purchaser or the donee, without (leaving) any obstacle in the way of his using it....Know that the Shahid Sani said that 'takhliat' (vacating) is the removal of an obstacle, if there is any, in the way of the purchaser entering into possession, coupled with permission to take possession of it. And the author of the Kifaya criticizes this, stating that in the case of hiba and wakf and the like this (necessity for permission) may hold, but in the case of a sale it is not practicable, inasmuch as the object may go out of possession without his intending it. But in my opinion Shahid Sani means by permission, intimation that no obstacle exists in the way of his occupying it." [19]

e.—Takhliat or vacating explained.

6. Similarly in regard to wakf, allowing the public to pray in a building erected for serving as a masjid, is held equivalent to transfer of possession (and the wakf is completed).[20] The wakf is also completed when an aqueduct is built and people have used it, or occupied a caravansary, or inn, or buried a corpse in a cemetery,[21] or a road is dedicated to Muslims, and one Muslim has passed over it, or a bridge made, and people have crossed it.[22] Conversely where the donee does not exercise any acts of ownership over the subject of gift, it may be deemed that possession has not been transferred to him.[23]

Use or exercise of ownership as possession.

"As delivery of possession in the case of waqf is deemed necessary though Abu Yusuf holds a contrary opinion, the nature of the delivery depends in each case upon the nature of the specific thing, for example, the delivery of a cemetery is by the burial of one person ; of a tank or reservoir by one person drinking there ; a guest-house (mussaffir khaneh, travellers' house) by one wayfarer or traveller alighting there. Similarly as the purpose of a mosque is that people should pray there in jama'at, it is required that where there is no express dedication, prayers should have been offered there with the azan or iqamat." [24] When the owner of the property declares himself a trustee or mutawalli a change in the character of possession may be equivalent to transfer of possession : s. 395A, p. 427.

Nature of delivery depends on nature of the thing : cemetery, tank, travellers' house, mosque.

Change in character of possession.

[18] Cf. Bail. II. 204, *ll.* 17-19 (par. 4).

[19] *Jamiu'sh Shittat*, 128, 129.

[20] Bail. I. 604 (615); s. 514.

[21] Bail. I. 609 (620); s. 462, *ill.* (3).

[22] Bail. I. 610 (par. 2) (621).

[23] *Sadik Husain K.* v. *Hashim A. K.*, (1916) 43 I. A. 212, 218 (par. 3) 233 f. 230 f. = 38 All. 627, 462 (par. 3), 647 f., 657.

[24] *Raddul Muhtar*, Vol. III. 572. Cited Ameer Ali, *Mahommedan Law* I. 305. I have not been able to trace original in work referred to, but law laid down in *Fatawa Alamgiri* cited above from Bail. & in *Kazi Khan*, 296.

SECTION 382A.

Domat: possession of—moveables, cattle, house, lands.

7. "Possession, taken in a proper sense, is the detention of a thing, which he who is master of it, or who has reason to believe that he is so, has in his own keeping, or in that of another person by whom he possesses.... Thus one may possess moveables by keeping them under lock and key, or having them otherwise at one's disposal: thus one possesses cattle by shutting them up, or giving them to be kept: thus one possesses a house by dwelling in it, or having the keys thereof, or trusting it to a tenant, or by building in it: thus one possesses lands by cultivating them, reaping the fruits, going and coming through them, and disposing thereof at pleasure.[25]

Acquiring right to possess.

"We must not confound," continues Domat, "the ways of acquiring the right to possess...with the ways of entering and getting into possession, and of having a thing in one's power to use it, to enjoy it and to dispose of it. The ways of acquiring the property of things, and by means of the property the rights to possess them, are infinite. For one acquires them by a sale, by exchange, by donation, and by different titles which the laws have regulated....We are now to consider how one becomes possessor, and the ways of entering upon a real and actual possession. Seeing the use of possession is to exercise the right of property, it implies three things: (i) a just cause of possessing as master, (ii) the intention to possess in this quality, and (iii) detention....Without intention there is no possession....Without detention, the intention is useless....And without a just cause the detention is only usurpation."[26]

Actual possession implies: i.—just cause, ii.—intention, iii.—detention.

Definition in French Code.

8. Possession is defined in the French Civil Code as "the retention or enjoyment of a thing or of a right which we have, and which we make use of, either ourselves, or by another person, who holds it or makes use of it in our name"—Art. 2228.

Exercise of power.

9. "The term has been defined as follows: simply the owning or having a thing in one's power, the present right and power to control a thing." "That condition of fact under which one can exercise his power over a corporeal thing at his pleasure, to the exclusion of all other persons." "The detention or enjoyment of a thing which we hold or exercise by ourselves or by another who keeps it or exercises it in our name." "Natural possession is that by which a man detains a thing corporeal, as by occupying a house, cultivating grounds or retaining a moveable in possession." It is also defined to be the corporeal detention of a thing which we possess as belonging to us without any title to that possession, or with a title which is void.[27]

Possession: i.—apparent, ii.—formal, iii.—actual.

10. Sometimes apparent possession is used in the sense of (1) open visible possession in contradistinction to formal possession; or (2) in contradistinction to actual possession, as when an agent is said to have apparent authority. Formal possession is sometimes taken by symbolical delivery.[28]

[25] Domat, *Civ. Law*, (1861) (transl. Wm. Strahan) I. 845, 846, ss. 2127, 2130.
[26] *Civ. Law*, I. 853-858, ss. 2147, 2161. [27] *Amer. Cycl. of Law*, I. 55.
[28] *French* v. *Gething*, [1921] 3 K. B. 280, 285.

11. "The doctrine of possession has been extended under the name of QUASI POSSESSION or of POSSESSIO JURIS to the control which may be exercised over advantages, short of ownership which may be derived from objects." [29]

SECTION 382. Advantages short of ownership.

383. (1) The declaration and acceptance of a gift do not transfer the ownership of the subject of gift, unless and until [1] the donor transfers to the donee such seisin or possession [2] as the subject of the gift permits,[3] viz. until the donor (*a*) puts it

II. TRANSFER OF POSSESSION COMPLETES GIFT.

(A) ACTS ON PART OF DONOR.

[29] Holland, *Jurispr.* 179.

[1] Where possession is given to donee subsequently to declaration & acceptance, ownership of subject of gift is transferred to donee, as from date when possession given, & not before : Bail. II. 207 (*second*); *Minhaju't Talibin*, 234 ; e.g. in *Anwari* v. *Nizamuddin*, (1896) 21 All. 165, 171-172 ; *Sadik Husain K.* v. *Hashim*, (1916) 43 I. A. 212 = 38 All. 627, (P. C.); *Musa* v. *Kadar*, (1928) 55 I. A. 171, 176 *ll.* 9-10). Macn. 201, (case 5) dissented from *Ebrahim* v. *Bai Asi*, (1933) 59 Bom. 254, 260, 261. Cf. *Khader* v. *Hussain*, (1869) 5 Mad. H. C. R. 114, 119 ; *Fakir Nynar* v. *Kandaswamy*, (1912) 35 Mad. 120, 129. SEISIN has crept in in this context, but is to be avoided as seisin has very special meaning in English law : Blacks. *Com.* II. 209 : "ACTUAL SEISIN....either by his own entry or by the possession of his own or ancestor's lessee for years or by recurring rent from a lessee of the freehold (Co. Litt. 15) : or unless he hath had what is equivalent to corporal seisin in hereditaments that are incorporeal ; such as the receipt of rent, a presentation to the church in case of an advowson (Co. *Litt.* 11), & the like. ..For the law requires this notoriety of possession, as evidence that the ancestor had that property in himself which is now to be transmitted to his heir. Which notoriety hath succeeded in the place of the antient FEODAL INVESTITURE, whereby while feuds were precarious, the vasal on the descent of lands was formerly admitted in the lord's court....& there received his seisin in the nature of a renewal of his ancestor's grant in the presence of the feodal peers : till at length....an entry on any part of the lands within the country.... or other notorious possession, was admitted as equivalent to the formal grant of seisin, & made the tenant capable of transmitting his estate by descent.. .makes him the root or stock from which all future inheritance by right of blood must be derived." "LIVERY OF SEISIN is no other than the pure feodal investiture, or delivery of corporal possession of the land or tenement ; which was held absolutely necessary to complete the donation." Blacks., *Com.*, *Laws of Eng.* II. 311.

[2] Bail. II. 203 (*ll.* 5-7) 204 (*ll.* 3-4, 9-11); I. 508 (*l.* 17), 512-513 ; Hed. 482 ; *Obedur R.* v. *Md. Muneer*, (1871) 16 W. R. 88 ; *Shah Jan B.* v. *Shib Chunder*, (1874) 22 W. R. 314 ; *Jeswant S. U. S.* v. *Jet Singhjee U. S.*, (1844) 3 Mo. I. A. 245 ; *Meherali* v. *Tajudin*, (1888) 13 Bom. 156 ; *Mahomed Farid* v. *Mahomed Abd. Gafur*, 15 Cal. L. J. 14 = 13 I. C. 434 ; *Rahiman* v. *Md. Fatima*, (1914) 15 Mad. L. T. 345 = 23 Ind. Cas. 65 ; *Muhammad Hamid U. K.* v. *Muhammad Majid U. K.*, (1917) 52 Punj. Rec. 356, (No. 92). So LIMITATION for suit to set aside gift does not begin till possession given : *Mulani* v. *Maula Baksh*, (1923) 46 All. 260 ; *Meda Debi* v. *Imaman B.*, (1884) 6 All. 207 (F. B.); *Sarajul Haq* v. *Khadim H.*, [1884] All. W. N. 60.

[3] This rule, *submitted*, misapprehended in *Namdar* v. *Mohammad S.*, (1913) 11 All. L. J. 726, where it was not in power of intending donor to obtain mutation of names owing to her death within 4 or 5 days of declaration of gift : on this ground gift was held to be as complete & effectual as if she had obtained mutation of names. It is observed, *obiter*, "it is also difficult to see how such directions (viz. that tenant should pay rent to donee) could be given to the tenants at the time of making the gift unless they happened to be present." But, (1) directions need not be given at very moment of declaration of gift though tenant could have been called, or donor & donee gone to tenant, (2) if death prevents some essential part of transaction to be performed, transaction remains incomplete & ineffectual. "The execution of deeds of gift in which possession is never given" "with POSTPONEMENT OF POSSESSION may well take the place of revocable legacies, the transfer of possession being dependent on the future conduct of the donee."—*Ma Mi* v. *Kallander* (No. 1), (1926) 54 I. A. 29, 31. That case having reference to a charity it is added : "no such reasons for postponement existed as regards a charity of this kind." *Qamaruddin* v. (*Mt.*) *Hassan Jan*, (1934) 16 Lah. 629 (cases discussed).

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within the power of the donee to take possession of the subject of gift, if he so chooses,[4] or (*b*) does everything that, according to the nature of the property forming the subject of the gift, is necessary to be done for transferring ownership of the property, and rendering the gift complete and binding upon himself.[5]

(2) Imam Malik holds that the right to the subject of gift relates back to the time of the declaration.[6]

Illustrations.

(1) On 21 Oct. 1891, D made a gift to his daughter of the whole of his property, being shares in two villages, then and subsequently held under attachment by the Collector for arrears of revenue, providing that she should give him Rs. 120 annually for maintenance. Held, that the donor having transferred to the donee, and (2) divested himself of, the rights which he had, and which he purported to give and (3) got her name entered in the GOVERNMENT RECORDS, there was a valid gift, notwithstanding that suits for rent due were brought by the donor after the date of the gift—such suits having been brought before the MUTATION of names took place.[7]

(2) On[8] 12 Feb. 1879, *D* made a deed of gift,[9] transferring her right in half of certain properties to her daughter and co-sharer.[10] The evidence of transfer of possession, as stated by the Privy Council : (*a*) DECLARATION[11]

[4] Bail. I. 514 (par. 2) (522), II. 204 ; Ameer Ali, I. 65, citing *Fatawa Kazi Khan*, 282, & *Majimaa-ul-Anhar* ; *Pathumma Umma* v. *Thittu Umma*, (1918) 36 Mad. L. J. 159 ; *Jamilunnissa* v. *Muhammed Zia*, [1937] All. 609 (placing donee in position to take possession).

[5] *Milroy* v. *Lord*, (1852) 4 De G. T. & J. 274, *per* Turner L. J. : "The settlor must have done everything which according to the nature of the property was necessary to be done in order to transfer the property & render the settlement binding." Cf. Ameer Ali, *Mah. Law* I. 860 : *Majamaa-ul-Anhar* uses similar language, viz. "possession so far as its nature admits." *Mahomed Buksh K.* v. *Hosseini*, (1888) 15 I. A. 81 (CAL.) referring to *Kalidas* v. *Kamhya Lal*, (1884) 11 I. A. 218 (pp. 355 (*n.* 42), 380, 402, 416 f); (*Syed*) *Zamin* v. *Syed Akbar A. K.*, (1937) 64 I. A. 158, 168 (par. 2) (CHANGE OF CHARACTER OF POSSESSION from malik's possession to *mutawalli's*) ; *Abdul Cadar* v. *Tajoodin*, (1904) 6 Bom. L. R. 263, 266 (on donor doing all that it was within his power to do for transferring possession) ; *Ebrahim* v. *Bai Asi*, (1933) 58 Bom. 254 ; *Chanda Sahib* v. *Gangabai*, (1921) 45 Bom. 1296 (gift of 5 properties : possession given of 2 : 3 being mortgaged ; mortgagee retained possession : gift held valid as to all) ; *Hamidullah* v. *Ahmadullah*, (1936) 34 All. L. J. 292 (wife to husband).

[6] Hed. 482 (col. ii).

[7] *Anwari Begum* v. *Nizamuddin*, (1896) 21 All. 165 following 16 I. A. 205 ; see *ill.* (2). Cf. s. 369, com. (xii.).

[8] *Muhammad Mumtaz A.* v. *Zubaida Jan*, (1889) 16 I. A. 205 = 11 All. 460. P. C. reversed findings of fact by Subord. Judge : H. C. not having expressed any opinion on it : see 11 All. 470.

[9] In *Ma Mi* v. *Kallandar* (No. 1), (1926) 54 I. A. 23, 30 (CUSTODY OF THE DEED, whether retained by donor or given to donee, & what became of it after donor's death, were held to throw little light & disregarded : but see s. 383, *ill.* (6) point (*a*) (vii.).) ; cf. *Kadarbhai* v. *Nanibibi*, (1926) 28 Bom. L. R. 1096, 1100.

[10] Point taken that the gift invalid as *musha* : not pointed out in reply that gift was from one co-sharer to another. Points (*l*) & (*m*) characterised by P. C. as "futile ;" and (*i*), (*j*) & (*k*), as "weak & unavailing."

[11] See s. 403 on ACKNOWLEDGMENT OF POSSESSION. *Ma Mi* v. *Kallander Ammal* (No. 1), (1926) 54 I. A. 23, 29 (circumstances from which "it was only natural that he should have been anxious to perfect the gift by delivering possession." On

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in deed that possession transferred, and that the donor had abandoned all control of every kind in respect thereof (the donee's husband was the general manager of both) 11 All. 475 ; (*b*) 22 Feb. 1879, the deed was registered ; (*c*) 24 Feb. the donor gave a POWER OF ATTORNEY [12] to a third person to present and verify a petition for MUTATION [13] of names ; and (*d*) petition presented 28 Apr. ; (*e*) 5 Jun. parwana issued by Asst. Collector for PROCLAMATION of deed of gift, and for enquiry as to possession ; (*f*) which was done ; 27 July, the village patwari reported that the deed was made, and possession transferred ; and (*g*) 28 Jul., he reported that the NOTIFICATION had been proclaimed ; (*h*) the presumptive heir of the donor, did not raise any objection to the MUTATION of names. The donee died on 3 Dec. 1879 ; mutation of names took place on 4th Feb. 1880 (after the death of the donee). As against this evidence (*i*) there were 5 decrees in suits by the donor for rent accrued after the date of the deed of gift : (*j*) 26 Nov. 1879 the donor paid revenue (*k*) Jan. 1880, order of Asst. Collr. spoke of the donor as being in possession ; [the suits were, however, commenced, the payment of revenue was made, and the order issued before the mutation of names in the Collector's books.] (*l*) the donor continued to reside in one of the houses forming part of the gift ; (*m*) the donee's husband made an attempt to acquire the whole of the property, and it was argued that if the gift had been valid there would be a question as to only 1/6 of it.[13a] *Held*, that it was proved that possession was taken, and that there was a complete and valid gift.[8]

Umjad Ally *v.* Mohumdee, 11 Moo. I. A. 516 :

(3) In 1848 D[14] transferred and indorsed to his son,[15] Government promissory notes of the value of Rs. 6,74,000, stipulating that the proceeds of the notes should be paid to himself, the donor. In 1853 Government notified that certain notes, of which the said notes formed part, were about to be paid off, and option was given to the then holders. *Held*, that the legal title was undoubtedly in the donee (544),[16] the probability being that it was intended as a transfer of property in lifetime of the donor with reservation of use or

other hand, deed of gift conversely furnished evidence that possession not transferred, where stated—" you are to take possession after my death : " *Kadarbhai* v. *Nanibibi*, (1926) 28 Bom. L. R. 1098, 1105, 1107.

[12] *Ma Mi* v. *Kallandar*, (No. 1), (1926) 54 I. A. 23, 31 (POWER OF ATTORNEY).

[13] *Ma Mi* v. *Kallandar* (No. 1), (1926) 54 I. A. 23, 30 (MUTATION proved : presumed it must have been at instance of one of parties to deed of gift & in this case, of donor, who was on spot); *Musa* v. *Kadar*, (1928) 55 I. A. 171, 177 (MUTATION); *Abadi* v. *Kaniz*, (1926) 54 I. A. 33, 43 ; *Hajee Kalub* v. *Mehram*, (1872) 4 N. W. 155 ; *Hamid* v. *Mujawar*, (1902) 24 All. 257 ; *Sheikh Muhammad Mumtaz* v. *Zubaida*, (1889) 16 I. A. 205, 216, 217 (ALL.) (mutation not actually necessary to complete the transfer).

[14] Nawab Moonawarood Dawlah. The parties were Shias, but *Hidaya* & other Hanafi authorities cited (no Shia books). See s. 352, p. 362 where 11 Moo. I. A. 516 discussed. Cf. *Akbarally* v. *Mahomedally*, (1931) 57 Bom. 551, 560, 561 ; *Mohammad Abd. Ghani* v. *Fakhr Jahan B.*, (1922) 49 I. A. 195, 208.

[15] Nawab Umjad Ali Khan.

[16] (*Nawab*) *Umjad A. K.* v. (*Mt.*) *Mohumdee B.*, (1867) 11 Moo. I. A. 516, 544, 548 = 10 W. R. (P. C.) 25. Figures in ( ) refer to pp. of 11 Moo. I. A. This principle not applied where gift of house made by husband to wife, stating that right to live in house reserved to husband & that wife may take possession on his death : *Kadarbhai* v. *Nanibibi*, (1926) 28 Bom. L. R. 1098, 1103. The difficulty could have been overcome with slight changes in form of deed.

SECTION 383. Donor retaining income of gift.

proceeds of the money transferred, during his lifetime only : "The DESIGN to ALTER, and so in one sense to defeat, the disposition of property is simply a design to CONFORM TO THE LAW whilst working out an unforbidden design." (547—8.)[16] : "The gift relates to the substance of the article and not to the use of it,[17] there is no such participation in the thing given as would invalidate the gift. Again, the Muhammadan law defeats, not the grant, but the condition ; but the arrangement between the donor and donee was based on valid consideration, the son's undertaking is valid and could be enforced in India as a TRUST constituting a valid obligation to make a return of the proceeds during the time stipulated. The Muhammadan law authority whom Mr. Campbell consulted supported it. His opinion is treated somewhat lightly as a nude opinion unsupported by authority ; but it is to be observed that unless some authority had been cited to show the transaction invalid, EFFECT should have been GIVEN to the MANIFEST INTENTION of the parties....The consideration, two rings, may be small and inadequate in the sense of purchase money ; but it cannot be treated as of no pecuniary value." (550 par. 2).[18] *Held*, there was a valid gift inter vivos as to the promissory notes. Costs of both parties out of residuary estate of deceased.[16]

(4) D executed a deed of gift of all his rights of inheritance in the estate of a deceased person reciting that it was made in consideration of NATURAL LOVE AND AFFECTION, and of past SERVICES. *Held*, that this was not a HIBA BIL IWAZ, which consists of two transactions (both the hiba and the iwaz being gifts) : that only such properties can be the subject of iwaz as can be the subject of gift : that natural love and affection and past services can neither be the subject of a gift nor of iwaz : that possession was necessary to be transferred, and the gift property (i.e., share in the estate) being immoveable, and not of a nature which renders it impossible to deliver actual possession to the donee, actual possession was necessary. No such actual possession having been given, the gift was ineffectual.[18]

(5) Humera Bibi,[19] on 14 Jan. 1888 executed a deed of gift of a house and other property in favour of her brother's son Minnat-ullah. The donor subsequenaly sued to have the gift declared void[20] on the ground that possession had not been transferred to the donee. The EVIDENCE bearing on possession as appearing from the Judgment : (*a*) at the time of the gift the donor and donee LIVING TOGETHER in the house ; (*b*) after the gift, the donor continued to live there ; (*c*) the deed was executed in autograph by the donor ; (*d*) attested by 31 witnesses ; (*e*) REGISTERED ; (*f*) it RECITED that possession was given and taken ; (*g*) MUTATION of names followed, 24 Jan. 1888 ; (*h*) government REVENUE was PAID afterwards invariably by the donee

[17] See s. 366A (use or usufruct distinguished from substance).

[18] *Rahim B.* v. *M. Hasan*, (1888) 11 All. *per* Mahmood, J. ; Macn. 201 (case 6) ; on allusion to *hiba-bil-iwaz*, see ss. 406 f.

[19] *Humera* v. *Najmunnissa*, (1905) 28 All. 147 ; see *Ibhram* v. *Suleman*, (1884) 9 Bom. 146 ; *Syed Ali Zamin* v. *Syed Akbar A. K.*, (1937) 64 I. A. 158, 164 ; see also s. 396.

[20] *Ma Mi* v. *Kallandar* (No. 1) 54 I. A. 23, 31 (donor purported to revoke gift).

in his own name; (*i*) the donee treated the property as his own: (i) in various partition proceedings the donee was regarded, as proprietor and acted as such; (ii) in 1896 and 1899 he executed mortgages on it, describing himself as full owner; (*j*) 7 or 8 months after the gift, the donor in answer to interrogatories stated in her affidavit that (i) she had made a gift of the property, (ii) that he resided in it with the permission of the donee, (iii) that the donee was in possession of the whole property; (*k*) a musical entertainment was given to CELEBRATE THE GIFT, and give it publicity; (*l*) not a single RECEIPT FOR RENT was produced in the name of the donor; (*m*) the receipts produced were in the name of the donee; (*n*) after the death of the donee, the donor claimed to succeed as his heir, and when she found that she was not his heir, she set up, 13 or 14 years after the date of the gift, the case of the gift being invalid. *Held* that transfer of possession of the whole subject of gift (including the house) was proved: for the INTENTION TO TRANSFER possession of the house was unequivocally MANIFESTED in the most clear and emphatic language to the effect that the donor had divested herself of all her interest in it, and withdrawn her possession of it; and such intention having been given effect to, as appears from the facts above mentioned, neither the actual physical departure of the donor from the house with all her belongings, nor a formal entry by the donee, was necessary: so that the donor's continuing to live in the house with the permission of the donee did not derogate from the completeness, or the validity of the gift.[19]

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(6) One[21] Baqar Ali made a gift of Mahal Serai a portion of Khairabad property to his wife Fakhr Jehan: deed of gift registered (11):[21] gift attacked (*a*) as colourable or fictitious, without intention on part of donor to transfer: this being against the tenor or deed, BURDEN OF PROOF clearly on those who dispute gift (12): (i) clear that donor wished to provide generously for donee; (ii) she occupied zenana portions frequently; (iii) she exercised no individual ACT OF PROPRIETORSHIP over any portion of the establishment; (iv) in her and her husband's absence, servants of the donor's estate occupied it; (v) REPAIRS done at donor's expense; (vi) no MUTATION of names in records; (vii) DEED handed over to her: remained IN HER POSSESSION (13). Intention to make gift held proved. (*b*) as to possession (i) during life-time she merely resided with donor and no change in method of occupation, (ii) RECITAL in deed that possession transferred: see s. 403. Gift of Mahal Serai by Baqar Ali to his wife held effective (14).[21]

1.—Necessity for transfer of possession to complete gift.

The necessity for possession, in order to complete a gift, is based on the same ground on which a contract without consideration is not enforceable. Transfer of possession is necessary for transferring complete ownership under Muhammadan law, even where the transfer is for consideration: the purchaser of movable property is not, in Muhammadan law, entitled to resell it, until it is delivered to him.[22] Where the donor has not done everything

[21] *Mohammad Sadiq* v. *Fakhr J.*, (1931-2) 59 I. A. 1. The figures in ( ) refer to numbers of pages. See *n.* 9 on CUSTODY OF TITLE DEEDS.

[22] Hed. 286.

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to divest himself of the property, some third party must, in order that the gift be completed, make the donor do what he has left undone : this would infringe the principal notion connected with a gift—its voluntary nature.[23]

2.—Reason : Hidaya.

The Hidaya thus explains the requirements of a gift : " Gifts are rendered valid by tender, acceptance and seizin. Tender [or declaration] and acceptance are necessary because a gift is a contract, and tender and acceptance are requisite in the formation of all contracts ; and seisin is necessary in order to establish a right of property in the gift, because a right of property according to our doctors is not established in the thing given by means of the contract, without seisin.[24] The arguments of our doctors are twofold.—First, the Prophet has said a gift is not valid[25] without seisin (meaning that a right of property is not established in a gift until after seisin).—Secondly, gifts are voluntary deeds ; and if the right of property were established in them previous to the seisin, it would follow that the delivery would be incumbent on the voluntary agent, before he had voluntarily engaged for it." [25] In other words, if a gift were valid[25] without possession being given to the donee, the law would be decreeing specific performance of an agreement without consideration, in many cases not even an agreement, but a mere wish on the part of the donor, or a surmise that he must have wished it.[26]

Viz. donor cannot be obliged to do any thing.

3.—Bequest.

In the case of a bequest, on the other hand, under Muhammadan law, the " transfer is to be decreed as having effect from the death of the testator, and not from the time of taking possession, though there should have been some delay in taking it." [27]

4.—Suit to cancel a gift where possession not given.

It has been held that the donor cannot sue the donee for cancellation of the gift, on the ground that he did not give possession : because either the deed of gift is a nullity, from which the plaintiff would not apprehend any injury, or " if possession was non-essential to its validity, then it would be a good deed of gift." [28] On both these points the learned judges cautiously declined to express an opinion. It is conceivable that if the question again presents itself for decision, the Court having to deal with it (fortified by the authorities referred

[23] *Mahomed Buksh K.* v. *Hosseini B.*, (1888) 15 I. A. 81, 95 (CAL.) (if donor has not done all he could to perfect his contemplated gift he cannot be compelled to do more = s. 348, *n.* 42.) citing *Kali Das Mullick* v. *Kanhya Lal*, (1884) 11 I. A. 218, 229, 233 (CAL.) ; *Ebrahim* v. *Bai Asi*, (1933) 58 Bom. 254, 257.

[24] This appears tautological : as though it were said that seisin (on which see *n.* 1) is necessary because it is necessary ; but what is in fact conveyed is that ownership in property does not under general law pass until possession transferred : analogy of registration under modern systems close & helpful : possession is under Muhammadan law as necessary for completing title as registration under law of India. The question, however, often gets confused and indistinct, since possession is connected with ownership as its natural result.

[25] Hed. 482 (col. ii). " Valid " = " complete & effectual."

[26] Same reasoning is basis of rule of Hanafi law that where subject of gift capable of divison, the gift ought not to be considered complete unless division is made : Hed 482 (col. I., II.) ; cf. s. 374, com. ; distinguish case where transfer is made for valid consideration, operating as contract : *Mahammadu-Nissa B.* v. *J. C. Bachelor*, (1905) 29 Bom. 428. See pp. 355 (*n.* 42), 380, 402.

[27] Bail. II. 207-208 ; but see Succ. Act, XXXIX. of 1925, s. 336, ch. on Wills.

[28] *Umrao B.* v. *Jan Ali S.*, (1898) 20 All. 465.

to in s. 383(1)), may feel that it would not be too bold a proposition to affirm that "possession is essential to the transfer of a gift"; and in that case the decision may proceed on different grounds—grounds based on the terms of the Specific Relief Act. SECTION 383.

4.—Transfer of possession in theory of law of HIBA, not matter of form.

Transfer[29] of possession in hiba[30] is not merely a matter of form, nor something merely supplying evidence of the intention to make a gift. The necessity for the transfer of possession is expressly insisted upon as part of the substantive law, since transfer of possession effectuates that which the gift is intended to bring about, viz. the transfer of the ownership of the property from the donor to the donee. It may be said that transfer of possession is no more a matter of form than the necessity for consideration for the validity of a contract is a matter of form. The law does not ask, Did the donor really intend to give the subject of gift, i.e. did he really intend to transfer the ownership of the subject of gift from himself to the donee? What the law asks is, Has the donor actually given away? or Has the ownership been actually transferred from the donor to the donee?[32] In regard to contracts it has been well expressed: "It is often difficult to determine whether what is said amounts only to a willingness to treat about a matter, or is an absolute contract; and the adoption of a form removes the difficulty."[31] So that what may have been considered a mere matter of form becomes incorporated in substantive law. What has to be determined is not whether the donor had finally resolved to make a gift, but whether he had actually transferred away the property—and even where the transfer is for consideration, possession has, in most systems of law, an important[32] bearing on the rights of the parties and others claiming through them: since (under Muhammadan law) the owner's right ceases on his death, and devolves upon his heirs, it follows that where the owner dies without transferring the property to another, the person to whom a voluntary transfer was intended to be made, has no claim against the heirs.

(B.) Registration.

384. The registration of a document constituting the declaration and acceptance of a gift, does not, without delivery of possession by the donor, complete and effectuate the gift.[1]

[29] This paragraph cited with approval & applied: (*Mt.*) *Bibi Bilkis* v. *Sheikh Wahid Ali*, (1927) 7 Pat. 118.

[30] At least in Muhammadan law as finally developed, in the form in which we now find it: for as Lord Mansfield & Mr. Justice Holmes point out, even doctrine of consideration in English law of contract had its origin merely in form: cf. Holmes, *Common Law*, 273; *Pillans* v. *Van Mierop*, (1765) 3 Burr. 1664, cited in s. 213, com. *Mohammad Abdul Ghani* v. *Fakhr Jehan B.*, (1922) 49 I. A. 195, 209 (*per* Sir John Edge: object of law being prevention of disputes as to whether donor intended title to pass & evidence of transfer having been effected). Muhammadan law requires transfer of possession as completion of act of transfer (even when the transfer is for consideration, as a sale): analogy of registration close: analogy of law of consideration in England is also suggestive. See s. 348, *n.* 42.

[31] Brantley, *Contracts*, 36, cited Harv. Law Rev. XXVII., 208-53: article *The End of Law*, by Pound.

[32] See s. 382A, com. ("connotation of possession: importance").

[1] See Ind. Registr. Act, s. 17; ss. 347, 399 of this work. *Ma Mi* v. *Kallander Ammal* (No. 1), (1926) 54 I. A. 23; *Vahazulah* v. *Boyapatti*, (1907) 30 Mad. 519; *Ismal* v. *Ramji*, (1899) 23 Bom. 682; *Allah Rakha* v. *Muhammad Ali*, (1928) 9

SECTION 384. Transfer of Property Act : registration.

The power to extend any part of the Transfer of Property Act to Burma did not authorize the Local Government to extend particular sections of the Act, so as to give those sections a different operation from that which they had in the Act itself read as a whole, and to abrogate, in the area to which the extension applied, a rule of Muhammadan law till then in force there, as to which the Legislature had expressly provided that it was to remain unaffected by the Act. The local government extended to Burma, different sections of the Act, which render registration and attestation compulsory in the case of transfers of immoveable property by sale, mortgage, lease or gift, as provided in the Act. There is no reason to suppose that the government intended to do more in the case of gifts by Muslims than to make such registration and attestation compulsory ; or that it purported to give to those sections such different operation as is above mentioned.[2]

Both registration and transfer of possession are now necessary in Burma.[2]

In records, &c. the names of deceased persons are often allowed to stand. Names of persons who had died before 1869 were found in lists prepared under Act I. of 1869.[3]

(c.) ACTS ON PARTS OF DONEE.

(1) Donee already in possession.

385. Where the subject of the gift is in the possession[4] of the donee at the time of the declaration, the gift is completed and effectuated by acceptance ; and no formal transference of possession is necessary.[5]

Illustration.

A piece of cloth is deposited with R, who says to the owner "Give it to me," and the owner answers "I have given it to thee." This is a gift. But if the cloth had been in the hands of the owner himself and the same words had passed between them, it would have been a deposit.[6]

"Nor is it necessary that any time should elapse to enable the donee to repeat his seisin as some of our doctors have said."[7] Similarly, possession in

Lah. 567 ; *Samsul Nehar* v. *Moulvi Mahiuddin*, (1920) 25 C. W. N. 310 ; *Abdul Rahman* v. *Gaya Prasad*, (1929) 5 Luck. 384 ; *Rahim* v. *Imam*, (1912) 17 Cal. L. J. 173 ; *Mogulshah* v. *Mahamad Sahib*, (1887) 11 Bom. 517 (two rulings between Hindus viz. *Vasudeo* v. *Narayan*, (1882) 7 Bom. 131 ; *Dagai* v. *Mothura*, (1883) 9 Cal. 854, "would appear to be equally, if not especially, applicable to gifts under the Muhammadan law") ; *Abdul Majid K.* v. *Hussein Bibi*, (1919) 23 Bom. L. R. 229 ; ROMAN LAW : gift may be complete without delivery ; but registration required if subject of gift of 200 (later 500) solidi or over.—Justin. II. vii. 2 ; cf. *Bai Ramabai* v. *Bai Mani*, [1898] Bom., P. J., 147 ; ENGLAND : Bills of Sale Act, 1878 requires registration within 7 days by grantee of BILL OF SALE. But he may choose not to register it & take actual possession : *French* v. *Gething*, [1921] 3 K. B. 280, 286.

[2] *Ma Mi* v. *Kallandar Ammal* (No. 1), (1926) 54 I. A. 23, 28 (par. 1) (RANG.).

[3] *Muhammad Abdul Ghani* v. *Fakhr Jehan Begam*, (1922) 49 I. A. 195, 200 (OU.).

[4] I.e. ACTUAL POSSESSION—*Valayat Hossein* v. *Maniram*, (1879) 5 Cal. L. R. 91 ; (mere collection of rents from tenants by agents does not constitute such possession). Cf. however, s. 382 A, com. 10. *Ahmadi B.* v. *Abd. Aziz*, (1927) 25 A. L. J. 407 (donor, father, was out of possession : he made gift to his daughters : both together sued for possession & obtained decree : gift held complete).

[5] Bail. I. 514 (522), II. 204, (*ll.* 14-19) ; *Radd-ul-Muhtar*, IV. 783 ; 484 (col. i. par. 4) ; *Mathar S. Hossain S.*, (1910) 23 Mad. L. J. 734.

[6] Bail. I. 510 (519) ; cf. s. 5c. See s. 382A, com.

[7] Bail. II. 204 (*ll.* 17-19), (par. 4).

the hands of the legal guardian of a minor is possession in himself (s. 400, pp. 434, 436), and no transfer is necessary. SECTION 385.

The Transf. of Prop. Act, s. 54 provides for completion of the transfer of ownership of property of a less value than Rs. 100, by delivery : delivery of possession in s. 54 has been held to imply a change of possession : and that, where the vendee (or other alleged transferee) is already in possession, there can be no change of possession, and no delivery under s. 54.[8] The delivery of possession in the Muhammadan law of gift must be considered, therefore, to be different from that under s. 54, as explained in the decision.[8] Change of possession.

386. (1) Profession, if taken by the donee of his own accord, must be with the express or implied consent of the donor.[9] (2) Donor must consent to donee taking possession.

(2) The mere declaration of a gift does not amount to the donor's consent to the donee taking possession ; but, where possession is taken by the donee at the same meeting as the declaration, the donor, if he raises no objection to it, will be presumed [10] to have consented.[11] Mere declaration of gift does not amount to such consent.

(3) Where the declaration of gift is made in the vicinity of the subject of gift,[12] possession taken by the donee not at the same meeting, but subsequently, is, without the express consent of the donor, not valid or effectual. When subject of gift present.

(4) Where the declaration of gift is not made in the vicinity of the property,[11] effectual possession may, without the express consent of the donor, be taken after the separation of the meeting.[13] When not present.

D gives his slave to R, (all three being present together) without saying : " Take possession of him," and the donee goes away, leaving the slave behind ; he cannot afterwards take possession of him.[14] *Illustration.*

387. A gift made through the declaration of a trust is completed by possession being given to the trustee,[15] unless the (D.) Intervention of THIRD PARTIES.

8 *Sibendrapada Banerjee* v. *Sec. of St.*, (1907) 34 Cal. 207.

9 Hed. 482 (col. ii.); Bail. I. 513 (521); II. 204 (par. 4).

10 Hed. 483 (col. i. *ll.* 13-15); cf. s. 5A.

11 Bail. II. 204, *n.* 6 : *Tahriru'l Ahkam* (Shia), insists on permission though donor present at time of gift. Cf. Macn. 215.

12 Distinction about gift being made in vicinity of subject not expressly made : Bail. II. 204. But where subject of gift is not at hand at time of gift reasonable time must, clearly be given to donee to take possession. But see Bail. II. 204, *n.* 6.

13 Bail. I. 513 (521); Hed. 482, (col. 11).

14 Bail. I. 514 (*ll.* 7-11) (522); *Hashimbi* v. *Ajamat Bi*, (1924) 48 Bom. 396 (donee authorized to take possession on expiration of lease) : s. 386(3).

15 *Sadik H. K.* v. *Hashim A. K.*, (1916) 43 I. A. 212, 221 (ALL.) = *Mirza Sidik Husain* v. *Nawab Saiyid Hashim* in some reports : (it would be narrow conception of term " gifts " to exclude any gift where donor's bounty passes to his intended beneficiary through inducing TRUST, so that while a gift by A to C direct would be

SECTION 387. Gift through a trust.

trust is declared by will,[16] or the donor declares himself to be the trustee. In the latter case change in the character of possession operates and takes effect as a transfer.[17]

Illustrations.

(1) On 9 Oct. 1876 D executes a deed of trust of certain properties, and appoints two trustees. He does not transfer possession to the trustees during his lifetime. Subsequently he makes a will confirming the trust deed ; and dies on 6 May 1883. *Held,* that the interest of the beneficiaries did not arise in the lifetime of D, as the gift was not completed, but that the deed operated as a part of the will : and was given effect to as such.[15]

(2) A gift of immovable property to A, B, and C, provides that the management of the property shall be in A, that Rs. 40 of the net income be paid by A to B, and balance divided between A and C : B, or C may enforce his rights under the gift as against A, or A's transferee.[18]

1.—Trusts in Muhammadan law.

" The conception of a trust apart from a gift was introduced in India ", said Syed Sahib Ameer Ali, " with the establishment of Muslim rule. But the Muhammadan law relating to trusts differs fundamentally from the English law." [19] The word trust is used sometimes to refer to the obligation that is annexed to the ownership of property (as in the Indian Trusts Act, s. 3) and

governed by Muhammadan law, gift by A to B in trust for C would be governed by some other law. So to hold would defeat plain purpose & object of the statutes ; *Moosabhai* v. *Yacoobhai,* (1904) 29 Bom. 267 ; *Abaul Cadar* v. *Tajoodin,* (1904) 6 Bom. L. R. 26 ; *Mirza Hashim Mishkee* v. *A. A. H. Bindancem,* (1918) 6 Rang. 343, 347 ; *Adv. Gen.* v *Yusufalli,* (1921) 24 Bom. L. R. 1060, 1078, 1079 ; *Syed Shah Muhammad Kazim* v. *Syed Abi Saghir,* (1931) 11 Pat. 288, 338-9, 363 ; *Musharraf B.* v. *Sikandar Jahan B.,* (1928) 51 All. 40, 53.

[16] *Ill.* of TRUST BY WILL : *Ghulam Muhammad* v. *Ghulam Husain,* (1931) 59 I. A. 74, 82, 84 = 54 All. 93, 101, 102 (will set aside 1/5 of estate for expenses of slaves & other dependents to remain under control of testator's son & to get necessary expenses for food & clothing but not to take possession of land, or any interest in corpus, & taking nothing if disobedient ; son held to take beneficial interest subject to maintenance of slaves during their lives, p. 84).

[17] Ind. Trusts Act, s. 6, requires trust property to be transferred to trustees " unless the trust is declared by will, or the author of the trust himself is to be the trustee." CHANGE IN CHARACTER OF POSSESSION see s. 395A. It is necessary for completion of (gift or) trust, that it should have been acted upon : ACTING ON TRUST being, in this form of gift, equivalent of that transfer of possession which Muhammadan law requires, & is necessary for " indicating with reasonable certainty...an intention....to create....a trust," under Ind. Trusts Act, s. 6. See s. 387, *ill.* (1) ; *Sugrabai* v. *Mahomedalli,* (1933) 36 Bom. L. R. 1151 (settlor had constituted himself & another, trustees : trust deed failed for want of transfer of possession) ; *Syed Ali Zamin* v. *Syed Akbar A. K.,* (1937) 64 I. A. 158, 159 ; *Sadik H. K.* v. *Hashim A. K.,* (1916) 43 I. A. 212 (ALL.) = s. 387, *ill.* (1). Cf. s. 458, *ill.* (8).

[18] *Tavakalbhai* v. *Imtiyaj,* (1916) 41 Bom. 372. See s. 369, pp. 389 f.

[19] *Vidya Varuthi Thirtha* v. *Balusami Ayyar,* (1921) 48 I. A. 302, 312 (MAD.) ; *Peary Mohan* v. *Monohar,* (1921) 48 I. A. 258, 265 (" There is no doubt that the word ' TRUSTEE ' covers a very large number of relationships involving different obligations ; the word ' trust ' therefore, may be so used that it is intended to apply only to one class of such duties, & it follows that rules & decisions which depend upon the special conditions attached to the particular class would not of necessity apply to another when those conditions did not exist. The rule forbidding the purchase of an estate of a person who stands in regard to his dealings with it in a fiduciary relationship is, however, general in its application " : Lord Buckmaster) *Puran* v. *Darshan,* (1911) 9 All. L. J. 709 = 11 Ind. Cas. 146, 170 (creation of public or private trust, save by making a *wakf* unknown to Muhammadan law) reversed *Mahant Puran Atal* v. *Darshan Das,* (1912) 34 All. 469.

SECTION 387. 2.—Forms of trusts in Muslim law.

sometimes to the deed containing the trusts, and in particular to deeds containing family settlements in England. The family trusts of Hanafi law took most often the shape of wakf, which was wrongly excluded from the term private trusts prior to the Wakf Act, 1913. But in the sense of annexing obligation to the ownership [20] of property, trusts abound in Muslim law. Trusts are recognized not only in the case of the mutawalli of a wakf, the guardian of the property of a lunatic or minor, and the executor ; there is in addition a specific recognition of " ownership with responsibility " to another person [21] in such texts as the Fatawa 'Alamgiri, the Sharaiu'l-Islam and the Hidaya. A technical term representing a very complex notion in one system of law, cannot have an exactly equivalent term, connoting identical incidents in another system of law.[22] But the Privy Council,[23] and long before their Lordships so great an authority both on law and on the meaning of Arabic terms as Sir William Jones, and the careful and accurate translator of the Fatawa 'Alamgiri and Sharaiu'l-Islam, who had a good deal of experience in the administration of law (with whom may be mentioned the translators of the Hidaya) have concurred in using the terms trust and trustee in order to render into English the meaning of Muslim texts on law.[24]

[20] Ownership of trustee not insisted upon, e.g. guardians & agents called trustees. Cf. *Tagore case*, (1872) L. R. I. A. SUPP. VOL. 47, 71 : " The anomalous law which has grown up in England of a LEGAL ESTATE which is paramount in one set of Courts & an EQUITABLE OWNERSHIP which is paramount in Courts of equity does not exist in & ought not to be introduced into Hindu "—nor (*submitted*) Muslim—" law. But it is obvious that PROPERTY whether movable or immovable must for many purposes be VESTED, more or less absolutely IN SOME PERSON or persons FOR THE BENEFIT OF OTHER PERSONS & TRUSTS of various kinds have been recognized & acted on in India in many cases. Implied trusts were recognized & established here in the case of a benami purchase in *Gopeekrist Gosain* v. *Gungapersaud G.*, (1854) 6 Moo. I. A. 53 ; & in cases of a provision for charity or for other beneficent objects such as the professorship provided for by the will under consideration where no ESTATE IS CONFERRED UPON THE BENEFICIARIES & THEIR INTEREST IS in the PROCEEDS OF THE PROPERTY (to which no objection has been raised) the creation of a trust is practically necessary." Cf. definition of trust in Indian Trusts Act, 1882 : " obligation annexed to ownership of property arising out of confidence reposed & accepted."

[21] Bail. I. 514 (522), 518 (par. 2, 3) (526), 519 (527-528), 527 (536), 591 (601), 665 (676), II. 250, Hed. 149, 214, 347, 414, 471, 478 (col. ii. par. 4), 484 (col. i. par. 3, 4), 644, 632, 636 (col. ii. par. 2). " Has it ever been suggested," asked Jessel, M. R., " until very recently that there is any difference between an express trustee or an agent or a bailee, or a collector of rents, or any body else in a fiduciary position ? " —*In re Hallett's Estate*, (1879) 13 Ch. D. 696, 709.

[22] See s. 11 c, p. 84 f.

[23] In *Varden Seth Sam* v. *Luckpathy Royjee Lallah*, (1862) 9 Moo. I. A. 303, 321, Lord Kingsdow, after citing *Hidaya*, I. 208, tit. " pawns," said : " By the Muhammadan law such a contract....would be one not of pawn, but of TRUST." See also (*Nawab*) *Umjad A. K.* v. (*Mt.*) *Mohumdee B.*, (1867) 11 Moo. I. A. 517, 548 ; *Mohammad Abdul Ghani* v. *Fakhr Jehan B.* (1922) 49 I. A. 195 = s. 395 A, *ill.* p. 427, = 24 Bom. L. R. (P. C.) 1268, 1280 : " The donee would have received them (the rents or profits) as a TRUSTEE for Munni Bibi, although the title to the corpus of the property was in him." See also *Mahomed Ismail* v. *Ahmed*, (1916) 43 I. A. 127 (CAL.) *passim* ; *Sadik H. K.* v. *Hashim A. K.*, (1916) 43 I. A. 212 (see p. 419, *n.* 15) = 18 Bom. L. R. 1037, 1043 ; *Vidya Varuthi* v. *Balusami Ayyar*, (1921) 48 I. A. 302 (MAD.) ; *Bishun Chand Basawant* v. *Syed Nadir Hossein*, (1887) 15 I. A. 1 (CAL.) (property devised to TRUSTEE, for religious duties, no portion of corpus can be sold in execution of decree against trustee personally).

[24] See also transl. from *Raddu'l-Muhtar*, IV. 783, in *Jabedanessa* v. *Nazibal Islam Molla*, (1910) 15 Cal. W. N. 328, 331. Ind. Trusts Act, 1882 is applicable to purchasers.

SECTION 388.
(E) Gift through Agent.
Possession to agent of donee.

388. The donee may authorize an agent to take possession of the subject of the gift on his behalf,[25] and a gift may be validly completed by transferring possession of the subject of gift to any person so authorized.[26]

(F) Continuance of possession unnecessary.

389. After a gift has been completed, its validity is not affected by a subsequent change of possession[27] or by the fact that the donee does not continue to be in possession of the subject of the gift.[28]

Donor coming back to the property.

Compare : " After possession has once been acquired, it is preserved without an actual detention." [29] Instances of the donor coming back into a house, or never leaving a house, which forms the subject of gift are noted under ss. 396, 401, *q. v.*

Revocation of gift.

" Non-continuance of possession " may, however, (1) in some cases where the gift is revocable be evidence of revocation. For the idea underlying the phrase of the Muslim jurists that a gift is not obligatory is twofold : (*a*) that it need not be made at all, (*b*) that even after it has been made the subject of gift need not (exceptis excipiendis) be allowed to continue in the possession of the donee as his property, i.e. the gift may be revoked : ss. 420, ff. (2)

Creditor's rights.

Secondly, especially where creditors are concerned, it may throw doubt on the good faith or the real intention to make a gift, s. 346 A, com. (p. 348 f.).

III. DIFFERENT MODES OF TRANSFERRING POSSESSION.
(A) As affected by character of property.

390. The gift of movable property,[30] is not complete unless the property is actually delivered.[31]

The gift of movable property is styled hadya as distinguished from hiba ;

[25] *Fatawa Alamgiri, Hiba*, ch. XI. gives unnecessary, or inapplicable details.

[26] Ind. Contr. Act, s. 90 : *Mohinudin* v. *Manchershah*, (1882) 6 Bom. 650, 662 (*ll.* 8-9, from bottom) ; *Jamilunnissa* v. *Muhammad Zia*, [1937] All. 609.

[27] " If POSSESSION were once TAKEN & the deed of gift took effect, no SUBSEQUENT CHANGE OF POSSESSION would invalidate it : " *Sheikh Muhummad Mumtaz* v. *Zubaida*, (1889) 16 I. A. 205, 216 = 11 All. 466.

[28] *Jamilunnissa* v. *Muhammad Zia*, [1837] All. 609 (CASUAL OR FUGITIVE POSSESSION obtained by donor, is not sufficient to discharge burden of proving falsehood of declaration made by himself that possession delivered) ; *Amina* v. *Khatija*, (1864) 1 Bom. H. C. R. 157 (gift of house by mother to daughter : exclusive possession given to donee : afterwards mother & daughter reside together in house : value of evidence that there was complete transfer not detracted from : relation between parties explained their residing together : Sausse, C. J. : " The circumstances of possession, once given, being subsequently continued, does not appear to be a necessary condition of a complete seisin, or its non-continuance to invalidate the *hiba* " referring to *Jafier* v. *Hubshee*, 1 S. D. A. Rep. of Beng. 12 ; Morl. *Dig.* " Gifts " pl. 55, p. 268 ; cf. *Kandath V.* v. *Musalian V.*, (1907) 30 Mad. 305; *Doe dem. Ramtono* v. *Jeenut*, (1843) Fulton, 152, 154. (" It would be absurd to suppose the necessity of the husband's never occupying those premises which he has given to his wife.") This case is respectfully doubted in other respects : s. 410, com., p. 458, *n.* 32.

[29] Domat, I. 847, s. 2132, Code, vii. 32.

[30] " Upon this subject of POSSESSION, much importance attaches to the NATURE OF THE PROPERTY itself."—*Kuthali Moollavar* v. *Peringati Kunharan Kutty*, (1921) 48 I. A. 395, 398, (MAD.). See s. 382A, com.

[31] *Majma-ul-Anhar*, 342, cited & transl. Ameer Ali, I. 42 (90). Sect. 382A, com.

see s. 437, p. 471. Under the Indian Contract Act, IX. of 1872, s. 149, delivery to the bailee may be made by doing anything which has the effect of putting the goods in the possession of the intended bailee or of any person authorized to hold them on his behalf. The Transfer of Property Act, s. 123, recognizes as an alternative for delivery of moveable property, the execution of a registered instrument of transfer, but that section does not apply to Muslim.[32] See s. 384, pp. 417 f.

SECTION 390. (1) Possession of movable property. Contract Act, Transfer of Property Act.

391. An entry in books of account that a sum of money has been paid over to the donee, does not take the place of transfer of possession or in itself complete the gift.[33]

(2) Book entry as transfer.

392. A gift of immovable property, in the occupation of the donor, is[1] completed by his vacating[2] it and ceasing to exercise any rights over it,[3] and placing the donee in such a position that he can take possession if he chooses.[2] The donor may, to complete the gift, take a lease of the property from the donee, the donor paying rent for occupying it himself.[4]

(3) Possession of immovable property: (*a*) Vacating. (*b*) Lease.

Illustration. D is living in a mansion, and purports to make a gift of it saying to the donee: "Take possession," or "I have delivered." The gift is not valid. The result would be the same if instead of the donor, his people, or his goods, were

32 Trans. of Prop. Act, s. 129; cf. Ind. Contr. Act, ss. 90-94: delivery of articles sold.

33 *Mahomed Husein* v. *Aishabai*, (1934) 36 Bom. L. R. 1155; *Sir Jamsetji Jijibhai* v. *Sonabai*, (1865) 2 Bom. H. C. R. 133, 137; *Hariram Serowagee* v. *Madan Gopal Bagla* [1929] AIR (P.C.) 77 = (1828) 31 Bom. L. R. 710, 713: (Lord Sumner: "The ACCOUNTS in themselves are mere book-entries & do not confer or determine in rights; but whatever else they show, they do not show completed gifts to Mahadevi. It is not pretended that Mahadevi received any money & then deposited it....or that she ever in fact accepted these gifts. Nor did Brijcumari make herself the bailee of Mahadevi by any unequivocal act which changed the character of her own continued possession.") See also *Ibrahimbhai* v. *Fulbai*, (1902) 26 Bom. 577; *Manchershaw Narielwala* v. *Ardeshir N.*, (1908) 10 Bom. L. R. 1209, 1217, reversed, (1912) 12 Bom. L. R. 53; *Emnabai* v. *Hajirabai*, (1888) 13 Bom. 352 (acts of ownership may, however, be evidence of possession); see s. 404, com.

1 *Is* in s. 392 in contradistinction to *may* in ss. 393-395; s. 392 represents net result that has to be brought about; ss. 393-395 refer to what, in law, amounts to compliance with s. 392. In first sentence simplest & most primitive condition of utilizing property contemplated—where donor directly in occupation, & donee expected to derive equally direct benefit.

2 On meaning of "VACATING PROPERTY" see s. 383, com. Cf. *Zohooroodeen Sirdar* v. *Baharoollah S.*, (1864) 1 Bom. H. C. R. 157; *Gulam Jafar* v. *Masludin*, (1880) 5 Bom. 238, 243 (par. 4).

3 Keeping any article whatsoever, "even a straw," belonging to donor, in subject of gift, technically infringes rule of completely vacating: but this rule not enforced rigidly, especially where donee is near relation of donor; (*Bibi*) *Sultan Khaver* v. (*Bibi*) *Rukhia*, (1905) 25 Bom. 468.

4 *Rajabai* v. *Ismail Ahmed*, (1870) 7 Bom. H. C. R. (O.C.J.) 27, 31-33 (no lease proved; but assumed that possession may be given in this manner); (*Bibi*) *Khaver Sultan B.* v. (*Bibi*) *Rukhia S.*, (1905) 25 Bom. 468 (donor paid to donee after gift, Rs. 30 for board & lodging); *Humera Bibi* v. *Najmunnissa*, (1905) 28 All. 147; *Kandath* v. *Musaliam*, (1907) 30 Mad. 305. See s. 393, *nn.*

SECTION 392.

in the mansion.[5]—*sed quaere.*[6] The inference to be drawn seems to be that the gift of a house in which there are goods of the donor is invalid if the continued occupation of the house with the goods was of right, and not by the licence of the donee.[6] See s. 383, com., pp. 415 ff.

(*c*) Customary control.

"It (delivery of possession) is the transfer from the transferor to the transferee of the customary (urfiya) control over the thing. See the Jawahiru'l Kalam, cited in s. 382 A, com. par. 5, pp. 408 f.

(*d*) Attornment by tenants transfers possession.

393. Possession of immovable property occupied by tenants may[7] be transferred by the donor requiring the tenants[8] to attorn to the donee.[9]

(*e*) Receipt of portion of rent.

393A. Possession of shares[10] in Zamindari villages and parcels of land, (where physical possession is impossible) may[11] be transferred by receipt of the appropriate portion of the rent or income.[12]

[5] Bail. I. 520 (*ll.* 1-4) (528, par. 1). But see Bail. I. 530 (539) *ll.* 2-4 : this does not apply to minors. See also Macn. 231, Prec. XXII. on Gifts. *Contra*, (*Shaik*) *Ibhram* v. (*Shaik*) *Suleman*, (1884) 9 Bom. 146, 150 ; (*Bibi*) *Khaver Sultan* v. (*Bibi*) *Rukhia*, (1905) 29 Bom. 468 = 6 Bom. L. R. 983 ; *Mathar Saheb* v. *Hoosain S.*, (1912) 23 Mad. L. J. 734 (authorities collected) ; *Danoo Darjee* v. *Momatajoddi Bhuiya*, (1909) 17 Cal. L. J. 85.

[6] *Mathar S.* v. *Hossain S.*, (1910) 23 Mad. L. J. 734, 737 (s. 392, *ill.* "based on the authority of Kazi Khan's *fatwa*, is cited in some later collections of *Fatwas* or opinions of jurists & commentators, with disapproval.") See also s. 392, com.

[7] Note that s. 393 runs : "*may* be transferred." Mode in which transfer would be most completely transferred referred to in s. 392. Honest endeavour to transfer possession in another way may be equally efficacious though perhaps more difficult of proof. In every case, question depends on result of acts by which possession purported to be transferred—whether or not resulting in donee, deriving benefit of subject of gift (i.e. its produce, or income) after gift : s. 382A.

[8] *Leigh* v. *Dickeson*, (1884) 15 Q. B. D. 60, 66 (TENANT IN COMMON may be considered as holding exclusive possession of house owned by him in common with other co-tenants, where there is lease from other co-tenants to him).

[9] (*Shaik*) *Ibrahim* v. (*Shaik*) *Suleman*, (1884) 9 Bom. 146, 150 (par. 3) ; *Sharifa B.* v. *Gulam Mahomed Dastagir K.*, (1892) 16 Mad. 43, 48 ; *Amina B.* v. *Khatija B.*, (1864) 1 Bom. H. C. R. 157, 162 (par. 2) ; *Mullik* v. *Muleka*, (1884) 10 Cal. 1112, 1124 ; cf. *Khajooroonissa* v. *Rowshan Jehan*, (1876) 3 I. A. 291 = 2 Cal. 184, 197 (*ll.* 17-18) ; *Sajjad Ahmad K.* v. *Kadri B.*, (1895) 18 All. 1 (gift of zamindari rights, held directly under government, in occupation of tenants, completed by requesting tenants to pay rents to donee, & MUTATION in Collector's books) ; (*Bibi*) *Khavar S.* v. *Bibi Rukhia*, (1905) 29 Bom. 468 ; *Mathar S.* v. *Hossain S.*, (1910) 23 Mad. L. J. 734, 737 ; *Muhammad Hamidulla K.* v. *Md. Majidulla K.*, (1917) 52 Punj. Rec. 356, 365-366.

[10] *Midnapur Zamindari Co. Ltd.* v. *Naresh*, (1924) 51 I. A. 293, 296 (CAL.) (CO-SHARERS holding lands in common : each co-sharer (i) entitled to cultivate (in his own interest) in proper husbandlike manner any part not cultivated by another : but (ii) liable to pay to his co-sharer compensation in respect of such exclusive use : (iii) such exclusive use no ouster ; (iv) if co-sharers cannot agree how lands held in common, may be used, remedy of co-sharer objecting to exclusive use by another co-sharer is obtaining PARTITION.)

[11] See ss. 392, 393 "is," "may," see *nn.* 1, 7.

[12] *Sadik Husain Khan* v. *Hashim Ali K.*, (1916) 43 I. A. 212, 222, *ll.* 1-5 = 38 All. 627, 646 (in case of undivided shares in zamindar villages & parcels of land, physical possession is impossible, & "as to them receipt of appropriate portion of rent or income issuing out of or derived from them is the only form the necessary possession could assume.").

393B. Possession of the equity of redemption of immovable property in the possession of a mortgagee, may be transferred by the donor giving to the mortgagee notice of his having conveyed to the donee the property subject to the mortgage, and permitting the donee to exercise all acts of ownership that may be exercised by the owner of the equity redemption.[13]

SECTION 393B.
(f) Notice to mortgagee.

394. Possession of incorporeal property (other than an actionable claim)[14] may be transferred by the donor transferring to the donee such possession as the nature of the property permits, and divesting himself of all his rights in it.[15]

(4) Where subject of gift is incorporeal.

So a gift of Government promissory notes may be perfected by transferring and endorsing the notes to the donee.[16] Similarly, if the donor dismisses her servants employed on the property forming the subject of gift, and after the date of the gift, the tahsildars are employed and paid for by the donees, and they collect rent for the donees, the gift is perfected.[17] On the other hand, where money is deposited in a bank, and the deposit receipt is marked "not transferable," mere delivery of the receipt does not operate as a gift : [18] nor does a mere book entry : s. 390.

1.—Government promissory notes
2.—Zamindary.
3.—Money.

The following suggestive observations[19] are cited in the hope, that the analogy may indicate how the Muslim law may develop : "If seisin means possession and if possession expresses the fact of physical control exercised by a person over a thing, two consequences would seem to follow : In the first place two persons cannot at the same time both exclusively possess the same thing....But in spite of this theoretical difficulty, the conception of seisin was applied not only to the interest of the tenant who holds in demesne,[20] but also to the interest of the Lord who holds in service ; [20] and not only to the tenant

Extension of doctrine of seisin.

Two persons : both with exclusive seisin.

[13] See s. 370, pp. 392 f.

[14] Trans. of Prop. Act, ss. 130 ff. on ACTIONABLE CLAIMS.

[15] See com. ; *Rahim Bakhsh* v. *Muhammad Hasan*, (1888) 11 All. 1, 9 (par. 2), 10 par. 2) per Mahmood, J. ; *Mohammad Abdul Ghani* v. *Fakhr J.*, (1922) 49 I. A. 195, 207, (*ll.* 15-18) 209, 210 ; cf. *Nizamuddin* v. (*Mt.*) *Zabeda B.*, (1874) 6 N. W. 338, 341 ; *Shahzadee Hazara* v. *Khoja Hossein A. K.*, (1869) 12 W. R. 498 ; *Mathar Sahib* v. *Hossain S.*, (1910) 23 Mad. L. J. 734 (per Abdur Rahim, J.) ; *Samsul Nehar* v. *Moulvi Mahiuddin*, (1920) 25 C. W. N. 310. "Where INCORPOREAL RIGHTS over real estate (or immovable property) consist in or admit of EXCLUSIVE ENJOYMENT the *de facto* exercise of them is ANALOGOUS TO POSSESSION, & is protected by the same remedies" : Pollock & Wright, *Possession*, 35. See *n.* 23.

[16] (*Nawab*) *Umjad A. K.* v. (*Mt.*) *Mohumdee B.*, (1867) 11 Moo. I. A. 16 = 10 W. R. (P C.) 25 ; *Sahibunnissa* v. *Hafiza*, (1887) 9 All. 213 (pension under Act XXIII. of 1871) ; cf. *Sajjad A. K.* v. *Kadri B.*, (1895) 18 All. 1 ; *Anwari B.* v. *Nizamuddin*, (1896) 21 All. 165.

[17] *Mullick A. G.* v. *Muleka*, (1884) 10 Cal. 1112. See s. 369, com. (iv).

[18] *Aga Mahomed J. B.* v. *Koolsom B.*, (1897) 24 I. A. 196 = 25 Cal. 9.

[19] Holdsworth, *Hist of Eng. L.*, III. 96.

[20] Cf. "A lord has a free-hold tenant & that tenant has been duly performing his services. How shall we describe this lord's position ? Shall we say that he is seised of the tenant's homage & fealty & services, or shall we say that he is seised

SECTION 394. of the particular estate, but also to the reversioner or remainder-man. As we have seen, it was this extension of the doctrine of seisin which was a principal cause for the evolution of the conception of estates in the land. In the second place it is difficult to conceive of the possession of an incorporeal thing. But notwithstanding this difficulty the conception of seisin was extended to the large and miscellaneous list of incorporeal things known to the mediaeval common law ; and this extension has given rise to some curious and long lived rules, firstly as to the transference or creation of these incorporeal things, secondly, as to the manner in which they were regarded by the law, and thirdly, as to the conditions under which they could be enforced and protected." [19]

Of incorporeal things.

(B) Suit.

394A. Possession may be transferred by the donor associating the donee with himself in instituting a suit and obtaining a decree for possession.[21]

(C) Substitutes for physical possession.

395. The donor may complete the gift by transferring symbolical [22] or constructive possession of the subject of the gift to the donee.[23]

i.—Symbolical or constructive possession.

" The Muhammadan law requires that the donor should be in actual or at least constructive possession, and that he should give actual or at least constructive possession of the property to the donee." [24] This was obiter. Even constructive possession not having been given, Sauses, C. J. said that " handing over symbolical possession of a house or property by keys, etc," [25] is a sufficient transfer of possession. This was also obiter, as the donor was the husband and he actually went out of the house before witnesses.[26]

of the land? We may take whichever course we please, but if we say that he is seised of the land, we ought to add that he is seised of it not in demesne, but in service."—Pollock & Mait., *Hist. of Eng. L.* (1895) II. 124, par. 2.

[21] *Ahmadi B.* v. *Abd. Aziz,* (1927) 49 All. 503.

[22] SYMBOLICAL POSSESSION by sticking up bamboo in some prominent place, accompanied by beat of drum or some sort of proclamation : Tr. of Prop. Act, s. 54, *per* Prinsep, J. *dissentiente* : *Narayan C. C.* v. *Dattaram R.,* (1882) 8 Cal. 597, 605 ; cf. *Abdul Cadar* v. *Tajoodin,* (1904) 6 Bom. L. R. 263, 261. Distinction between (1) symbolical delivery, and (2) handing over keys for enabling person to take possession & exercise rights. Cf. " it never was imagined....that DELIVERY OF A MERE SYMBOL in name of the thing would be sufficient to take it out of that statute : yet notwithstanding, delivery of the key of bulky goods....has been allowed as delivery of the possession, because it is the way of coming at the possession or to make use of the thing : &, therefore, the key is not a symbol, & would not do," per Lord Hardwicke, *Ward* v. *Turner,* (1751) 2 Ves. Sen. 431, 442.

[23] *Ismal* v. *Ramji,* (1899) 23 Bom. 682 ; *Rahim* v. *Imam,* (1912) 17 Cal. L. J. 173. Exclusive control & deriving benefit from subject of gift necessary : s. 382A. *Ebrahim* v. *Bai Asi,* (1933) 58 Bom. 254 ; *Syed Ali Zamin* v. *Syed Akbar A. K.,* (1937) 64 I. A. 158, 164.

[24] *Ismal* v. *Ramji,* (1899) 23 Bom. 682 citing *Mohinudin* v. *Manchershah,* (1882) 6 Bom. 650 (F. B.); (*Shaik*) *Ibhram* v. (*Shaik*) *Suleman,* (1884) 9 Bom. 146 ; *Meherali* v. *Tajuddin,* (1888) 13 Bom. 159.

[25] *Amina B.* v. *Khatija B.,* (1864) 1 Bom. H. C. R. 157, 160, 161 (par. 3, 4). Cf. Ameer Ali, I. 60 (177): " according to the Sheikh & its authors of *Sarair, Ghunia,* etc. seisin may be either actual or constructive."

[26] See also *Moosabhai* v. *Yacoobhai,* (1904) 29 Bom. 267 = 7 Bom. L. R. 45.

SECTION 395.
ii.—Constructive or symbolical transfer explained.

Constructive or symbolical transfer of possession can in reality be only evidence of a real transfer of possession. For transfer of possession means (to adopt the language of the Jawahiru'l Kalam) transfer of the "customary control" of the subject of gift.[27] If, for instance the donor hands over the key of the gate of an unenclosed pasture-land to the donee, but continues to take his cattle on to the land and exercises the same customary control, or acts of ownership usually exercised over it, as before, the handing over the key would hardly symbolize any transfer of possession; but the case might be quite different if the land were a vacant building site completely surrounded by a boundary wall, and there were no means of entering it except through one gate; and no object in entering the land except for purposes of building upon it, there being no control customarily exercised over it, except holding the key. The real object of symbolical or constructive possession is to indicate a transfer where no other direct physical act can indicate it. Where there is any immediate benefit to be derived from possession, the reaping of that benefit is taking possession; and though symbols may be useful to fix the exact point of time, they cannot take the place of actually deriving the benefit from the subject of the gift; nor of exercising acts of ownership over it.

iii.—Delivery: benefit: acts of ownership.

(D) Change of character of donor's possession.

395A. If the donor changes the character of his possession, as, e.g. if from holding as owner, he holds as trustee, it may operate as a transfer of possession.[1]

Illustration.

Mohammad Abdul Ghani *v.* Fakhr J. B. 49 I. A. 195.

Usufruct reserved.

One[1] Munni Bibi had under Hanafi law the right as owner to dispose by gift or by will of certain taluqdari property (p. 206). She executed (7 Mar. 1884) a document in favour of her husband's nephew Lutfullah, making to him a gift of her movable and immovable property and all her zamindari and lambardari estate, RESERVING to herself FOR her LIFE, THE USUFRUCT of certain properties (mentioned in a list of "exempted" properties), "without power of alienation by mortgage, sale or gift": stating "and after me the donee shall also be the owner of the said exempted property" (p. 203). On the same date the donee obtained possession and mutation of names in his favour of all the other property; he paid the government revenue on all the property, including the exempted property (p. 210), and got possession of the exempted property on the death of the donor in 1906. *Held*, (1) that the deed was intended to be and to operate as an immediate and irrevocable disposition of all the property, subject to the reservation for her own use during her lifetime of the usufruct of the exempted property, and (2) it must be construed as a deed of gift and not as a will;[2] (3) that the whole zamindari property

[27] See s. 382 A, 408 : 5; also per Lord Hardwicke : *Ward* v. *Turner*, (1751) 2 Ves. Sen. 421, 442 (cited p. 426, *n.* 22).

[1] *Mohammad Abdul Ghani* v. *Fakhr Jahan Begam*, (1922) 49 I. A. 195, 209, 210 (ALL.); cf. *Chandsaheb* v. *Gangabai*, (1921) 45 Bom. 1296, see s. 370; *Hashimbi* v. *Ajmalbi*, (1924) 48 Bom. 396. Observe, however, that s. 395A merely puts situation in new form : question still remains, what acts constitute change in character of possession so as to transform possession as owner into possession as trustee; for answer see s. 382 A, pp. 406 ff : benefit of property must be transferred.

[2] Whole property of which gift was made treated as single unit of property.

SECTION 395A. iv.—Possession of part constructive possession of whole.

and not parts of it only must be regarded as one property, the taking possession of any part being constructively a taking possession of the whole, and the donee must be regarded as having been in constructive, although not in physical, possession of the corpus of the exempted property from 1884 to 1906. (4) If, between 7 Mar. 1884 and the death of the donee (1906), he had received any of the rents and profits of the exempted property he would be held to have received them as TRUSTEE for the donor, although the title to the corpus of the exempted property was in himself.[1] See s. 366 A.

(E) Intention to transfer possession unequivocally manifested.

396. Where[3] the intention[4] of the donor to complete a gift by transferring possession has been unequivocally manifested, effect will, as far as possible, be given to his purpose.[5] In particular, where a gift is made of a house, part of which was, prior to the gift occupied by the donee, and part by the donor, the unequivocal manifestation by the donor of an intention[6] to transfer complete and exclusive possession of the

View taken that donor transferred whole property immediately, presumably stipulating for return during her life time of usufruct of part of the whole property transferred : so that (*Nawab*) *Umjad A. K.* v. (*Mt.*) *Mohumdee B.*, (1867) 11 Moo. I. A. 517 (see s. 352, pp. 362 ff.) became applicable. Where however, there is transfer of property RESERVING TO DONOR USUFRUCT FOR LIFE, the facts may take another aspect : usufruct & corpus being different : (i) so far as bare corpus is concerned there may be taken to be complete immediate transfer ; (ii) as to usufruct, there is transfer, postponed to death of donor : this would bring the transfer of that part of the usufruct which will accrue after death of donor under testamentary disposition. If this distinction were observed there would (*submitted*) be no conflict with rules restricting bequests to bequeathable 1/3. See question discussed at length as to *wakfs* : s. 366 A, com., pp. 382 ff ; and as to wills s. 580 A.

[3] Sect. 396 based on West, J.'s judgment : *Ibhram* v. *Suleman*, (1884) 9 Bom. 146. His somewhat complicated language is retained : I. General proposition : (*a*) where declaration of gift made, & (*b*) intention to transfer possession clearly proved, there (as far as possible) effect will be given to clearly proved intention, viz. if possible it will be held that possession has been transferred as intended : cf. s. 403, (p. 438). II. Particular application of general proposition : where gift intended of whole of house occupied jointly by donor & donee : parts in possession of each being immediately connected one with other,—in such cases, if intention to transfer possession of whole house clearly made out, that intention will be given effect to ; the facts that (i) donor did not actually vacate entire house, (ii) donee did not formally take exclusive possession of whole & every part of house, will not defeat intention of donor to give possession of whole.

[4] INTENTION of donor to transfer possession must be proved : it depends on facts in each particular case : *Ma Mi* v. *Kallander Ammal* No. 1, (1926) 54 I. A. 23, 29-31 (evidence of intention : mutation of names : husband (donor) got wife (donee) to execute power of attorney authorizing another person to manage the lands) ; *Abdul Majid* v. *Husseinbee*, (1919) 22 Bom. L. R. 229 (gift to maternal grandson held not completed) ; *Kadarbhai* v. *Nanibibi*, (1926) 28 Bom. L. R. 1098, 1105. One of the questions in such cases : whether residence of donor along with donee, sufficient to detract from value of evidence that there was intention to complete gift by transfer of possession : SUBSEQUENT RESIDENCE OF DONOR WITH DONEE, may be explained by their relation, & may not be inconsistent with view that possession of whole of property actually passed : *Kandath Vettil* v. *Musaliam Vetti P.*, (1907) 30 Mad. 305 ; *Alla Pichai Tharagan* v. *Mahomed Moideen T.*, (1914) 15 Mad. L. T. 216.

[5] Cf. Bail. II. 304, *n.* 8 ; *Ma Mi* v. *Kallander* (No. 1), (1926) 54 I. A. 23, 29 ; *Mohammad Sadiq* v. *Fakhr J.*, (1931) 59 I. A. 1, 13, 14.

[6] Part occupied by donee must be in immediate connection with part in occupation of donor : cf. ss. 401, 389, pp. 437, 422. *Baldeo Prasad* v. *Shubbratan*, (1936) 34

SECTION 396.

whole house,[7] may put the donor out of possession, and the donee into possession, of the whole,—notwithstanding that there is (on the part of the donor) no actual physical departure, and (on the part of the donee) no formal entry into exclusive possession of the whole.[8]

When donor and donee both on the premises.

In the leading case,[9] West, J. observed, "As to the delivery of the house, the principle is to be borne in mind that when a person is present on the premises proposed to be delivered to him, a declaration of the person previously possessed, puts him into possession.[10] He occupies certain part, and this occupation becoming actual possession, by the will of the parties, extends to the whole which is in immediate connection with such part, where the possession is rightfully, though not where it is wrongfully, taken—ex parte Fletcher.[11] An appropriate intention, where two are present on the same premises, may put the one out of, as well as the other into, possession, without any actual physical departure or formal entry, and effect is to be given, as far as possible, to the purpose of an owner whose intention to transfer has been unequivocally manifested." [9] "This decision has now stood," said Jenkins, C. J. "in the authorized reports for over 20 years, and it has never, as far as I can find, been questioned. On the contrary, it has since been referred to as containing true exposition of the law in Ismal *v.* Ramji Sambhaji,[12] to which Tyabji, J. was a party, while in Rahim Bakhsh *v.* Muhammad Hasan,[13] Mahmood, J. in delivering the judgment of the Court, expressly distinguishes the case then before him from so much of the decision in Shaikh Ibhram *v.* Shaikh Suleman [9] as related to the house, without in any way suggesting that the law as laid down on this point was erroneous. The decision is also cited by Muttusami Ayyar, J. in Sharifa Bibi *v.* Gulam Mahomed Dastagir Khan.[14] Here then, if anywhere, it is best stare decisis." [15]

Ibhram *v.* Suleman. 9 Bom. 146.

A. L. J. 590 (father-in-law to daughter-in-law : gift of half of house in common occupation of both).

[7] "An appropriate intention" = intention appropriate to transaction, viz. intention to transfer complete & exclusive possession : *Ibhram* v. *Suleman*, (1884) 9 Bom. 146. There must be some evidence of such intention : *Abdul Razak Saib* v. *Zainab Bi*, (1932) 63 M. L. J. 887 ; *Kadarbhai* v. *Nanibibi*, (1926) 28 Bom. L. R. 1098. Cf. s. 403.

[8] (*Shaik*) *Ibhram* v. (*Shaik*) *Suleman*, (1884) 9 Bom. 146, 150, 151 ; approved *Mohammad Sadiq* v. *Fakhr J.*, (1931) 59 I. A. 1, 3, 14 ; 9 Bom. 146 followed (*Bibi*) *Khaver* v. *Bibi Rukhia*, (1905) 29 Bom. 468 ; *Humera* v. *Najmunnissa*, (1905) 28 All. 147 ; cf. *Rahim* v. *Md. Hasan*, (1888) 11 All. 1, 12 ; *Mathar* v. *Hossein*, (1912) 23 Mad. L. J. 734 ; *Danoo Darjee* v. *Momatajoddi Bhuiya*, (1909) 17 Cal. L. J. 85 ; *Alla Pichai* v. *Moideen T.*, (1914) 15 Mad. L. J. 216, 223 ; *Mt. Munifa* v. *Fateh*, (1914) 23 Ind. Cas. 453 = 17 O. C. 60.

[9] (*Shaik*) *Ibhram* v. (*Shaik*) *Suleman*, (1884) 9 Bom. 149.

[10] Domat, *Civil Law*, I. 863.

[11] *Ex parte Fletcher*, (1871) 5 Ch. D. 809 (illegal attempt to get possession, which failed).

[12] *Ismal* v. *Ramji Sambhaji*, (1899) 23 Bom. 682.

[13] *Rahim Bakhsh* v. *Muhammad Hasan*, (1888) 11 All. 1, 12.

[14] *Sharifa B.* v. *Gulam Mahomed Dastagir Khan*, (1892) 16 Mad. 43.

[15] Followed : *Mathar* v. *Hossain*, (1910) 23 Mad. L. J. 734 ; approved in *Mohammad Sadiq* v. *Fakhr J.*, (1931) 59 I. A. 1, 13 (OU.).

SECTION 397.
IV. POSITION OF PARTIES AND TRANSFER OF POSSESSION
(A) MINOR DONEE.

397. Possession on behalf of a donee who is a minor, or of unsound mind must normally [16] be taken by the guardian of the donee's property.[17]

(1) Guardian.

(1) Where the donee is a married minor woman, possession may be taken either by herself or her husband [18] provided that she is old enough to permit consummation of marriage; but otherwise possession by her husband, is valid only if she is in his custody; in other cases her guardian may alone take possession on her behalf.[18]

Illustrations.

(2) D makes a gift to an infant, and gives possession to the brother of the infant's grandfather. The seisin of the brother "will not be legally sufficient, unless the infant was living under his protection." [19]

(3) *D* makes a gift to a boy whom she has in her custody, and has been treating as her adopted son. She continues to be in possession of the subject of gift; it was *held*,[20] that the gift was valid though possession was not transferred to the donee, or to his de jure guardian, and notwithstanding that the father of the donor was living. But that decision is over-ruled. The rule (that possession of the de facto guardian is enough) does not apply to the mother or any other person maintaining the child unless the father is dead and no guardian has been appointed.[20]

(4) Where a father has given a mansion to his little son, in which there are goods belonging to himself the gift is lawful and approved.[21]

Gift to minors.

The Fatawa Alamgiri, chapter VI, Book on gifts, is devoted to the special rules relating to gifts to minors. (The law as to the persons who are entitled to be guardians of the property of a minor or lunatic must be borne in mind.)

1.—Gift by father.

The three main propositions are: I. A gift by a *father* to his minor child is complete by the contract. (Ordinarily the contract would mean the declaration and acceptance, but in this connection presumably it means the mere declaration): the subject must be in the donor's possession or control: s. 400(3). II. As to gifts by a *mother*: (1) the subject must be in her own hands, (2) the father must be dead, without having appointed an

2.—By mother.

[16] Sect. 397 deals with NORMAL CASES: ss. 398-401, pp. 432-438, with SPECIAL cases, viz., where guardian or de facto guardian or quasi-guardian is himself donor.

[17] Hed. 484 (col. ii., par. 2, 6); Bail. I. 503 (*ll.* 6-7) (511); II. 204; Macn. 213; s. 398 (possession of *de facto* guardian); *Daaimu'l-Islam* to same effect; cf. *Mohinud-in* v. *Manchershah*, (1882) 6 Bom. 650, 660 (par. 1), 662 (par. 2, last 2 sent.); *Jabedanessa* v. *Nazibal Islam*, (1910) 15 Cal. W. N. 328.

[18] Bail. I. 530-531 (539-540): reason: husband entitled to custody of wife after she is old enough for consummation; see s. 24(1) & s. 3; Hed. 484 (col. ii. par. 6). By this rule ss. 24(8), 358A (status of married woman in regard to gifts not different from that of unmarried one) not contravened; marriage creates relation which gives to husband rights of custody over wife: this alters circumstances: rights & liabilities remain same, though their effect altered by altered circumstances.

[19] Macn. 213 (case 13); 223 (case 29).

[20] (*Mt.*) *Banoo B.* v. *Fukheroodeen Hosein*, (1816) 2 S. D. A. (CAL.) 180: overruled by *Musa* v. *Kadar*, (1928) 55 I. A. 171, 179 (not accepting Ameer Ali, *Mah. Law*, I. 113-114 (131,182).). See also s. 398A com. *n.* 8.

[21] Bail I. 530 (539).

executor.[22] III. As to gifts by *every other person* who has care of the child, the text proceeds as follows (the examples being transposed to *nn.*):

SECTION 397.
3.—By other person who maintains minor.

(Hanafi law.)

"Where the donee is a minor, or of unsound mind, the authority to take possession on his behalf is in his guardian (wali).[23] The rule is the same whether or not the minor [or lunatic] be living in the family[24] of these persons. Where the [guardian[25]] is absent at a distance without any communication, possession may be taken for a minor by any person who follows him next in guardianship. And with regard to persons other than the [guardian] such as the brother,[26] paternal uncle,[26] mother,[26] and other relatives,[26] they have all[27] the authority to take possession of a gift for a minor if he is in their family.[24] Similarly, when the minor is in the family[24] of the executors of the said persons, the executors may take possession.[27] And so when a stranger maintains an orphan,[28] who has no other (relation), the stranger also may effectually take possession of the gift.[27] In none of these cases does it make any difference whether or not the minor has sufficient intelligence to understand what taking possession implies. But in all cases it is assumed that the father[29] is either dead, or if alive, is absent at such a distance that he cannot be communicated with. When, however, the father is living and present, and the minor is in the custody of the persons referred to,[30] the question arises whether it [viz. possession taken by them] would be valid.[31] No express mention has been made of this in the books, except that it is said that in the case where a stranger maintains an orphan who has no one else to maintain him, it would be valid for him to take possession of the gift on his behalf; and this provision implies that the taking possession by these persons would not be valid when the father is present—it being said in the case of the paternal grandfather also that [even] he cannot take possession on behalf of the minor, in case the father is alive. There is no express provision dealing with the case where the minor is in his custody and [i.e. as distinguished from the case] where he is not. But from what is expressly stated, it is implied

Possession by—

i.—Guardian of his property

ii.—Guardian of person [of property] having custody of minor.

iii.—Stranger having custody when there is no relation.

iv.—*Semble*, if father present no one else can take possession.

v.—Grandfather.

[22] If executor appointed, *he* is guardian of property & *he* must take possession. Mother (1) must have such control over property that she is in position to make gift of it; (2) she must be the person reasonably expected to be in charge of property transferred to minor donee, if she purports so to take charge of it.

[23] *Wali* = "guardian of property:" this is shown by words immediately following: "who is first the father, then the father's executor, then his grandfather, then the executor of the executor, & then the *Kazi*, & then the person appointed by the *Kazi*," : s. 252.

[24] *Iyal* = family; *iyalat* means custody: instead of translating "if he is in their family," it might be better rendered "if he is living in their custody."

[25] In original: "the father or his executor, & the grandfather or his executor," and two lines lower down: "the father or grandfather." See *n.* 23.

[26] Viz. guardians of person but not of property.

[27] Each of these is said to be a rule of *ihtihsan*, "liberal construction."

[28] *Yatim* in original.

[29] This must refer, *semble*, not only to father but also to his executor to grandfather, & grandfather's executor: *n.* 23. Possession taken by uncle invalid if father's executor present: this is mentioned 16 *ll.* later.

[30] I.e. not father, but brother, uncle, mother, & other relations.

[31] On general reasoning result reached in *Musa* v. *Kadar*, (1928) 55 I. A. 171 (BOM.) that possession taken by other than father not valid.

SECTION 397.
vi.—Father's executor.
vii.—Paternal uncle.
viii.—Brother.
ix.—Mother.

that it would not be valid [even where he is in the custody of the grandfather]; so it is in the Zakhira.[31] In the case where the minor is in the custody of his paternal uncle and in his family,[24] and a gift has been made to the minor, and the executor of the father is present, and the uncle has taken possession of the gift, it is said that his possession is not valid, and if the brother or the paternal uncle or the mother takes possession of it, while the minor is in the custody of a stranger, it would not be valid. But if the stranger in whose custody the minor is, takes possession of it, it would be valid. So it is in the Fatawa Qazi Khan." [32]

(Shia law.) Guardian of property must take possession.

Under Shia law, possession on behalf of a minor or lunatic must be taken by the father, or the grandfather, or "the legal guardian, or the judge," i.e. those alone who have the right to be, or to appoint, guardians of the property.

Circumstances.

The case takes different aspects depending upon the presence or absence of any of the following incidents or circumstances: (*a*) the donor being the legal or de facto guardian of the property of the minor, and being entitled or naturally expected to take possession of the minor's property; (*b*) the donor having lawfully the custody of the minor's person (being lawful guardian of his person); (*c*) some person (not being the legal guardian, but having, either authorizedly or without objection, custody of the minor or of property on his behalf) as a matter of fact taking possession of a gift on behalf of a minor from a donor who is not the legal guardian of the minor's property.[33]

(2) Transfer of possession to PERSON WHO HAS CUSTODY though not legally guardian of property.

398. In the absence [1] of the legally entitled guardian of the donee's property,[2] possession may be taken on the donee's behalf (1) under Hanafi law,[3] by any person who has custody, of the donee; (2) under Shia law (the Sharaiu'l-Islam states) "by the legal guardian, or the judge."

(3) Implied authority from guardian.

398A. Where a Muslim minor or person of unsound mind is in the custody of a person other than his legal guardian, *semble,* the person having custody, may in a fit case be deemed to be impliedly authorized under s. 388, as an agent to take possession of gifts on behalf of the minor, whether the guardian is present or not.[4]

[32] *Fatawa 'Alamgiri,* III. 733 (Naval Kishore).

[33] Where law empowers any person to act as guardian of minor's property, there is corresponding duty so to act. Such person must of necessity be in possession of minor's property, including property given to minor as gift. It follows that an explanation is due of allegation that some person not having any such right or duty was selected by donor for entrusting subject of gift meant for minor. Why did donor avoid natural, normal, course of giving property meant for minor to his guardian?

[1] Absence said to = "distance of 3 stages": Macn., 206-207 (case 9).

[2] Absence of father is insisted upon; Bail. I. 530 (*ll.* 26-32) (539); same would apply in case of all legal guardians, as appears from *ill.* See s. 397, com.

[3] Bail. I. 530 f. (539 f.); II. 204. Sect. 398A, in first edition formed part of s. 398. See s. 398A, com.

[4] See s. 397, *ill.* (3). Submitted: fact that legal guardian permits another to

SECTION 398A. Implied authority of guardian to take possession.

The Fatawa 'Alamgiri [5] and Hidaya lay down that possession of a gift may be taken, on behalf of a minor, by a person who is the guardian, not of the minor's property, but of his person ; and, as an extension of this rule, anyone who has the actual care and custody of the person of a minor, is so authorized. The transfer of possession to such a person (the de facto guardian) is, however, valid only in case the father is absent. There may, no doubt, be cases where the father (or other legal guardian) may be deemed (by allowing another person to have the custody of the minor, or otherwise) to impliedly authorize that person to take possession of the subject of gift. The authorization may in a fit case be inferred barely from the fact that the legal guardian permits the other person to have custody of the minor. Such an implied authorization is alluded to in the Hidaya : " It is lawful for a husband to take possession of anything given to his wife, being an infant, provided she have been sent from her father's house to his ; because she is held by implication to have resigned the management of her concerns to the husband."[5] The next two sentences, however, restrict the case to the husband alone, and do not place even the mother in the same category.[6] The argument is that the authority to the mother and others is from necessity ; and no necessity arises unless the father is dead. These are rules of inferences to be drawn from facts : and the inferences to be reasonably made must alter with changed circumstances.[7] The significant distinction between (i) cases where there is no transfer of possession (or change in the enjoyment of the benefit : s. 400) and (ii) where there is a real transfer of the benefit to the minor but the legal guardian is not entrusted with the property, must be kept in mind. Sect. 398A is intended to cover the latter. So again, in Shia law only the father and grandfather and their executors can be guardians whether of property or of the person,[8] and the law is stated in much stricter terms in the

Quaere, whether custody implies (or includes) such authority.

have custody may justify the presumption. Macn. 206-207 (case 9) (mother held entitled to take possession in absence of father—gift being by herself). Benefit must accrue to minor.

[5] See s. 397, com. & p. 430, *n.* 17. [6] Cf. also rule about absence at distance.

[7] *Musa* v. *Kadar*, (1928) 55 I. A. 171 disapproves extending rule in s. 400 to cases where there is no transfer of possession at all. Such extension had in this work been objected to on principle. Case in s. 398A is where there is transfer, but not to legal guardian of property : donor ceases to exercise ownership over subject of gift & presumably minor derives benefit from it, through person in whose custody minor is living : real change in person deriving benefit is the crucial test & decisive factor as to transfer of possession : s. 400, *nn.* & com., pp. 434-6.

[8] Syed Ameer Ali, *Mahom. L.*, I. 113, 114 (182) : " When a gift is made to a minor, according to Hanafi law, the possession of any person in whose protection the infant is living is sufficient. Among the Shias there are two divergent views. According to the Muhaqqiq, possession should be taken on behalf of a minor by a person legally authorized to do so, or by the judge. According to the Shaikh & the Usuli jurists the possession of any person who is a guardian *de facto* is sufficient. But even according to the *Sharaiu'l-Islam*, when possession has been obtained, & held on behalf of a minor, by a person other than the father or grandfather, (or their executors) who are the guardian *de jure*, the Court will not allow the gifts to a minor to be invalidated." No authority is cited, but said in *n.* that " the point was decided in accordance with this rule by the Calc. H. C. ; " no particulars given. (*Mt.*) *Banoo Beebee* v. *Fukheroodeen Hosein*, (1816) 2 S. D. A. 180 = s. 397, *ill.* (3) (minor, adopted by donor as her son into her family : possession by her on behalf of minor, donee held sufficient to validate gift) ; now overruled : *Musa B.* v. *Kadar B.*, (1928)

SECTION 398. Shia texts.[8] In the converse case where the minor's property is dealt with, the law is no doubt much more stringent, and none but the authorized guardian can act on his behalf.[9] The guardian has no power to make an iwaz out of the minor's property, though iwaz makes the primary hiba irrevocable.[10]

(4) Possession to minor donee.

399. Possession of the subject of gift may be transferred to a person who has sufficient intelligence to take possession thereof, though he be a minor or of unsound mind.[11]

(5) Transfer of possession unnecessary where,—

400.[12] Neither express acceptance nor transfer of possession[13] is necessary for the completion of the gift, where all the conditions and requirements mentioned in this section are complied with, viz. where :—

Gift to minor : from guardian.

(1) the donee is a minor or person of unsound mind ;

(2) the donor is (*a*) the donee's father, or (*b*) the donee's father being absent,[14] the donor is the donee's grandfather, or any other person entitled (in the father's absence) to be the guardian of the donee's property,[15] or (*c*) the father [and grandfather][16] being absent,[17] and no guardian having been

55 I. A. 171 (rule is that gift invalid, unless possession delivered : exception in case of gift to minor by father or other guardian to be strictly construed).

[9] See ss. 269, 270.

[10] Bail. I. 535 (*ll.* 4-9, par. 3) (544).

[11] Hed. 484 (col. ii. par. 5); Bail. I. 351 (*ll.* 7-11) (540); Macn. 213.

[12] Sect. 400 = what was included in ss. 400-400A in last edition.

[13] The declaration of gift has in law effect of transforming possession of donor on his own behalf, into possession on behalf of donee, as guardian of donee's property. Hed. 482, 483, 484 (col. i., par. 4); Bail. I. 145 (par. 2), (507-508), 510 (*ll.* 18-20) (518-519), 529, 530-531 (538-559); II. 204; Macn., 212, K. 2; *Ameeroonissa* v. *Abedoonissa*, (1874-5) 2 I. A. 87, 104 (par. 4),(see *n.* 20) (referring on p. 98 to (*Nawab*) *Umjadally* v. (*Mt.*) *Mohumdee*, (1867) 11 Moo. I. A. 517 *q. v.*) : followed *Md. Sadiq* v. *Fakhr J.*, (1931) 59 I. A. 1, 15 (LUCK.); *Munno* v. *Jehandar*, (1866) 1 Agra 250 (no change in real NATURE OF ENJOYMENT); *Musa* v. *Kadar*, (1928) 55 I. A. 171 (see *n.* 17); *Ebrahim* v. *Bai Asi*, (1933) 58 Bom. 254 (test of transfer); *Gani Mia* v. *Wajid*, (1935) 39 C. W. N. 882, 885, col. ii.; *Subramania A.* v. *Mulla Veetill A. K.*, (1918) 35 M. L. J. 541; *Suna Mia* v. *S. A. S. Pillai*, (1932) 11 Rang. 109; *Moulvi Wajeed Ali* v. *Moulvi Abdool A.*, [1864] W. R. 127; *Hussain* v. (*Shaik*) *Mirza*, (1889) 13 Mad. 46; *Fatima B.* v. *Ahmed B.*, (1903) 31 Cal. 319; affirmed (1907) 35 I. A. 67 = 35 Cal. 271; (*Nabob*) *Amiruddaula Hussain* v. *Nateri*, (1871) 6 Mad. H. C. R. 356, 359; *Jabedanessa* v. *Nazibal Islam M.*, (1910) 15 Cal. W. N. 328 : *Giyasoodeen* v. *Fatima*, (1866) 1 Agra 238.

[14] See *n.* 17. This seems overlooked in such cases as *Subramania Aiyar* v. *Mulla Veettil Assan Koya*, (1918) 35 M. L. J. 541.

[15] Hed. 484 (mentioning (*a*) EXECUTOR appointed by father; (*b*) GRANDFATHER; (*c*) GRANDFATHER'S EXECUTOR : these relations have authority over orphan, as they stand in place of father" : ss. 385, 388, 397. When HUSBAND entitled to custody & charge of his minor wife, (s. 397, *ill.* (1).) he may take possession on her behalf. Bail. I. 530-531 (539-540); Hed. 484. *Abdul Majid* v. *Hussein*, (1919) 22 Bom. L. R. 229 (gift by mother held not established).

[16] Grandfather not expressly mentioned; but he is guardian in absence of father; & in father's absence is in same position as father. See *n.* 8.

[17] *Musa* v. *Kadar*, (1928) 55 I. A. 171, 175 f., 178 f., (BOM.) ("when the father who is the natural guardian of his infant children is alive & has not been deprived of his rights & powers of guardian, the rule will not apply" : donor, viz. grandfather,

appointed [18] the donor is the mother or other person who is maintaining the donee ; SECTION 400.

(3) the subject of gift is in the possession of the donor, or of some person holding it on the donor's behalf ; [19] and Possession of donor.

(4) there is a real and bona fide intention on the donor's part to transfer without consideration the ownership of the subject of gift to the donee : [20] a change in the mode of enjoyment [20] or a declaration of the donor that he retains possession on behalf of and as guardian of the minor,[21] may be evidence of such intention : the absence of a change in the mode of enjoyment is evidence of a want of such intention : s. 395 A.[20] Real bona fide intention.

(Abdul Rasul), had maintained & brought up his grandsons (donees) from time of their birth till his own death : but during that time father & mother of minor donees also living with donor, with occasional visits by father to his own land : these facts *held* insufficient to complete grandfather's gift without transfer of possession : exception will not be extended. See *nn.* 14, 18-25).

[18] Words of *Hidaya* cited in *Musa* v. *Kadar*, (1928) 55 I. A. 171, 179 : "The same rule holds when a MOTHER gives something to her infant son whom she maintains & of whom the father is dead & no guardian provided, & so also with respect to the gift of any other person maintaining a child under these circumstances." Hed. 484 (col. i., par. 4) ; cf. Bail. I. 529 f. (538 f.) : "In like manner as to gifts by a mother when....the father is dead without having appointed an executor. And so also as to gifts by every other person who has the care of the child."

[19] Bail. I. 529 (538) ; *Rahim* v. *Muhammad*, (1888) 11 All. 1 ; *Chaudhri Mehdi* v. *Muhammad*, (1905) 33 I. A. 68, 75 (ALL.) ; *Fakir Nynar* v. *Kandasawmy*, (1911) 35 Mad. 120, 126 (*ll.* 4-5) (gift ultimately rejected as donor, GRANDMOTHER, not in possession, p. 134).

[20] Sect. 346 A deals specifically with necessity for intention to make gift, but it seems desirable to restate it here : *Ameeroonissa* v. *Abedoonissa*, (1875) 2 I. A. 87, 104 (par. 4). "Where there is on the part of the father or other guardian a real & BONA FIDE INTENTION to make a gift the law will be satisfied without change of possession, & will presume the subsequent holding of the property to be on behalf of the minor." "The MODE IN WHICH the father DEALT WITH the PROFITS would" Sir Barnes Peacock observed, "be important as regards the bona fides & completeness of the gift as throwing light upon the intention" 98 (*arg.*), cited *Musa* v. *Kadar*, (1928) 55 I. A. 171, 176 (BOM.). "The INTENTION of the donor must be demonstrated by his entire relinquishment of the thing given : & the gift is null & void when he continues to exercise any act of ownership over it" 176, (*ll.* 12-15). *Md. Sadiq* v. *Fakhr J.*, (1931) 59 I. A. 16 ("in the case of a gift by a Muhammadan father to his infant child no transfer of possession is required, it is only necessary to establish a BONA FIDE INTENTION to give") ; *Ma Mi* v. *Kallandar Ammal*, (1926) 54 I. A. 23 (RANG.) ; *Abdul Majid* v. *Hussain Bee*, (1919) 22 Bom. L. R. 229 ; *Kadarbhai* v. *Nanibibi*, (1926) 28 Bom. L. R. 1098, 1105 ; *Subramania Aiyar* v. *Mulla Veettil Assan Koya*, (1918) 35 M. L. J. 541 (presumption that gift valid : but this decision must now be read subject to *Musa* v. *Kadar*, (1928) 55 I. A. 171 ; cf. *Gulam Muhammad* v. *Muhammad Amin*, (1882) 17 Punj. Rec. 251 (No. 86) ; *Sultan Miya* v. *Ajibakhatoon B.*, (1931) 59 Cal. 557, 562, 564, 566, 567 ; *Khaliq* v. *Mahabir P.*, (1930) 6 Luck. 403, 405, 407 (bona fide intention : pp. 405, 407 ; subject of gift in father's hands or in that of depository, p. 406). "But if it be in hands of USURPER, PLEDGEE or TENANT gift not lawful for want of possession" (viz. if tenant not asked to attorn, &c.) : Bail. I. 529, cited *Gani Mia* v. *Wajid Ali*, (1935) 39 C. W. N. 882, 885. *Ebrahim* v. *Bai Asi*, (1933) 58 Bom. 254 (test of transfer).

[21] See s. 403. *Musa* v. *Kadar*, (1928) 55 I. A. 171, 178 (absence of such declaration) ; *Fakir Nynar* v. *Kandasawmy*, (1911) 35 Mad. 120, 123, 128 (*l.* 1) (donor purported to retain possession as guardian of minor & on his behalf). See *nn.* 22, 28.

SECTION 400. Possession of guardian is possession of ward.

Sect. 400[22] contains the same principle[23] as s. 388, "because seizin by the guardian is seizin on his (the minor's) part; hence, at the time of the declaration, the minor may be taken to be already in possession of the subject of the gift, which consequently need not be retransferred to him formally." The reasoning, of course, does not apply where the son is not a minor,[24] or where the father purports to make a gift to his son, and there is no real change in the nature of the enjoyment.[25]

Shia law.

The Shia law is thus stated: "If any other than the father or grandfather of the child should make him a gift, the donor's possession would not be sufficient, whether he [the donor] have power over [i.e. custody of] the child or not, and the legal guardian must obtain power over the gift in order to complete the right of the child."[26] But the general rule that possession may be taken by an agent on behalf of the donee (s. 388) must apply equally to the guardian; and the person legally entitled to be the guardian of a minor may presumably allow another to take possession of gifts made to his ward. See s. 398 A, p. 432.

"If the father," says the Fatawa 'Alamgiri, "makes a gift of a house to his minor child, and has not defined the boundaries and rights appertaining to it, and if the house is, at the time of the gift, entrusted[27] to some one, and the person to whom it is entrusted is living in the house, then the minor will become the owner of the house by the contract of gift; and in this regard sadaqa is also similar to hiba."[28]

V. CREDITORS' INTERESTS SAFE-GUARDED.

400A. Where the creditors of the donor are defeated by a gift the Court will apply s. 400 strictly and with caution.

[22] Sect. 400 covers cases where donor is father or grandfather or other person legally entitled to be in possession of property of minor: *Fakir Nynar* v. *Kandasawmy*, (1911) 35 Mad. 120 extended the rule to *de facto* guardians. But *Musa* v. *Kadar*, (1928) 55 I. A. 171, 178 (BOM.) held, rule cannot be extended; *Fakir Nynar's* case may possibly be distinguished on ground that donor declared his possession after gift to be as that of minor's guardian, & on behalf of minor: cf. s. 403, pp. 438 f.

[23] Principle explained *Rahiman Bi* v. *Mahomed Fatima*, (1914) 15 Mad. L. T. 345 = 23 Ind. Cas. 651 = [1915] Mad. W. N. 430; *Alamanaya Kumjari* v. *Murkuti*, (1915) 29 Mad. L. J. 733; *Muhammad* v. *Yaji Ruddin*, [1915] Mad. W. N. 876 = 2 L. W. 1018; followed, *Allah Rakha* v. *Ali Muhammad*, (1928) 9 Lah. 567, 574.

[24] See also ss. 404, 405, comm.

[25] *Musa* v. *Kadar*, 55 I. A. 171, 176 *ll.* 12-15; *Munnoo* v. *Jehandar*, (1866) 1 Agra 250; *Khader Hussain S.* v. *Hussain B. S.*, (1869) 5 Mad. H. C. R. 114, 119; *Ebrahim* v. *Bai Asi*, (1933) 58 Bom. 254.

[26] Bail. II. 204 (par. 5, *ll.* 23-28); 218 ("*fourth*," last 6 *ll.*)

[27] In original *wadi'at* = "a deposit, trust, whatever is committed to another's charge." (Richardson, *Dict.*).

[28] *Fatawa 'Alamgiri, Hiba*, ch. XI. last sent. citing *Jawahir Akhlati*: cf. Hed. 484 (col. i. par. 4.) "(1) It makes no difference whether the subject of the gift be in his own hands or in deposit with another; but (2) if it be in the hands of a usurper (i.e. when father cannot exercise any control over it at all), or of pledgee (s. 370) or of tenant (s. 393) the gift is not lawful (viz. by mere declaration),—for want of possession." Bail. I. 529 (538) (par. 2), ch. VI. of Arab. text. Cf. *Rahim B.* v. *Muhammad H.*, (1888) 11 All. 1; Macn. 201 (case 6); *Chaudhri Mehdi H.* v. *Muhammad* (1905) 28 All. 439 = 33 I. A. 68, 75; *Fakir Nynar* v. *Kandasawmy*, (1909) 35 Mad. 120 which was before the courts 9 times: before Munsiff; 4 times before District & High Courts: findings required by High Court 3 times: suit of 1904; S. A. to H. Ct. in 1909, final judgt. in 1911.

SECTION 401. VI. Gift between husband and wife : living together in subject of gift. Need not vacate.

401. Where the husband or wife makes to the other [1] the gift of a house in which they have been living together, the gift may be completed without the donor vacating the house, viz. without the donor departing from it, or removing his or her property from it.[1] *Quaere,* whether the same rule applies in the case of gifts between relations other than husband and wife, who are living together.[2]

The principle underlying s. 401 is that goods placed in the conjugal domicile of the husband and wife living together, are in the possession of both : and that the husband alone is not in apparent possession.[3] After a gift to the wife, once mutation of names is proved, the natural presumption arising from the relation of husband and wife is that the husband's subsequent acts with reference to the property were done on his wife's behalf, and not on his own.[4] Bona fide intention to make the gift has always to be proved : and when the interests of creditors are concerned, courts are very cautious.

Bona fide intention.

Creditors' interests.

The case of the father and his minor children, s. 400, stands, in principle, on a different footing[5] : the father being his minor child's legal guardian, his possession is not only the possession of the child, but he alone may properly

[1] Macn. 214. *Md. Sadiq* v. *Fakhr J.*, (1931) 59 I. A. 1, 12-14 ("actual vacation by the husband & actual taking of separate possession by the wife" not required, p. 13); *Ma Mi* v. *Kallandar Ammal* No. 1, (1926) 54 I. A. 23 (gift to wife : mutation of names : husband managed for wife : but also power of Att. obtained by husband in favour of third person showing intention to transfer); *Amina* v. *Khatija*, (1864) 1 B. H. C. R. 157 (Texts "do not contain any express....reference to a gift from husband to wife. Converse gift from wife to husband, of house in which they were residing & in which they continued to reside, is mentioned as one of the exceptions," Sausse, C. J., *ib.* 162); *Azimun Nissa B.* v. *Dale*, (1868) 6 M. H. C. R. 455 ; *Emnabai* v. *Hajirabai*, (1888) 13 Bom. 352 (two gifts by husband to wife : (i) of house occupied by tenants : registered deed : transfer to donee's name in municipal books : faizandari bills made out in her name : donor continued collecting rents : but in 1892 account prepared of rents to date, in donee's name : gift *held valid* ; (ii) gift of half of house owned by donor : other half belonging to his brother : husband & wife residing in it : *held* invalid as *musha*); *Naaz B.* v. *Manzor Ahmad*, (1911) 8 All. L. J. 580 (*per* Karamat Husain, J., pre-emption holds only in case of gift from wife to husband on ground that husband has possession of wife's property, but not vice versa); *Kadarbhai* v. *Nanibibi*, (1926) 28 Bom. L. R. 1098 (gift from husb. to wife : reserving right in husband to live in property : gift held invalid for want of possession : pp. 1100, 1107 : decision was one on question of fact only. If husband had made complete gift to wife & she had then granted right of residence to husband, transactions would have been valid. If possession of corpus had been given, then *Nawab Umjad Ali's* case (1867) 11 Moo. I. A. 517 would have applied with reference to reservation of usufruct (right of residence) during donor's life.

[2] The *quaere* referred to, but left unsolved : *Mohammad Sadiq* v. *Fakhr J.*, (1931) 59 I. A. 1, 14. Submitted rule not to be extended : cf. *Musa* v. *Kadir*, (1928) 55 I. A. 171.

[3] See *Ramsay* v. *Margrett*, [1894] 2 Q. B. 18, 25, 27, 28 ; *French* v. *Gething*, [1921] 3 K. B. 280, 284 (where minor's guardian in possession of goods of minor as well as of his own) ; *Shephard* v. *Pulbrook*, (1887) 4 T. L. R. 642, 643.

[4] *Ma Mi* v. *Kallandar Ammal* No. 1, (1926) 54 I. A. 23, 30, citing *Amina* v. *Khatija*, (1864) 1 Bom. H. C. R. 157 ; *Emnabai* v. *Hajirabai*, (1888) 13 Bom. 352, with reference to first gift.

[5] *Bava* v. *Mahomed*, (1896) 19 Mad. 343 (rule does not apply between aunt & nephew); *Vahazullah* v. *Boyapati*, (1907) 30 Mad. 519, 523 (nor between lady & one described as her foster-son, but "who was no real relation to her"). See s. 396 ; *Musa M.* v. *Kadar B.*, (1928) 55 I. A. 171 (BOM.).

SECTION 401. take possession on behalf of the minor. It is submitted that subject to s. 396, this rule cannot be extended[5] to gifts between others than the wife and husband : in cases where the donee is not sui juris, ss. 397-400 apply.

VII. PROOF OF POSSESSION : (A) Presumptions. Onus on donee. Exception.

402. The onus is on the person claiming to be the donee to prove that possession has been given to him ;[6] *except* that where the intention of a father[7] to make a gift to his minor child is proved, the onus is on the father to show that the subsequent possession was not held on behalf of the minor.[8]

Illustration. D admits that he made a declaration of gift but says, " I gave, but did not put him in possession : " the " word is with the donor " : (but the donee may demand his oath, if he insists that possession was given).[9]

(B) Donor's acknowledgment that possession given.

403. From the donor's acknowledgment of having made a gift and delivered possession, it may be presumed against the donor and persons claiming under him, that the gift was completed as acknowledged.[10]

Illustrations. (1) D makes a declaration of gift. The donee accepts it. Before possession is, or acknowledged to be, given, the donor dies. The gift is inoperative.[11]

(2) " The subject of gift is in the possession of D and another claims it,

[6] *Ismail Mahomed* v. *Hurbai*, [1898] Pr. Judgts. (BOM.) 10 : onus thrown on donee on authority of passage in *Khajooroonissa* v. *Rowshan*, (1876) 3 I. A. 291, 307 = 2 Cal. 184, 197, dealing with onus in cases in which gift has effect of defeating policy of Hanafi law, against interference by wills with devolution of property amongst heirs. Similar policy in Shia law, though gifts to relatives & especially to children considered " highly proper & becoming." Bail. II. 205, par. 4, it is considered abominable to make unequal gifts to them. But under Shia Ithna Ashari law, bequests to heirs valid without consent of other heirs.

[7] Cf. s. 400 : onus may shift where CREDITORS' INTEREST involved.

[8] *Moulvie Wajeed* v. *Moulvie Abdool Ali*, [1864] W. R. 121, 123, 124 ; *Ameeroonissa* v. *Abedoonissa*, (1875) 2 I. A. 87 ; *Fatima* v. *Ahmad*, (1903) 31 Cal. 319, 330. But see s. 5B, & *Musa* v. *Kadar B.*, (1928) 55 I. A. 171 (BOM.).

[9] Bail. II. 208 (*third*) ; s. 402, *ill.* is immersed in adjective law (see ss. 5B, 11B). It may be paraphrased as follows : presumption is in favour of donor ; if donee produces evidence, presumption may shift.

[10] See s. 403, *ill.* & com. for Hanafi law ; Ind. Evid. Act, s. 17 ; Bail. II. 204 (*ll.* 4-8), which implies that presumption conclusive, but refers doubtless to acknowledgments or admissions in Court ; & to proceedings similar to fines & recoveries of Eng. feudal law. On distinction between conclusive & other presumptions, see last sent. of passage translated from *Fatawa Alamgiri* in s. 403, *ill.* (2). Cf. also Transfer of Property Act, s. 122 : *Ma Mi* v. *Kallandar* (No. 1), (1926) 54 I. A. 29 (RANG.) ; (*Shaik*) *Ibhram* v. (*Shaik*) *Suleman*, (1884) 9 Bom. 146, 150 (par. 3, *ll.* 8, 9, " A declaration of the person previously possessed puts him into possession ") ; *Humera* v. *Najmunnissa*, (1905) 28 All. 147, 150, 151, (donor in reply to interrogatories administered to her, 6 or 7 months after gift, admitted having given possession ; her evidence, 14 years after that possession had not been given, disbelieved). See also *Amina* v. *Khatija*, (1864) 1 Bom. H. C. R. 157, 161, 162 ; *Jabedanessa* v. *Nazib*, (1910) 15 Cal. W. N. 328 ; *Mohinudin* v. *Manchershah*, (1882) 6 Bom. 650, 656. *Namdar* v. *Muhammad*, (1913) 11 All. L. J. 726 (principle of s. 403 alluded to, but *submitted* judgment seems to misapprehend rule that possession need be transferred only so far as possible). See s. 383, *nn.*

[11] Bail. II. 204, *ll.* 4-8 ; cf. *Humera* v. *Najmunnissa*, (1905) 28 All. 147, 152 ; Ind. Ev. Act, ss. 17 ff.

SECTION 403.

saying 'a gift of it was made by D, who gave me possession,' which D denies. The claimant asserts that D had acknowledged that he had made the gift, and that he had given possession, which the donee had taken. Abu Hanifa had at first held that this evidence would not be accepted, but later he altered his view, and the two disciples agree with the latter view.[12] And the same rule prevails when a similar dispute arises in rahn and sadaqa. And if the testimony of the two witnesses conflicts in this regard, that one witness bears testimony to actual possession, and another to the donor merely acknowledging that possession was given, then without any difference of opinion the testimony cannot be accepted. And if the slave (the subject of gift) be in the possession of the donee, and the witnesses depose to the donor having acknowledged to have given possession to the donee, then the testimony is valid according to both the earlier and the later views expressed by the great Imam [Abu Hanifa]. This is in the Zakhira. And if the donor acknowledges before the Kazi, then though the slave is at the time in the possession of the donor he will be taken from the donor, and given over to the donee.[13] ....This is from the Muhit." [12] Acknowledgment by the donor that he has transferred possession (though it has not really been transferred) may, it is stated in the Sharaiu'l-Islam, take the place of actual transfer of possession.[14] "The declaration of the donor that he has given possession is sufficient to denote real possession,"—Tohfa, IV. 59, cited by Kemball, J.[15] A declaration on the deed that possession was transferred, "as a declaration of fact, must be regarded as binding on the heirs of the donor." [16]

i.—Acknowledgment of transfer of possession.

ii—Retracting acknowledgment.

On the other hand, in interpreting the Transfer of Property Act, s. 54, "The essence of a transfer by delivery of property" has been said to be, "that possession is changed;" [17] so that apparently there cannot be said to be any delivery under that Act, where the vendee is already in possession. Muhammadan law is satisfied if the donee is already in possession before the gift is made: no transfer is then needed.

No gift was held proved where no formal transfer of the property was executed, but mutation of names had been made in favour of the donor's wife, and a petition presented to the revenue court, stating that the donor had transferred his rights and interests to her and made her his locum tenens, without power to transfer the property in any way, but that she would continue to hold and possess the share for her life.[18]

iii—Mutation of names not sufficient.

[12] *Fatawa 'Alamgiri, Hiba* ch. IX. *ad. init.* But see s. 5 B. *Rahn* = mortgage.

[13] An admission in Court, of course, stands on higher footing.

[14] Bail. II. 204 (par. 2); cf. s. 403, *n.*

[15] *Mohinudin* v. *Manchershah*, (1882) 6 Bom. 650, 656 (par. 2).

[16] (*Sheikh*) *Muhammad Mumtaz* v. *Zubaida*, (1889) 16 I. A. 205 (216, *ll.* 1-4): ("In the deed of gift she declared—an ADMISSION by which Usman as her heir & all persons claiming through him were bound—that she had made the donee possessor of all properties given by the deed"); followed *Mohammad Sadiq* v. *Fakhr J.*, (1931) 59 I. A. 1, 13 (LUCK.).

[17] *Sibendrapada* v. *Sec. of State*, (1907) 34 Cal. 207.

[18] *Mumtazunissa* v. *Tufail*, (1905) 28 All. 264. Cf. *Ibrahim* v. *Isa*, (1916) 41 Bom. 5 (transfer in lieu of *mahr*).

SECTION 404.
(c) Acts of ownership evidence of possession.

404. Acts of ownership [19] exercised by the donee over the subject of gift, are evidence that possession was transferred to the donee.[20]

Illustration.

D declares orally before seven witnesses that he gives to his wife in lieu of her mahr, all his revenue-paying lands. She subsequently pays the Government dues and obtains a decree of ejectment against a tenant. *Held*, that whether or not mahr was due, the acts referred to showed that there was a transfer of possession, and the gift was valid and complete.[21]

Nature of such acts.

The acts of ownership [22] exercised by the donee must, it is plain, be such as he could not, or at least did not, exercise before the gift.[23]

The husband made the gift of a house to his wife. He continued recovering the rents and utilizing them for the family expenses, but had accounts of the rents prepared 10 or 11 years after the date of the gift in the name of the wife. These circumstances were held to afford sufficient evidence of possession having been given.[24] But even a grandfather's ostensible gift to a grandson is impugnable " by showing that the proceeding by which the grandfather professed to dispose of this property in his grandson's favour, was merely a nominal one, followed by no change in the real nature of the enjoyment of the property, which remained his, and under his control, just as much after as before the date of the deed ; and that its object was. . . . to carry into effect a collusive arrangement whereby the claim of Munnoo Bebee (if not of other persons, creditors of Ameer Khan) might be evaded." [25] A similar decision was given where " in fact the produce of the shares was applied during the life-time of the donor after the gift, just as it had been before." [26]

Creditors' rights.

[19] Cf. *Metrop. Ry. Co.* v. *Fowler*, (1813) 60 L. J. (Q. B.) 518, 525, noted s. 345, com., p. 345, *n.* 22. POSSESSION = being so placed with reference to something as to be ABLE TO EXERCISE CONTROL over it : s. 382A ; obvious, therefore, that effective exercise of control & acts of ownership, of taking its benefit, form best & most direct evidence of possession : see *per* Parke, B., p. 407 & citations 5, 6, in s. 382 A, com., pp. 408 f. *Ebrahim* v. *Bai Asi*, (1933) 58 Bom. 254. See *n.* 22.

[20] *Jones* v. *Williams*, (1837) 2 M. & W. 326, 327 ; *Barnes* v. *Mawson*, (1913) M. & S. 77 ; *University Col.* v. *Oxford C.*, (1904) 20 T. L. R. 637 ; *Ferrand* v. *Milligan*, (1845) 7 Q. B. 730. See also *Bhagwansing* v. *Sec. of State*, (1906) 10 Bom. L. R. 571 (Batty, J. collects authorities) ; *Sharifa* v. *Ghulam Md. D. K.*, (1892) 16 Mad. 43 ; *Rujabai* v. *Ismail A.*, (1870) 7 Bom. H. C. R. (O. C. J.) 27, 31-33 (donee gives lease to donor) ; *Gulam* v. *Masluddin*, (1880) 5 Bom. 238, 242, 243. Cf. *Mathar* v. *Hossain*, (1910) 23 Mad. L. J. 734, 736.

[21] *Kamarunnissa* v. *Husaini*, (1880) 3 All. 266 (P. C.).

[22] See s. 382 A, com., p. 407, citing *Jones* v. *Williams*, (1837) 2 M. & W. 326 (*per* Parke, B.).

[23] Cf. *Valayet* v. *Maniran*, (1879) 5 Cal. L. R. 91 ; *Jahandad* v. *Abdul Ghafur*, (1930) 57 I. A. 273 (acts of ownership in regard to jungle land considered) ; *Ebrahim* v. *Bai Asi*, (1933) 58 Bom. 254 (ENJOYMENT OF BENEFIT & acts of ownerships most satisfactory evidence of possession).

[24] *Emnabai* v. *Hajirabai*, (1888) 13 Bom. 352 ; cf. s. 401.

[25] *Munnoo B.* v. *Jehandar K.*, (1866) 1 Agra 250. See also *Alamanayakunigari Nabi* v. *Murkuti Papiah*, (1915) 29 Mad. L. J. 733 ; *Muhammad Sulfalia* v. *Yajihuddin*, [1915] Mad. W. N. 876 = 2 L. W. 1018 ; *Rahiman* v. *Mahomed Fatima*, [1915] Mad. W. N. 430 = 15 Mad. L. T. 345. These cases cited & followed, *Allah Rakha* v. *Ali Muhammad*, (1928) 9 Lah. 567, 574 ; *Ebrahim* v. *Bai Asi*, (1933) 58 Bom. 254. Cf. *Musa* v. *Kadar*, (1928) 55 I. A. 171, 176.

[26] *Khader H. S.* v. *Hussain B. S.*, (169) 5 Mad. H. C. R. 114, 119.

405. The purchase by a Muslim of property in the name of his son or wife or other person,[1] will, unless there are circumstances indicating that a gift was intended,[2] ordinarily be considered to be benami or farzi, and the property to belong to the person who paid the purchase money : [3] but very little evidence might be sufficient to turn the scale.[4]

SECTION 405. (D) Purchase by father in name of son.

Illustrations. Benami or farzi purchase.

Cf. Indian Trusts Act, 1882, s. 82,[5] and s. 346, com. (1) "The presumption of a benami or farzi purchase may of course be removed by circumstances[6] showing that the property was intended to be transferred to the son but evidence of acts of ostensible ownership prove (*sic*) nothing."[7] See s. 404. (2) Government securities were endorsed and delivered by a father to his son in the presence of the local Treasury Officer. The question arose[8] whether a transfer of ownership was intended, (as held by the first court) or a benami transaction (as held by the High Court). The Privy Council referred to the fact that (i) the father was old, and that the son had been appointed his attorney, (p. 1): "old age may be a good cause for transferring such dominion as enables the transferee to deal with others ; but whether it would induce the

1 In (*Sheikh*) *Bahauder Ali* v. (*Sheikh*) *Dhomun*, (1808) 1 Cal. Sud. Diw. Rep. 250 (purchase in name of wife's niece, Kheir-on-Nisa, see p. 251, held FARZI : property vests in person to whom grant actually made, not necessarily in person whose name is made use of); *Bipeen Beharee Chaudhry* v. *Ram Chunder Roy*, (1870) 14 W. R. 12, 15 (common form of BENAMI); *Ganendra Mohun Tagore* v. *Upendra Mohun Tugore*, (1872) I. A. SUPP. 47, 71 "TAGORE CASE" (implied trusts recognized & established in case of *benami* purchase); *Ravji* v. *Mahadev*, (1897) 22 Bom. 672 (BENAMI NOT FRAUDULENT); *Akbar Ali* v. *Mahomed Faiz Buksh*, (1871) 15 W. R. 12, 14 ; *Palaniyappa Chetty* v. *Arumugom Chetty*, (1864) 2 M. H. C. R. 26 ; (*Mt.*) *Nawab Begum* v. *Hussain Ali K.*, [1938] Lah. 149 (wife claimed property, purchased in her name, as gift : held purchased benami : no gift : cases reviewed).

2 (*Moulvie*) *Sayyad Uzhur* v. (*Mt.*) *Altaf Fatima*, (1869) 13 Moo. I. A. 232, 247 = 4 Beng. L. R. 1 ; following *Gopee Krist G.* v. *Gungapersaud G.*, (1854) 6 Moo. I. A. 53 ; *Naginbhai* v. *Abdulla*, (1882) 6 Bom. 717. See cases cited p. 442, *n.* 10.

3 *Ashabai* v. *Haji Tyab Haji Rahim*, (1882) 9 Bom. 115, 122 (rule not restricted to purchases : applied to ACCOUNT opened in name of son by father).

4 *Mohammad Sadiq* v. *Fakhr J.*, (1931) 59 I. A. 1, 15, 16 (purchase of *Sher Darwaza* in name of daughter : 4 years after purchase, deed sent in tray for inspection of daughter's father-in-law at time of her marriage : held to be daughter's. Purchase of village Jiamau in name of wife, p. 15 : price Rs. 51,000 : Rs. 1,600, earnest money & stamp duty paid by husband : wife swore she paid this back & paid purchase money : she had sufficient means : deed was with her : mutation in her name : property held to be wife's).

5 Property must be held for benefit of person paying or providing consideration if it appears that such other person did not intend to pay for benefit of transferee. (Sales in execution of decrees & for arrears of revenue are excepted from. Indian Trusts Act, 1882, s. 82).

6 *Gulam Jafar* v. *Masludin*, (1880) 5 Bom. 238 ; cf. also s. 400 ; p. 442, *n.* 10.

7 See (*Maulvie*) *Sayyad Uzhur Ali* v. (*Mt.*) *Bebee Ultaf Fatima*, (1889) 13 Moo. I. A. 232, 247 ; *Kerwick* v. *Kerwick*, (1920) 47 I. A. 275. Under the English law, there is a presumption that a gift was intended, which may be rebutted by an unmistakable act of possession, or by formal possession taken by the donor. Halsb., *Laws of Eng.* XV. 415, s. 824, 417, 827 ; *Stock* v. *McAvoy*, (1872) L. R. 15 Eq. 55.

8 (*Nawab*) *Ibrahim Khan* v. *Ummat-ul-Zohra*, (1896) 24 I. A. 1, 7 (*ll.* 5-10) = 19 All. 267, 271, 274 ; cf. *Ameeroonissa* v. *Abedoonissa*, (1875) 2 I. A. 87, 111 (par. 3, 4); STRIPPING ONESELF BARE : 24 I. A. 1, 7 (*ll.* 5-10); *Ashgar Ali* v. *Delroos Banoo*, (1877) 3 Cal. 324, 327 (par. 2) (P.C.); *Khurshed Husain* v. *Faiyaz H.*, (1914) 36 All. 289 (= s. 359 B, *n.* 29).

SECTION 405.
Unlikelihood of donor stripping himself bare.

General (i.e. the donor) to strip himself bare, and to leave himself and the rest of his family at the mercy of his eldest son is another consideration;"[8] (ii) immediately after the endorsement, the father set about making a will (the endorsement was on 5 Mar. the will was signed on 15 July). Though the will was quite invalid, the legacies and annuities contained in it were referred to as showing that the father could not have looked on the son as the owner of the notes. This was strengthened by (iii) the father continuing to pay out sums from their income as before. The trial court had held that the father made a gift of the corpus, reserving the income to himself. The High Court and Privy Council held that this was a mere theory of the trial court; the son's case being quite different.[8] (3) But in another case[9] where (i) the defendant had for 9½ years been in possession of a house purchased in his name by the plaintiff, (ii) without being made to account for the rents or profits, and (iii) it was shown that the defendant had rendered to the plaintiff great and very valuable services sufficient to establish a claim on the plaintiff's generosity, the circumstances were held to be decisive in favour of holding that a gift was intended.[9]

Benami transactions.

Questions frequently arise, whether a transfer of property is to be taken as intended to benefit the person in whose name the transfer is taken, or it is merely a benami transfer, by which is meant, that the transfer is taken in the name of a person, but such person is not intended to take the real benefit of it. A synopsis of the pros and cons as to a transaction being (i) benami, or (ii) beneficial and real, taken from [10] some important cases is given in *n.* 10

[9] *Pandit Ram Narain* v. *Maulvi Muhammad Hadi*, (1898) 26 I. A. 38 = 26 Cal. 227.

EVIDENCE PRO & CON AS TO BENAMI.

[10] EVIDENCE PRO & CON AS TO BENAMI referred to in: *Dhurum Das Panday* v. *Shama S. D.*, (1843) 3 Moo. I. A. 229; *Gopee Krist G.* v. *Gungapersaud G.*, (1854) 6 Moo. I. A. 53; *Moulvi Sayyud Uzhur A.* v. (*Mt.*) *Bebee Ultaf F.*, (1869) 13 Moo. I. A. 232; *Nawab Azimut A. K.* v. *Hurdwaree M.*, (1870) 13 Moo. I. A. 395 = *Ruknadowla Nawab Ahmed A. K.* v. *Hurdwari M.*, (1870) 5 Beng. L. R. 578, 583; *Nawab Ibrahim A. K.* v. *Ummat-ul-Zohra*, (1896) 24 I. A. 1 (ALL.); *Pandit Ram Narain* v. *Maulvi Muhammad T.*, (1898) 26 I. A. 38 (OU.); *Bilas Kunwar* v. *Desraj Ranjit S.*, (1915) 42 I. A. 202; *Kerwick* v. *Kerwick*, (1920) 47 I. A. 275; *Sultan Begum* v. (*Nawab*) *Qamar A.*, [1933] AIR (P. C.) 164; *Mohammad Sadiq Ali K.* v. *Fakhr J. B.*, (1931) 59 I. A. 1 (OU.); *Gulam Jafar* v. *Masludin*, (1881) 5 Bom. 238, 242, 243; *Naginbhai* v. *Abdulla*, (1882) 6 Bom. 717; (*Mt.*) *Nawab Begum* v. *Hussain A. K.*, (1937) Lah. 149; *Akbarali* v. *Mahomed Faiz B.*, (1871) 15 W. R. 12, 14; *Radhamonee* v. *Ram Narain D.* (1874) 22 W. R. 440, 441. R = person in whose name purchase made; D = claimant if transaction *benami*. (A) TENDING TO PROVE BENAMI: (i) *practice* of *benami* of long standing: 6 Moo. I. A. 53, 72; 13 Moo. I. A. 232, 246; 49 I. A. 205; 24 I. A. 7; 5 Beng. L. R. 578, 583; (ii) *receipt* in name of R proves nothing: 6 Moo. I. A. 73, *l.* 4; (iii) criterion: from what source money comes: 6 Moo. I. A. 74; 3 M. I. A. 229, 240; 13 M. I. A. 247; 15 W. R. 12, 14; 22 W. R. 440, 441: [1937] 1 Lah. 149: but see (xxvi.)—(xxix); (iv) that R is stranger: 6 M. I. A. 75; but see [1933] AIR (P. C.) 164, 166 no advantage in making *benami* transaction in favour of persons other than heirs; (v) impropriety or immorality of making *unequal division* among children: 6 M. I. A. 75; 14 W. R. 14, 15 (P. C.); 5 Bom. 238, 242, 243; (vi) once money proved to be paid by D it is on R to prove whether what is prima facie nature of transaction (*benami*), was not so: 6 M. I. A. 79; 13 M. I. A. 247; [1937] Lah. 149; (vii) burden on R 6 I. A. 80; [1937] Lah. 149; (viii) *account* of transaction in name of person, distinguished from account with person: 6 M. I. A. 82; (ix) *two names*: son & his wife, strong argument for *benami*: 13 M. I. A. 247; (x) no acts of *ostensible ownership*: 13 M. I. A. 247; (xi) sole use & *enjoyment* for D & wives during life time: 42 I. A. 202, 204; wives (R) asking for D's *permission*: 42 I. A. 202; (xii)

§ 7.—Iwaz or Return for Gift.

406.[11] After a gift (in this context called the primary gift) has been made and completed, the donee may offer to make a reciprocal gift, i.e. a gift from himself to the person who made the primary gift. If with the offer of such a reciprocal gift it is signified [12] that it is made by the primary donee in return for the primary gift to himself,[12] then the reciprocal gift is called the iwaz or return for the primary gift. If the second (reciprocal) gift is accepted as a return or iwaz for the

1. IWAZ IN TWO MODES. (A) Where iwaz not stipulated for : hiba bil iwaz.

EVIDENCE PRO & CON AS TO BENAMI (*Con.*).

money spent on house : well & walls built : 42 I. A. 204 ; (xiii) non-production of *accounts* may be no ground for adverse inference : 42 I. A. 206-7 ; (xiv) promissory notes transferred by D to R who renewed in his own name : against this *subsequent conduct* considered : I. A. 3, 4 ; (xv) *financial position* : 47 I. A. 275, 283, 285-286 ; (xvi) D disposing of interest of G. P. Notes : 24 I. A. 4 ; (xvii) these notes *sole source of income of D* : unlikely that he should strip himself bare : 24 I. A. 4, 7 ; (xviii) *words* of D that he had made gift of notes, if inconsistent with his overt *acts*, cannot be relied on : 24 I. A. 7 ; (xix) importance of will though never treated as valid in law ; light it throws on *intention* of D : 24 I. A. 8 ; (xx) payment out by D as his own money : 24 I. A. 8-9 ; (xxi) idea that Government rules forbade purchase of property in D's own name : though mistaken & not followed in regard to another property : 47 I. A. 275, 284 ; (xxii) father & son lived in house purchased in son's name : rent paid to banker of father & son : credited in son's name : account rendered to son : but account originally mere transfer of father's balance to son's name : CREDITORS CONCERNED : held *benami* : 6 Bom. 717 ; (xxiii) Rajput Taluqdar of Oudh, purchases bungalow in name of R, Muslim mistress : D has sole *use & enjoyment* of it for himself & two Hindu wives during life : spends money on it : R never during D's life-time in bungalow : it is inappropriate for making provision for R : net income being very small : when or how she got possession of it not clear : purchase *benami* for D, decree of H. C. reversed that of Subd. Judge restored. (B) THAT TRANSFER IS BENEFICIAL : (xxiv) purchase in name of minor : 6 M. I. A. 81 ; (xxv) property named after R : [1933] AIR (P. C.) 164 ; (xxvi) conversation, views of sons, prove nothing : 6 M. I. A. 84, 85 ; (xxvii) *source of purchase money* very important, see (iii) : but not the only criterion : 26 I. A. 38, 39 ; (xxviii) intention of gift in return for R's services : 26 I. A. 38, 39 ; or (xxix) of good feelings [1933] AIR (P. C.) 164 ; (xxx) though there may be no presumption of advancement in such cases in India, very little evidence of intention suffices to turn scale : 59 I. A. 1, 16 ; (xxxi) actual possession or receipt of *rents* : [1933] AIR (P. C.) 164 ; (xxxii) donor himself alleged original object was to favour sons at expense of daughter ; not allowed to set aside deed (or get it declared *benami*) against SONS'S CREDITORS : 13 Moo. I. A. 395 (see facts stated 5 Beng. L. R. 578, 579, 580); (xxxiii) strong motive to disinherit other heirs : 5 Bom. 238, 242, 243, or (xxxiv) great devotion to beneficiary [1933] AIR (P. C.) 164. (War loan purchased in name of minor nephew to whom lady, D, devoted but who was not among her heirs : bonds remained in R's possession : interest drawn by him : not clear that any advantage would be gained by D carrying on *benami* transaction in favour of parties other than heirs : gift held proved).

[11] Sect. 405 was in earlier editions in much shorter form. But *hiba bil iwaz* is so much misunderstood that definition is recast in more explicit terms.

[12] Bail. I. 532 (*ll.* 11-13) (541) forms : "this is the *iwaz* or the *badal*," or "in place of thy gift," or "I have made a donation of this for thy gift." If reciprocal gift made without saying "in *iwaz* of thy gift," or using some other out of forms mentioned, second gift would not be exchange for the primary gift, but new gift, & each party would have right to revoke, (*ll.* 15-21). *Ussud Ali Khan* v. (*Mt.*) *Olfut Beebee*, (1868) 3 Agra 237 (gift : donor intimating that donee had been kind & attentive son & had enabled father to redeem some property from mortgage & build house, but did not distinctly & specifically bestow property in lieu of anything received : hence not *hiba bil iwaz*).

SECTION 406. primary gift and completed, the whole transaction (consisting of the primary and reciprocal gifts) is called hiba bil iwaz (or gift with return).[13]

Illustrations. (1) D makes a gift to R of a horse. R then makes a gift of a camel to D, and states that the gift of the camel is a return for the primary gift of the horse. The gift of the camel is the "return" or iwaz for the primary gift of the horse, and after the camel has been given and accepted by the primary donor, the transaction, consisting of the gifts of the horse and the camel respectively, together form a hiba bil iwaz.

(2) A Muslim died, leaving as his heirs his widow, and his brother. His estate was kept joint, and managed by his brother, who made an annual allowance of money and grain to the widow for maintenance. Later, he executed a deed of gift of certain property in her favour. Two days after, she passed a writing in his favour relinquishing to him her rights in her husband's estate. *Held*, that the two deeds amounted to a hiba bil iwaz.[14]

(3) D purports to make, (18 Nov. 1839) a deed of gift, in which it is set forth that, in consideration of a payment of Rs. 10,000, he gives to his son, 1/3 share of his moiety of a zamindari. On the same date the father executes a will referring to the deed of gift. In May 1841, the son applies for mutation of names in respect of the said 1/3 share; the father resists this claim, denying receipt of consideration. On 19 Nov. 1841, a petition is presented to the Collector dated 14 Nov. 1841 purporting to proceed from the father in which he admits the gift, and consents to mutation of names. He had died on 15 Nov. 1841. The Collector declined to act on this petition. *Held*, that no real consideration was passed, that there was no intention on the part of the father to part with the property at once to the son; but that both were endeavouring to evade the Muhammadan law by representing that to be a

[13] *Rahim Bakhsh* v. *Md. Hasan*, (1888) 11 All. 1; *Sirajuddin Haldar* v. *Isab Haldar*, (1921) 49 Cal. 161; (*hiba bil iwaz* transaction made up of TWO RECIPROCAL GIFTS: if a transaction cannot be proved to be *hiba bil iwaz* it may be proved as *hiba*: *submitted* that this could have been put in this way: if both parts of *hiba bil iwaz*, viz. *hiba* & *iwaz* cannot be established, but only the primary *hiba* can be established, it will be given effect to,—which is elementary); *Rahim Jan* v. *Iman Jan*, (1911) 17 C. L. J. 173: *Rasool Bee* v. *Gulam Kasim Sahib*, (1914) 1 L. W. 505 = 23 Ind. Cas. 802. See also table following s. 345. Much confusion of thought would be avoided if *hiba bil iwaz* were translated "A GIFT WITH A RETURN GIFT" or "TWO RECIPROCAL GIFTS instead of GIFT FOR A CONSIDERATION. Last expression objectionable (1) because "gift" & "consideration" are contradictory; (2) consideration implies an exchange agreed upon prior to any transfer. *Mohan Lal* v. *Mahmud Husain*, (1922) 44 All. 580; *Jidda Jan* v. *Sheikh Baktar*, (1919) 24 C. W. N. 926; *Sarifuddin Md.* v. *Mohiuddin Md.*, (1927) 54 Cal. 754 (true *hiba bil iwaz* distinguished from what is wrongly so styled, being in fact sale); *Kulsum Bibi* v. *Bashir Ahmad*, [1937] All. 285 (transaction, when precisely analysed consists in each party making gift to other: Transf. of Prop. Act does not apply: no registered document necessary: oral gift to wife with delivery of possession: simultaneously, or immediately after, wife gave discharge of her prompt *mahr* of Rs. 21,000: held to be *hiba bil iwaz*); cf. *Bashir Ahmad* v. (*Mt.*) *Zubaida Khatun*, (1925) 1 Luck. 83 (husband transferred share in village to wife in lieu of *mahr*: held *hiba bil iwaz*).

[14] *Muhammad Faiz A. K.* v. *Ghulam A. K.*, (1881) 3 All. 490 = 8 I. A. 25. The deceased was Muhammad Husain Khan; Waliunnissa the widow; Faiz Ahmed Khan, the brother.

present transfer of property which was intended only to operate after the father's death, and consequently that there was no valid gift.[15] SECTION 406.

Wrong use of the term hiba bil iwaz.

Baillie has pointed out that the expression hiba bil iwaz is, or was in 1865 when he wrote, frequently used inaccurately in India, and applied to transactions which would really be denominated sales, alike by Muslim and English lawyers.[16] The popular misapplication of technical terms of law cannot affect the law as laid down in texts which are expressed in precise language, and were written long before the inaccurate use of the terms in question came into vogue, and written, as a rule, in countries sufficiently distant from India to be free from the taint of Indian malapropism of Arabic words.[17] No doubt, popular misuse of such terms may have to be borne in mind when documents unskilfully expressed have to be construed. Decisions[18] given in the Sadr Diwani Adalat, on which the earlier English books on Muhammadan law are greatly based, often consisted of the interpretations of documents of this nature : prior to the passing of the Indian Contract Act, the Muhammadan law of sale was applicable in India.[19]

In these circumstances what the Muslim writers of authority mean when they speak of hiba bil iwaz and hiba ba shartu'l iwaz must be first defined and appreciated. Such definition and appreciation will make it possible to state with precision the real nature of the different classes of transactions. Then it can be considered which of the transactions contemplated by the texts are of such a nature that they would, under the Acts of the Indian legislature, fall on the one hand within the category of gifts (and be therefore governed by the Muhammadan law), and which under contracts (and be governed by the Indian Contract or Transfer of Property Act).[20]

[15] *Khajooroonissa* v. *Rowshan Jehan*, (1876) 3 I. A. 291 = 2 Cal. 184, 197, 198. Headnote states that when consideration for gift actually paid, transfer of possession not necessary to validate gift. This proposition, it is *submitted* is (i) contradictory in terms (how can there be consideration for a gift?). (ii) unfounded in law—referred to by P. C. as part of appellant's contention, not as their own exposition of law ; see s. 411 ; *Rasool B.* v. *Madari Mahaldar Gulam Kasim S.*, (1914) 1 L. W. 505 = 23 Ind. Cas. 802 (MAD. H. CT.).

[16] Bail. I. 122, 532 *n.* (541 *n.*). Thus per Lord Shands : [Arju Bibi] "became absolute owner .by virtue of a conveyance (*hiba bil iwaz*) bearing to be granted for an onerous consideration : " *Sarat Chunder* v. *Gopal Chunder*, (1892) 20 Cal. 296, 303 (P. C.) ; *Hitendra* v. *Maharaja of Darbhanga*, (1928) 55 I. A. 197 (transaction called *hiba bil iwaz* which was not gift, consideration not being illusory).

[17] See s. 11c. Macn. & Ameer Ali mean by *hiba bil iwaz* what Baillie calls the "Indian form" which resembles sale in all its legal incidents. Certain statements in Macn. seem incapable of being supported unless they are understood as representing the transactions referred to by Baillie. Syed Ameer Ali no doubt says *hiba bil iwaz* is sale in all its legal incidents : *Mahom. Law*, I. 101, but this must be read with context. viz. : "When the exchange takes place subsequently to the gift the *iwaz* is regarded as a gift *ab initio*." *Ibid.* I. 98 ; cf. *ibid.* I. 102 (par. 1). Whatever may be the misconceptions, it is submitted that the texts are quite clear & there is no reason why the law should be confused with notions which cannot stand examination.

[18] E.g. Macn., p. 52 : "A *hiba bil iwaz* resembles a sale in all its properties ; the same conditions attach to it, & the mutual seizin of the donees is not, in all cases, necessary," APPX. Dig. of Cases, Deed, 2, Gift, 11. Note "not in all cases."

[19] *Shaikh Husain Khan* v. *Hashim Ali Khan*, (1916) 43 I. A. 212 = 38 All. 627, 643 (par. 3), 647, 648, 657.

[20] *Rujabai* v. *Ismail Ahmad*, (1870) 7 Bom. H. C. R. (O. C. J.) 27.

SECTION 406.

They lie midway between gift and barter or sale.

The chief characteristic of a gift, is that it is a transfer without consideration.[21] At the time when the rules relating to hiba ba shart ul iwaz (gift with a stipulation for return) and in a less degree to hiba bil iwaz (lit. a gift with a return gift) arose in Islamic countries, it seems to have been more common than it is now-a-days for persons to enter into transactions that can be best described as lying midway between gifts strictly so called, and barter.[22] A hiba bil iwaz consists of two separate acts of donation, i.e. of mutual or reciprocal gifts of specific property between two persons, each of whom is alternately donor and donee.[23] The notion underlying a hiba bil iwaz was something of the following nature: D makes a gift to R, and R spontaneously (but out of the feeling of regard stimulated by the gift that he has just received) makes a gift, in his turn, to D, saying that his gift is a return for the gift that D had made him. In modern society R would probably desist from making such a statement, and would defer his gift till some suitable occasion arose, supplying a pretext for the gift. But mutual gifts of our own times are in essence the same as the hiba bil iwaz of the Muslim lawyers : a person who receives a present, in most instances feels himself under a social obligation to give a present in return : though as a matter of delicacy he disguises if possible the mutuality and reciprocity of his gift by waiting for a suitable occasion. Iwaz on the contrary accentuates the reciprocity by pointed reference.[24] When, in any case, the reciprocal gifts have been completed, under Muslim law, a new legal incident arises, viz. that each of the said gifts becomes irrevocable : gifts being in the theory of the law of Islam, normally revocable ; though the exceptions to this rule are so numerous that few gifts retain their revocability, even where no iwaz is given.

Genesis of hiba & iwaz explained.

Considered from this point of view, the law may be stated in the following terms : " The donee of any gift may make the said gift irrevocable by giving a gift in his turn to the donor, stating that it is in return for the said gift ; provided that the donor of the original gift accepts the return as such. The return for a gift so made is called the iwaz and the transaction is then called hiba bil iwaz." The distinction between a reciprocal gift made even with this intention and an article given in a contract of exchange or barter is obvious.

(B) Stipulated iwaz : hiba ba shart ul iwaz.

407. A gift[25] made with a stipulation for a return, is

[21] Bail. I. 507 (*ll.* 1-3) 515 ; II. 203, (*l.* 3); Hed. 482, to same effect.

[22] *Rujabai* v. *Ismail Ahmed*, (1870) 7 Bom. H. C. R. (O. C. J.) 27 ; *Solah B.* v. *Keerun B.*, (1871) 16 W. R. 175 ; cf. also *Mahammadunissa B.* v. *J. C. Bachelor*, (1905) 29 Bom. 428.

[23] Nature of transaction admits of no doubt either on texts, or on lucid exposition of Mahmood, J., *Rahim* v. *Muhammad*, (1888) 11 All. 1 & later of Niamatullah, J., in *Kulsum Bibi* v. *Bashir Ahmad*, [1937] All. 285.

[24] Contrast, Tacitus *Germ.* 21, 26 ; " Habitually careless of the future, the Germans were gratified both in giving & receiving presents, but without any idea that they thereby either imposed or contracted an obligation."

[25] The use of the word gift conduces to error, at least inaccuracy : stipulation for return & gift, being contradictory. But it is difficult to find a substitute even if it were possible to alter well established terms.

termed a hiba ba shart ul iwaz.[26] The return stipulated for may be specified or unspecified. SECTION 407.

The distinction between a hiba bil iwaz and a hiba ba shart ul iwaz in their inception is (1) that the intention to make an iwaz is an afterthought in the former ; (2) in the latter the two " go hand in hand not one before the other ; " (3) the return is contemplated by both parties in the hiba ba shart ul iwaz. In the hiba bil iwaz it is the donee under the primary gift who of his own accord thinks of making a return, and offers it to the primary donor.

Iwaz compared with consideration in a contract.

The fact that a " return " is stipulated for in a hiba ba shart ul iwaz must not be considered to affect the original nature of the transaction : ex hypothesi, there is primarily a gift,[25] i.e. there was no consideration for the transfer of the subject of the gift ; and the stipulation for return is not to be taken to be consideration : otherwise there would not be a gift. Consequently the original gift and the stipulation are not reciprocal promises forming the consideration for each other under the Indian Contract Act, s. 2, (f), but each is independent of the other.[27] It may be stated at once that such transactions are very peculiar, and that in our times we should expect either a gift to be made without any stipulation, or otherwise a contract in clear terms. But inasmuch as the law had its origin not in our times, nor in the country where it has to be applied (see s. 11(c) there ought to be nothing surprising if transactions unfamiliar to us are referred to, and provided for.[28]

The law relating to hiba bil iwaz and hiba ba shart ul iwaz.

The nature of the original gift and the return is clearly explained in the Fatawa Alamgiri [29] and by eminent judges.[23] But this has not prevented the law being frequently misconceived. Accordingly, the relevant passages from the Fatawa Alamgiri [29] are translated below, paragraphed and numbered. The rules of law are printed in italics.

Iwaz if not stipulated for is like gift.

I. " Where the iwaz follows the hiba, *it is a hiba in its inception*—there is no difference of view on this point amongst our doctors. . . . All the *conditions which apply to a hiba apply to the return following a hiba* (amongst them giving possession, taking possession, and acknowledgment).[30] This is stated in the Khizanatu'l Muftiyin.

If iwaz stipulated for,—

II. " The second kind of iwaz viz. an iwaz which is stipulated for in the declaration and acceptance [31] of the hiba,—if the hiba is with the condition of a return then,—

[26] Bail. I. 534 (543) ; II. 208 ; *Rassool Bee* v. *Gulam Kasim Sahib*, (1914) 1 L. W. 505 = 23 Ind. Cas. 802 (true nature of *hiba bil iwaz & hiba ba shart ul iwaz* : transfer of possession necessary in both). See also table in s. 345 ; cf. *Moghulsha* v. *Mahomad*, (1887) 11 Bom. 517. Sect. 442, *ill.* (2) (*c*)-(*e*), p. 478.

[27] Cf. *Rahim Baksh* v. *Muhammad Hasan*, (1888) 11 All. 1. See *n.* 23.

[28] Gratuity to attendant is gift when made ; with tacit, or express understanding for " return " in shape of service. But if attendant does not render service, donor does not consider himself in same position as purchaser who hands to shopkeeper price of article, & shopkeeper does not tender goods.

[29] *Fatawa Alamgiri* (Cal. ed.) IV. 550, *ll.* 5-2 from bottom.

[30] *Qabz* = giving possession ; *hiyaza* = taking possession ; *iqrar* = acknowledgment. These words are omitted in Bail. I. 543 (*ll.* 16-17) (543 *l.* 18).

[31] *Aqd-ul-hiba* = agreement for *hiba.*

SECTION 407. in its inception it is a gift.

(1) "*in its inception the same conditions are applicable to it (to the iwaz) as the conditions applicable to a hiba,* so that,—

(*a*) "the iwaz is not valid in respect of an undivided thing, which is capable of division,

(*b*) "nor can property (or right of ownership) be established in it (the iwaz) prior to transfer of possession ; and,—

(*c*) to each of the parties is given the right not to accept (the transaction).[32] But,—

(2) "*After possession has been taken by each* [viz. by the donee of the primary hiba, and by the donee of the iwaz] *the law applicable will be the law of sale* ; so that—

(*a*) "neither of them will have the liberty to take back what belonged to him, but—

(*b*) "the claim of pre-emption will apply to it and,—

(*c*) "each will have the option on the ground of there being a defect in the thing of which he has taken possession, to give it back.

Sadaqa.

III. "And a sadaqa with a stipulation for return, is reckoned as a hiba ba shart ul iwaz.

"These rules are laid down on the principle of ihtihsan,[33] for analogy would require that a hiba ba shart ul iwaz should be considered a sale from beginning to end : so it is stated in the Fatawa Kazi Khan.

"If a gift is made of a house to two men for the iwaz of 1,000 dirhams, after possession has been taken mutually, this gift will be considered (i.e. will be converted into) a lawful sale : this is stated in the Qunia." [34]

It is clear that neither a hiba bil iwaz nor a hiba ba shart ul iwaz is complete without each side taking possession of the subjects of gift and return respectively. Each of these two transactions consists of two completed reciprocal donations : and each of the component donations requires transfer of possession for its completion.

Hiba ba shart ul iwaz after completion almost a form of barter.

It would be difficult in India to prove such a hiba ba shart ul iwaz as would not be a contract : [35] for it would mean proving that though the donor stipulated for a return at the time he was making a declaration of gift, the stipulation did not form consideration for the property purported to be transferred by way of gift. But when a transaction once comes within the category of a hiba bil iwaz or a hiba ba shart ul iwaz, it is submitted, that there is no warrant for stating that transfer of possession can be dispensed with in regard to its completion.

[32] Donee of primary or original gift (*hiba*) is not bound to accept *hiba* with stipulation proffered ; he may accept the *hiba* without accepting stipulation (in which case primary donor may revoke his gift) : So stated : but apparently original gift has not at this stage been completed, & it is meant that his offer to make the *hiba* may be withdrawn. The two transfers (under *hiba* & *iwaz*) become irrevocable, only after possession has been mutually taken.

[33] *Istihsan* = juristic preference (from *hasan* = approved) see p. 19.

[34] *Fatawa Alamgiri, Hiba,* Ch. VII. = Bail. I. 534 (543), 535 (544). Cf. s. 345, s. 343 : table : "Hiba & iwaz : their incidents & stages."

[35] Cf. *Rujabai* v. *Ismail Ahmed,* (1870) 7 Bom. H. C. R. (o. c.) 27 ; *Mirza Beebee* v. *Toola B.,* (1829) 4 S. D. A. (CAL.) 334.

SECTION 408. II. IWAZ OR RETURN. (A) Part of subject of gift.

408. Whatever may validly form the subject of hiba may validly form the subject of iwaz or return ;[1] and doing or abstaining from doing something may operate as iwaz, whether such act or abstention has been antecedently stipulated for, or subsequently to the primary gift, accepted as iwaz.[2] *Quaere,* whether part of the subject of hiba may be validly accepted as iwaz.[3]

Explanation.—The produce or profit or usufruct of the subject of hiba does not form part of the subject of hiba.[4]

Illustrations.

(1) A gift is made and accepted with a stipulation that the donee shall give over to the donor the income or proceeds of the subject of gift ; and possession of the subject of gift is transferred to the donee. The gift is valid ;[5] and the donee's undertaking to give over the income or proceeds to the donor is also valid and enforceable in the Courts as a trust.[5]

(2) Government promissory notes were transferred, with the condition that the donee was to receive only the interest during her life, and that after her death the notes were to be held in trust for all her heirs. The Privy Council

[1] "Return from God" is quite different : ss. 348, 462, *n.* 26.

[2] E.g. *mahr* : *Mahomed Faiz Ah.* v. *Ghulam Ahmed K.*, (1881) 3 All. 490 = 8 I. A. 25 ; *Muhammad Esuph R.* v. *Pattamsa Ammal*, (1899) 23 Mad. 70 ; *Bashir Ahmad* v. (*Mt.*) *Zubaida K.*, (1925) 1 Luck. 83 ; *Razina Khatun* v. *Abida K.*, [1937] All. 153 (transfer of whole property to wife in satisfaction of *mahr* shortly after decree against him : *mahr* actually due : no FRAUD ON CREDITORS found : to prefer one creditor over another not being fraud) ; *Rahim Bakhsh* v. *Muhammad Hasan*, (1888) 11 All. 1, 5 (par. 2), 6 (par. 2, 3) (past services cannot be *iwaz*, nor natural love & affection) ; *Amir Khan* v. *Hukumut B.*, [1926] AIR (OU.) 474.

[3] See s. 408, com. with reference to part of subject of gift as *iwaz*. In last edition stated more cautiously that under Shia law part of subject of *hiba* may validly form subject of *iwaz*, & that under Hanafi law *iwaz* in *hiba bil iwaz* may not consist of part of subject of original *hiba* (unless such a change has taken place in the latter, that original *hiba* has become irrevocable). [Bail. I. 532, 533 (541-542) : see also *ill.* (4)]. It was queried whether under Hanafi law in a *hiba ba shart ul iwaz* a return may be stipulated for, consisting of a part of the subject of the original *hiba*. As main result of *iwaz* under texts is to make the *hiba* irrevocable ; where *hiba* has become irrevocable without any *iwaz*, it may seem to import little whether or not the *iwaz* is valid as iwaz. But real significance of the *quaere* is that if *iwaz* is valid as *iwaz*, it is irrevocable, whereas if it takes effect as independent *hiba*, it is revocable. Moreover, the provision may have important bearing on conditional gifts, & limited estates through trusts, in which direction law of gifts is expanding in India.

[4] See s. 366A. (*Nawab*) *Umjad Ally* v. (*Mt.*) *Mohumdee Begum*, (1867) 11 Moo. I. A. 517 = 10 W. R. (P.C.) 25. See ss. 353 ff. 366-369A. Parties in this case Shias but P.C. decision based on Hanafi texts. Result that under Hanafi as well as Shia law stipulation (*shart*) may be lawfully made (in *hiba ba shart ul iwaz*) for return of produce of subject of *hiba*. Stipulation in *hiba ba shart ul iwaz* is not enforceable : its fulfilment rests on mere will of donee. *Semble*, produce of subject may also form subject of *iwaz* in *hiba bil iwaz*. See s. 408, com. : *Lali Jan* v. *Muhammad Shafi K.*, (1912) 34 All. 478 = 9 All. L. J. 798.

[5] (*Nawab*) *Umjad Ally Khan* v. (*Mt.*) *Mohumdee B.*, (1867) 11 Moo. I. A. 517 = 10 W. R. (P.C.) 25 ; *Kasim Hussein* v. *Sharifunnissa*, (1883) 5 All. 285 ; *Lali Jan* v. *Muhammad Shafi K.*, (1912) 34 All. 478 = 9 All. L. J. 798 ; *Tavakalbhai* v. *Imtiyaj B.*, (1916) 41 Bom. 372, 798 ; *Rahiman Bi* v. *Mahomed Fatima*, (1914) 15 Mad. L. T. 345 = 23 Ind. Cas. 651 = [1915] M. W. N. 826.

SECTION 408. did not decide whether the condition was void and the gift absolute as it was unnecessary in the case before them.[6]

(3) D makes a gift on condition that the donee should return a part of the subject of gift as an iwaz. Under Hanafi law the condition is unenforceable,[7] and the gift absolute. Under Shia law both the gift and the condition are valid.[8]

(4) "If the donee convert a portion of the gift to another substance, and give it in exchange, it would be a good iwaz. If a person make a gift of one thousand dirhams to A, who gives in exchange out of the same one dirham, this is not a good iwaz according to us (i.e. the Hanafis) though Zufar differs."[9]

(5) "The faqih Muhammad bin Baqir Majlisi in reply to a question gave the following response: Being asked, 'If a man makes the gift of a property or a garden to his wife in lieu of her mahr, does it come under the category of a hiba with a return, so that unless one of them retracts, the other cannot retract?' he answered, 'Yes, it is a hiba with a return.'"[10]

The next two paragraphs are taken from a Shia authority:

1.—Iwaz may consist of a contract—

2.—to sew,

3.—to release debt against donor or other person.

"Anything that is capable of being given as a return, is sufficient (to form iwaz). It may be in the form of a contract, such as a letting and hiring, and the like, which requires a declaration and acceptance, and forms a separate transaction by itself; or it may consist of (a promise to do) some work, such as sewing a certain piece of cloth, which does not require a separate contract; and, by such sewing, [i.e. after possession is given of the iwaz, e.g. after the stipulation to sew has been fulfilled, which is like giving possession] it becomes a hiba with return (hiba muawwaza); or it may be the release of a claim against the donor, or some other person. Although in the treatises of the faqihs there is no express provision dealing with this matter, yet the generality of their statements includes all; and with reference to sadaqa it has been cited in evidence of its being irrevocable, that as a return from God is also an iwaz, so it falls under the head of (hiba muawwaza) gift having a return.... and the learned doctor Aga Muhammad Baqir Behbahani in a Persian treatise has expressly asserted the principle in such general terms."[10]

(Shia law.)
4.—Part of subject of hiba valid as iwaz.

"In the case of a hiba with a stipulation for a return, there is no distinction whether the return that is made consists of a part of the subject of hiba, or of anything else; for when it (the return) is not specified, the fact that it has come into the donee's possession in consequence of the hiba makes no difference; hence a part of the subject of hiba may be given in return for the whole."[10]

a.—Produce not part of corpus.

That PRODUCE is NOT PART OF CORPUS, seems clear on a detached view of the

[6] (*Prince*) *Suleman Kadr* v. *Darab Ali K.*, (1881) 8 I. A. 117 = 8 Cal. 1, 7; cf. (*Nawab*) *Ibrahim A. K.* v. *Ummat-ul-Zohra*, (1896) 19 All. 267 = 24 I. A. 1.

[7] Bail. I. 538 (547): see however, s. 352.

[8] See s. 408, com. & *n.* 10.

[9] Ameer Ali, *Moh. L.* I. 101 (162) citing *Fatawa Kazi Khan.*

[10] *Jamiu'sh-Shittat*, 392 (Shia text) s. 347 on gifts in lieu of *mahr.*

matter. The " produce " of a cow includes not only its milk but its calves. The latter cannot be considered to be parts of their mother. The instances most often given in the texts, refer to female slaves and their offspring, which make the distinction clearer still. In the context, however in which the Privy Council referred to the distinction [11]—while they were considering whether there could be a gift of promissory notes, without giving to the donee the right to take their produce (or the recurring interest)—the distinction has seemed to some critics paradoxical. It has been observed that produce would ordinarily be considered a part of the corpus ; and the entire reasoning of the judgment has been questioned. But, as has already been submitted (s. 366A) there is at least one aspect from which produce and corpus must (as a question of jurisprudence) be considered to fall into two entirely distinct categories. For in the case of the corpus the rights dealt with are notionally static : (i) Corpus consists of the totality of the present rights that the owner has. (For the purpose of appreciating the reasoning, let us for the moment put out of mind the complexity arising out of the distinction between the ' bare corpus ' and the ' corpus cum produce,' and let the mind not dwell on the fact that the sum total of present rights, which taken together forms ownership, includes the right to use the property in future : these matters have been duly dwelt upon in s. 366 A, com.)' (ii) On the other hand usufruct or produce refers to rights that accrue from time to time as the produce arises, or as the rights to the use of the property come into operation. With usufruct the notion of time and duration is necessarily connected : if you deal with produce you have to specify for what period of time ; a day's produce, or a year's; or produce that will accrue during the life-time of A or B.[12] Whereas with proprietary rights the notion of varying degrees of duration is not only absent : it is repugnant to them, since proprietary rights are by their definition rights unlimited in respect of duration. For illustrating the reasoning, let the usufruct consist of such tangible produce as grain or fruit : then by a transfer of usufruct, determinate tangible objects are ultimately transferred —though the objects are non-existent at the time when the transfer is made and come into being only in the future : but the moment they come into being and the transferee takes possession of those determinate objects, he becomes their absolute owner : he becomes entitled to them as clearly as he would to any " corpus " : the produce for the time being (when it consists of grain or fruit) takes the shape of " corpus " as much as the land. The produce being itself a distinct object may also in its turn be called corpus, but must be kept separate from the parent corpus.

SECTION 408. Corpus and produce.

b.—Notion of duration associated with produce, not with corpus.

The important point is that while usufruct is still in the form of usufruct, it has to be measured by time as much as land has to be measured by length and breadth.

The process by which the notion of time or duration gets introduced into proprietary rights under Muslim law is neglected by those who are familiar

[11] (*Nawab*) *Umjad Ally* v. (*Mt.*) *Mohumdee Begam*, (1867) 11 Moo. I. A. 517.
[12] Hed. 441, col. ii. § 5 (fixing period of right to usufruct).

SECTION 408.

c.—English doctrine of estates in land.

with the English doctrine of estates in land. That doctrine introduces, in its own method, the notion of time into proprietary rights. It is recognized by the historians of English law that that method is very peculiar. But it has planted deep rooted ideas in the minds of English lawyers, and through them in the minds of those who practise and administer law—who in their volumes teach, and from the Bench of Indian Themis pronounce, Muslim law (see s. 443A, com.). Proprietary rights in land being in English law "projected upon the plane of time," the result is that having interests in property for limited periods of time is spoken of as owning the property for the time. Hence produce is apt to be taken as part of the corpus, as it becomes the property of "the owner for the time being," (whereas under Muslim law the usufructuary or person entitled to the use and enjoyment of the property for a limited period of time is not called owner, and ownership of the land and the right to enjoy the usufruct are kept distinct). Hence also little sympathy is shown towards that reasoning in the Muslim texts which founds itself upon the notion of time being associated exclusively with usufruct and being dissociated from the ownership of the corpus. The Muslim texts on the other hand have already found an outlet for those notions and jural requirements, which depend upon the association of duration with proprietary rights. That outlet for the texts is furnished by their conception of usufruct. That conception an endeavour has been made to expound in this work. Having the charter of that outlet, the texts cannot be drawn away from a rigid definition of ownership pinning it down to a static condition. They refuse to speak of anything as ownership that is not "full ownership." They have no temptation to entertain the notion of "ownership for limited periods," or to overlook the contradiction contained within that expression. Still, it may seem strange that there should have been such a complete misapprehension of these notions in the minds of those expounders of Muslim law who owe primary allegiance to English law. Such expounders might have been expected to be familiar with proprietary rights being dealt with for limited periods of time, and thus to be astute in finding methods in which such limited interest may be created. If indeed the matter is considered without prejudice, it will be recognized that the notion of duration can be introduced easiest with reference to transfers of such rights as accrue from time to time. At the least that method may stand on a footing of equality with that which has found its way in English law.

d.—Operation of rules of iwaz on future produce.

The Privy Council recognized the distinction between corpus and produce in considering whether the hiba in question before them was incomplete or vitiated by having annexed to it a condition that had reference to the produce.[11] This step must bear on the validity and effect of other transactions. The same decision held that a hiba may be complete as regards the corpus of its subject, notwithstanding that it may not be complete in regard to its produce: that possession of the subject of the hiba may be complete notwithstanding that (i) possession of its produce is not given, and (ii) the donee has no right to take possession of the produce. Where the donor of the corpus purports

to impose conditions relating to the produce, such conditions will not prima facie be considered as affecting the voluntary nature of the hiba of the corpus ; but only as affecting something that is not part of the subject of hiba.

e.—Conditions raising a trust.

That part of the Privy Council judgment [11] in which their Lordships say that the arrangement is enforceable as an agreement raising a trust, introduces a new and important development in the Muhammadan law of gifts. Traces of an arrangement between the donor and donee may no doubt be found in a hiba ba shart ul iwaz.[13] But that transaction is treated in the texts as voluntary to the last moment, so that until it is completed, and until both the donor and the donee have performed their respective parts, either is free under the texts not to perform what he has agreed to do. The donor may resile by revoking his gift, or the donee refuse to do what he stipulated to do. (The fact that after both parties do what has been arranged, the transaction in considered as a sale, is irrelevant to the present discussion, though it has been a fruitful cause of misapprehension).[14] The Privy Council ruling has on the other hand made it possible to place such transactions on a firm basis from which the parties cannot resile. This development in the law is (it will be presently shown) entirely in accord with the spirit and the letter of the Koran. Its importance lies in this fact. Produce being something that comes in the first instance into the possession of the donee of the corpus (or is closely connected with what is in the possession of that donee), the donor cannot come into possession of it by purporting to " reserve " the right to the produce. He can only obtain it if the donee gives it to him, or allows him to take it or is constrained by the law (as e.g. a trustee) to let him have its benefit. So that whether the produce is technically part of the corpus and whether the gift is considered a conditional one, or whether it is considered that the donor merely reserves his rights over one object while he gives away another, still the difficulty arises from a situation that cannot be adequately dealt with by either of the two jural concepts that have found place in the texts, and which did cause a certain degree of agitation in the minds of the authors of the texts. These conceptions are : (i) the recognition of the distinction between ayn (substance) and manafi (usufruct) s. 366A, and (ii) the conception of the right to future usufruct as something the ownership (tamlik) of which may be transferred like the ownership of any existing determinate thing : s. 443. But a sufficient provision for the case has been found in the notion of trusts and fiduciary relations. This notion of trusts though borrowed at the present moment from England can be derived from or traced back to the very words of the Koran. Trusts were by no means unknown to the

f.—Conditions affecting usufruct can be enforced as trust but not under the jural concepts of the Texts.

g.—Trusts traced to words of Koran.

[13] Not a *hiba bil iwaz*, for in that there is no arrangement at the start.

[14] Rule that completed *hiba ba shart ul iwaz* is treated as sale in its legal consequences means that after *hiba ba shart ul iwaz* is completed same results follow in respect of pre-emption, etc. as on sale. But this rule much misunderstood : great confusion of terms. Law deals with rights, not with physical objects. When future produce is mentioned what law contemplates is the right to take future produce. The question whether a right having reference to some physical objects, or some situation that will come into being at a future time, ought to be permitted to be dealt with in same manner as bundle of present rights relating to determinate physical things in existence, arises sooner or later in most systems of law.

SECTION 408. law of Islam. Recognizing their influence upon such transactions as are now under consideration resuscitates the teachings of the Koran in this respect, and provides the law with a ready-made machinery which England has evolved after centuries of experience and thought. No student of Muslim law and its development can treat this benefit to the law with indifference.[15]

h.—Distinction between incidents of iwaz when it has been stipulated for and when not.

In considering what may form the subject of the iwaz, attention must not be drawn away from the fact that (1) in a hiba bil iwaz though the iwaz proceeds from the donee of the primary gift, the primary donor has the option of refusing to accept the proffered iwaz.[15] So that it is reasonable, if the primary donor chooses to accept part of the subject of his own gift as iwaz, to permit him to do so. Similarly (2) in a hiba ba shart ul iwaz the primary donor has the option to refuse the stipulated iwaz. But that is not all. For in this transaction he has to take the initiative in proposing what should be the iwaz for the hiba that he is making; and if he chooses, of his own accord, at the very time of making the gift, to stipulate that a part of his own gift should be returned to him as the iwaz, he ought surely to be permitted to act upon his choice, and to be kept to it. Sect. 408 is therefore submitted.[16]

i.—Conclusion.

i.—Disregard of stipulation may amount to fraud.

The ruling of the Privy Council has since the work was first published been frequently applied,[17] and has had a liberalizing effect, bringing the law nearer to the needs of modern times.[18] Stipulations in the nature of trust annexed to gifts have now become familiar. The donor frequently transfers property to the donee on the understanding that such stipulations will

[15] Similarly see *Kazim Ali Khan* v. *Sadiq A. K.*, (1938) 65 I. A. 219, 232 (LUCK.): "Had the authorities cited been relevant to this question & conclusive to the effect that Muhammadan law provided no remedy in such a case as the present, it by no means follows that an Indian Court, would not afford a remedy." Development of Muslim law now depends upon the breadth of vision of judgments inducing the assurance that the tribunal which pronounced the Tagore decision has not stepped down from its former pedestal.

[16] In the earlier editions it was submitted that whether under Hanafi law return consisting of part of subject of primary gifts could be stipulated for was not quite clear. Since then trend of decisions has strengthened submission.

[17] *Umjad Ally's* case, (1867) 11 Moo. I. A. 517 had till then been adversely criticized, or tacitly neglected. The change began with *Tavakalbhai* v. *Imtiyaj B.*, (1916) 41 Bom. 372 in which argument contained in s. 408 was accepted: gift of immoveable property with stipulation that donee shall give to donor fixed sum out of rents & profits annually: stipulation held binding. Numerous cases followed in which the principles laid down in 1867 have been followed & extended.

[18] "Is it then contrary to JUSTICE, EQUITY & GOOD CONSCIENCE" asked Sir Geo. Lowndes, *Muhammad Raza* v. *Abbas Bandi B.*, (1932) 59 I. A. 236, 346 (OU.), "to hold an agreement of this nature binding? Judging the matter upon abstract grounds their Lordships would have thought that where a person had been allowed to take property upon the express agreement that it shall not be alienated outside the family, those who seek to make title through a direct breach of this agreement could hardly support their claim by an appeal to these high sounding principles." "Even in an executory contract," said Lord Macnaghten, *Tailby* v. *Off. Recr.* (1883) 13 App. Cas. 523, 557, "I apprehend it is not competent for the vendor to say, 'I cannot give you all I promised, so you shall have nothing.' The purchaser is entitled to take what the vendor can give him, & as a general rule, he is also entitled to a corresponding abatement in the price. But where the consideration has actually passed, it is difficult to suppose anything less consonant with EQUITY than a rule which should lay down that a man who has had the benefit of the contract may escape from its burthen, merely because he has promised what he can perform & something more too, & promised it all in one breath & in the most compendious language."

be given effect to. Courts enforcing the Muhammadan law of gifts as justice, equity, and good conscience, can hardly enforce that law in such a manner as to allow a fraud to be committed by permitting the donee to contend that he is not bound by the stipulation.[18] The Shia lawyers give wide extension to the rules of iwaz and to grants of limited estates, relying on the insistence of the Koran upon engagements being carried out,— SECTION 408.

ii.—Koran insists upon fulfilment of promises.

> "It is not righteousness that ye turn your faces to the East and the West; but righteous....[are] those who keep their promise (covenant)[19] when they make one,"....Koran, ii. 177; "And perform your covenant,[19] verily the covenant shall be enquired of," xvii. 34; "Oh ye who believe!—fulfil your undertakings," v. 1.

These are not isolated or casual references to the duty of acting on one's pledged word. A striking piece of evidence showing that it was recognized as one of the half a dozen cardinal rules of Islam, is furnished by the extract from Ibn Hisham's Life of the Prophet in which the early emissary to the Negush of Abyssinia mentions that the Prophet's summons to God required "a declaration of His unity, being truthful in speech, and faithful in the fulfilment of trusts."[20] The following from the Koran forms a fitting summing up:

> "Among the people of the book there is he who, if thou trust him with a weight of treasure, will restore it to thee. And among them there is he who, if thou trust him with a dinar will not return it to thee unless thou keep standing over him....verily those who barter for a small price Allah's covenant and their oaths, they have no portion in the Hereafter."—Koran, iii. 75, 77.

iii.—Development of law in India.

The circumstances that must necessarily cause a development (not to term it a transformation) in the Muhammadan law of gift may again be noted here: (1) the totally novel conditions of modern life as compared to those contemplated by the text-writers of several centuries ago; (2) the law of contracts strictly so called is now entirely drawn away from the sphere of Muhammadan law, (though the law of gifts forms a part of the law of aqd or contract in Muslim texts); (3) the Indian Trusts Act is applicable to Muslims; and (4) the dealings that Muslims have with non-Muslims, who are governed by different rules. Occasionally illuminating sparks are produced by the clashing of laws.

Sect. 409 is now omitted.[21]

[19] *Ahad* in original. It may be translated "covenant." Its dictionary meanings are oath, bond, compact, promise, treaty, agreement, &c. See s. 417, com. last part: *Jawahiru'l Kalam*, IV. 619. cited s. 447, com.

[20] See above p. 6, *n.* 16 where passage set out.

[21] (*Bibee*) *Kulsoom* v. (*Bibee*) *Ameerunnessa*, (1863) Hyde. 150 (Wells, J. *solus*, decreed possession of land to plaintiff in whose favour on her marriage day "a *hebabil ewaz* or deed of gift" was executed, by her mother-in-law. Plaintiff went to live with her mother-in-law after marriage: "that accounts for her not being put into immediate possession," (p. 154, *ll.* 4-6). Necessity of possession for completing gift not alluded to at all in judgment, which deals only with question whether deed was executed). (*Nawab*) *Khwaja M.* v. (*Nawab*) *Husaini B.*, (1910) 32 All. 410 = 37 I. A. 152; ss. 59, 106.

SECTION 410.

III. LEGAL INCIDENTS OF IWAZ.

410. The law applicable to a return made subsequently to the completion of the primary gift, is (subject to ss. 417-419), the same as the law applicable to gifts generally.[22]

(A) As of gifts.

1.—Transfer of possession of iwaz necessary.

The following from a Shia text[23] refers to the iwaz in a hiba ba shart ul iwaz: "In order that the iwaz which has been stipulated for should be binding [i.e. transferred irrevocably to the primary donor: s. 420, com.,] there must be a declaration, acceptance, and possession on both sides (i.e. of the subject of the gift and iwaz or return respectively): so that the mere declaration, acceptance and possession of the primary hiba does not make it irrevocable, so long as the second gift (i.e. return)[23] is not completed by possession being given of it. Just as acceptance of the declaration of a gift is necessary in order that it may be completed, so also offering and giving (of the return) is necessary....Yet if the donor says, 'I give you this with the stipulation that you should sew this piece of cloth which I place before you,' or that you should make a ring out of this silver that is before you,' and if the donee, without the knowledge of the donor, sews, or makes a ring, then in this case it is true that a return has been completed, and the donor cannot change his mind (i.e. revoke his gift) nor is there any need for acceptance (on the part of the donor). Hence, what is meant, is, that where the return [is of such a kind that it] needs the usual declaration and acceptance (as in the case of a return consisting of a fresh gift, or another transaction), the offer of a return on the part of the donee is not sufficient (to make the original gift irrevocable) unless the donor accepts it; but where it does not need a declaration and acceptance (such as a release, and doing some work like sewing a piece of cloth, or forging silver) if the donor should change his mind, and [the donee] become aware before that is done [i.e. the donee has done what was suggested by the donor as the return] then he [the donor] is at liberty not to accept it, and may reject the sewing or the forging. It is the prevalent and well-known opinion of the learned, that a release requires no acceptance in cases other than this, viz. where it serves as a return for a thing,—as is evident."[23]

2.—Acceptance when unnecessary.

3.—Release.

4.—Hiba bil iwaz not a sale.

Much misapprehension of the law,[25] which even Mahmood, J.'s exposition has not succeeded in removing[26] may perhaps be traced to Macnaghten,[27] who refers in the following terms to the statement in the texts: "They say that a

[22] Bail. I. 534 (par. 2) (543). See *Rahim Bakhsh* v. *Muhammad Hasan*, (1888) 11 All. 1, 5 (par. 3), 6 (par. 1), 7 (par. 2) (*per* Mahmood, J.); *Rasool B.* v. *Madari Mahaldar Gulam K. S.*, (1914) 1 L. W. 505 = 23 Ind. Cas. 802 (MAD. H. C.).

[23] *Jami-ush-Shittat*, 392. Note that the author calls *iwaz* "the second gift."

[24] Binding = obligatory = irrevocable. See ss. 420, 462, pp. 465, 552 *n.* 2.

[25] Notions of gift & consideration seem irreconcilable. Consideration makes transaction governed by Ind. Contr. & Trans. of Prop. Acts: what is spoken of as a *hiba bil iwaz*, is, in reality contract with valid consideration: cf. *Mahammadunnissa Begum* v. *J. C. Batchelor*, (1905) 29 Bom. 428. The *mahr* may be the consideration: s. 347, com., p. 351.

[26] *Rahim* v. *Muhammad*, (1888) 11 All. 1; see also *Kulsum B.* v. *Bashir Ahmad*, [1937] All. 285; *Rasool B.* v. *Madari M. G. K. S.*, (1914) 1 L. W. 503 = 23 Ind. Cas. 802.

[27] Macn., *Mooh. Law*, 209 *n.* (case 15). Cf. also table on p. 343.

hiba bil iwaz is a sale in every sense of the word." But it is entirely overlooked that a transaction is called a hiba bil iwaz only after it has been completed by possession being taken both of the hiba and the iwaz. For (1) a hiba bil iwaz starts with a gift ; and at the time of the gift there is no mention of a return (or consideration); for if there were, the transaction would be styled a hiba ba shart ul iwaz. Therefore, as regards the first or primary gift it is a hiba pure and simple, and there is no question that that should be completed by possession. Again (2) the iwaz is voluntary on the part of the donee, and it must be completed like any other gift. (3) When this has been mutually done, then the transaction consisting of the two gifts is called a hiba bil iwaz. The question is still doubtful whether the iwaz may be given and completed as an iwaz though the primary donor has not completed the primary gift by transfer of possession. On principle it would seem that if the primary donor does not give possession the only remedy to the primary donee is to revoke the gift of what was intended to be the iwaz.

Hiba bil iwaz distinguished from barter,

It has, however, been held[28] that the hiba bil iwaz may be completed without transfer of the possession of the subject of the original gift—provided that the "consideration[29] agreed to be given" is proved to have actually passed. With all deference, though the result could not have been otherwise, the judgment confuses clearly distinguishable notions. How can there be a consideration agreed to be given" in a hiba bil iwaz? That can only be in a hiba ba shart ul iwaz. There was before the Court a clear contract —the considerations consisting on the one hand of the release of the mahr by the wife and on the other the deed of settlement. Alternatively it may be termed a compounding or release of the mahr.[30]

—not complete without transfer of possession.

This confusion of ideas and the statement based on it that in a hiba bil iwaz possession is not required, are sought to be supported by what on examination will be found to be merely a reference to the contention of the appellant,[31]—a contention which in the first place was not upheld by the Privy Council, and which in the second place could have had reference only to a hiba ba shart ul iwaz. Their Lordships mention neither a hiba bil iwaz nor a hiba ba shart ul iwaz in express terms. But they do state that, according to the appellants' contention it was assumed that the donor had the intention to divest himself of the property. As it was, the donor was proved to have had no such intention. There was no occasion to consider whether,

Khajooroonissa *v.* Roushun Jehan.

[28] *Muhammad Esuph B.* v. *Pattamsa Ammal*, (1899) 23 Mad. 70, 73, citing (but misapprehending (see s. 410, com.) (*Ranee*) *Khajooroonissa* v. (*Mt.*) *Roushun J.*, (1876) 3 I. A. 291 = 2 Cal. 184 ; *Rahim Jan B.* v. *Imam Jan*, (1912) 17 Cal. L. J. 73 seems to be under same misapprehension.

[29] The "consideration" is not mentioned till after the first gift has been made.

[30] See ss. 99, 100, pp. 177 ff.

[31] (*Ranee*) *Khajooroonissa* v. (*Mt.*) *Roushun Jehan*, (1876) 3 I. A. 291, 307, 308 = 2 Cal. 184, 197 (par. 2) : "But it was conceded that in order to make the deed valid in this view of the case, two conditions at all events must concur, viz. an actual payment of the consideration on the part of the donee, & a *bona fide* intention on the part of the donor to divest himself *in praesenti* of the property, & to confer it upon the donee." See *Rasool Bee* v. *Madari Mahaldar G. K. S.*, (1914) 1 L. W. 505 = 23 Ind. Cas. 802 (MAD. H. C.), where 3 I. A. 291 is explained.

SECTION 410. if the alleged contention had been proved to exist, the mere intention, neither carried into effect, nor followed by the actual payment of the consideration, could turn the two intended transactions into a hiba bil iwaz or hiba ba shart ul iwaz. They certainly did not purport to decide to that effect.[32]

(B) Return before completion of gift.

411. *Quaere,* whether a return may be validly made before the original gift has been completed ; and whether, if a return is so made and accepted, the original gift is enforceable if possession has not been given of its subject.[1]

Whether possession of subject of return enough without that of subject of hiba.

It has been [2] said that possession of the consideration, i.e. return in a hiba bil iwaz, is necessary, but not of the subject of the hiba itself. The latter proposition is (*submitted*) quite opposed to the theory of a hiba bil iwaz. The iwaz or return, or what has been called consideration in the judgment, arises in the case of a hiba bil iwaz as an afterthought on the part of the donee, after the primary gift is completed, and both the primary gift and the return are governed by the rules as to completion in s. 346 : moreover the return cannot operate as such (viz. for the purpose of making the primary hiba irrevocable) unless it " be distinctly opposed to the prior gift by words clearly expressive of such opposition as, for instance, by saying ' this is the iwaz or the budul, or in place of the gift.' " [3]

(C) Iwaz by party other than donee.

412. An iwaz or return may be made by a person other than the donee of the primary gift ; and it may be made by such other person though he may not have been desired to do so by the donee.[4]

[32] *Doe, dem. Ramtonoo Mookerjee* v. *Bibee Jeenut,* (1843) Fulton 152, 154, seems to exemplify most errors above referred to : (1) Though judgment does not allude to *hiba bil iwaz,* headnote is that *hiba bil iwaz* is valid without render of possession to donee ; (2) judgment, however, does speak of transaction as gift, yet states that its validity " must be construed according to the rules affecting the laws of sale ; " this misdescription of the transaction may perhaps be explained by fact that " the deed of gift recited that the wife was in possession & that the gift was made as a *hiba bil iwaz* or gift in lieu of her marriage portion." Having fallen into the double error (*a*) of calling that gift which in fact was contract for consideration (for husband in consideration of *mahr* due to wife agreed to transfer part of property to wife, & wife in consideration of transfer agreed to release her right to claim *mahr*) & (*b*) of considering that even if it were a gift no transfer of possession would be necessary, result arrived at was, by happy chance, correct : one error counteracting the other. (3) The fallacy that because a completed *hiba ba shart ul iwaz* has in Muhammadan law same legal incidents as completed sale, therefore, same rules apply for completing *hiba bil iwaz,* as for completing sale, is also illustrated.

[1] Position turned upside down : there cannot be real *iwaz* till original gift completed. But transactions in our times often of such complexity that such questions must arise.

[2] *Moosa Adam Patil* v. *Ismail M.,* (1900) 12 Bom. L. R. 169, 186, (" this is the law by the common consent of all authorities,"—which are, however, not referred to ; but on p. 189 reference is made to *Chaudhri Mehdi Hasan* v. *Muhammad H.,* (1905) 33 I. A. 68 ; judgment of P. C. is said to contain some confusion between the two forms of gifts. *Submitted* : there is no such confusion in 33 I. A. 68. See s. 11c.

[3] Bail. I. 532 (541). See *Rasool Bee* v. *Madari Mahaldar G. K. S.,* (1914) 1 L. W. 505 = 23 Ind. Cas. 802 ; s. 410, com.

[4] Bail. I. 535, *ll.* 9-13 (544); 534, *ll.* 13-16 (543); Hed. 486.

413. The return must be made to the donor of the primary gift. Where its subject is purported to be given to a person other than the primary donor, it does not operate as a return, and does not make the primary gift irrevocable, unless it has been stipulated that the return should be made to such other person.[5]

SECTION 413.
(D) Iwaz cannot be to other than donor.

This section is based on a Shia text[5] : "The return should go to the donor, and not to any other ; so also it appears from the response of Abdullah ibn Suran, where he (al Sadiq) is reported to have said, 'When the donor gets a return, it is not permissible for him to revoke it,' from which it is inferred that when the return is made to any person other than the donor, he may revoke it (the primary gift).[6] In the second case (viz. in a hiba ba shart ul iwaz) it is so (i.e. the gift becomes irrevocable) because a stipulation is equivalent[7] to a price. Hence such a stipulation of a gift to another person (by way of return) which has been mentioned in the agreement of the primary gift, operates as a return of the subject of the primary gift, which then becomes a gift with a return, and is rendered obligatory,[8] except that the primary donor may revoke the first gift (i.e. may not complete it, or may retract it before it becomes irrevocable by the acceptance of the return) and the donee may (similarly) revoke the second gift."[5]

414. A return may be made as to only a part of the subject of the original gift.[9]

(E) Iwaz as to part of gift.

415. (1) The donee is under no obligation to make any return, except as provided in ss. 351 and 352, notwithstanding that the primary gift is a hiba ba shart ul iwaz, viz. made with a stipulation for a specified return.[10]

IV. LEGAL EFFECTS OF IWAZ AND HIBA ON EACH OTHER.
(A) Donee not bound to make a return.

(2) The primary donor is not obliged to accept what the donee offers as a return : even if (*a*) there was a stipulation for a specified thing being given as a return, and (*b*) the donee offers to give as a return what was specified.[11]

(B) Donor not bound to accept it.

The following are from Shia texts :—

"'When[12] a person has made a gift in general terms,[13] there is no condition or obligation on the part of the donee to give any gratuity in return,' and the

[5] *Jamiu'sh-Shittat*, 392. [6] Viz. it does not operate as a return at all.
[7] To be quite accurate, the author should have said "potentially equivalent."
[8] Obligatory = irrevocable : s. 420, com., p. 465.
[9] Bail. I. 535 (*ll.* 5-8) (544); 487 Hed. (col. i).
[10] Bail. I. 535 (544); II. 208.
[11] The clauses (*a*) & (*b*) seem to result from *Jawahiru'l-Kalam* & *Jamiu'sh-Shittat* : ss. 416 & 417, comm.
[12] *Jawahiru'l-Kalam*, IV. 635, words in ' ' are from *Sharaiu'l-Islam*, on which *Jawahir* is commentary. Bail. II. 208.
[13] I.e. made simple *hiba*.

SECTION 415. rule is the same whether it be from an equal, an inferior, or a superior. There is no difference of opinion about it. It appears from the writings of jurists that its being binding[14] depends on a return being made. But if, for instance, it is a gift to a relation, it is binding without a return.[15] True, it is said in the Kafi that a present from an inferior to a superior requires a return of an equal value, and that the donee is not allowed to deal with it before making any return or expressing an intention to do so. 'Still, if he should do so, the donor would thereby be barred from retracting the gift,' if the return is accepted by the donor. He (the donor) is not bound to accept it, for it is like a new gift, which he is not bound to accept, the more so as it cancels his (the donor's) right to revoke (the primary gift)." [See also s. 416, com.].

Return like a new gift. "Ishaq ibn Ammar says: 'I asked, "A man makes a present to me with a view to get something that I have, in return; I take it, but I do not give anything in return. Is this valid?" He (Imam Jafar-us-Sadiq) said, "Yes, you may do so, but you ought not to neglect making the return."'"[16]

"The result of an examination of the authorities bring us to the view adopted by Muhaqqiq[17] and other learned jurists: the words of Muhaqqiq are as follows: 'The donee cannot be compelled to make the stipulated return, but he has the option,'—by which he means that the donee can elect either to make the stipulated return, or to give back the subject of the gift itself.... At any rate it is the approved and prevalent opinion that so long as he (the donee) has not fulfilled the stipulation, and acceptance and possession [of the return] by the[primary] donor have not taken place, the donee has the option of either fulfilling the stipulation, or returning the gift.[18]

(c) Hiba bil iwaz, Hiba ba shart ul iwaz both irrevocable.

416. After the primary gift and its return have both been completed by possession of the subject being respectively transferred, neither the gift nor the return can be revoked. Where a return is made as to part only of the subject of the gift, the gift is irrevocable only as to the said part.[19]

Illustration. D makes a gift of a house to a stranger, and puts the donee in possession. Then the donee gives a horse as a return for the gift, which D accepts. Then D purports to sell to a third person the said house. The sale is invalid.[20] If the donee had not given the horse as return, the sale would have been valid, provided that D had previously revoked his gift, but not otherwise.[21]

14 I.e. irrevocable: s. 420, com.

15 See s. 424. (N.B.—present extract deals with Shia law).

16 *Jawahiru'l-Kalam*, IV. 636; i.e. there is no legal, but only moral obligation to make expected return. Note: no actual stipulation for return is mentioned but donee knows that donor make the gift in expectation of specific return & yet accepts the gift.

17 I.e. author of the *Sharaiu'l-Islam*. 18 *Jamiu'sh-Shittat*, 382.

19 Hed. 487 (col. i.); Bail. I. 538 (*ll.* 5-8) (541); II. 205 (*ll.* 16-19), 207 (*ll.* 4-5).

20 Bail. II. 207.

21 The first juristic act is valid: the second assumed to be done inadvertently.

The rule is the same whether the iwaz has been stipulated for or not; i.e., whether it is hiba bil iwaz or hiba ba shart ul iwaz. SECTION 416.

The following from a Shia text shows the difficulty of adhering to the theory that a hiba ba shart ul iwaz is a gift and not a sale : that it continues to be a gift and a voluntary and revocable transaction, until the subject of gift and of the return are respectively transferred : and that then it "turns into" a sale. Many of the rules, it is clear, are of merely moral obligation :—"The details relating to revocation may be stated thus : (1) with a stipulation that a return will not be made, there is no question that the gift is not obligatory [i.e. it is revocable] [22]; (2) with a stipulation for a return, what is stipulated for is absolutely obligatory; [23] (3) again, where the stipulation specifies the return, the specific return is obligatory, that is to say, the donee must make the stipulated return, otherwise the donor has the option of breaking off the transaction [25]; (4) where the stipulation does not specify the return, the fulfilment of the stipulation is not the less obligatory, but if the parties agree upon the subject (lit., amount) of the return that is sufficient; (5) where they do not (so agree) it is necessary to make a return of the same value, whether it consists of another article, or of the value (in money) of the subject of the original gift): it is not obligatory on the donee to make a return of greater value than the subject of gift. Yet the donor may demand it,[25] just as the donor cannot be compelled to accept the first.[25] The value of the gift must be taken to be what it is at the time of the transfer of possession, if it is transferred subsequently to the declaration; or it may be fixed at the time of making the return." [26]

Jawahir-ul Kalam.

Return makes primary gift irrevocable.

417. Where a return [27] is stipulated for, and it is in fact made and accepted,[28] the primary hiba and the iwaz (after possession of their subjects is transferred) mutually operate as reciprocal considerations, and the two together constitute a transaction, of which the legal incidents are in Muslim law the same as those of a sale.[29] *Semble,* subject to s. 351 the

(D) Hiba ba shart ul iwaz after completion operates as sale.

[22] I.e. (*a*) not necessary to complete, (*b*) it is revocable. See s. 415(2), s. 420, com.

[23] I.e. if no return made, donor may revoke original gift. See clause (3) of this passage. Donor has no power to enforce specific performance. See s. 415.

[24] *Aqd* = agreement; cf. s. 18(3), *n.*

[25] I.e. he may threaten to revoke gift unless return of higher value made. Illustration in *Jawahiru'l-Kalam* (iv. 636) of gift to Prophet of camel (apparently of extraordinary value): donor not satisfied though offered 3 camels in return, nor with 6: at last 9 offered, & he was satisfied. This was nothing but sale; but according to social ideas of the time, method of forcing hands of persons from whom favour, or dealings, sought. The present writer had experience with Turkish gentleman who made gift of Koran to him, & expected in return to be paid his passage to Constantinople; history of rest of transaction (this work not being treatise on diplomacy) not relevant.

[26] *Jawahiru'l-Kalam,* IV. 636.

[27] Return may consist of remission of MAHR by wife : s. 347, com., p. 351.

[28] But not until made. See s. 417, com., p. 462.

[29] E.g. (*a*) for PRE-EMPTION, (*b*) in regard to 3 days' option of revocation under

SECTION 417. transaction is governed in India by the Muslim law of sale ;[30] and not by the Indian Contract Act or the Transfer of Property Act.[31]

Where return stipulated for.

A Shia text states :—"The donor may stipulate either (1) that no return should be made ;[32] or (2) that a return should be made ; or (3) he may make an absolute gift without reference to any return. (1) As regards the first case, no difficulty arises in concluding that the donee is not required to make any return ; and if the gift is not made to a relative, nor with the intention of approach (to God) etc. the donor may revoke it so long as its subject continues to exist. (2) Where the donor stipulates for a return, it is evident that no question can arise as to its validity ; in such a case he may either (*a*) specify the return that has to be made, or (*b*) leave it unspecified. If it is specified, the stipulated return must be made ; with the result that if the donee gives the stipulated return, and the donor receives it, the gift becomes irrevocable ; but if the donee does not make the stipulated return, the donor has the option of revoking his gift. Thus, by saying that 'the stipulated return must be made,' what is meant is that if the donee desires the gift to take effect (irrevocably), he must make the stipulated return ; and not that there is any absolute obligation on the donee to make the return. In other words, the donee is not bound to make the return ; which means that if he chooses, he has the option of giving back the subject of gift itself, and making no return. It is evident from this that when the donee makes a return, it is not binding so long as the donor does not accept it. For the return is like a fresh gift. Traditions are in general terms, to the effect that revocation is valid until a return is made, and that the donor is under no obligation to accept it. Nay, even if he accepts or agrees to the return, so long as he has not taken possession of its subject, he has the option of revoking it (his primary gift). And inasmuch as there is no authority to the effect that this is one of those transactions which can become obligatory (irrevocable)[33] before acceptance and possession, no such inference (in favour of its being irrevocable) can be drawn from (the ordinance contained in the Koran) 'fulfil covenants,'[34] being in general terms, as some have supposed. So also no such inference can be

It need not be made, but if made, it will cause the original gift to be irrevocable.

Return like a fresh gift.

Fulfil covenants.

Muslim law, in similar matters, & (*c*) transaction considered as sale & not gift. Cf. *Ghulam Mustafa* v. *Hurmat*, (1880) 2 All. 854 ; *Rujabai* v. *Ismail Ahmed*, (1870) 7 Bom. H. C. R. (o. c.) 27 ; *Esahaq Chowdhry* v. *Abedunnissa B.*, (1914) 42 Cal. 361. Sect. 351 above (= p. 361 (Ind. Contr. Act, s. 25).

[30] That law not superseded for all purposes, e.g. not for pre-emption ; cf. *Fida* v. *Muzaffar*, (1882) 5 All. 65 ; *Amjad* v. *Mushtaq*, (1895) 17 All. 454.

[31] When s. 451 inapplicable, great difficulty in the transaction satisfying preliminary requirements for formation of contract. Point, however, not likely to arise : importance only where Ind. Contr. Act & Muhammadan law conflict.

[32] This seems supererogatory ; but donor may wish to preserve his right of revocation : or may be a person of consequence not desirous of having any return from donee.

[33] See s. 420, com.

[34] Referring to Koran, ii. 177, cited in Intr. Chap. p. 6, also p. 455 ; *J. Tavakalbhai* v. *Imtiaj*, (1917) 41 Bom. 372, 376 ; s. 408, com. *ad. fin.* translat. *Jawahiru'l-Kalam*, IV, 619, s. 447, com.

drawn from traditions (authentic though they be) as the one in which Abdullah ibn Sinan reports : 'He (Imam Jafar-us-Sadiq) said : "The gift is valid (i.e. irrevocable) for relatives, and for one who has given a return for his gift, and in others revocation is allowed."'" [35] SECTION 417.

418. Where a hiba ba shart ul iwaz or a gift with a stipulation for a return is made, and the stipulation is unlawful, both the gift and the stipulation are void.[1] (E) Unlawful stipulation avoids gift.

Sect. 418 is based on a Shia text : [2] "Now as to the stipulations which are unlawful : (these are) such as may be muqtaza-i-aql (unreasonable), for instance, the donor says : 'I give this to you, and make a condition that you should not sell it, and you should not make a gift of it to others,'—in such a case the stipulation is invalid : [2] regarding the validity of the original contract (gift) there are two ways (of considering it), or rather two opinions, and the better opinion is that it is invalid." [2] RESTRICTION AGAINST ALIENATION Void.

Where the fee (i.e. absolute ownership) was sought to be made to devolve from one generation of the donor's descendants to another, without its being alienable by them or liable to be taken in execution for their debts, the Privy Council held the prohibition against alienation to be void in law, not affecting the donee or his creditors.[4]

419. Where either the primary gift or the return is, or becomes, wholly or in part, void, the return [5] or primary [6] gift respectively becomes wholly or in part revocable, as the case may be,[7] provided that (1) the primary gift may not be (F) When either the gift or the return is void the other may be revoked.

[35] *Jamiu'sh-Shittat*, 382.

[1] See com. [2] *Jamiu'sh-Shittat*, 381.

[3] UNREASONABLE RESTRICTION invalid, because contradictory of grant itself : grant being of full *ayn* or ownership (not merely of *manafi* or some of the rights which are components of ownership) : thus grantee is in same breath (i) granted full rights & (ii) told not to exercise one of most important of rights comprised in grant : see s. 345, com., p. 345 ; (FULL OWNERSHIP ; PROPERTY) s. 348, com. (*hiba* = grant of ABSOLUTE ESTATE ; conditions annexed to gifts) ; s. 352, com. (undertakings by donee) ss. 366, 366 A, 369, 443, 443 A, 444, comm. ; s. 408, com. (notion of DURATION annexed to USUFRUCT). Cf. s. 348, *ill.* (5). "If again the gift were in terms of an estate inheritable according to law, with super-added words RESTRICTING the POWER OF TRANSFER which the law annexes to that estate, the restrictions would be rejected as being repugnant, or rather as being an attempt to take away the power of transfer which the law attaches to the estate which the giver has sufficiently shown his intention to create, though he adds a qualification which the law does not recognize" : *Tagore Case*, (1872) L. R. I. A. SUPP. 47, 65. See *Yeap Chear Neo* v. *Ong Chung Neo*, (1875) 5 C. P. 381, 394 ; ss. 443A, 449, comm. ; *Sookhmoy Chunder Dass* v. *Srimati Monohurri Dasi*, (1885) 12 I. A. 103, 110, cited s. 443A, com. *n.*

[4] *Nizamuddin* v. *Abdul Gafur*, (1892) 19 I. A. 170 ; *Babulal* v. *Ghansham Das*, (1922) 44 All. 633 ; *Nasir Ali Shah* v. *Sughra Bibi*, (1919) 1 Lah. 302, 306 (provisions RESTRAINING ALIENATION & conditions as to devolution on death of sons void) ; *Muharram Ali* v. *Barkat Ali*, (1930) 12 Lah. 286 ; *Abdul Wahid Khan* v. (*Mt.*) *Nuran B.* 12 I. A. 91, 99 (alienation without special emergency restricted) ; *Muhammad Raza* v. (*Mt.*) *Abbas Bandi*, (1932) 59 I. A. 236 (restriction against "ALIENATION TO STRANGERS," upheld) : see *n.* 3.

[5] Bail. I. 533 (*ll.* 27-32) (542). [6] Bail I. 533 (*ll.* 32) (542).

[7] Bail. I. 534 (*ll.* 1-2) (543).

SECTION 419. revoked where it would have become irrevocable without a return ;[8] and (2) the return may be revoked even though it has increased or diminished in value.[9]

Illustrations. (1) If the father purports to make a GIFT out of PROPERTY BELONGING to his MINOR child, and receives a return or iwaz from the donee, the primary gift is void, and both the primary gift and return may be revoked.[10]

(2) A gift is made to a minor : the minor's father purports to make a return out of the minor's property : "the exchanging is not lawful, though the gift were made on condition of an iwaz." Both the primary gift and the iwaz may therefore be revoked.[10]

(3) D in his death illness, purports to make a gift to R of the whole of his property valued at Rs. 600, for which R makes a return. If the value of the return is Rs. 400 or more (i.e. 2/3 of D's estate) the primary gift and iwaz are both valid.[10]

(4) In *ill.* (3) if the value of the return is Rs. 300, then the gift is invalid as to Rs. 100, i.e. 1/6 of it. The donee may, in such a case, either pay Rs. 100 to the heirs, in which event the gift and return both become irrevocable, or he may return the gift, and demand back the return which he had made.[11]

§ 8.—REVOCATION OF GIFT.

I. NORMAL REVOCABILITY OF GIFT.

420.[12] The donor may, subject to ss. 422-429, revoke the gift,[13] even if at the time of, or after, the declaration of the gift he has purported to waive his right of revocation ; provided that where he has accepted something in return for the waiver, he cannot validly revoke the gift.[14]

Illustrations. (1) The following are valid FORMS OF REVOCATION : "I have revoked the gift," or "I have restored it to my own property," or "I have annulled or dissolved the gift," or "I have retracted, or taken back my gift," or "I demand the restitution of my gift."[15]

[8] Bail. I. 533 (*ll.* 14-17) (542). See ss. 424 ff.

[9] Bail. I. 533 (*ll.* 32-34) (542). See ss. 424 ff.

[10] Bail. I. 535 (par. 3) (544) ; but *ill.* (1) & (2) may in fact amount to agreements for barter, which if sufficiently in interest of minor may be within power of father as guardian & so enforceable.

[11] Bail. I. 536 (545), 542 (*ll.* 20-25) (551).

[12] Sect. 420 cited & applied : *Imdad Ali* v. *Ahmad Ali*, [1925] AIR. (OU.) 518.

[13] *Cassamally* v. *Currimbhoy*, (1911) 36 Bom. 214.

[14] Bail. I. 508 (*l.* 30) (516), 529 (538) 528 (par. 2) (537); II. 205 (*ll.* 13-15); Hed. 436 (col. i.). *Ismal* v. *Ramji Sambhaji*, (1899) 23 Bom. 682 (gift held revoked); cf. *Ma Mi* v. *Kallandar* (No. 1), (1926) 54 I. A. 23, 31 ; Trans. of Prop. Act, s. 126 : gifts may not be revoked unless made REVOCABLE BY AGREEMENT : gift revocable at mere will of donor, void. But Ind. Contr. Act, s. 159 : a thing lent gratuitously, even if for specific period, may be demanded back within period. ROM. LAW : Justin., II. 7, 2 : " If those that receive the boon prove ungrateful, we have by our constitution given leave to revoke the gifts on certain fixed grounds ; " gifts between husband & wife & from child to parent subject to complicated restrictions : *Dig.* XXIV. Tit. 1.

[15] Bail. I. 524 (533); II. 205 *n.* 10. See s. 5c.

(2) But a mere resumption of the subject of gift is not a valid revocation, nor does a sale purported to be made of the gift property, operate as such.[16] SECTION 420.

Revocability is one of the main characteristics of a "voluntary" transaction in the eyes of Muhammadan lawyers; an "obligatory" transaction being frequently opposed to a "revocable" one.[17] s. 462 *n.* (A) Voluntary therefore revocable.

So, "If a man make his testament and last will irrevocably," said Lord Coke, "yet he may revoke it, for his acts or his words cannot alter the judgment of the law, to make that irrevocable which of its own nature is revocable."[18] But, of course, the right of revocation may be validly parted with for consideration.[14]

421. A gift may be revoked as to only a part of the subject thereof; and where a gift is irrevocable as to only a part of its subject, it may be revoked as to the other part.[19] (B) Partial revocation valid.

422. A conditional revocation of gift is not valid; nor a revocation referred to a future time.[20] (C) Conditional revocation invalid.

If the donor says, "when the beginning of this month comes, I have revoked," the revocation is not valid, because it can neither be suspended on a condition nor referred to a future time.[20]

423. (1) Under Hanafi law, the revocation of a gift is completed either by an order of the Court cancelling the gift,[21] or by the donee consenting thereto: but revocation is not completed either by re-assumption of the subject of the gift by the donor[22] or by his purporting to alienate it.[23] Where there is[24] (*a*) an order of the Court, or (*b*) the donee consents to the donor revoking the gift, its subject revests in the donor without his taking possession.[25] Unless there is such

II. REVOCATION HOW COMPLETED.
(A) HANAFI LAW.
(1) Order of court or
(2) Consent of parties.

[16] Bail. I. 524 (533); II. 207.

[17] Cf. Bail. I. 508 (par. 3) (516), 549 (*l.* 6) (551), 550 (*ll.* 3, 20-25) (558); II. 211 (*ll.* 9-11), 212 (par. 2), 226 (par. 2), 227 (*ll.* 4-15); see also s. 348, com. on theory of law of *Hiba*. *Jami'ush-Shittat, Hiba*, 392, cited s. 462, *n.* 2.

[18] *Vynor's Case*, [1609] 8 Rep. 80*a*, cited in *In re Heyes, Walker* v. *Gaskill*, (1914) 30 Times L. R. 637, (*per* Evans, P.) (Prob. Div.).

[19] Bail. I. 526 (*ll.* 17-18) (535); Hed. 486 (col. ii.) 487 (col. i).

[20] Bail. I. 524 (533).

[21] Bail. I. 526 (536); Hed. 486, 487; *Jainabai* v. *R. D. Sethna*, (1910) 34 Bom. 604, 611 (seems to overlook that order of Court necessary merely for completion of revocation: 34 Bom. 612-613 based on misconception that creation of limited interests governed by rules of *hiba*). See s. 11 C.

[22] Bail. II. 205, *n.* 10. [23] Bail. II. 207 (*ll.* 5-10).

[24] Hed. 486 (col. i.), 487; Bail. I. 527 (par. 3) (536), 524 (*ll.* 10-12) (533 *ll.* 10-11); *Enaet Hossein* v. *Khoobunnissa*, (1889) 11 W. R. 320; *Sheik Jeetoo* v. *Mt. Budun*, (1837) 6 S. D. A. (CAL.) Rep. 189.

[25] Bail. 527 (*ll.* 22-25): effects of cancellation (*ll.* 14-16); doubtful if revocation by mutual consent amounts to "cancellation"; "precedents" (*l.* 17) (536, par. 3, sent. 2) favour that view.

SECTION 423. an order or consent, the revocation is not complete unless and until the donor takes possession of the subject of the gift.[26]

(B) SHIA and SHAFII LAW. Order of Court not necessary.

(2) Under Shia [27] [and Shafii] [28] law the revocation of a gift is complete without any order of the Court.[27]

"Should the donor die without affording any other proof of his intention to retract the gift"—than mere re-assumption of the gift from the donee—"it is still, although found in the donor's possession, the lawful property of the donee." [27]

In a case where the donee was a niece of the donor's (so the gift could not have been revoked) it was held that the donor could come to the Court for revocation of a declaration of gift which had not been completed by transfer of possession.[29]

III. GIFTS THAT ARE IRREVOCABLE between—

(A) relations (1) parties consanguine

424. Under Hanafi law gifts in favour of relations [30] by consanguinity within the prohibited degrees [30] are irrevocable.[31] Under Shia law gifts to any relation by consanguinity are irrevocable.[32] Under Shafii law gifts from a father or other paternal ancestor, to a child or other descendant are revocable ; [33] but gifts between all other relations by consanguinity are irrevocable.[33]

Illustration.

"'Rahm' or consanguinity in this connection means," says a Shia text,[32] "any relation whatsoever by blood, known as nasab, however distant the

[26] Bail. I. 527 (*ll.* 28-35) (536, par. 4 last *ll.*); Hed. 487 (col. i. par. 3, col. ii. par. 1, 2). Donee's giving back possession implies consent. Donee has no power to revoke consent to donor taking back possession.

[27] Bail. II. 205 *n.* 10 ; revocation is necessary : not mere re-assumption of gift from donee, citing *Tahriru'l Ahkam* from Mss. of translator of *Imameea Digest*, vol. I. *Semble* this is matter for appreciation of evidence—whether any intention to revoke. Bail. II. 207, (*ll.* 5-10) : "Others maintain that it (viz. sale by donor, donor being stranger, & there being no *iwaz* for the gift) would be valid, because he has power of retraction ; but the first opinion (viz. that the sale would be void) is best supported."

[28] *Minhaju't-Talibin* & its com. do not seem to mention decree of Court ; Shafii law, therefore seems to agree with Shia on this point, as on so many others ; though see s. 424.

[29] *Umrao Bibi* v. *Jan Ali Shah*, (1898) 20 All. 465 : see s. 383, pp. 416 f.

[30] Hed. 486 (col. ii.); Bail. I. 524 (533), 525 f. (8th) (534 f.); Macn. 215 ; Bail. II. 205 (*ll.* 9-13); 207 (*l.* 4). Some Shia authorities hold gifts to others than parents, to be revocable. Macn. 202-203 (case 6) mentioning revocation of gift to son's daughter, says "there is special exemption in case of donation from father to son or grandson, resumption of which is declared allowable." This statement seems erroneous unless parties governed by Shafii law : see com. *Imdad Ali* v. *Ahmad Ali*, [1925] AIR (OU.) 518 (gift in favour of SON-IN-LAW revocable); *Maqbul Husain* v. *Ghafurunnissa*, (1914) 36 All. 333 (= s. 427, *n.* 7). Prohibition for cause other than consanguinity (e.g. fosterage) does not prevent revocation : Bail. I. 525 f. (534 f.).

[31] "According to the *Khazanat-ul-Mufltin* relationship arising from fosterage or affinity does not bar revocation," Ameer Ali I. 94 (154), Bail. I. 525 f. (534 f.).

[32] *Jawahiru'l Kalam*, IV. 630.

[33] Hed. 485 (col. ii); *Minhaj*, 235. Maliki law similar : Ameer Ali, I. 89 (149).

kinship be, and even though it be such as does not establish prohibition to marry. But as regards what is related from some authors on law to the effect that the term is limited to those who are prohibited from intermarriage, it is a rare opinion, and open to be refuted from what you have already learnt." [32] Cf. s. 425, com. citing Sharh-i-Luma as to "near" relatives. SECTION 424.

Under Shafii law a gift between relations by consanguinity is only then revocable, when the donor is the father or other paternal ancestor of the donee. Under all other systems the gift to a descendant cannot be revoked in any case, being to a person within the prohibited degrees. The explanation of this strange contradiction between the schools of Shafii and others is interesting: Shafii bases his rule on a tradition that the Prophet said, "Retract not gifts." This is taken by the other exponents to be merely recommendatory, and not a positive legal injunction. Shafii on the other hand, gives it legal force and deduces therefrom that gifts are generally not revocable; he then derives an exception (permitting revocation of gifts to descendants) from the father's and other ascendants' "power" over the property of their descendants. Under all the schools the father has a right to apply the child's property to the maintenance of himself and of the child: see s. 290, p. 315. But Shafii alone draws from this rule the conclusions that the father has such a patria postestas as to entitle him to deal (*a*) with the property of his children, even though they be adults, and (*b*) with property which the descendant has derived from him. See s. 348, com., p. 356, on causes of irrevocability. Shafii law. Gift to defendant revocable.

425. (1) Under Hanafi law a gift cannot be lawfully revoked where at the time when the gift is made the donor is the husband or wife, of the donee.[1] (2) Affinity between parties.

(2) Shia authorities are agreed that to revoke such a gift is abominable, and some hold it unlawful: but the better opinion is that it is not unlawful.[2] (Shia law). Permissible, but abominable.

Explanation.—A marriage contracted subsequently to the gift does not make the (prior) gift irrevocable, nor does a gift made during marriage become revocable on a dissolution of the marriage.[1]

"Irrevocability may arise", says a Shia text,[3] "from the fact of his (the donor's) being a near relative, even one with whom marriage is not prohibited; or (according to the better opinion) from the fact of their being husband and

[1] Bail. I. 525 (7th) (534, 7th); Hed. 496; *Shah Makdum Bakhsh* v. *Lutf Ali*, (1834) 5 S. D. A. Rep. 355 = Morl., *Dig.* I. 269, s. 60; *Sadiq Ali* v. (*Mt.*) *Amiran*, (1929) 5 Luck. 406 (wife stated to be within prohibited degrees—an obvious oversight, unless marriage was void).

[2] Bail. II. 205, 206. *Luma'a* considers the other opinion to be better, see com. Ameer Ali I. 89-90 (149-150) says, author of *Mabsut* (referred to as the *Shaikh*) takes same view; & that the law laid down in *Sharaiu'l-Islam* not very different, "considering how much the moral is mixed up in the *Sharai* with the legal." The *Sharaiu'l-Islam*, however, frequently draws attention to distinction between moral & legal obligations: s. 5 D, p. 44.

SECTION 425. wife." [3] The Daaimu'l-Islam (Shia Ismaili authority) lays down that gifts between husband and wife are not revocable.[4]

(*b*) death.

426. A gift may become irrevocable on the death of the donor or donee.[5]

(*c*) perishing, (*d*) change, (*e*) transfer, (*f*) increase in value.

427. (1) Under Hanafi law a gift becomes irrevocable on the subject of the gift (*a*) perishing ;[6] or (*b*) being so changed as to lose its identity ;[7] or (*c*) being alienated, or transferred in any manner whatever[8] from the donee ;[9] or (*d*) increasing in value,[9] by reason of (i) an inseparable accession thereto,[10] or (ii) its removal from one place to another.[11]

(Shia and Shafii law.)

(2) Under Shia [12] and Shafii law a gift becomes irrevocable under s. 427(1)(*a*),(*b*),(*c*). The Shia texts are divided as to whether a gift may be revoked after the donee has caused any increase or profit to accrue to the subject of the gift.[12]

Revocable and irrevocable gifts.

I. " It is said in Al Murasim, that a gift to a stranger is of two kinds : (1) what can be consumed and (2) what cannot be. (1) If it be such as can be consumed, like measurable articles, and it is consumed, then there is no revocation. (2) What is not such, is of two kinds : (*a*) one for which there is a return, and (*b*) one for which there is no return. (*a*) In the former case there is no revocation, and (*b*) in the latter, revocation is allowed. II. In Al Ghunia, the author places under the kind in which revocation is not allowed,

[3] *Sharh-i-Luma'a*, I. 232. [4] *Daaimu'l-Islam.*

[5] Bail. I. 525 (2nd, 3rd) (534, 2nd, 3rd); Hed. 486 (col. i.); Macn. 212 (*ll.* 1-2,) 215.

[6] Bail. I. 524 (par. 3), (534, *ll.* 2-4) " for there is no means of having recourse for its value since the contract was not for value." Bail. II. 205, *ll.* 14-16.

[7] See Bail. I. 525 (6th) (534); e.g. grinding wheat, baking flour, churning milk into butter, makes the gift of the wheat, flour or milk irrevocable. Hed. 486 (col. i.). Turning a bath into dwelling house, without making any addition to the building, does not make it irrevocable nor vice versa : Bail. I. 526 (*ll.* 5-7), (535) ; *Maqbul Husain* v. *Ghafur-un-Nissa*, (1914) 36 All. 333 (gift to husband's nephew : partition of village comprised in gift held not to amount such substantial alteration of subject as to make gift irrevocable).

[8] Bail. I. 525 (2nd) (534), (1st) (534) whether by sale, gift or death ; *Shah Makdum Bakhsh* v. *Lutf Ali*, (1834) 5 S. D. A. 355 = Morl. I. 269, s. 60 ; *Wajeed Ali* v. *Abdool Ali*, [1864] W. R. 121 (alienation by donee ; but note that gift was to son & would have been irrevocable on that ground too).

[9] *Shah Makdum Bakhsh* v. *Lutf Ali*, (1834) 5 S. D. A. Rep. 355 ; *Wali Bandi B.* v. *Tabeya B.*, (1919) 41 All. 534, 537.

[10] Hed, 486 (col. i.); Bail. I. 525 (4th) (534), e.g. house plastered with mortar or clay ; or buildings repaired, or door in them shut up ; *Mulani* v. *Maula Baksh*, (1923) 46 All. 260, 263.

[11] According to Abu Hanifa & Imam Muhammad : Bail. I. 525 (*l.* 15) (534). Some Shia authorities go so far as to hold that mere use by donee makes gift irrevocable. But *Sharaiu'l-Islam* pronounces opposite opinion more reasonable & approved.

[12] Shia law : increase not stated as preventing revocation : Bail. II. 205 (par. 3), 208 (case 4), 209 (case 6); difference of view mentioned : Bail. II. 209.

(1) such in which return is stipulated for, and made; or (2) in favour of a relation; or (3) the person to whom the gift is made is such that by the gift having been made to him, approach to God is the result. Under the latter class he places all others." [13] SECTION 427.

428. A gift for which an iwaz [14] has been given to the donor, either by the donee or by a third party, and accepted by the donor as such, becomes irrevocable.[15] (g) iwaz.

430.[16] In two cases a gift again becomes revocable,[17] which was in its inception revocable, but which had become irrevocable because its subject was alienated or transferred, or increased in value by an accession: s. 427(1)(*c*), (*d*); viz. (1) where the alienation consisted in the donee making a fresh gift of it to a third person, and that fresh gift is revoked by him; (2) where an increase in value was caused by an accession, and that accession has perished or is destroyed.[18] IV. REVIVAL OF REVOCABILITY. Revocation of second gift.

(1) In 1900 D makes a gift (called the first gift) of a horse to a stranger, without return. In 1901 the donee makes a gift (called the second gift) of the horse to a third person. In 1903 the donee revokes the second gift and takes back the horse from the third person. Between 1901 and 1903 the first gift may not be revoked; but it may be revoked after 1903 or before 1901. *Illustrations.*

(2) The first gift referred to in *ill.* (1) would have remained irrevocable in and after 1903, if the donee had got back the horse by purchase or had inherited it.[17]

432. Where a gift has become irrevocable owing to its subject increasing in value (s. 427(1)(*d*).), the right does not revive on a subsequent diminution in its value.[19] Diminution in value rise does not revive revocability.

433. On revoking a gift, the donor becomes entitled only to the future rights in the subject of the gift, and not to rights accruing from prior transactions.[20] V. EFFECT OF REVOCATION. Not retrospective.

D makes a gift of a house. Another house adjacent to the subject of gift *Illustration.*

[13] *Jawahiru'l Kalam*, IV. 631, (Shia Text). Number & letters are mine. "Where one person makes a gift of a horse, & the donee has it trained, there is no power of revocation on the part of the donor": Ameer Ali, I. 94 (154).

[14] Bail. I. 525 (5th) (534), II. 205, (*ll.* 16-19), 207 (*ll.* 5-7); Hed. 486 (col. i.); *Sadiq Ali* v. (*Mt.*) *Amiran*, (1929) 5 Luck. 406, 409.

[15] Hed. 486 (col. ii. par. 6).

[16] Sect. 430 consolidates what formed ss. 429, 430, 431, in the previous editions. Sect. 429 is now incorporated in s. 427(1)(c).

[17] Bail. I. 526 (par. 4) (535), 527 (*ll.* 1-3, 18-21) (536).

[18] Bail. I. 526 (*ll.* 11-13) (535). Sect. 430, cl. (2) was s. 431 in the earlier editions.

[19] Bail. I. 526 (*ll.* 18-26) (535). [20] Bail. I. 526 (*ll.* 30-36) (535).

SECTION 433. is sold, and then the donor revokes the gift ; he has no right of pre-emption over the adjacent house.[20]

(A) On revocation donor not to be compensated for *deterioration* in subject of gift.

434. On revoking a gift, the donor has no right to compensation from the donee for deterioration in the subject of the gift, or damage caused to it while the donee[21] was in possession of it.

(B) (Shia law.) Increase which cannot be separated,—donor's.

435. (1) Under Shia and Shafii law, on revoking a gift, the donor is entitled to such increase or profit accruing from the subject of the gift as cannot be separated from it, or is formed, or in existence, at the time when the gift is made.[22]

Donee to get half of increases.

(2) Where the donor revokes the gift after any increase or profit has, as the result of the donee's act, accrued to the subject of the gift, then those Shia authorities who hold the revocation valid (s. 427 (2).) require the donor to compensate the donee for half the cost to him of bringing about the accrual of the said increase or profit.[23]

Explanation.—The donee is entitled to such increase or profit as can be separated from the subject of gift, whether or not it was formed at the time of the gift.

REVOCATION OF GIFT : DEFECTS IN & ACCRETIONS TO SUBJECT :

1. Defects or deficiencies must be borne by the donor ;

2. As to an accretion (which term includes increase or profit accrued from the gift) not caused by the donee,—

Inseparable.

(*a*) an accretion united to the original gift and inseparable from it, belongs to the donor ;

Separable.

(*b*) an accretion not so united belongs—

(i) to the donee, if it came into being entirely after the gift,

(ii) to the donor if it was formed at the time of the gift.[24]

3. The donor must bear half the cost of an accretion caused by the donee's act. Some authors hold that such a "use" of the subject debars the donor from revoking.

(C) Donee may use subject of gift until revocation complete—not after.

436. (1) The donee may use and dispose of the subject of a gift until (but not after) the revocation of the gift is complete and effectual under s. 423.[25]

[21] Bail. II. 208 (*fourth*).

[22] Bail. II. 208 (*fourth*). Cf. Ind. Contr. Act, s. 163 ; ROM. LAW : Specifications : Justin. II. r. 25-28 ; Gai. II. 79.

[23] Bail. II. 209.

[24] Bail. II. 208.

[25] Bail. I. 527-528 (535-536) refers directly only to cancellation by Court ; but presumably same rule applies to revocation by mutual consent. Cf. Ind. Contr. Act, s. 161.

(2) Unless, after the revocation of the gift is complete, the donor demands restoration of possession, and the donee refuses to restore it, the donee is not responsible for any loss to the subject of the gift while it lawfully remains in his possession.

SECTION 436. On demand by donor revoked gift to be returned.

§ 9.—GIFTS IN OTHER FORMS THAN HIBA.

437. Sadaqa [26] is a transfer of property [or rights] in all respects like a hiba [27] save that a sadaqa (*a*) is made out of a desire to obtain religious merit ; [28] (*b*) it is irrevocable [29] whether made to a rich or a poor man ; [27] (*c*) it need not be expressly accepted.[30]

I. SADAQA, OR GIFT WITH A RELIGIOUS MOTIVE.

Sadaqa is used in the Koran as an equivalent for alms :

"A kind word and forgiveness is better than sadaqa [26] followed by injury. God is absolute, clement."—Koran, ii. 263.

Sadaqa, hiba, hadiya, distinguished.

The Jawahiru'l Kalam, (a Shia text) refers to a tradition that Imam Jafar us Sadiq said :—"Sadaqa is an innovation ; at the time of the Prophet people used to give only as hiba and nahala. Hence in a quotation from Tai it is said that when a reward (from God) and approach to God (ss. 348, 462) are intended in a gift, it is termed a sadaqa, and so a distinction arises between it and a hiba or a hadiya....If one adds (to the declaration of gift) the words 'for the sake of God,' that is to say, he joins with the gift (the intention of) approach (to God) it is not proper to revoke it....Hiba is thus more general than sadaqa, because the latter has the condition of approach (to God), which does not accompany the former. Hadiya is still more limited in meaning, because it requires the carriage of its subject from one place to another. So it cannot be said that one has made a hadiya of a house or of landed property, rather it should be said he has made a hiba of it." [31]

"Reward from God is a return, and so it (viz. a sadaqa) falls under the class of gifts for which there is a return" [32] (and as such is irrevocable).

[26] *Sadaqa* = (dictionary meaning) "legal alms : alms to the poor."

[27] Hed. 489 ; Bail. I. 545-547 (554-556), 516 (*ll.* 13-16) (524); II. 224.

[28] Bail. II. 224. See s. 5D ; *Minhaj* 235 ; *Jainabai* v. *R. D. Sethna*, (1910) 34 Bom. 604 (suggestive judgment, but full of *obiter dicta* on many points on which the learned judge was in possession of only fragmentary materials. To say : that "a private gift *inter vivos* to be legal & valid, must be free from all pious or religious purposes" (pp. 609-610), is not correct if it is meant that a religious motive annexed to a private gift affects its validity in any way ; it is recognized in the judgment that, by one & same act, part of property may be given with religious motive, & part without it, though this is taken as enunciating a new & apparently profound principle).

[29] Bail. I. 545 (*ll.* 4-5) (537); cf. *Gulam Hussain S.* v. *Aji Ajam Tadallah S.*, (1868) 4 Mad. H. C. R. 44, 47 (*sadaqa* has like *wakf* religious motive : but *wakf* disposes of usufruct, *sadaqa* of corpus : see s. 366A, com.).

[30] Bail. I. 545 (*ll.* 17-19) (554).

[31] *Jawahiru'l Kalam*, IV. 615.

[32] *Jamiu'sh Shittat*, 392 (Shia text). Cf. *Sadiq Ali* v. (*Mt.*) *Amiran*, (1929) 5 Luck. 406, 409.

SECTION 437. Sadaqa and doctrine of musha.

A donation of ten dirhams to two men may either be a gift or a sadaqa. If the donees are poor the donation becomes according to Abu Hanifa a sadaqa : he "has construed a gift into alms when the object is a poor man," and vice versa.[33]

II. GIFT OF A DEBT OR OTHER OBLIGATION.

438. A gift may be made of the right to recover a debt or enforce an obligation.[1]

Illustration.

A father contracts his son, in marriage, and pays the mahr, on behalf of the son. This is a gift of the mahr from the father to the son, so that should half of the mahr be repayable by the wife, it will be received by the son and not the father. "There is some room for doubt."[2]

This is in part covered by ss. 353 B, 366, 369. So a gift may be made of a pension :[3] Pensions Act XXIII. of 1871, s. 7(2). And rent may be remitted, the remission operating as a gift which becomes complete at the termination of the period when it becomes due.[3]

III. Completing gift of actionable claim.

439. The transfer of an actionable claim[4] whether with or without consideration[5] is complete and effectual upon the execution of an instrument in writing, signed by the transferor or his duly authorized agent, but not otherwise. Upon the execution of such an instrument all the rights and remedies

[33] IIed. 485 (col. i.-ii.)

[1] Bail. I. 522-523 (531-532), 527 (par. 2) (536); II. 203 (par. 2), restricting it to release of debt or obligation, 204, 80 f. ; GIFTS OF DEBTS stated to be lawful only on "liberal construction" (*ihtihsan*), Macn. 208-209. *Daaimu'l-Islam* (Shia Ismaili law). ROMAN LAW : "obligations no matter how contracted do not admit of any form of transfer" ; Gai. II. 38, 204, 80 f. *Mabsut & Jamiu'sh Shittat* seem to agree with Hanafi view ; law now governed, however, by Ind. Contr. Act, 1872, ss. 50, 62, 134 ; Transf. of Prop. Act, 1882, & Insurance Act, 1928, see ss. 439, 440, below.

[2] Bail. II. 80 f.

[3] *Sahibunnissa* v. *Hafiza*, (1887) 9 All. 213 (decision based on Pensions Act, 1871, not on the Muhammadan law); *Enaet Hossein* v. *Koobunnissa*, (1869) 11 W. R. 320 (landlord allowed for 3 years remission of Rs. 2,000 per year out of rent to his sister-in law, tenant ; gift held complete at end of each year of remission : as gift of debt to debtor it is irrevocable). Bail. I. 524, 527 (533, 536). See also *Ebrahimbhai* v. *Fulbai*, (1902) 26 Bom. 577 (assignment by husband to wife of 1/3 share of certain moneys in hands of Acctt.-Gen. invested in Govt. prom. notes ; held assignment not invalid for want of notice to Acctt.-Gen., nor as *musha*). When *hiba* made to two or more donees & subject not partitioned amongst them, Abu Hanifa holds it void as *musha*, his two disciples hold it valid. Cf. s. 379 ; *Ebrahim* v. *Bai Asi*, (1933) 58 Bom. 254 ; disciples equally hold it valid if *sadaqa*. Abu Hanifa's opinion recorded in two ways : in *Jama Saghir* that he holds such *sadaqa* valid ; but invalid according to *Mabsut*.

[4] ACTIONABLE CLAIM = claim to any debt (other than debt secured by (i) mortgage of immoveable property, or (ii) by hypothecation or pledge of moveable property) or to any beneficial interest in irrevocable property not in the possession either actual or constructive of the claimant, which the civil courts recognize as affording grounds for relief, whether such debt or beneficial interest be existent, accruing, conditional or contingent : Transf. of Prop. Act, ss. 130, 132 ; as *ill.* are mentioned life assurance policy & a bond.

[5] The words "whether with or without consideration," were inserted in Transf. of Prop. Act, 1882, by Transf. of Prop. (Amendment) Act, 1929. It had been submitted in earlier editions that the Transf. of Prop. Act, 1882 governed transactions whether for consideration or without.

of the transferor whether by way of damages or otherwise vest in the transferee.[6] SECTION 439.

440. (1) The[7] holder of a policy of life assurance may, notwithstanding any law or custom having the force of law to the contrary, with or without consideration, validly assign or transfer the policy (*a*) with the condition that, on the happening of a specified event during the life of the policy holder, (i) the assignment shall be inoperative, or (ii) that the interest shall pass to some other person ; and (*b*) it may be validly assigned in favour of the survivor or survivors of a number of persons. IV. GIFT OF INSURANCE POLICY. Defeasible conditionally. Survival amongst donees.

(2) The holder may (*a*) nominate the person to whom the money secured by the policy shall be paid, in the event of his death ; (*b*) he may cancel the nomination, and (*c*) if he assigns or transfers the policy, the nomination is automatically cancelled ; (*d*) he may change the nomination by an endorsement, or further endorsement, or a will, as the case may be. Nomination.

(3) If the policy matures for payment during the lifetime of the holder, or if, before the policy matures for payment the nominee dies, or all the nominees die, the amount secured by the policy shall be payable to the policy holder or his heirs or representatives. When payable to holder.

(4) If the nominee or any of several nominees survives the policy holder, the amount secured by the policy shall be paid to the survivor or survivors.[7] Survivor.

Apart from the Insurance Act IV. of 1938, ss. 38, 39,[7] the questions involved in s. 440 have been considered to be beset with difficulties. Has Muslim law any bearing on them and if so what is the resulting effect ? An assignment or nomination made without (pecuniary) consideration proceeding from the assignee or nominee to the policy holder, has occasionally been treated solely as a species of gift, governed in all respects by the Muslim law. As gift and hiba are constantly identified, it is assumed with the utmost equanimity Bearing of Muslim law

[6] Transf. of Prop. Act, Ch. VIII., s. 130(1): amended by Act II. of 1900, s. 4 & XX. of 1929, E.g. *Mullick Abdool Guffoor* v. *Muleka*, (1884) 10 Cal. 1112 (gift of right to receive rents or dividends upon government securities ; *malikana* right = right to receive from government a sum of money representing the *malik's* share of profits of revenue estate, 1,125); *Anwari B.* v. *Nizamuddin S.*, (1898) 21 All. 165 (gift of property attached to Collr. for arrears of revenue); *Mirza Abid Husain* v. *Munnoo B.*, (1927) 2 Luck. 496. See also *Bashir Ahmad* v. (*Mt.*) *Zubaida K.*, [1926] AIR (OU.) 186 ; & s. 438, *ill.*

[7] The Insurance Act, 1938, ss. 38, 39 will be found set out in the Appendix containing Legislative Enactments.

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that the law of hiba must be applied to the transaction. The Transfer of Property Act, s. 129, saves rules of Muhammadan law from the operation of the Chapter in that Act on Gifts : ss. 122-128. But that Chapter refers only to the transfer of "certain existing movable or immovable property made voluntarily and without consideration" : s. 122. So that under s. 129 only those rules of Muhammadan law which govern gifts of such existing property are saved. Again s. 130 provides that the transfer, whether with or without consideration, of an actionable claim (a life insurance policy being given as an illustration of an actionable claim) shall be complete and effectual upon the execution of such an instrument in writing as is described in s. 130. Upon execution of such an instrument the rights and remedies of the transferor vest in the transferee. So that, assuming that the transfer of an insurance policy without consideration would otherwise be considered a gift, the saving clause in s. 129 does not introduce the Muslim law of hiba, and s. 130 directly provides for the position, and thus prevents the intervention of any other rules of law.

Does Transfer of Property act, save Muslim law ?

Position stated.

It is desirable at the start to clear up the process of reasoning by which the rules of Muslim law can (if at all) bear upon the transaction. On the hypothesis that the premiums have been paid in due course, the policy holder has already performed his part of the contract, and all that remains to be done for its complete execution, has to be performed by the insurers. The fulfilment of the insurers' part of the contract consists in their paying the sum secured by the policy. So long as they receive directions from the promisee (the policy holder or his locum tenens) and in accordance with the directions agree to undertake liabilities that do not contravene the provisions of the Indian Contract Act, ss. 50, 62 f., or other Legislative enactments, or public policy, they would seem to be bound by their agreement. The only bearing that Muslim law seems in that case to have upon the transaction, would appear to depend upon or arise out of the construction to be put upon the holder's directions, and upon the interpretation (in accordance with his own law) of the method of fulfilling the contract as prescribed by him. Otherwise the law applicable to a Muslim policy holder in respect of contracts for consideration is not Muslim law. The transaction in question arises out of the fulfilment of a contract for consideration, and the promisee's law in this case is the general law of contracts in India. The promisee may give detailed and complicated directions, requiring the insurers to act in one way should certain events take place, and in another way should other events take place. If the insurers do not object or refuse to undertake such liabilities as fall upon them, and are willing to carry out his directions, no question of Muslim law seems to arise, as their obligations arise out of contracts. It seems difficult moreover, to bring an assignment (which is in fact a novation) under the category of a gift. To do so, the transaction must be split up, and the part between the transferee and the policy holder considered as though it were independent of the vital part that the insurers have to play. Can the transaction be considered otherwise than as a tripartite agreement ? Under the

Bearing of Muslim law.

Indian Contract Act, s. 2(*d*) the consideration may be past, and it need not move from the promisee : the words are " when the promisee or any other person has done or abstained from doing or does or abstains from doing," etc.[8] SECTION 440.

Effect of Death of person entitled to endowment.

Secondly, questions less easy of solution, may arise upon the death of the promisee, viz. of the person who has to receive payment from the insurers, whether that person is the original policy holder or an assignee or a nominee. (A nominee may to some extent be made a party to the contract : though this is not necessary). On the death of the promisee, questions may arise whether his heirs or legal representatives, had, prior to his death, acquired in praesenti any interest in the contract though that interest was to come into fruition on his death, and if so what the nature of that interest is. In particular the question may arise whether the power (if any was originally possessed or retained by the deceased promisee) of cancelling or altering the directions or of prescribing or sanctioning the manner in which the contract shall be performed, devolves upon the heirs or legal representatives of the deceased party, or whether on the death of the promisee the persons, arrangements and directions continue, so far as they affect the insurers to remain unaltered (and unalterable), irrespective of the desire and claims of the said legal representatives. The position may be put in another form. If the promisee under the policy creates interests in favour of third persons, the question may be whether the interests so created are capable of being interfered with by such directions given by the deceased as are to come into operation after his death, or whether the power possessed by him to give such directions ceases when he dies. The power may devolve upon other persons, either his legal representatives or the persons who were entitled immediately prior to his death, and the rights of such persons may be unaffected by that part of his directions which lays down what is to happen after his death. The fact that a Muslim has testamentary powers limited to the bequeathable third of his estate and in other ways (s. 579 ff.) may affect these questions.[9]

Directions as to what must happen on death of holder.

Which rule of Muslim law, applicable ?

On the assumption that the provisions of the Transfer of Property and the Indian Contract Acts above referred to, save the Muhammadan law to any extent, it must be determined which rule of Muhammadan law must govern the question. For this purpose the nature of the particular transaction must be kept in mind. If Muhammadan law is applicable, it would be the particular rule applicable to the particular transaction in question. The rules relating to hiba appear on a very slight consideration to be clearly inapplicable. For while (1) a hiba consists of the immediate transfer of the ownership and possession of a determinate physical object (ayn), and is not complete or of any effect whatsoever unless possession is actually

[8] *Samuel* v. *Ananthanath*, (1883) 6 Mad. 351, 354 ; *Iswaram Pillay* v. *Sonnivaveru Taragan*, (1913) 38 Mad. 753, 763.

[9] The English decisions lay down that a policy on a man's own life forms part of the estate of the deceased. But it may be dealt with in India by contracts which would not be enforceable in England owing to the definition of consideration in the Indian Contract Act : *Haas* v. *Atlas Insurance Co.*, (1913) 2 K. B. 209 ; *Re Lambert*, (1916) 85 L. (Ch.) 279.

SECTION 440. transferred, (2) an assignment or transfer of a policy consists of the novation of an executory contract, under which the insurers have, at some future time, to pay a sum of money, in performance of their contract with the policy holder. The original contract under the insurance policy is replaced by a new contract. Under the new contract the insurer contracts and undertakes a liability with the assignee. This is a tripartite arrangement, relating to the performance of an executory contract. Thirdly, (3) when the policy holder makes a nomination in the sense in which that expression is used in the present context, (Insurance Act, 1938, s. 38) he in fact prescribes or sanctions a particular manner in which the insurer's promise to pay the amount secured by the policy, must be performed. Consequently the Indian Contract Act, 1872, ss. 50, 62 (see also the illustrations thereto) would appear to govern assignments and nominations. As after a nomination the policy holder remains the promisee, and as by nomination he merely prescribes or sanctions how the insurer may perform his promise of paying the amount insured, the policy holder retains, it would seem, his power to cancel or alter his directions to the insurers, and to give fresh or altered directions.

Inapplicability of law of hiba : revocation.

It may, however, be considered, or for the purposes of argument conceded, that there are cases of assignment or nomination in reference to which Muhammadan law has a bearing. Then the question may arise whether the policy holder may under Muhammadan law cancel or alter his nomination. The answer to this question has been supposed to depend to some extent upon the law permitting the revocation of a hiba. It is submitted that this supposition is erroneous. When a hiba is made, the donor hands over corporeally some property consisting of a determinate physical object, and puts it into the possession of the donee ; and thereafter when he revokes the hiba, he becomes entitled to take back, or resume possession of the subject of hiba from the donee's possession. This is surely a totally different category of transactions from that involved in the cancellation or alteration of an assignment or nomination—under which arrangements are made or directions given in regard to some act to be done in future, and then altered or cancelled. These directions and arrangements and their alterations or cancellation, all have reference to the manner in which the donor's promisor shall make a payment not yet due, but which will become due, on a future occasion. The rules relating to the one case cannot be taken to govern the other case, unless the whole transaction is viewed in a distorted light. If the analogy of a hiba is at all to be introduced, the analogy should be with the case where a person expresses an intention of making a hiba in future, and changes his mind.

Assignment in favour of survivor and life-interest.

The question whether a nomination or transfer may be made on the condition that it is only to be effective if the nominee or transferee survives the policy-holder has—strange as it may seem—been supposed to depend upon the power to create a life interest in favour of the nominee or transferee, and to involve in its explication the aid of the rule of law that a life interest may be created under Shia law, and an encounter with the (submitted erroneous) assumption that it cannot be created under Hanafi law. But grants of life-

interests have been explained as giving rise to rights of enjoying the recurring usufruct of property during the grantee's life or for other stated periods. The distinction between such usufructuary rights and rights dependant such directions or arrangements between the promisor and promisee as a nomination or transfer, is as clear as the distinction between them and a hiba. SECTION 440.

It is submitted that if Muslim law is in any respect applicable, those rules of Muslim law must be made to bear on the transaction, which govern transactions of a category similar to a novation or to directions given by the promisee prescribing or sanctioning a particular mode of performing the promise, or to arrangements made with reference to the performance of contracts. There are, no doubt, provisions in Muslim texts with regard to transactions arising out of contracts which may bear some analogy to novations and such directions.[10] But the present writer has not come across any rule or principle in the texts which would displace the rules now clearly enunciated in the Insurance, Contract, and Transfer of Property, Acts. It is difficult to trace out any rule of Muhammadan law, which, to use the language of the Transfer of Property Act, would be affected by the provisions contained in these Acts of the Legislature. *Submitted*: No rule of Muslim law affected by Insurance Act, ss. 38, 39.

441. Muhabat[11] is a contract or similar transaction for inadequate consideration, the intention of the parties being that to the extent to which the consideration is inadequate the person concerned should benefit as though he were the donee of a gift.[12] V. INADEQUATE CONSIDERATION. Mahabat defined.

442. Gifts of mahr are subject to the following special rules : (*a*) the wife may lawfully make a conditional gift of her unpaid mahr to her husband, and if the condition is not fulfilled, she may demand payment of the mahr from him ;[13] (*b*) a gift of the mahr to a dead husband VI. GIFT OF MAHR. (*a*) Conditional. (*b*) To dead husband.

[10] The expression *hawala(t)* refers in Muslim texts, to transfers of debts, whether for consideration or otherwise. ("*Hawala* entries" are familiar. Origin of term is Arabic ; *hawl* = transfer ; *hawalat* = transference, then applied to that through which transfer (viz. of debt.) is made. Drafts or cheques in Arabic = *waraqate hawalat* = letters of transfer). Texts do not easily acquiesce in transfer of debts to others than the debtors. But that really does not create any great difficulty. It is only necessary to recognize that in fact there must be two transactions : (i) release of promissor (insurers) by original policy holder (promisee) & (ii) fresh undertaking by insurers to pay to transferee of debt (instead of policy holder). Each of these promises may be considered as a complete & independent contract for consideration, & no objection can be urged against either.

[11] "MUHABAT," it is stated, literally signifies a gift. In the language of the law it means a gift interwoven in some compact or deed, as if a person should sell part of property to another at an inferior value : The illustrations that follow are of slave valued at 30 *dirhams* & sold to Zaid at 10 ; & another worth 60 sold to Umar at 20. "In that case Zaid obtains a *muhabat* of 20 *dirhams* & Umar a *muhabat* of 40 *dirhams*." Bail. I. 628 (638), 641 (652); Hed. 676, 688.

[12] Hed. 486 (col. ii. par. 5, 6). To put it in another way something may be transferred partly for consideration & partly as a gift. *Mubarak-un-nissa* v. *Mansub Hasan K.*, (1911) 33 All. 421, 424 (arg.).

[13] Bail. I. 120 (par. 1); cf. *Fatawa Alamgiri*, Vol. II. *Nikah*, ch. vii. *fasl* 10

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is valid,[14] and operates to extinguish the right of the widow to claim the mahr.[15]

Illustrations.

(1) H says to his wife, "Has thou freed me from the mahr, that I may give thee this thing," or "take thee to Mecca?" and the wife frees H; then H refuses to give her the thing, or to take her to Mecca; there is no release of the mahr.[16]

(2) A wife tells her husband, "'You absent yourself much from me, but if you remain with me then the wall which is in such a house is a gift to you from me,' whereupon he stays with her for a while and then divorces her. The case may present five aspects; (*a*) if she made a mere promise, and not a gift in praesenti, then the wall is not the husband's; (*b*) if she made a gift, and he promised, then the wall will be the husband's, provided that possession of it was given to him, but not otherwise; (*c*) if the gift was made with a stipulation that he should stay with her, and possession was given, even then the fatwa is that the wall is not the husband's;[17] (*d*) if she says 'I have made a gift of this wall to you provided that you stay with me,[18] the wall is not the husband's; (*e*) if she compromised with him on the stipulation that he should stay with her, and the wall be a gift to him, then the wall is not his."[19]

(3) A wife says to her husband, who is ill, "If you die of this illness, you are released from my mahr." This is void, being a contingent gift.[20]

(4) A wife is divorced by her husband, who agrees to re-marry her on condition that she should make a gift to him of the mahr due on their first marriage. Her consenting to do so, does not affect her right to the first mahr, whether they re-marry or not, "because she placed on herself, as a consideration for the marriage, her property (mahr) and no consideration is due from the wife to the husband in marriage."[21]

(5) A wife is divorced by her husband. While she is in her iddat, he gives her maintenance, to induce her to marry him; afterwards she refuses to marry: then the Sadr-us-Shahid says that he can claim back the maintenance if the maintenance was given on the condition that she should marry him; Kazi Khan has said that it can be claimed back whether she marries or not, because it was in the nature of a bribe.[22]

Bribe.

(*ad. fin*): extract from *Havi*, consisting of *responsum* of Shaikh Rahmatulla: see s. 442, *ill.*

[14] Bail. I. 120 (*l.* 6), 544 last line; *Fatawa Alamgiri* (Hiba, ch. xi.) citing *Sirajia.*

[15] *Jyani Begam Fakiroddin* v. *Umrav Begam*, (1908) 32 Bom. 612;—provided that widow had attained majority under Indian Majority Act: *Abi Dhunimsa* v. *Muhammad Fathi Uddin*, (1917) 41 Mad. 1026.

[16] Bail. I. 538 (547), 539 (548).

[17] *Fatawa Alamgiri* says that Shaikh Abul Qasim holds contrary view; but *fatwa* is as stated above.

[18] "Here the gift is contingent."—Bail. I. 539, *n.* 2 (548).

[19] Bail. I. 539 (548).

[20] Bail. I. 540 (549).

[21] *Qazi Khan*, cited in *Alamgiri*; Bail. I. 540 (549), 541 (550). See s. 95.

[22] *Fatawa Alamgiri* (*Hiba*, ch. xi.) citing *Kazi Khan.*

Sect. 442 refers to gifts of her mahr by the wife. On gifts by the husband in lieu of mahr, see s. 347, p. 351. Mahr is a debt, a claim by the wife against her husband. Occasionally the issue is confused by speaking as though mahr were some tangible object instead of an actionable claim. SECTION 442. Gift of mahr.

"On the death of a person, someone sends to the son of the deceased some cloth for his burial shroud, then does the son become the owner of the shroud, so that he may retain the cloth, and bury his father in another shroud?—The law is that if the deceased was such a person that, owing to his learning and knowledge of the law or piety, people considered it auspicious to give a shroud to him, then the son will not be the owner of it ; and in such a case if the son wraps up the corpse in another shroud, then he will be obliged to return that cloth to its owner ; but if the case is not such, then the son may use the cloth as he likes." [23]

VII. ARIYAT OR GIFT OF USUFRUCT

443. (1) Ariyat[1] is the transfer, without consideration, of the right to enjoy the manafi or the benefit, or to take the profits of property, movable or immovable or such transfer of the right of the enjoyment or the use or usufruct thereof.[2]

Incidents of :

(2) A grant by way of ariyat may, Muslim texts lay down, be made by one who has not attained puberty ; *semble* this provision of the law is not any more enforceable in India. The subject of ariyat may be musha or the undivided part of anything. The period for which the right is transferred, must (*semble*) be fixed in transactions for consideration ; in voluntary transactions it may be left undetermined.[3]

Its period

[23] *Fatawa Alamgiri* (*Hiba*, ch. xi., *ad fin.*).

[1] *Mumtazunnissa* v. *Tufail Ahmad*, (1905) 28 All. 264 ; *In Pet. of Khalil Ahmad*, (1908) 30 All. 309 (inaccurate expressions in 28 All. 264, corrected); *Mohamad Sher K.* v. (*Mt.*) *Kamalunnissa*, [1925] AIR (OU.) 289 ; *Sookhmoy Chandei D.* v. *Sri Monohurri Das*, (1885) 12 I. A. 103, 109 (last *l.*) = 11 Cal. 684, 682, (when rents & profits given & intention to pass estate appears, these words sufficient to pass it)—With regard to use of word "ESTATE" in this discussion see s. 443 A, p. 487. CORPUS would more nearly represent original texts. ARIYAT is misleadingly translated as LOAN. Word LOAN in present context is apt to suggest movable property. Usufruct is hardly applicable to movables. Word loan is, however, used, because (i) ownership of corpus is not transferred to grantee ; *ariyat* merely transfers right to usufruct or profits ; (ii) *ariyat* intended to be likened to *commodatum* of Roman law : & *commodatum* is translated "gratuitous loan." Characteristic of *commodatum* mainly stressed in this context is that grantee is bound to restore the thing itself : Just., III. 14, 2 ; Hunter, *Rom. Law*, 475-9 (3rd ed.). In that respect *ariyat* does correspond with *commodatum*. See however *n.* 14.

[2] Hed. 478 : ARIYAT : definitions in *Hidaya* & *Fatwa Alamgiri* are in identical words : "*tamlik ul manafi beghair-e-iwaz* (*in*) :" *tamlik* = "making master or owner." (see *n.* 14) ; *ul* = "of the" ; *manafi* = "usufruct" [MANAFI or MANFA'AT = benefit, advantage, utility, profit, use.] ; "*beghair-e-iwaz* = without consideration" ; *mu'ir* = grantor of *ariyat* ; *mustair* = grantee ; article of which usufruct is granted, called in the Hidaya *ariyat*, but in *Fat. Al.*, *musta'ar*. Baillie I. 547 (556) translates *tamlik* as "transfer of property." Cf. "WAKF is a transfer of property & is like a permission to take the USUFRUCT," Bail. II. 217 (par. 2).

[3] The reason for the distinction apparently is that voluntary transactions are revocable : Hed. 441, (col. ii., par. 4, 5), states : "if however, the composition be a

SECTION 443. It is not necessary for the grantor to make a declaration of ariyat and the grantee to accept it.[4]

Illustrations. (1) The following formulæ are instanced as being appropriate for making grants by way of ariyat, viz. by a man saying—

"I have made thee owner of the MANAFI (PROFITS) of this house [with or without the addition of the words: "for A MONTH];"[4]

"I lend thee this robe: thou mayest wear it for a day;"[4]

"I lend thee this house that thou mayest live therein for a year;"[4]

"I make this house of mine thy residence for one month," or "for my life-time;"[4]

"My house is for thee a gift by way of residence;"[4]

"I have lent you this thing," or "given you," or "made you owner of the USE of this house," or "this garment;"[5]

"This is for you for your USE, minha" [but you have no further rights in it];

"This land is for you as a TUM'A (food, eatables);"[5]

"I have caused this slave to serve you;"[5]

"I have mounted you on this beast," [not intending to make a hiba];

"My house is for your residence [for your life-time]."[5]

(2) D says to R 'my house is for thee if thou survive me, and for me if I survive thee."[6] This may operate by way of ariyat.[6]

(3) A Muslim made in 1877 an oral gift of a one anna share in a Zamindari to his illegitimate son. The donor died about 1900; the donee in 1920. *Held*, that though the donee's name was entered as owner, the evidence showed that the purpose of the grant was his maintenance: that purpose indicated that the grant was for the life of the grantee. Having

stipulation of USUFRUCT in lieu of property, then the laws & rules incident to hire take place with regard to it; because the characteristic of hire (namely, an endowment with usufruct in exchange for property) exists in it. And as in contracts REGARD IS HAD TO THE SPIRIT OF THE AGREEMENT, it is also requisite that the PERIOD OF RIGHTS TO THE USUFRUCT BE FIXED." The recognition of the transfer of *manafi* or usufruct is a point of great importance in the development of the law: & stands as the parallel of what has been called by Pollock & Maitl., *Hist. of Eng. Law*, II. 10, "a characteristic which, at all events for 6 centuries & perhaps for many centuries more will be the most salient trait of 'our' English land law. Proprietary rights in land are, we may say, projected upon the plane of time. The category of quantity, of duration, is applied to them." Usufructuary rights are, by their very nature projected upon the plane of time: the category of quantity, of duration, must be applied to them, by their very definition. Cf. *Keshavlal Tribhovan* v. *Adhyaru Maganlal*, (1933) 58 Bom. 327, 339, (F. B.).

[4] (i) Hed. 478-482; observe that grantee is made *owner* directly of *manafi* (profits): not that *property* is transferred so that profits may as incident of that transfer be taken or enjoyed. (ii) *Muhammad Faiz Ahmed K.* v. *Gulam A. K.*, (1881) 8 I. A. 25 = 3 All. 492, 502, 503; *Mubarak Unnissa* v. *Mansub H.*, (1911) 33 All. 421. (iii) Of course a benefit cannot be thrust on any one. (iv) Cf. "nothing enters the proprietorship of man without his option (consent), except inherited property"—*Jafri B.* v. *Amir Md. K.*, (1885) 7 All. 822, 833 (Mahmood, J., citing *Ashbah-un-Nazair*). (v) *Hardoon* v. *Belilios* [1901] A. C. 118 (cited s. 589 com.); (vi) Cf. Just. II. XIX. 5; (vii) s. 345, p. 341, *n.* 3.

[5] *Fat. Al., Ariyat*, Ch. I. Ameer Ali translates (or rather paraphrases) it. More rigid rendering by Principal A. A. A. Fyzee in (1933) X. Bom. Law Journ., 351.

[6] See s. 445, *ills.* (2), (3), p. 517.

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regard to its purpose, the grant was construed as a transfer of the right of the usufruct of the one anna share by way of ariyat and not as hiba.[7]

1.—Definition of ariyat.

Ariyat is defined both in the Hidaya and the Fatawa Alamgiri[8] as "the transfer of the ownership[4] of the manafi (benefit or usufruct[9] or produce) of something without return."[10] It thus represents the transfer of those rights which authorize the transferee to take the benefit or produce of some physical object, whether it is land or movable property.[11] See s. 366 A, p. 380.

Neglect of ariyat as a transfer of right.

Causes of neglect.

The full significance of ariyat has, it is submitted, not been appreciated in India, nor have the principles relating to it been accorded their deserts in the development of legal conceptions and transactions. Two causes of this unmerited neglect of ariyat seem to be : (1) Baillie has omitted altogether to include in his Digest any extracts whatever relating to ariyat, either out of the Fatawa Alamgiri, or any other Hanafi text, and (2) the passage on ariyat in the English version of the Hidaya, uses terms not commonly used in legal context : leading to much misapprehension of the real significance of the version.[11] Syed Sahib Ameer Ali however has pointed out that ariyat is

[7] *Mahammad Siddiq K.* v. *Reseldar K.*, (1920) 2 Luck. 216 ("The grant is not a *gift* under Muhammadan law," (p. 219) is obviously a slip for "the grant is not a *hiba* under Muhammadan law").

[8] *Fatawa Alamgiri* adds, "This is the opinion of Abu Bakar ar Razi, & of the generality of our Doctors."

[9] Definition of USUFRUCT in Justin. II. 4, pr.—"usufruct is the right to use & enjoy what belongs to another, but its substance must remain un-impaired," —seems to represent exact meaning of *manafi*. Cf. p. 346, *n.* 14 (another defin.).

[10] See s. 443(1), *n.* 2, p. 479.

[11] (*A*) See p. 479, *n.* 2 : *tamlik*=the causation of *milk* ; *milk*=ownership, and/or possession ; *tamlik* = that which causes ownership, and/or possession ; *tamlik* may be translated as "making *malik* or owner and/or possessor" : ownership & possession being in early notions almost interchangeable,—hardly separable from each other. *Tamlik* may in the present connection be rendered by "transfer of ownership." (B) "Investiture" (by which word Hamilton translates *tamlik*), Hed. 478, is presumably used in sense of "causing to vest." To this rendering two objections : (1) word "investiture" not easily understood in this sense, & (2) introduction here of a word derived from word *vest*, obscures gist of discussion : because context in which the word *vest* is introduced, is discussion of Shafii's objection to the proposition that use or usufruct (though intangible) can be subject of ownership or vest as property vests—property being restricted to tangible things. But *vest* is used when rights are in question ; & controversy when presented in this form : "whether there may be any investiture (or vesting) of rights of usufruct"—entirely conceals question really raised by Shafii : viz. whether intangible thing, such as use or usufruct, can be said to be subject of *tamlik*, i.e. ownership and/or possession—viz. whether "use" is something whose ownership can be transferred from one person to another in the same way as the ownership of horse or camel. (C) The word ARIYAT is translated LOAN in sense of *commodatum*. *Commodatum* is appropriate rendering of *ariyat*, in so far as it emphasizes that the subject must be specifically returned, & that grantee has no right to consume it. What is however overlooked is that *ariyat* corresponds much more closely to *usus* (use) in Roman law than to *commodatum*. "Labeo said that use (*usus*) was the genus of which *commodatum* was the species,—that use applied both to movables & immovables while *commodatum* applied only to movables" (Hunter, *Rom. Law*, 475, 3rd Ed.) (D) Since *ariyat* applies equally to movables & immovables, it is unfortunate that wrong term from Roman law adopted. But translation *loan* is also unhappy inasmuch as that word more correctly represents Arabic *qarz* in which debtor not required to return specific article borrowed but to return the like (e.g. when money is lent). Translator of *Hidaya* does not observe this distinction. And yet this distinction is very important. Cf. *Jafri B.* v. *Amir Md. K.*, (1885) 7 All. 822, 830. (E) This is important because law of *ariyat* being applicable also to movables, subject of *ariyat* cannot be something whose use

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analogous to habs in Shia law. On the basis of the law of habs life-interests are recognized under Shia law.[12] Ariyat refers to the transfer without consideration of rights merely of use or enjoyment, therefore of rights not amounting to the [full] [13] ownership of the property. It consequently creates a limited interest in another's property, movable or immovable.[14] The recognition of a distinction between an interest in the property itself, and a mere personal claim against an individual who happens to own certain property, is a refinement and growth later than the texts. The texts seem to assume that if the owner of some tangible property creates rights having reference to his property in favour of another person, by which he (the owner) is personally bound, then he cannot deal with his property in derogation of his personal liabilities. When land is the subject of ariyat and the intention to bind the property (viz. to create an interest in it) is expressed or implied in a registered document, the result may, it is submitted, be the creation of what would be called an estate [15] under English legal terminology.[14]

Personal claim : interest in property : distinction.

2.—Hidaya on ariyat.

The preliminary passage on ariyat in the Hidaya merits scrutiny both as an instructive example of the struggle of early law with "intangible things,"

results in its consumption : & if such an article purported to be given in *ariyat*, new complications arise. For then two doubts result : (i) is expression *ariyat* misused ; & is *qarz* or debt intended? (ii) is this misuser merely inadvertence, or is it subterfuge for avoiding Muslim law, which rigidly prohibits usury ?

[12] Ameer Ali, *Mahm. Law* (4th ed.) L. 143. See below s. 518 & *n.* 17 thereto.

[13] See Poll. & Maitl., *Hist. of Eng. Law*, II. 151, cited p. 345, *n.* 12 on OWNERSHIP & FULL OWNERSHIP (s. 345, com.).

[14] What is material in respect of *ariyat* is not whether its subject is movable or immoveable property, but whether the property may be used & enjoyed without being destroyed (or consumed). Unless the property may be used without being consumed, it obviously cannot be subject of *ariyat*. *Ariyat* contemplates distinction between usufruct & property itself : s. 366 A, p. 380. This introduces in this context question of nature of use involved. Use of one kind may cause destruction. Use of another kind may cause no injury. So that before it can be pronounced whether particular kind of property may be subject of *ariyat*, it has to be determined what sort of use is contemplated by particular *ariyat*, to which property sought to be subjected : question accordingly turns into : "can this property be subject of this kind of *ariyat* ?" Thus e.g. money is generally "consumed" in use : but money & coins may be given (as stated in *Fatawa Alamgiri*) on *ariyat*, viz. for a purpose or a use which will not cause it to be "consumed" or used up, e.g. "in order to test weighing scales, or to adorn a shop with them, or for purposes of show, or for some other purpose, by which the corpus is not changed :" Hed. 480. See *Sharh Luma*, 233, cited s. 450, com., p. 526 ; *Fat. Al.* : (1933) X. Bom. L. Journ. 351, 354. When money is given for, e.g. weighing or adorning, then ordinary rule that on loan of money being made, identical coins loaned need not be returned, but their equivalent may be returned, does not apply. In such cases money is not given as loan or debt, but on *ariyat*. When this aspect, viz. indestructibility of the particular object, by the particular use for which it is given, is borne in mind, importance of distinction between (*a*) corpus, or *ayn*, or thing itself, or substance, & (*b*) usufruct, appears. Where object cannot be used without destruction, of course, whole premises disappear. On other hand much misconception arises in appreciating distinction between *corpus* & *usufruct* when property in question is land. For when land is in question, usufruct may be so complete, & for such duration, as to leave corpus a bare notion, something like a *scinlilla juris*. This is the case in *wakf* in which usufruct for ever appropriated for objects of *wakf*. But Muslim law is same for movables as for immovables. Its general statements cannot be appreciated unless circumstance that they apply to movables as well as to land is always kept in mind. When this is kept in mind, it becomes clear why "corpus" & "usufruct" treated as distinct.

[15] See definition of ESTATE, Blackst, *Comm.*, cited s. 443 A, p. 487, *n.* 1 ; cf. p. 485, *n.* 27. Estate = interest in land : though owing to the feudal system, interests in land could arise only in certain formal ways.

and as an aid to the appreciation of the great step in the development of law that is taken when ariyat is recognized as tamlik or transfer of ownership —or more literally, making another owner of property. SECTION 443.

Having defined ariyat as the transfer of the ownership of the benefit or usufruct, the Hidaya refers to the objections taken against that definition by Shafii and Karkhi. Those objections are very formal and casuistical. They rest upon speculative notions and ideas rather than the facts of life and conduct. But their casuistical attractions must not be permitted to draw away attention from the underlying substantial objection to the Hanafi definition. The substance of the objection, it is submitted, is to be sought in an inarticulate feeling that only tangible objects are capable of ownership or possession : that ariyat ought not to be defined as any kind of transfer of ownership (tamlik), since usufruct is not a tangible object. The objection is therefore taken that instead of defining ariyat as a transfer of the ownership of anything, it ought to be defined (as is done by Shafii) as a license to use the property of another.[16] The definition proposed by Shafii avoids the notions of ownership and possession. In reality it refuses to face the situation created by the emergence of rights not amounting to full ownership,— rights that clamour for recognition. The Hanafi definition on the other hand boldly extends the notion of ownership to these novel groups of rights. i—Shafii's objections to Hanafi definition of ariyat. ii—Replies to objections.

Shafii's objections which are stated below fall under four heads : (the Hanafi replies follow immediately after the objections). *Objection* I : the formula by which ariyat is granted includes the word ibahit, meaning license or permission [consequently what is involved in ariyat is merely license or permission and not any transfer of property]. *Reply* : (*a*) the word ariyat is itself derived from ariya which means a grant, and the word owner (malik) or ownership often occurs in the formula of a grant of ariyat ; (*b*) "the use of a thing, moreover is capable of being property in the same way as the actual thing itself ;"[17] (*c*) The occurrence of the word ibahit in the grant is not conclusive against ownership of something being involved in ariyat : since it (the word ibahit) is employed in settling contracts of lease[18] which are investiture (i.e. which cause a vesting of ownership and/or possession) with respect

[16] When once recognized (see s. 345, pp. 345 f.) that all transfer of property is merely transfer of bundle of undefined rights which make up ownership of that property, then discussion whether *ariyat* should be called license or transfer of property, seems futile. But as has been submitted, Shafii's real (perhaps subconscious) objection is his unwillingness to admit—or unpreparedness of his mind to recognize—that an intangible notion, like the use of a thing, can be conceived of as being the subject of ownership or its ownership as being transferable. Still less is he prepared to recognize that even where ownership of tangible thing concerned law deals with rights affecting it, & that rights & liabilities are always intangible though they may affect tangible things ; cf. *Sharh Luma* 233, cited s. 450, com., p. 526.

[17] This is a long step in development of legal ideas. But note that intangible things are not recognized as being what they are. They are treated as tangible things. Final step taken when recognized that even where apparently tangible things are concerned, in reality law deals only with rights therein. At that stage law relating to tangible things recognized as dealing merely with the intangible things called rights & liabilities.

[18] Transaction of leasing necessary in daily life : so it commanded recognition. Gratuitous transaction of *ariyat* had, *pede claudo*, to creep after its more powerful cousin & peep about to find itself a dishonourable & precarious foothold.

SECTION 443. to the use[18] of the thing hired. *Objection* II : Ariyat is valid without a specification of its period, which shows that usufruct is not property : since nothing can be transferred unless that which is being transferred, is certain[19] —in other words if something is being transferred, it must be certain, it must be known what is being transferred. *Reply* : Uncertainty in ariyat is of no consequence, as it cannot be productive of strife : inasmuch as ariyat is revocable.[20] *Objection* III : Ariyat may be revoked, whereas if it involved a transfer of ownership it would (like a lease) be irrevocable.[18] *Reply* : Revocation of an ariyat is nothing more than a prohibition to enjoy the usufruct, and after such prohibition, the usufruct ceases to be the property of the grantee.[21] *Objection* IV : the grantee of an ariyat is not entitled to let out the subject on hire : whereas whoever is himself proprietor of a thing may constitute another proprietor of it. *Reply* : the grantee is not competent to let out on hire the subject of ariyat since that is attended with injury to the grantor.[22]

3.—Four forms of transfer of ownership.

The sequel to this in the Hidaya also deserves attention : "Transfer of ownership is made in four different shapes : I. By sale which is transfer of the substance, for a return. II. By hiba which is a transfer of the substance, without a return. III By lease or hire which is a transfer of the usufruct of some property, for a return. IV. By ariyat which is a transfer of the usufruct, without return."[23]

4.—Ariyat a transfer of property.

This emphasizes what is implied in the definition under which ariyat must in Hanafi law be treated as a transfer of property. Shia law is also very

[19] Here there seems to be fallacy of using the word "uncertain" (middle term in the syllogism) in two different senses : (1) in major premise (viz. "that nothing uncertain can be transferred") "uncertain" is intended to mean something that cannot be determined ; (ii) in minor premise (viz. that *ariyat* is uncertain) the word "uncertain" is used with reference to a right the duration of which may be short or long : first sense quite different from the second.

[20] (i) Both objection & reply seem to suffer (respectfully submitted) from failure to come into contact with real difficulty,—with novel situation when for first time group of rights not coinciding with tangible objects, created. When grant of such rights is in question, so long as rights granted are properly defined, there cannot be any objection on ground of uncertainty. That which might be fatal uncertainty when tangible object has to be handed over, may be innocuous additional incident in intangible right, adding no doubt to complexity of the right, but by no means rendering transaction ineffectual. (ii) Turning to substance of objection & of answer, observable that both based on revocability of *ariyat*. It is its revocability that forms basis of objection that its subject is uncertain : it is its revocability that furnishes answer to objection. Formal reasoning could no further go. (iii) On critical analysis no real issue found to arise between the two definitions. Shafii defines *Ariyat* as license to use another's property. But does not license consist of group of rights of which licensee is made *malik* (owner/possessor)? Can this smaller group of rights not be called species of property analogous to—not identical with—larger bundle, constituting (full) ownership of determinate corporeal property?

[21] This objection may seem difficult to understand in view of normal revocability of gifts. But explanation : objection comes from Shafii whose system does not recognize normal revocability of gifts as Hanafi law does.

[22] At this early stage of introduction of this new conception in the law, not immediately realized that (i) whether grantee may be allowed authority to hire out or not may depend upon terms of grant ; (ii) grantor may grant right of hiring out, or may restrict nature of grant, & (iii) whether grantee's letting out will be attended with injury to grantor, may be left to grantor to consider at time when he makes the grant.

[23] Hed. 478, (col. ii). See also p. 387 (s. 366A) & s. 580(2) (bequests of usufruct).

clear on the point. The Shia texts lay stress upon the insistence of the Koran that promises must be performed : s. 408, com., p. 455 : see also Indian Contract Act, ss. 148 ff. particularly s. 159 (restoration of goods lent gratuitously). SECTION 443.

5.—Incidents of ariyat.

From the definition of ariyat as a transfer of the ownership of the usufruct or benefit of any property, and the vigorous defence of the theory that there can be such a transfer, certain corollaries must be drawn. Though the texts lay down that : (i) ariyat arises from a permission to use some property, or to take its profits for a definite period ; (ii) that it is revocable at the will of the owner of the property ;[24] (iii) that it consists of a right which cannot be assigned by the person who has the permission ; (iv) which does not devolve on his heirs, and (v) that in an ariyat it is not necessary that the donor should be of age nor (vi) that the thing forming its subject should be divided off, if musha ; nor (vii) is acceptance after proposal a condition,[25] none of these incidents are to be taken (it is submitted) too rigidly : s. 5c : Caution is necessary in reference to texts containing rules intended to be subject to agreements to the contrary or liable to be governed by implications. It may in special be pointed out that the texts are express, that (1) ariyat need not be for a definite period, and that, if the period is left undefined, it is understood that the grantor retains his power of revocation at will ; (2) that the power of revocation may be relinquished for consideration[26] and presumably may be relinquished without consideration ; since the whole transaction may be brought into being for consideration, or without consideration, it must follow that a particular incident of the transaction (revocability) which has the effect of effacing it after it has been brought into being, may for consideration be made inexistent. As pointed out by the Privy Council, it would be an extraordinary limitation of the right of property to forbid a present parting with the exclusive possession and enjoyment for a time : and all in the name of allowing a power of revocation to the grantor.[27] Again, it may be that the grant will be strictly enforced in favour of the grantor, still if it is clear

(i) Revocability of ariyat.

(ii) Relinquishment of revocability.

[24] *Mumtazunissa* v. *Tufail Ahmad*, (1905) 28 All. 264. Certain expressions in judgment liable to be misunderstood, explained on review ; *In re Khalil* (1908) 30 All. 309.

[25] *Mahomed Faiz K.* v. *Ghulam Ahmed K.*, (1881) 8 I. A. 25 = 3 All. 490. See judgment of Mahmood, J. then Subdte. Judge.

[26] Hed. 486 (col. ii., par. 5, 6) : "a stranger may lawfully give a compensation for the relinquishment of a right, as in the case of *khul* of composition. (The rule is confined to stranger for this reason that when person is not stranger but kinsman, law causes right of revocation to cease, without any such relinquishment ; there is no question of compensation being given by a kinsman for relinquishment of the right because in his case the law itself causes the right to be relinquished).

[27] *Juttendromohun Tagore* v. *Ganendromohun T.*, ("*Tagore case*,") (1874) L. R. I. A. (Supp.) 47, 74, 75. The whole passage requires careful attention. It is as follows : "The first LIFE INTEREST in Jittendra Mohun Tagore" [terms of the will given on p. 59 of report] "next requires attention. It was objected to on two grounds. First because it was said that Hindu law recognizes only one entire estate in the land & does not allow of that estate being cut up into smaller distinct interests in the way of LIFE ESTATE, REVERSION, REMAINDER & so forth. As for the first objection it amounts to this : that because there is, as was contended, only one estate technically known to Hindu Law, & that an entirety, there can be no contract by which an owner of land may bind himself to allow to another the ENJOYMENT OF THE USUFRUCT of the land to the exclusion of the owner, for a given time, whether for years or for life (because in the law we are dealing with the

SECTION 443. (iii) Assignability of ariyat.

that the permission to assign is granted, or if it is provided that the right granted should devolve on the heirs of the grantee, there seems no reason why such provisions should not be held binding and effective.[28] The Jawahiru'l Kalam after stating that sukna is like an ariyat, says that it is revocable unless it is limited for life or for a fixed term. Sukna is a form of ariyat, giving a right of residence : and what is said about this particular form of ariyat would seem on principle to be applicable to ariyat generally.[29]

6.—Rules of hiba and ariyat compared.

Some of the necessary results of treating usufruct, (the right to take in future the benefit of a tangible thing), as a species of property, capable of being transferred (cf. p. 526, s. 450, com. Sharh Luma) provoke comparison with allied notions and incidents of hiba : (i) "Taking possession" of the right to enjoy future produce, or the usufruct for some time in the future, must obviously be understood in a very different sense from taking possession of the subject of hiba, which consists of a tangible thing. (ii) The rule (s. 349, p. 357) that a contingent or future hiba is void cannot be interpreted, (in reference to the transfer without consideration of rights in property which are to come into being in future) in the sense that a transfer cannot be made so as to entitle the transferee to receive the fruit that will arise in future : for the transfer of future usufruct in indirect terms brings this about. With reference to transferring possession of the usufruct, the rule must be stated in another form,—that the mere expression of an intention to transfer fruit that will arise at some future time, does not give rise to any rights.[30] But a present transfer of the right to the usufruct for a definite future period is something far more definite and effective than a mere expression of such a future intention. (iii) Similar alteration in its colouring must affect the rule

distinction of chattel & freehold has no existence), & to give exclusive right of possession for the enjoyment of that usufruct." [Observe that Willes, J. identifies "LIFE ESTATE" with "ENJOYMENT OF USUFRUCT FOR LIFE," 6 *ll.* later he again paraphrases it as "A PRESENT PARTING WITH EXCLUSIVE POSSESSION & ENJOYMENT FOR A TIME."] "It was admitted for the plaintiff that ANNUITIES given & charged upon land are valid : but if the annuity equalled or exceeded the profits, there would be an effectual gift of all the profits & practically of the land, & yet it was contended that possession & enjoyment of the land could not be directly given. Whether this interest & right of possession for years or for life is called an ESTATE or not, it as effectually excludes the general owner, as an estate would. In the absence of any authority for so EXTRAORDINARY A LIMITATION OF THE RIGHT OF PROPERTY as would forbid a present parting with the exclusive possession & enjoyment for a time, their Lordships entertain no doubt that possession & enjoyment may be so dealt with, & that there is no objection to a similar interest being given by will." With reference to the words "whether this interest & right of possession for years or for life is called an ESTATE or not" cf. "where no ESTATE is conferred upon the beneficiaries & their interest is in the proceeds of the property."—*Tagore Case*, 71, full passage cited s. 387, com., p. 421, *n.* 20.

[28] *Mannox* v. *Greener*, (1872) 14 Eq. 456, 461 : "The direction that she is to have the free occupancy of any house in the possession of the testator will entitle her in my opinion either to reside in the house or to let it as she may think fit." *Hemangini Dasi* v. *Nobin Chand Ghose*, 8 Cal. 788, 801 : Ind. Succ. Act X. of 1865, s. 159, *ill.* (*c*) = Ind. Succ. Act XXXIX. of 1925, s. 179 : transfer of right to take future produce spoken of as transfer of the future produce itself ; but law in every case deals with right & liabilities referring to property, not property itself.

[29] *Jawahiru'l Kalam* IV. 618, 619 translated in s. 451, com., p. 527. See also ss. 453, 454, 455, 580(2) = pp. 529.

[30] See Bail. I. 539 (548) = s. 442, *ill.* (2) where gift *in praesenti* is contrasted with mere promise.

that the subject of hiba must be absolutely transferred and that the ownership of the transferor must cease. Those rules formulated in the rigid terms just stated, follow as a necessary corollary when the transaction consists of the transfer of the complete ownership of a determinate physical object. When, however, the subject of transfer consists of a particular right, viz. when the complete bundle of rights appertaining to some definite physical object, which bundle is called ownership, is not transferred, but only one or more component rights picked out of that bundle, and transferred, then the said rules can mean no more than the truism that rights which have been transferred cease to belong to the transferor, and cannot be exercised by him any longer. The right transferred may or may not be a complex one. In any case both the donor and donee may exercise some control over the same physical object : but those rights which are transferred do not continue to remain the donor's,—if it is necessary to enunciate this platitude. (iv) Sect. 366 requires that the property which is the subject of hiba shall be in existence. But the notion of usufruct implies property expected to come into existence in future : s. 366 cannot,—the texts leave no doubt on this point,—be interpreted on the basis that the law does not recognize a present right to such future property, or that that present right is incapable of being presently transferred. No doubt, if a person were to say, I expect to acquire such and such a right in future : when I become entitled to it I will transfer it to you : [30] in that case no transfer takes place. But if he holds a present right of the nature under consideration and transfers it, in the manner required by law, there is it is submitted no reason why the intention of the parties should not be given effect to.

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Transfer of future property.

Summing up the results, ariyat is a transfer of usufruct or use : use of such a nature is intended as depends upon and conforms to the character and type of the corporeal object concerned, and as will not result in its consumption or destruction. The transfer must be for a defined period of use (so that the notion of time is introduced). Law being concerned with rights and not with things, ariyat from the juristic view refers to the transfer of rights which permit the exercise of some species of control over determinate things without those things being consumed or used up or destroyed, preserving the corpus intact, and conceding that the right to the corpus may be retained by the owner of the thing. See s. 444, com., p. 501.

7.—Definition of ariyat—juristically.

It is submitted that these legal notions supply all that is necessary for the creation of limited interests in property movable or immovable for determinate periods of time.

§ 10.—Life-Interests : Limited Estates : Hanafi Law.

I. HANAFI LAW : LIMITED INTERESTS.

(A) ESTATES IN ENGLISH LAW.

443A. Under the terminology peculiar to English law certain groups of rights in land are spoken of as constituting "estates [1] in the land." Estates in the land may represent

[1] Words "ESTATE" & "life-estate" have been occasionally used almost as talismans. (i) Blackstone, *Comm.* (Oxford 1766) II. 59, 103, 104, 311, 120, 124 (omitting details

SECTION 443A. Ownership. Rights short of ownership.

either (*a*) a group of rights constituting the full or absolute ownership [2] of the property, held heritably and for an unlimited duration, or (*b*) rights that fall short of full or absolute ownership, being limited to the life of the grantee, or being otherwise restricted as to duration or use or disposition. *Hanafi* [3] law recognizes transfers under both the heads, but the two heads are not brought under a single category, nor included under a single designation such as " estate " :

(*a*) the expression " ownership of the property " (movable or immovable) is restricted under Hanafi law to denote full or absolute ownership ;

(*b*) granting a group of rights that fall short of full ownership (the rights being limited in point of duration, and|or in other ways) is referred to as investing with the usufruct or with the right [4] of enjoying the possession, and|or

not now material) will, it is hoped, assist precision : " Almost all real [immovable] property is therefore styled a *tenement*, the possessors thereof *tenants*, & the manner of the possession *tenure*." " An ESTATE IN LANDS, tenements & hereditaments, signifies SUCH INTEREST AS the tenant [viz. the POSSESSOR of the land] HATH THEREIN :....It is called in Latin *status* : it signifying the condition, or circumstance, in which the owner stands, with regard to his property....An estate of FREEHOLD....is ' the possession of the soil by a freeman.'....Such estate therefore, & no other, as requires actual possession of the land, is legally speaking freehold : which actual possession can, by the course of the common law, be only given by the ceremony called LIVERY OF SEISIN, which is the same as the FEUDAL INVESTITURE. And from these principles we may extract this description of a FREEHOLD ; that it is such an estate in lands as is conveyed by livery of seisin ; or, in tenements of an incorporeal nature, by what is equivalent thereto." " This livery of SEISIN is no other than pure feudal investiture, or delivery of corporeal possession of the land or tenement ; which was held absolutely necessary to complete the donation." (ii) ESTATE is a term serving " to bring the various proprietary rights under one category."—Poll. & Maitl., *Hist. of Eng.* II. 11. See p. 485, *n.* 27. LIFE ESTATES need not be estates of freehold, & even freehold life estates may be of many varieties in respect of both their creation & their incidents. (iii) Yet often spoken of in India as if they always represented precisely same group of rights in every case : in reality rights granted to life-tenants under each deed must naturally differ from rights granted under every other : each deed has its own special limitations & restrictions suitable to its own circumstances. So long as an estate defined as above is created, & so long as its duration is the life, either of the grantee or of some other person, it may, it would seem, be called a life-estate. (iv) See page 419 *n.* 8. IV.

[2] OWNERSHIP = " a convenient name for a bundle of undefined rights, comprising all the rights which a subject may exercise over land."—*Metro. Ry. Co.* v. *Fowler*, (1891) 60 L. J. (Q. B.) 518, 525 : s. 345, com., p. 245, *n.* 12. Referring to expression " ABSOLUTE OWNERSHIP," Poll. & Maitl. II. 6, say : " Might he (Bracton) not have asked whether in such a context ' absolute ' is anything better than an unnecessary expletive." Hanafi law puts the group of rights marked (*a*) in s. 443, in a category by itself ; it alone is styled ownership. To speak of ownership for limited period of time, is, under Hanafi terminology contradiction in terms.

[3] Shia law is separately treated : see ss. 446-455.

[4] Obviously there must be some benefit arising from the grant ; & as texts say that use or benefit is transferable it is meant that the right to specific use or benefit is transferable. Note that USUFRUCT does not consist of one precisely determined group of rights : usufruct or use of property may be defined & restricted in any way that grantor desires : it must in every case have correspondence with the particular

benefit of the property, for life, or for a fixed period of time.[5] SECTION 443A.

Much difficulty in the appreciation of the Hanafi law governing limited interests in property, or (which is the same thing) rights in property not amounting to its full ownership[6] has arisen from a failure to attend to the classification and terminology of the Hanafi texts, and from a forced identification of terms used in those texts with terms prevalent in English law,—though there is no real equivalence between the two.[7] The gravity of these difficulties and errors is increased by what is not merely a matter of words or terminology,—the omission to bear in mind that notions prevalent in English law relating to estates in land are the results of the history of land in England, to which there is probably no parallel even in Europe. Nevertheless these peculiarities[8] of English law have been taken as though they represent-

1.—Forced identification of Hanafi terminology with that of English law.

i—Peculiarities of English law taken as fundamentals.

object in question : every object having its own distinctive use : riding horse or milking cow, living in mansion or cultivating field. But in this manner—viz. by providing for the transfer of the rights of using or enjoying or exercising control over the property in distinct methods & manners & for distinct purposes—ownership is resolved into the individual rights of which it is composed & some rights are particularized & re-grouped so as to comprise the particular form of usufruct intended to be granted in respect of the particular property, p. 346, *n.* 14, p. 380, *n.* 14, p. 481, *n.* 9, p. 533, *n.* 14.

[5] Rights not amounting to full ownership are not spoken of as "ownership for a limited period of time." Enjoyment of usufruct may be restricted.

[6] Reference is made in s. 345 & several other parts of this work to fact that *hiba* by its very definition excludes transactions (without consideration) which do not transfer entire ownership of some determinate object—though such transactions may be recognized in texts. Consequently when a person desires to transfer without consideration full ownership of a determinate physical object to another, technical form is to declare that he makes *hiba* of the thing. Stating that *hiba* is made of anything implies that full ownership thereof is transferred without consideration. Where anything is in terms transferred by way of *hiba* & there are other words in the grant whose effect is that grantee is not to take subject of transfer absolutely, but to exercise over it rights for life or for other limited period, or with other limitations, question arises what was real intention of grantor : to make *hiba*, or to transfer rights short of full ownership ?

[7] That in substance the two propositions viz. (i) giving property to *A* for life & (ii) giving him usufruct or rents & profits of that property for his absolute benefit during his life time—are identical is incontrovertible : in fact it was gist of very important part of *Tagore* judgment, L. R., I. A., Supp. 47, 74, 75, set out p. 485 (s. 443, *n.* 27). Yet what is material in present context & what was overlooked in *Bai Saroobai* v. *Hussein Somji*, [1937] Bom. 18, 49, 50 is that proposition (i) can only be given any meaning "if proprietary rights in land are projected upon the plane of time"—which English law does ; but neither Muslim law nor Roman law does. English notions of property in land must be recognized to be quite different from those prevalent not only in Muslim law but also Roman law. The stand point of the Muslim lawyers needs to be understood. It is consistent with the following reasoning. The law does not deal with "giving property," but with transferring rights in property : & when property is said in legal context to be given, what is meant to be expressed is that the OWNERSHIP of the property, viz. all rights capable of being exercised over the property (including right of hereditability) are transferred ; if therefore the property is given, right of transmitting it to heirs is given. If property is said to be given, & it is added that it is given for life, meaning that donee's heirs shall not succeed, there is a contradiction in terms.

[8] (i) Poll. & Maitl. speak of English land system as very peculiar. (ii) Prof. Holdsworth, *Hist. of Eng. Law*, II. mentions "the PECULIARLY ENGLISH CONCEPTION OF AN ESTATE IN LAND" (p. 350). "It is not until doctrines of tenure & possession have been elaborated by a strong court that we get the rise of the peculiarly English doctrine of estates in the land" (p. 76). (iii) He quotes Stubbs (C. H. I. 189) who characterizes the system as "an intricate system, a system rendered more intricate by poverty of nomenclature, variety of provincial custom...." &c. "English law at the period" (p. 40)—viz. when the conception of estates originated,

SECTION 443A. ed normal fundamental notions and principles of jurisprudence. It is assumed that the notions and terminology peculiar to English law are juristically of such a nature, that every system of law, however different its origin and history, must necessarily conform to them. It is taken for granted that a terminology which does not so conform, must be opposed to logic and good sense, and that the system of law which adopts a different terminology, must be incapable of development, or of ever attaining a state of progress in which methods of transfer necessitated by modern conditions of life and recognized by modern, or by English law, may find place.[9]

ii—Life estates are rights short of full ownership.

The notion in English law of life estates in property falls under the general head of the creation and transfer of rights short of full ownership in a determinate physical object, such as land. In India it is quite common to speak of the transfer of "ownership for life" or of ownership for limited periods.[10] Those expressions however are not really accurate, since "ownership" implies rights whose duration is unlimited in point of time. This will presently be referred to more fully (see p. 492 : "holder of life estate is a usufructuary").

iii—Features of proprietary rights in land in English law.

Sir Frederick Pollock and Prof. Maitland speaking of the "most salient trait of English land law," and of "the wonderful calculus of estates which even in our own day is perhaps the most distinctive feature of English

—"has no clear idea of the distinct juristic character of *res incorporales*" (p. 351). (iv) Present writer suffers from unfamiliarity with English law. His liability to err in this discussion might indeed have been offered as excuse for avoiding it. English law of real property however occasionally referred to in India—in oblivion of its complications, long history & difficulties. Endeavour has been made in this work to keep close to very words of eminent authorities taken as guides, so as to minimize danger of error. Whatever its misconceptions of English law, this work primarily concerned with Muslim law.

[9] The terminology under which holding life-estate in landed property, i.e. holding rights in land limited in duration to life of holder (or of some third person), is spoken of as owning property for life, is assumed as the normal, or indeed as the only method of expressing the concept. In Muslim law no exact term seems to be available corresponding to "an estate in real property"—no single term which applies both to (*a*) absolute ownership & (*b*) rights short of full ownership in land. From this the conclusion often drawn (*per saltum*) that Hanafi law recognizes transfers only of full ownership;—that (to use the language of Willes, J. in *Tagore Case*) there is only one estate technically known to Hanafi law & that an entirely, that Hanafi law does not allow of that estate being cut up into smaller distinct interests in the way of life-estate, reversion, remainder, &c. : and this notwithstanding that transfer of those very groups of rights which taken together constitute life-estate &c. is recognized. This conclusion seems to be based on the group of rights involved not being called OWNERSHIP, nor ESTATE, nor by any name common to itself & to full ownership. See citations from Tagore Case & Poll. & Maitl. in this com.

[10] In this way expression "OWNERSHIP" (which really means dominium & therefore implies that the property is susceptible to inheritance) used (i) sometimes to mean such dominium, & (ii) sometimes to express group of rights limited in duration, say to life of so-called owner. Poll. & Mait. are careful to point out that "the rights of a person who is entitled to hold land for his life are, of course, different from those" of a "person who is entitled to hold land in fee & demesne"; the latter, they explain, "may be spoken of as owner of the land." "The life tenant's rights are a finite quantity, the fee-tenant's rights are an infinite or potentially infinite quantity; we see a difference in respect of duration & this is our fundamental difference." In the term ESTATE "'our' lawyers have found a term for which they have long been to seek, a term which will serve to bring the various proprietary rights under one category, that of duration." "To hold in fee" = "to hold heritably"—Poll. & Maitl., *Hist. of Eng. Law*, II. 7 (par. 3), 10 *ll.* 26 ff., 11 *ll.* 10ff., 6 *ll.* 26 ff. (1st ed.).

private law," characterize the English terminology in these words : "proprietary rights in land are, we may say projected upon the plane of time. The category of duration is applied to them." SECTION 443

2.—Muslim law,—

On the other hand the law of Islam is not set upon the framework of the feudal system. It does not proceed on the basis of a cleavage between the law relating to land and to movables (though occasionally the rules of law relating to land and movables are different). It does not desire, for feudal purposes, to bring interests of all varieties in land—so long as they are recognized as interests in land under the feudal system—under a common category, distinct from rights in movable property and even from rights in land not so recognized.[11] It does not desire to place persons having certain classes of rights in land as a distinct class, almost a caste—as persons holding estates in land—so that they may be subjected to certain feudal claims, or be

[11] Let us imagine layman, accustomed to manner of expression common in India, consulting, with reference to disposition of his property, an Arab *faqih* (= lawyer) learned in Muslim law, out of touch with terminology of English law. Say client's property consists of orchard & camel. We may expect DIALOGUE BETWEEN CLIENT & FAQIH something to following effect :—*Client* : "I want to give my orchard & camel to *A* for life. I want to make him owner for life." *Faqih* : "I feel great difficulty in understanding your requirements. You say you want to transfer ownership of your orchard & camel to *A*. If you want to make *A* owner, it means that you want to invest him with all rights that may be exercised over property : one of most important results of such transfer is that the property will devolve upon *A's* heirs. Notion of ownership implies that owner has absolute rights over it,—of unlimited duration. You want to give *A* such heritable rights of unlimited duration, & then you say that he shall have those rights—the right of ownership—for period limited to his life : & that his heirs shall not inherit his heritable property. You must make up your mind what you wish to do. Do you wish *A* to be owner—or do you wish to give him rights short of ownership ?" *Client* : "My desire is that *A* should be like owner : only his rights should be so limited that after his death he should have no claim on the orchard & camel. That being my paramount intention, all *A's* rights are to be subject to that paramount object." *Faqih* : "After his death *A* will have no claim over orchard & camel. They will become property of *A's* heirs. —But I see what you want to give to *A*. You do not want to make him *owner* of orchard & camel, but you want to give him right to hold orchard & camel in his possession,—to get their profit and use : [Cf. English form of conveyance of life estate : "to hold the said premises to the use of the said *A. B.* and his assigns during his life."—Davidson, *Concise Prec.* 549 (pr.,156), 19th ed. (1910) *pass.*] "You want *A.* to have the right to eat the fruit of the orchard, & perhaps it is your intention, to empower him also, if he likes to sell & to ride the camel or hire it out. Is that so ? In short, you desire that during *A's* life he should have rights over what we lawyers call the *manafi* or usufruct of the orchard & camel. The benefits (*manafi*), that arise from the orchard & camel by their nature arise (unlike ownership) from time to time : the notion of duration long or short is inherent in the notion of the rights which entitle one to enjoy the usufruct : you may give the right of usufruct for a short period or a long period & its duration must be defined. [Hed. 441, see *n.* 12]. But you cannot give the ownership from time to time, as you can give the usufruct : because the first grant of ownership deprives you of all rights over the property ; you cannot subsequently (or for a period subsequent to the first grant of the ownership) exercise any rights over the property, having transferred them away, & having no right left in yourself regarding them. You will serve your purpose if you give *A* the usufruct, fixing its period as duration of *A's* life. In this way *A* will not be made owner (which you do not want him to become) of the orchard & camel : not being owner, he will not be able to transfer orchard or sell or kill camel : you do not want him to have power of doing these things ; but he will be enabled for time being to get (and/or, if you like, to permit another to get) all benefit from orchard & camel, that he would have if he were to own them, except right of transferring their ownership : not being owner, of course he cannot make another owner. Since his usufruct is restricted to his own life, there will be nothing left when he dies for his heirs to inherit in respect of the orchard & camel."

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vested with certain feudal privileges. It has no occasion to lay down that seisin of land if taken in the feudal manner, creates rights that ought to be placed in a category by themselves. It does not therefore disregard the contradiction in terms involved when ownership is said to be of limited duration.

i—Notion of limited duration cannot be connected with ownership,—

In English law "proprietary rights are projected upon the plane of time," —in other words it considers ownership as being capable of existing for a longer or shorter period,—Muslim law, on the other hand, considers ownership as a group of rights which by its definition is heritable and unrestricted in point of time. So once ownership (so defined) is under consideration, the notion of limited duration cannot be annexed to it. If the ownership of the object is transferred, it is, according to the Muslim terminology, a contradiction in terms to say in one breath that ownership, viz. all rights are transferred (and "all rights" must include the right to hold the property for all time, and the right to transfer and to transmit it to the donee's heirs), and in the next breath to say that on the donee's death it must come back to the donor.

ii—but with usufruct.

On the other hand, the right to use the property or to take its profits, is a right of such a kind that the notion of time is logically as well as legally associated with it. When the use is granted, or the profits are transferred, the question naturally arises, use for how long, profits arising during what period?[12] Where the intention is to restrict the duration of the rights transferred, it is necessary in logic to select for transfer such a group of rights (viz. usufruct) as permits of, or insists upon, the rights being restricted in respect of duration—not to select rights that are, by their nature or definition, inflexible in respect of their duration, being in themselves, or having been defined to be, of unlimited duration. This is what Hanafi law requires to be done.

The real question of substance, however, remains what is the intention of the parties who enter into the transaction.[13]

iii—Holder of life estate is a usufructuary.

The following observation of Pollock and Maitland shows the relation between the principles that have prevailed in English law and those adopted in the law of Islam: "Now anyone," say the learned authors, "who had been looking at Roman Law books[14] must have been under severe temptation to regard the tenant for life as a usufructuary and to say that while the tenant in fee is the owner of the land, the tenant for life has a jus in re aliena

[12] "It is requisite that the period of right to the usufruct be fixed." Hed. 441.

[13] *Sookhmoy Chunder Das* v. *Srimati Manohurry Dasi*, (1885) 12 I. A. 103, 110 = 11 Cal. 682, 692: "It is true if the bequest had been of RENTS & PROFITS, & it appeared that it was the intention of the testator to pass the ESTATE, those words would be sufficient to do it; but what their Lordships have to do is to find the intention looking at the whole of the provisions of the will & they gather from those words that it was not his intention to pass the estate. The PROVISION afterwards AGAINST ALIENATION further confirms this. It is not a case where the testator has expressed an intention to pass the estate & has added a CLAUSE AGAINST ALIENATION, in which case the clause against alienation would be void, but the provision here against alienation is confirmatory of the other part of the will." These principles are of universal application: only the totally different method of speaking & approaching the question under Muslim law must be borne in mind. Cf. s. 418, com., p. 463.

[14] Many Muslim text writers were familiar with Roman Law.

which is no part of the dominium but a servitude imposed upon it." [15] This observation, is the more deserving of attention, inasmuch as notwithstanding the essential identity between a usufruct for life and a life estate, and in spite of that identity having been reasoned out in the Tagore case [16] and having formed the basis of one leading decision in that great judgment, the two have been considered as something radically different and as being subject to different rules of law. Or rather these expressions have been contrived a double debt to pay—to supply food and nourishment for a double fallacy. They have been requisitioned to screen off the possibility of any light that might otherwise be thrown on the subject from two different apertures. First, when there is an encounter with Hanafi texts to the effect that usufruct for life may be transferred, then it is said that usufruct for life is something inherently distinct from a life estate (which latter is identified with what is called ownership for life); and the conclusion is reached—altogether satisfactory to the minds of those who are desirous of reaching that foregone conclusion—that when the question to be determined is whether under Hanafi law ownership for life (so called)' or life estates may be transferred, then texts relating to transfer of usufruct for life can have no bearing, and must be put out of sight. But secondly, when Hanafi texts are forthcoming which indicate that "transfer of ownership for life" is a self-contradictory collocation of words, then a change of front takes place, and the argument assumes the form that usufruct for life is nothing else than ownership for life, and that since Hanafi law is unable to understand what ownership for life means, therefore, a transfer of the usufruct for life must under that system be deemed to be impossible or must be understood as absolute transfer. The truth is that these two expressions—ownership for life and usufruct for life—are the same as well as different. They are different if the Hanafi terminology is logically adhered to : the expression ownership for life is in that terminology self-contradictory. But on the other hand they represent very similar ideas when attention is paid to what is really meant to be expressed, to the rights and liabilities intended to be grouped together by those who use these expressions in India.[17]

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iv—Usufruct for life is life estate.

[15] *Hist. of Eng. Law*, II. 8 (par. 2).

[16] *Juttendramohan Tagore* v. *Ganendramohan Tagore*, (1872) I. A. (SUPP.) 47, 74, 75, set out in s. 443, com., p. 485, *n.* 27. Cf. *Hemangini Dasi* v. *Nobin Chand Ghose*, (1882) 8 Cal. 783, 801. Cf. "We think that in giving to these heirs a specific share of the rents & profits he must be held according to the principle laid down in *Mannox* v. *Greener*, (1872) 14 Eq. 456, 'to have given to each of these persons a share in this ESTATE corresponding with the share of the profits'." See also Ind. Succ. Act X. of 1865, s. 159, *ill.* (c) = Ind. Succ. Act XXXIX. of 1925, s. 179.

[17] *Bai Saroobai* v. *Husein Somji*, [1937] Bom. 18 : life-interest conceived as different from usufruct for life : p. 25. Expression "corpus" is there used in sense entirely different from that in which Muslim jurists use expression *ayn*, (which is ordinarily translated *corpus*). *Ayn* implies rights over property which are heritable & unrestricted in point of time. In *Saroobai's* case at p. 47 it is said that the settlement must be construed according to principles of Hanafi law : but language of settlements in India does not follow terminology of Hanafi lawyers : & principles of Hanafi law get entirely distorted by confusion of terms & attempt to apply principles of Hanafi law, fails when terms of Hanafi law intermingled with terms of English law. On pp. 48, 49 in defiance of TAGORE CASE distinction made between gift (i) of net rents & profits, & (ii) of usufruct. But usufruct (*manafi*) = right to take rents & profits. See also p. 496, *n.* 6.

SECTION 443A. These considerations, it is submitted, make the classification and general notions underlying Hanafi law clear. A person either intends to transfer the full ownership of property or some rights falling short of full ownership. To say that the ownership of the property is transferred for a limited period of time, is a contradiction in terms, since ownership means "full and absolute ownership for all time."[18] If less than the full and absolute ownership is intended to be transferred then those rights falling short of absolute ownership which are intended to be transferred ought to be particularized : and the Hanafi terminology offers facilities for such particularization : whereas to speak of ownership for life is to speak of "full ownership" and "something short of full ownership" in the same breath.

v.—Estate or interest in property for life.

What then are the rights short of full ownership that are intended to be transferred when an interest is transferred which is to have duration for the life of the donee? It is (as has been seen) inaccurate to say that the transferor of such an interest is made owner for life. The life tenant's rights are, in respects other than duration, different from those of the full owner. When a life estate or an interest for life is conferred upon any person, all that is really intended is that rights of usufruct—of enjoying the property during his life, with suitable limitations as required by the particular circumstances, are conferred upon him. The Muslim doctors think that when this is the grantor's intention he will say so. It may be put in yet another way. The distinction between a life estate and an absolute heritable estate looms much larger in the eyes of the Muslim jurists, and they do not think of the former as being the same as ownership restricted in point of time. Perhaps the most significant explanation is that no cleavage exists between rights in land and other rights. All the different species of rights in land are not sought to be brought under a single category, bearing a single name—estate in land—quite distinct from rights in movable or "personal property."

English law, and the English feudal system seem to have found it convenient[19] or necessary to speak of all the various interests in land under the one general designation of estate, and to keep them separate from interests in or rights over movable property : the line of division being whether the subject of the right is land (and the interest in it of a nature affecting the feudal system), or a movable thing.[19] Muslim law takes another line of division,—whether the rights make up full ownership, or whether they fall short of ownership, consisting of some advantage to be derived from property movable or immovable.

3.—Ambiguous expressions.

That there is a line at which the two notions approach very near each other may be admitted. It is shown not only by the temptation in our times to speak of ownership for life, but by the fact that the Arabic text writers give examples of words which may mean one or the other—either an ariyat (grant of the usufruct) or a hiba (grant of absolute ownership).

[18] See s. 345, com., p. 345, *n.* 12, p. 485, *n.* 27, p. 488, *n.* 2, p. 490, *n.* 10.

[19] Liberty taken to make these general observations about English system merely for purpose of making my statements of Hanafi law clearer. See p. 490, *n.* 8(iv).

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4.—Usufruct means right of enjoyment.

One other point has been alluded to more than once but requires to be mentioned again in the present context. The Muslim texts speak of the grant of the manafi or of future produce, i.e. the grant of the right to take the future profits, and I have spoken of this as being equivalent to the grant of rights short of full ownership. I do so because when produce is said to be given, the transaction accurately stated in terms of the law is a present grant of the rights to take in future the produce when it will come into being. The texts speak of the benefit or the use or usufruct of property being granted, in the same way as they speak of the grant of the produce. To all these benefits there are corresponding rights : and indeed a right over the property must have reference to some benefit to be derived from the property. The texts mention that usufruct may be defined or particularized as desired by the grantor, that every kind of benefit may be so granted, limiting the use to be made, or benefit to be derived, by the transferee in any manner that the transferor may choose. And this means that every sort of right in the property may be transferred ; and when a right is spoken of, a group of rights is included. See s. 450, com., p. 526. (Sharh Luma I. 233).

(B) HANAFI LAW.

Hiba refers to absolute transfer.

Purported restrictions on hiba.

444. (1) Under Hanafi law [1] when it is clear that a donor has made a hiba [2] (viz. a present gift of the full and absolute ownership of certain property), and yet the donee's rights therein are purported to be restricted for his life (or for any other limited period) or he is prohibited from alienating it, the gift operates absolutely : the purported restrictions are invalid, and the donee takes the property not only for his own life with powers of alienation, but (by reason of the fact that the transfer is a hiba) he takes such an interest in the property that after his death it devolves upon his heirs.[3]

Transfer of rights for life.

(2) It is submitted that a Hanafi Muslim may grant without consideration [4] rights in property owned by him,[5] which

[1] "It is not certain that this proposition"—viz. "that a life interest is bad, & would resolve itself into an absolute estate for the benefit of the donee"—"can be sustained in the case of Shafiites to which sect the parties to this suit belong" : *Mahomed Ibrahim* v. *Abdul Latiff*, (1912) 37 Bom. 447, 458.

[2] *Hiba* is appropriate expression when absolute interest intended to be transferred. *Doe*, d. *Gallini* v. *Gallini*, (1833) 5 B. & Ad. 621, 640 ("TECHNICAL WORDS OR WORDS OF KNOWN LEGAL IMPORT must have their legal effect even though the testator uses inconsistent words UNLESS those inconsistent words are of such a nature as to make it perfectly CLEAR that the TESTATOR DID NOT MEAN TO USE THE TECHNICAL TERMS IN THEIR PROPER SENSE.") Same rule applied to deeds & other documents (Lord Davey) : *Lalit Mohan S.* v. *Chukkun Lal R.*, (1897) 24 I. A. 76 = 24 Cal. 834, 846. Cf. *Weerasekara* v. *Peiris*, [1933] A. C. 190.

[3] Hed. 489 ; Bail. I. 509 (517) (par. 2) ; *Nizamudin Gulam* v. *Abdul Gafur*, (1888) 13 Bom. 364.

[4] Transfer of LIFE-INTEREST in lieu of *mahr* held valid : *Bibi Janbi* v. *Hazarath Sahib*, (1910) 21 Mad. L. J. 958 ; *Jagdish Narain* v. *Bande Ali*, [1939] AIR (PAT.) 406. Is there any foundation for introducing notion that, under Muslim law, what may be GRANTED FOR CONSIDERATION may not be GRANTED, WITHOUT CONSIDERATION ?

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rights would constitute what is in English law called a life-estate.[6] The technical form required under Hanafi law for making such a grant is to grant to the donee the usufruct and|or similar rights in the property for life. Where the intention is clear to make a grant of such rights and no others, the Court will (it is submitted) as far as possible carry out the intention of the parties. In any case where it is clear that only a life interest is intended to be granted, it will not be expanded into an absolute interest.

Expansion of life-estate into absolute interest

Full ownership rights short of it.

(3) The texts discriminate (*a*) dispositions under which the full ownership is granted and then a condition imposed in contravention of the grant, from (*b*) grants by way of ariyat which refer to the benefits or the usufruct (rights short of full ownership) for life, or other limited periods. These texts had occasionally been interpreted as laying down that the grant of a life-interest operated as the grant of full ownership. That interpretation is no more open.[6]

Law of trusts and contracts in India.

(4) *Submitted,* no obstacle is left in the way of trusts creating a series of successive interests in favour of a series of

[5] I.e. owned by him absolutely (s. 345 "ABSOLUTE OWNERSHIP" p. 345, *n.* 12): obviously a Hanafi may be life tenant of property,—life-interest having been transferred to him for consideration, or by person not subject to Hanafi law: in which case Hanafi life-tenant may unquestionably transfer without consideration that life-interest, viz. his entire interest. In view of this fact & the prevalence of life-interests in *wakf*, can it be said that life-interests are not known to law by which Hanafis are governed in India? See ss. 366, 366A, 369 (pp. 378, 380, 388).

[6] It used to be generally assumed that Hanafi law did not permit creation of life-interests: that the attempt resulted in donee acquiring entire interest of donor. But now Privy Council in *Amjad Khan* v. *Ashraf Khan*, (1929) 59 I. A. 213 have decided against view that donee takes entire interest of donor,—without pronouncing any opinion on question whether life-interests (or other limited interests) may be created. The Bom. & Nag. H. C. have pronounced (it is submitted rightly) in favour of view that if life-interest is clearly intended, it will be given effect to: *Bai Saroobai* v. *Hussein Somji*, [1937] Bom. 18 (F. B.) (Beaumont, C. J. & Divatia, J., agreeing with B. J. Wadia, J.); *Subhanbi* v. (*Mt.*) *Umraobi*, [1936] AIR (NAG.) 113. View taken by Rangnekar, J., in his dissenting judgment [1937] Bom. 18 is (*submitted*) untenable: (i) 17 W. R. 525 did not hold that life-interests cannot be created: Beaumont, C. J. holds exactly contrary p. 46 viz. that if life-interest is clearly proved to have been intended, it will be upheld. Similarly Jenkins, C. J., in *Banoo B.* v. *Mir Abid Ali*, (1907) 32 Bom. 172, 174 said, "it is true that their Lordships do not approve the validity of such a transaction, but they certainly do not discard it as impossible;" (ii) Rangnekar, J. also mistakes mere explanation of Arabic term *amree* or *umra*, for general principle prohibiting life-interests; cf. s. 5C; (iii) *dictum* that "a gift of a usufruct....I have no doubt....is entirely contrary to the principles of Muhammadan law," seems to be directly contradictory to texts: e.g. Hed. 692: "an endowment with usufruct either gratuitous or for an equivalent is valid during life;" see also Bail. I. 652 (663); (iv) the view (expressed in [1937] Bom. 18 & in *Rasoolbibi* v. *Usuf Ajam*, (1933) 57 Bom. 537, 742) that usufruct for life would not be spoken of as life-estate is (*submitted*) opposed to citations from (*a*) Blackstone, (*b*) Poll. & Maitl., (*c*) Holdsworth (s. 443A, *n.*), (*d*) *Tagore case* L. R. I. A. (SUPP.) 47, 74 75, cited s. 443 com. *n.*; and (*e*) to principle.

donees, when the law of trusts and contracts in India, is brought into operation jointly with the principle of the Hanafi law that rights relating to the benefit or profits or enjoyment of the use or usufruct of property may be transferred, and that the usufruct may be transferred to one person, and the corpus of the property to another. SECTION 444. Successive interests.

In the earlier editions of this work, the decisions of the Courts in India were discussed at some length, and the conclusions submitted (1) that there was no distinct or binding pronouncement by the Privy Council holding that an attempt to grant a life interest must result in the absolute interest being transferred,[6] (2) that therefore a Bench of any High Court, and even a single Judge of the High Courts of Madras or Allahabad would have been free to examine the texts for itself or himself and to give effect to the result arrived at.[7] The discussion of the earlier decisions may however be now much more concise. It will be found in a note at the end of s. 444, com., p. 499, *n.* 15. This conciseness is (it is submitted) justified by two facts : *first*, the views put forward in the work since its first edition in 1912, and even the precise method and language of presenting them, including an incidental reference to a case between Hindu parties[8] have in effect (though not expressly) been approved in their entirety, and, with judicial authority, adopted in a very elaborate judgment.[9] Moreover the conclusion reached in the judgment, and I.—DECISIONS : *a.*—Theory that grant of life-estate must transfer whole ownership. [1925] AIR (OU.) 568.

[7] Arguments for & against theory that life-estate must expand into absolute interest summarized in last ed. as follows :—" I. AGAINST THE VALIDITY OF LIFE-INTERESTS.—The grant of a life-interest is a *hiba* of the absolute interest, with a condition (*shart*) that the subject of *hiba* will be returned after the particular life : it follows that :—(1) the condition is void, because it is in the nature of a stipulation for an *iwaz* referring to the subject of the *hiba* : but the subject of *hiba* cannot be subject of *iwaz* : (2) even assuming that the condition is valid, the legal result under Hanafi law would only be that, if the grantee is willing, he may voluntarily perform it ; but its performance cannot be enforced if the grantee wishes to repudiate it. In the latter case the grantor's only remedy, if he has any remedy, is to revoke his original gift. II. REPLY TO THE ARGUMENTS GIVEN ABOVE.—(1) The grant of a life-estate is not a conditional *hiba* of the whole dominium : it is an unconditional grant of that alone which is granted—of a particular interest or right in the property,—viz. its usufruct. (2) Assuming that it is a conditional *hiba*, the condition does not refer to the subject of gift, for the subject of gift consists of the rights granted & the condition refers to the reversionary rights which are not granted. Hence the transaction may be supported as a *hiba ba shart-ul-iwaz* : s. 426. (3) Assuming that it is a conditional gift & that the condition refers to the subject of gift,—(*a*) the condition may be unenforceable under the strict Muhammadan law, but under the law of British India, the donee may be considered a trustee for the reversionary or the donor (Ind. Trusts Act, s. 82); (*b*) if the condition is not enforceable even in British India, it is more in consonance with the theory of the voluntary nature of gifts to hold that, as there has been no intention to transfer the property absolutely, the transfer fails, than to hold that though the intention was to transfer only a life-interest, yet the absolute interest is transferred." See p. 498, *n.* 11 & (*Mt.*) *Subhanbi* v. (*Mt.*) *Umraobi*, [1936] AIR (NAG.) 113.

[8] *Lalit Mohun* v. *Chukkun Lal*, (1897) 24 Cal. 834, 846 = 24 I. A. 76. See *n.* 2.

[9] *Amjad Khan* v. *Ashraf K.*, (1929) 59 I. A. 213 upholding [1925] AIR (OU.) 568 = 28 Oudh Cas. 265 = 4 Luck. 305, 306-329 : gift to wife of property worth Rs. 15,000, —(*a*) as to Rs. 5,000 with POWER OF ALIENATION, (*b*) as to Rs. 10,000 WITHOUT POWER OF ALIENATION : wife to remain in possession during her life time ; after wife's death entire property worth Rs. 15,000 to revert to named collaterals of donor (not to

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its reasoning, have to the extent mentioned below, been upheld and approved by the Privy Council in appeal.[9] Secondly, the judgment of the Privy Council[9] has made the discussion of the earlier decisions to a great extent unnecessary. Some parts of the reasoning in the dissenting A. J. C.'s judgment which was not accepted by the Privy Council are respectfully considered in their appropriate context in the sequel.

Amjad Khan *v.* Ashraf Khan, 59 I. A. 213.

b.—Course that Court must follow.

Following Amjad Khan's case,[9] the Court must first ascertain the intention of the donor, by reading the terms of the deed of gift as a whole, and giving them the natural meaning of the language used.[9] If the Court, having acted in this manner, arrives at the conclusion that the donor intended to make, and did make a gift of a life interest,[10] then the Privy Council leaves open by its decision only two possible alternatives, viz. (*a*) if life-interests are allowed by the Hanafi law, the gift is valid as such (viz. it creates a life-interest), (*b*) if life-interests are not allowed, then the gift fails altogether.[11]

devolve upon wife's heir): wife took & retained possession during life: on her death her heir claimed (as against donor's named collaterals) whole property, *held* wife's heir could not succeed: as either (*a*) she acquired only life estate (viz. if such interest can be acquired under Hanafi law, by way of gift) & in that case that interest came to an end on her death, & her heir had no title, or (*b*) if under Hanafi law such interest could not be transferred to wife by way of gift *inter vivos*, then she acquired no interest in property. The alternative of wife acquiring full interest by expansion of life-interest into a heritable interest or a life interest resolving itself into an absolute estate, was altogether excluded in respect of cases in which, on ascertaining intention of donor by reading terms of deed as whole & giving to them natural meaning of language used, it is decided as matter of construction, that life-estate was intended to be granted; 59 I. A. 213 is followed in *Abdul Khalique* v. *Bejan Behari*, [1936] AIR (CAL.) 465 (will: wife to be executrix: to enjoy as owner during her life-time: sons not to get any share or income during wife's life-time: after her death, sons to get their legal shares: held wife either got only life-estate or nothing: so her heirs could not claim against sons of testator, the latter being remainder-men).

[10] Making gift of life-interest = granting group of rights in property whose duration limited to life of donee: s. 443A, com.

[11] In last edn., p. 509, it had been submitted, in a passage which is cited with approval in (*Mt.*) *Subhanbi* v. (*Mt.*) *Umraobi*, [1936] AIR (NAG.) 113 (see *n.* 7) that life-interests ought to be held valid; but that if that is not done, it is more in consonance with theory of voluntary nature of gifts to hold that, as there has been no intention to transfer the property absolutely, the transfer fails, than to hold that though the intention was to transfer only life-interest, yet absolute interest is transferred. That view has now been enunciated by P. C. in *Amjad Khan* v. *Ashraf Khan*, (1927) 59 I. A. 213. In *Amjad Khan's* case in Chief Court [1925] AIR (OU.) 568, 573, it was argued that to construe deed of gift for life as absolute gift disregards principle that Muslim law looks at intention of document & not at form, Ashworth, A. J. C. said that this argument involved confusion of thought: since "construction" may = (i) that which person executing document expressed, or (ii) effect that law allows deed to have: that "Muhammadan law does not in effect require that a deed giving a life estate should be construed, against the intention of donor, as having meant that he gave an absolute estate, but it requires that whatever his intention was, the deed shall be treated as giving an absolute estate." This view was rejected by P. C. 59 I. A. 213. Taken literally the words, "whatever his intention was," include (1) unquestionably lawful intention such as intention to create lease as well as (2) something entirely against law, public policy & morality. Ashworth A. J. C. could not have intended that in both events the donee would take the absolute estate, & yet it is difficult to surmise how to alter his words so as to express what learned Judge must have intended. This is stated not to catch at words (in a carefully thought out judgment), but most respectfully to emphasize submission that the suggested rule is so unreasonable as to be difficult of logical statement in any form going beyond what is laid down in 59 I. A. 213. The statement that every life interest is a conditional *hiba*, only seems tenable so long as all gifts are violently identified with

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c.—Life-interest does not expand into full ownership.

Under the decision of the Privy Council the donee's heirs do not, in either alternative, acquire any title to the property in which a life-interest was attempted to be created. While, therefore, the question whether life-interests are allowed by the Hanafi law has not yet been decided by the Privy Council, the proposition that a life-estate must expand into an absolute interest for the benefit of the donee (i.e. an estate descendible to the heirs of the donee) has been entirely rejected.

d.—Decisions upholding life-interest.

There are now decisions of two High Courts and of a Chief Court that life-interests if clearly intended, will be given effect to.[12]

e.—Two Privy Council decisions clinch the matter.

The earlier decisions will be considered presently :—Confining attention to the decisions of the Privy Council, the question may be very shortly dealt with : In Amjad Khan's case,[9] the latest Privy Council decision, it has been clearly laid down that where no more than a life-interest is intended to be granted the only question is whether or not the grant of a life-interest is valid : the grant will either operate as a life-interest or be entirely void. The bare question remains whether life-interests are valid under Hanafi law. Having reached this stage the reasoning in the Tagore case[13] furnishes the answer : "It is admitted" the judgment, in that case runs, "that annuities given and charged upon land are valid ; but if the annuity equalled or exceeded the profits, there would be an effectual gift of all the profits and practically of the land, and yet it was contended that the possession and enjoyment of the land could not be directly given. Whether this interest and right of possession for years or for life is called an estate or not, it as effectually excludes the general owner as an estate would....Their Lordships entertain no doubt that possession and enjoyment may be so dealt with."[13] It is submitted that the grant of annuities is referred to in Muslim law in the clearest terms.[14] The rest of the reasoning, it is submitted must follow.

The earlier decisions are succinctly referred in the footnote.[15]

hibas & brought under rules governing *hibas*, even though the gift may transfer usufruct, not *corpus*.

[12] *Bai Saroobai* v. *Hussein Somji*, [1937] Bom. (F. B.) 18; *Subhanbi* v. *Umraobi*, [1936] AIR (NAG.) 113 (bequest to A for life & after A's life to B, confers life-estate on A) : dissenting from *Abdul Rahiman* v. *Abdul Hafiz*, [1929] AIR (NAG.) 313 (which held broadly that under Muhammadan law there is no limited estate & life-interests are not recognized); *Naziruddin* v. *Khairat Ali*, [1938] 25 AIR (OU.) 51 : *Sri Ram* v. *Md. Abdul Rahim*, *ib.* 69 (life-estate, immediately followed by absolute estate valid). See also (*Mt.*) *Abbas Bandi* v. *Saiyad Muhammad Raza*, (1929) 4 Luck. 452 upheld on another point 59 I. A. 236.

[13] *Juttendra Mohan Tagore* v. *Ganendra Mohan Tagore*, (1872) L. R. I. A. SUPP. vol. 47, 74, 75, (TAGORE CASE).

[14] See s. 366 ; Bail. I. 652 (663), 658 (669); Hed. 692 ; ss. 348, 369, comm.

NOTE OF CASES.

[15] NOTE OF CASES—(i) (*Mt.*) *Humeeda* v. (*Mt.*) *Budlun*, (1872) 17 W. R. 525, 527 (P. C.) appeal from (1863) Sev. Rep. 665. Four observations made by P. C. (*a*) creation of such life-estate—viz. son giving up property only for life of his mother, retaining legal reversion himself,—"does not seem consistent with Muhammadan usage & there ought to be clear proof of so unusual a transaction" ; (*b*) expressions in the document relied upon, did not show that plaintiff was to take only life interest ; (*c*) only grounds from which it could be inferred that only life-estate was to be taken, were expressions that could be explained on supposition that they had been used to import that the property was to remain with widow for full term of her life ; (*d*) expressions too weak to prove a transaction so improbable—Thus P. C. held on construction of document, that no intention to create life-estate

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II.—TEXTS CONSIDERED GENERALLY.

It has occasionally been conceived that the texts lay down the rule that the grant of a life estate must be treated as a grant of the absolute estate which the donee's heirs are entitled to inherit. This, it is submitted, is a misconception. It arises from not realizing that the proposition in the texts that hiba can not be conditional, means no more than that hiba is a term implying not only that no consideration is received, but that the full ownership of its subject is immediately and unconditionally transferred. So that when a person uses inconsistent language, saying, "I make a hiba," and at the same time purports to impose conditions upon the grant, both parts of the disposition cannot be given effect to. It is therefore legitimate to assume that the main word hiba (which is a technical term of law) is used in its proper sense, and the conditions are unenforceable, being opposed to the paramount intention of the grant. If the donor wishes to part with less than the dominium, the appropriate course would be to grant directly those rights which will entitle

a.—Incidents of hiba: no limitations or conditions.

NOTE OF CASES *contd.*

was proved; (ii) (*Haji*) *Mahomed Faiz Ahmed K.* v. (*Haji*) *Ghulam A. K.*, (1881) 8 I. A. 25 (ALL.); grant by appellant to his brother's widow in consideration of her relinquishing her share in her husband's estate: held on construction to be *hiba*, & not *ariyat* for widow's life; (iii) *Suleman Kadr* v. *Darab A. K.*, (1881) 8 I. A. 117, 122 (CAL.): P. C. guard against assent to proposition that specific legacy payable out of specific fund, would have been invalid: P. C. by no means satisfied that gift of Government prom. notes, subject to condition that donee is to have interest for life, & that after her death, there is to be trust in perpetuity for all her heirs for all time is not according to Muhammadan law, in its legal effect, gift to her absolutely: condition being void: P. C. expressly do not determine this statedly unnecessary point; (IV) *Abdul Wahid Khan* v. (*Mt.*) *Nuran B.*, (1885) 12 I. A. 91 (CAL.): (headnote incorrect): compromise between widow & her husband's nephews: she to take absolutely, & nephews to be *her* (viz. widow's) heirs: such an arrangement is a *tauris* (= "making some stranger an heir": p. 94 *ll.* 22, 23; p. 101, *l.* 15): *held* on construction that it was not intended that on death of the strangers who were so made heirs, (viz. on death of husband's nephews) *their* heirs (viz. heirs of the nephews, & not heirs of widow, last owner) should (on principle of representation) step into rights conferred on nephews by *tauris*, as though *they* (the nephews) had a vested remainder; (v) *Nizamuddin* v. *Abdul Gafur*, (1892) 19 I. A. 170 = 17 Bom. 1, on appeal from (1888) 13 Bom. 264: settlor destined lands to his wives' children & descendants in perpetuity, according to Muslim law of succession: but so that none of them should have power of alienation by sale, gift, or mortgage: document put forward as *wakf*: all courts agreed that it failed as *wakf* (19 I. A. p. 177): lower courts held it valid as settlement: H. C. & P. C. held it inoperative as settlement. Before P. C. document supported neither as *wakf* nor settlement, but as will. Parsons, J. thought "creation of any life estate quite inconsistent with Muhammadan law," cited *Humeeda* v. *Budlun*, 17 W. R. 525,—contrast this with what P. C. really say: see (i) (*a*) in this *n*. But Parsons, J. went on to say: "It might be that by consent" [—by whose consent?—The H. C. treated the document as settlement, *inter vivos*, which being of nature of gift, required both parties' consent: if treated as will, P. C. point out, consent would not have validated it; *submitted* there is some confusion of thought in Parson, J.'s mind;] "such an estate might be created." He continues, "but as a general rule, the donee in such a case would take an absolute estate:" Bail. I. 537, *Hidaya*, III. p. 308 (Hed. 489) cited. In appeal—P. C. point out that (*a*) there was *no intention* to create series of life rents—"a kind of estate which does not appear to be known to Muhammadan Law (17 W. R. 525)," but (*b*) that the intention was to make fee devolve from one generation of his descendants to another, without its being alienable by them, or liable to be taken in execution for their debts; & (*c*) that even express consent to accept a will in such terms would not have made the legatee, owner of life estate, but FULL OWNER, WITH PROHIBITION AGAINST ALIENATION, which being void in law, could not affect either herself or her creditors. Yet no consent was averred: no evidence, no issue & no finding of fact upon which the H. C. could proceed in second appeal. [On PROHIBITION AGAINST ALIENATION being void: s. 418, com., p. 463. In so far as creation of life or other limited interest in testamentary disposi-

the donee to enjoy the exact benefits that the donor wishes the donee to enjoy. If he intends to transfer [the right to] some benefit less than the [bundle of rights forming] full ownership, then he is expected to specify the rights or the benefit that he intends to transfer : see s. 443 A, com., p. 490, *n.* 10. SECTION 444.

The law permits the transfer of the usufruct. The incidents of a transfer of the usufruct are materially different from those of a transfer by way of hiba. Under a hiba the ayn or corpus must be transferred, and the transfer must conform to a single rigidly prescribed mode, not admitting of any variation, viz. the immediate and complete transfer of the full ownership of a determinate physical object, which means the transfer of all the rights exercisable over the object ; and involves both that the transferee's rights are unrestricted in respect of duration and unconditional in respect of mode of enjoyment and use of the subject of hiba. The transfer of usufruct, on the other hand is a transaction permitting of infinite variation in respect of (i) its duration, as well as (ii) the nature and form of the particular use or method of enjoying or deriving benefit or advantage from the property : the

b.—Of transfer of usufruct : limitations : conditions :

i—duration,

ii—mode of enjoying.

NOTE OF CASES *contd.*

tions was concerned, special rules relating to " usufructuary wills," (s. 580(2)-(4).), were overlooked. *Mahomed Ibrahim* v. *Abdul Latiff*, (1912) 37 Bom. 447, 458, 459, points out that facts giving rise to decision in *Abdul Gafur* v. *Nizamuddin*, (1892) 17 Bom. 1, do not permit conclusion that every life-interest must be regarded as absolute interest ; [person to whom property given on footing (though under error) that he has only life-interest in it, is estopped from claiming absolute interest : *In re Anderson*, [1905] 2 Ch. 70 ; *Board* v. *Board*, (1873) L. R. 2 Q. B. 48] ; (vi) *Umes Chunder Sircar* v. (*Mt.*) *Zahoor F.*, (1889) 17 I. A. 201 = 18 Cal. 194 (life *mokurruri*, with remainder to two sons in events which took place : sons held to take definite interests, similar to vested remainders, though liable to be displaced) ; (vii) *Abdul Karim* v. *Abdul Qayum*, (1908) 28 All. 342, " life-interests & contingent interests " said to be " unknown to Muhammadan law " [—a proposition quite incorrect in view of most commonplace provisions in *wakfs*] : yet earlier in judgment stated that there was prima facie. . . . absolute gift : but ALIENATION PROHIBITED : (see s. 418, com.) : real objection to devise therefore not that life-interest sought to be created, but that donee of absolute gift sought to be deprived of power of alienation : s. 418, p. 463. This case followed without discussion or reasons : *Babulal* v. *Ghanshamdas*, (1922) 44 All. 633 ; (viii) *Abdoola* v. *Mahomed* (1905) 7 Bom. L. R. 306 ; " creation of life estate inconsistent with Muhammadan law : general rule that, when life estate is attempted to be created, donee would take absolute estate." But, (*a*) *Amjad Khan's* case, 59 I. A. 213, has put an end to this theory, (*b*) this was case between Khojas, & ought to have been governed by Shia law, under which always admitted that life-interests may be created. [See *Banoo Begam* v. *Mir Abid A.*, (1908) 32 Bom. 172. See, however, *Jainabai* v. *Sethna*, (1910) 34 Bom. 604, 612, 613 : as modified in *Casamally* v. *Currimbhoy*, (1911) 36 Bom. 214 = 13 Bom. L. R. 717, 767-768 : *Mahomed Ibrahim* v. *Abdul Latiff*, (1912) 37 Bom. 447, 458, 459 = 14 Bom. L. R. 987, 1000 ; *Bai Saroobai* v. *Hussein Somji*, [1937] Bom. 18, 27] ; (ix) *Mahomed Shah* v. *Offl. Trustee of Beng.*, (1909) 36 Cal. 431 (life-interest with remainder to certain other persons stated to be void) ; (x) *Marangami Rowther* v. *Nagur Meera Labbai*, (1913) 24 M. L. J. 256 (cases referred to cited as express authorities) : (xii) *Mohammad Abdul Ghani* v. *Fakhr J. B.*, (1922) 49 I. A. 195 = s. 395 A, *ill.*, p. 427 (reservation by donee of usufruct for his own life valid ; see ss. 366A, 369, com.) ; (xii) *Alimamma* v. *Amade Beari*, (1929) 58 M. L. J. 571 (*Amjad Khan's* case, (1929) 59 I. A. 213 sought to be distinguished—on ground that " there was express clause giving remainder to heirs of donor, on death of donee, & not merely case of invalid limitation being added : " a ground that present writer is unable to appreciate as distinction ; (xiii) *Ma Hmyin* v. *P. L. S. A. R. S. Chettyar*, [1935] AIR (RANG.) 318 (life-estates & vested remainders stated to be unknown to Muham. Law) ; (xiv) *Khajeh Sajidullah* v. *K. Habibulla*, [1939] AIR (CAL.) 192, 196, (Muhammadan law said not to favour grant of succession of life estates : *quaere* : cf. commonplace provisions in *wakfs*, see numerous cases in which life-estates are concerned).

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HANAFI TEXTS. It is submitted that many discussions of the question whether limited estates are permissible under Hanafi law, disregard the distinction between (1) hiba or transfer of the corpus, and (ii) transfer of the usufruct. It is also overlooked that since usufruct consists of a series of rights to arise in future, therefore the rights that are so granted may be restricted in duration. The grant of a restricted right cannot be treated as though a larger right had been granted and then a condition imposed that the larger right should not be exercised ; still less can a grant of a specified number or quantity out of an infinite succession of recurring rights, be treated as a grant of the whole infinite series, followed by restrictions preventing the exercise of a portion of the series and rendering the grant to that extent futile. Nor can the grant of usufruct for the life of A, be treated as the grant of the usufruct to A and his heirs with a condition that on the death of A, his heirs shall return it to the grantor.

a.—The Fatawa Alamgiri. A translation of the relevant passage from the Fatawa 'Alamgiri, taken as typical of all the Hanafi texts, of which it is a digest, is given below.[16] The context is important to bear in mind. The authors are dealing with "the *words* which have the effect of giving rise to *hiba*," [17] i.e. to a transfer of the full ownership. It is no less important to bear in mind that the alternative to (i) the words used having the effect of giving rise to a hiba is that (ii) they should give rise to an ariyat : the first is a transfer of the full ownership of the corpus, and the second a transfer of the use or profits, or usufruct which latter, as explained before, implies a grant of specified rights over the property,—rights that do not in sum constitute full ownership : s. 443.

"The words which have the effect of giving rise to a hiba," it is said in the Fatawa Alamgiri, "are of three kinds : *first*, such words as effectuate a hiba by force of their literal meaning ; *secondly*, such as give rise to a hiba by urf [18] (or customary significance) or by kinaya (or allegory) ; [19] and *thirdly*, such as may bear the meaning equally of hiba and of ariyat.

First—Literal formulae of hiba. (1) "INSTANCES [20] of the *first* kind of words [viz. of words that 'effectuate a hiba by their literal meaning'] are such as if one says :—

[16] New paragraphs & figures are mine. Bail. I. 509 (517) is not as full nor as close to original as the translation given above.

[17] Bail. I. 509 (517) translates :—"The words by which gifts are effected."

[18] See Intro. Ch. p. 18 & *n.* 21.

[19] Richardson : *kinaya* = "calling anything by a significant name, a metaphor metonomy, nickname." Kazimirski : "Surnom, sobriquet, metonymie." *Al faraid-dur-dariya.* "To allude to, to speak allusively of."

[20] These instances should be compared with the forms of *ariyat* in s. 443, com. *Hidaya, Hiba* (*init.*) II. 282 (Delhi ed.) passage apparently omitted in Hamilton's transl., contrasts respectively *ayn* = corpus, or substance with *ghallat* =produce or

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(i) I have made a hiba of this thing to thee, *or*

(ii) I have made thee the proprietor of this article, *and*

(iii) I have rendered this thing thine (*lit.* for *or* to thee), *or*

(iv) this thing is for *or* to thee, *or*

(v) I have made a present *or* a hiba of this to thee.

All these are words of hiba [or formulæ for making hiba],—effectuating a hiba by force of their literal meaning.

Secondly— Customary or allegorical formulae of hiba.

(2) "INSTANCES of the *second* kind of [formulæ for making] hiba [viz. such words as 'give rise to a hiba or transfer of full ownership by urf (or customary significance) or kinaya (or allegory)] are as follows : if one says,—

(i) I have clothed thee with this cloth, *or*

(ii) I have rendered thee a dweller of this house, then it is a hiba ; and similarly, if one says :—

(iii) this house is thine, during the whole of my life, or 'while I live,' or 'while thou art living, this house is thine, and when thou diest, the house will come back to me, and will become mine again,'—in that case also the hiba takes effect, [viz. the grant is by "words which give rise to a hiba or transfer of full ownership by urf or kinaya"] and the condition is void,[21] and

Thirdly— Formulae equally of hiba and ariyat.

(3) "INSTANCES of the third class of words [viz. words that may bear the meaning equally of hiba and ariyat] are such as if one says, 'this house is ruqba or habs for you,' and gives the house to the grantee, then (*a*) the great Imam and Imam Muhammad hold this to be an ariyat, and (*b*) Abu Yusuf construes it as a hiba.[22] This is contained in the Muhit Surukhsi."[23]

Two types of such illustrations taken out of their context have caused the misapprehensions to which reference has been made. These illustrations are : *ill.* (2) (iii) above—which is an instance of "words which give rise to a hiba by urf (customary significance) or kinaya (allegory)," and *ill.* (3) an instance of "words which bear the meaning equally of hiba and ariyat."

The Hidaya explains the interpretation of words characterized as being of

usufruct, & *hiba* with *ariyat* or grant of usufruct : "Therefore," it is said, "verily when 'feeding occurs in conjunction with what is eaten in *ayn* [*ma yutamu aynuhu*] by it is intended [*yuradu bihi*] ownership of *ayn* [*tamlik-ul-ayn*] in contrast with when one says, 'I have fed you with this land,' in which case it operates as an *ariyat*, because the *ayn* ('this land') is not eaten [*aynuha la yutamu*] : then it is intended (or the meaning to be attributed to the words) [*fa yakunul murad*] is the eating of the produce (*aklu ghallatiha*)."

[21] Bail. I. 509 (517) : "If he had said, this mansion is to thee *umri* or *hyati*, i.e. for thy age or for thy life, & when thou diest it reverts to me, in which case the gift is lawful & the condition void." This translation somewhat misleading, yet on this passage whole law seems to have been based in India. It merely refers to interpretation of particular form of Arabic words used, cf. s. 5c. Bail. I. 509 (517) : "Much of the voidableness of conditions," says Syed Ameer Ali, "arises from the character of the Arabic expressions," I. 86 (138).

[22] See *n.* 20. As the authorities do not interpret words of conditional gift in same way, the *Kazi* may adopt either one view or other : s. 11A ; though preferably opinion of majority prevails. In any case it is merely matter of interpreting Arabic words. Sect. 5c.

[23] *Fat. Al., Hiba* ch. I. entitled "On (1) definition, (2) constitution, (3) conditions, (4) kinds of *hiba*, & (5) on words that constitute *hiba*. Commencement of part (5) is translated above : rest of it consists of examples : s. 5c.

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such significance that they may bear the meaning equally of hiba and ariyat, viz. *ill.* (2) (iii) above, as follows : " The meaning of amree [24] is a hiba of a house (for example) during the life of the donee on condition of its being returned upon his death. The conveyance [i.e. the grant or transfer] of the house, therefore, is valid without any return, and the condition annexed is null. . . . an amree,[24] moreover, is nothing but a hiba and a condition, and the condition is invalid ; but a hiba is not rendered null by involving an invalid condition." [25]

Thus the Arabic word amree [26] is explained as a conditional hiba : s. 5c. Hence it is deemed to pass the absolute interest. A ruqba is interpreted as a contingent gift, hence it is void : s. 445.

b.—REASONING of Hanafi text-writers.

The reasoning of the Hanafi texts cited above may be paraphrased and expanded as follows : " When there is a grant of a hiba with a condition, the transaction must be deemed to be a hiba ba shart ul iwaz : s. 417. The shart (or condition) is that the subject of the hiba will be returned to the donor or his heirs after the death of the donee. There is no obligation on the part of the donee of a hiba ba shart ul iwaz to fulfil the shart. The shart can never be enforced. Moreover, this particular stipulation is invalid in its inception, because it contravenes the rule that the shart cannot validly refer to the subject of the gift (or part thereof). Thus where a hiba is made and a condition imposed on the donee to return the subject of hiba to the grantor or the grantor's heirs, the grantee takes the property without any means being available to the grantor to enforce the return of the subject of the grant after the death of the person to whose lifetime the grant purports to be restricted." See s. 408, com.

The proper way of meeting this objection is to alter the mode of disposition : not to grant the corpus, nor to make any hiba—but to deal only with the usufruct : the usufruct must be granted as stated above for definite periods of time : the period of time selected may be the life of the donor.

c.—OBJECTIONS against life interests in Hanafi law.

But this mode of meeting the objection requires at the very start—when the disposition is made, greater familiarity with the principles and fundamental notions contained in the texts than is usual. In India grants are oftenest made in accordance with English notions of settlements and trusts. Even in regard to grants in such forms, it may be argued in reply to the objections, that the voluntary transfer of a life-interest is not making a conditional gift : that the property of the donor in the ayn or corpus is intended to remain vested in him, and the donor transfers merely the life-interest in the usufruct, that consequently the donee gets only that which is parted with : that neither

[24] *Sic.* in Hed. 289 for *umra.*

[25] Hed. 489 : cf. Williams, *Real Property* (19th Ed. 1901), 91 : estate tail at first called a *conditional gift* by reason of the condition implied in the donation, that if the donee died without such particular heirs, or in case of the failure of such heirs, at any future time, the land should revert to the donor. Bract. fo. 17b, 47a, 68b, 69a ; Co. Lit. 290 b. *n.* (1) V. 1 ; 2 Black. *Comm.* 110 ; See also Poll. & Maitl. *Hist. of Eng. Law,* II. 16-19.

[26] Hed. 489 (col. i. par. 3); 2nd reason in Hed. *loc. cit.* (viz. that *ruqba* is contingent gift) overlooked by Bail. I. 509, *n.* 3 (517).

the right in the ayn or corpus, nor the usufruct for the period succeeding the period for which the usufruct is disposed of, is parted with, and that the donee can therefore have no more claim against either the corpus or the usufruct for the said succeeding period than he can against any other part of the rest of the donor's property.[27] Where the donor places the donee in possession on the express understanding with the donee that the latter is not to exercise full ownership over the property, can the transfer of possession be considered sufficient, to effectuate the transfer not only of what the donor purports to transfer but of something more? See s. 408, com. SECTION 444.

Once again it may be pointed out that all these arguments might be sound or unsound,—but the underlying hypothesis is that the *words* in which the grant is made consist of 'amree' or 'umra' or 'ruqba' : see s. 5 c.

These objections have been referred to in detail[28] to consider whether they can be urged where a life-interest is created under a trust, or on account of natural love and affection between parties standing in a near relation to each other (Indian Contract Act, s. 26). It is submitted that they cannot. III.—TRUST for life.

Where a Hanafi Muslim conveys property to trustees upon trust for a life-interest in favour of one of the beneficiaries, it is obvious that the rule in the texts that conditions between the donor and donee of a gift are not "obligatory," i.e. are not enforceable, this rule in the texts cannot prevail so as to make the trust unenforceable : because the Indian Trusts Act pronounces with Legislative authority that they are enforceable, unless they are invalid under that Act itself. Were it otherwise, the trustee would be entitled to take the property for his own benefit.

The only question, therefore that remains, is whether the trust is in itself invalid. It is declared to be invalid if its purpose (*a*) is forbidden by law, or (*b*) defeats the provisions of any law, or (*c*) is immoral, or (*d*) opposed to public policy (Indian Trusts Act, s. 4): (*a*) and (*b*) may be considered together, as the latter includes the former ; as to (*c*) and (*d*) it may be shortly said that, apart from the provisions of any particular settlement, they have no application. It is submitted that no provision of law is defeated by creating a life-interest, or providing that the trustee shall hold the property for the benefit of one person for life, and for another thereafter.[29] Life-interests may be created under a wakf. The Hanafi law as well as the Shia law provides for giving, without consideration, the right to the use or produce of property. It is recognized that a person may give to another the use of a house, without any consideration. Life-interests are nowhere declared to be illegal.[30] It is also clear that the corpus may be given to one person and the usufruct to another. By using the intervention of a trust the usufruct is *a.*—Life interest not forbidden by nor opposed to Hanafi law, though it could not be created by way of hiba.

[27] Under Eng. law chattels may be subject of gift, but at law only absolute interest in them can be given, *inter vivos*, & grant of chattels for life vests whole legal estate ; Halsb. *Laws of Eng.* xv. 408, s. 811.

[28] *Muhammad Raza* v. *Abbas Bandi B.*, (1932) 59 I. A. 236, 246 (OU.).

[29] *Bibi Janbi* v. *Hazarath Saib*, (1911) 21 Mad. L. J. 958 (life-interest for consideration); *Jagdish N.* v. *Bande A.*, [1939] AIR (PAT.) 406.

[30] *Submitted* nothing to show that life-interest contravenes policy of law. At the highest, no machinery available for enforcing stipulations : s. 408. Cf. p. 364, *n.* 35.

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b.—It could by ariyat and in wakf.

c.—Object of trust to accomplish new results.

d.—If Hanafi law of hiba controlled trusts, the trustee (not beneficiary) would take the full estate.

entrusted to a person who in accordance with the law of trusts gives effect to the donor's desires to which the donee and trustee all agree. This is exactly what is done under wakfs. The effect of the intervention of a trustee is that the revocability of an ariyat is taken away. In the case of the grant of a life-interest in a house, the grantor has the means of ensuring that the donee will, in accordance with his stipulation, return the subject of the gift, which could not be ensured under a hiba ba shart ul iwaz. In other words, a trust provides a method for enforcing the stipulation in a manner that was not contemplated by the Muslim texts. Such enforcement was not possible where the estate, legal as well as equitable, was transferred to one donee. That is but another form of expressing the same thing : that the law of trusts expressly provides a machinery for enforcing arrangements, of a kind which in the absence of such machinery, depended upon the honour of the persons concerned. These incidents of a trust, it is submitted, do not defeat any such provision of the law as to make a trust for a life-interest by a Hanafi, unlawful.

If the creation of a trust added no new incident to the transaction, no trusts would ever be created. The very object of trusts is to facilitate that which otherwise cannot be done. " If the objects of a trust, do not contravene the *policy* of the law, the mere circumstance that the same end cannot be effectuated by moulding the legal estate, is no argument that it cannot be accomplished through the medium of the equitable. The common law has interwoven with it many technical rules, the reason of which does not appear, or at the present moment does not apply, but a trust is a thing sui generis, and when public policy is not disturbed, will be executed by the Court." [31]

Again, as already pointed out, since under Hanafi law, after a hiba is completed, no stipulation between the donor and the donee having reference to the subject of the hiba can be enforced, were that branch of the law applicable to a trust, it would be the trustee and not the life-tenant that would acquire the absolute interest in the trust property. Let it be assumed that this rule of the Hanafi law of hiba applies to a trust. Even so it is clear that the trustee may voluntarily act upon the trust. No one can charge the trustee with acting upon the trust as doing something opposed to law. The Hanafi law cannot affect an obligation imposed upon him by the paramount authority of the Legislature. In any case on what principle can the beneficiary for life under a trust invoke the aid of the Hanafi law of hiba for enlarging his beneficial interest to a fee simple? Under that law, on the same principle on which he bases his claim, no benefit at all could be claimed by him as of right, for the trustee would become the absolute owner. And yet the rights and duties of the trustee are fixed by the Legislature, and it is not contended that a trustee appointed by a Hanafi could claim to be absolutely entitled to property conveyed to him in trust. See ss. 352, 366A, 369 f., 408, 443 ff.

Similar consideration apply when the gift comes within the Indian Contract Act s. 25(1). See s. 351.

It is laid down in terms that the " bequest of the service of a slave, or the

[31] Lewin, *Trusts*, (1904, 11th Ed.) 87. Cf. s. 408, com., p. 364, *n.* 35.

occupation of a mansion, or the produce (ghallat) of both, or of lands and gardens, is lawful. And it is lawful for a limited time or for ever ; [32] for as the profits [33] of a thing may be transferred by a person during his lifetime with or without a consideration, so they may in like manner be transferred after his death ; the thing itself being in a manner detained in his ownership, that the legatee may enjoy its profits [33] in the same way as a person in whose favour a wakf or appropriation has been made, enjoys its profits [33] by virtue of the ownership of the appropriator." [34] The transfer of the profits in the life-time is referred to as ariyat, which may be described as the grant of a right to the use of the thing : s. 443. Primarily ariyat is revocable at the will of the grantor, and is not transferable. But when such an interest is created under a will, the testator being dead at the time when the interests opens out, he cannot revoke it.[35] Thus, " it is stated in the Moontuka, on the authority of Abu Yusuf, according to one report, that when the occupancy of a house is bequeathed to a person without any limit of time he is entitled to it as long as he lives." [36]

SECTION 444. IV.—BEQUEST for limited period of time.

Ariyat in will irrevocable.

When the transfer is for consideration, the rule it has been admitted does not apply. There may be a conditional transfer, or a transfer for life.[37]

444A. (1) Under English law, a remainder is an estate [1] limited to take effect and be enjoyed after another estate (called the particular estate) is determined.[1] " A vested remainder (or remainder executed, whereby a present interest passes to the party though to be enjoyed in future) is where the estate is invariably fixed to remain to a determinate person, after the particular estate is spent." [2] No term seems to exist in Muslim law with a connotation exactly corresponding to that of vested remainder. It is submitted that it is misleading to speak of a vested remainder being recognized,

(C) REMAINDER : VESTED.

[32] " That is during the legatee's lifetime, as will be seen a little further on : & Mr. Hamilton has accordingly rendered the original word an indefinite period, following, no doubt, the Persian translators."—Bail. I. 652, *n.* 1, (*ll.* 1-11) (663). This view seems to be erroneous. Bail. I. 654 cited below, is an instance of grant not ending with life of grantor : moreover since bequests of usufruct are permissible, there seems no basis for suggestion that if intention is disclosed to grow usufruct for period beyond life of grantor, that intention will be ineffective.

[33] Profits—*manafi*. The sense would be better appreciated benefit if " usufruct " or " use " or " enjoyment " were referred to : see s. 366A.

[34] Bail. I. 652 (663), citing *Hidaya* IV. 1474 ; trans. IV. 527 = Hed. 692 ff.

[35] Cf. s. 426 ; Hed. 693 *ll.* 12-16 : " It is impossible for him to retract after his decease ; retraction is therefore not supposed possible."

[36] Bail. I. 654 (par. 2) (665); cf. Hed. 692-696.

[37] *Nasir-ul-Haq* v. *Faiyaz-ul-Rahman*, (1911) 33 All. 457, 462, *ll.* 5-16 ; (*Bibi*) *Janbi* v. *Hazarath Sahib*, (1910) 21 Mad. L. J. 958 (transfer of life-interest in lieu of *mahr* upheld); *Jagdish Narain* v. *Bande Ali*, [1939] AIR (PAT.) 406.

[1] Blackst. (1766) *Comm.* II. 164. See also Fearne, *Contingent Remainders*, (1826) 8th ed. pp. 216, 217. ESTATE : see s. 443A ; p. 487, *n.* 1 ; p. 490, *n.* 8(iv).

[2] Blackst. *Comm.* II. 168.

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Remainder. Vested. Incidents of.

or not being recognized in Muhammadan law ; and that (since a vested remainder represents a complex notion) the proper course is (*a*) to analyse the component incidents of a vested remainder as understood in English law, viz. the rights and liabilities arising out of it : (*b*) to determine with reference to each component right or liability, in regard to which a question arises whether under Muslim law any such right or liability can be annexed to the particular disposition before the Court ; and (*c*) if necessary to determine whether Muslim law allows or prohibits dispositions in which all such rights and liabilities are combined : if not, which of them may be lawfully combined.

Abdul Wahid Khan *v.* (Mt.) Nuran B., heirs of remainder man.

(2) A provision in a document to the effect that on the death of the proprietor of a certain taluqa, two named persons shall possess and enjoy and shall become successors and proprietors, was, on a construction of the document, held by the Privy Council [3] not to give to the said two persons [3] such a vested interest, similar to a vested remainder, as would, (on the said two persons predeceasing the proprietor) pass to the heirs of the said two persons. Accordingly, upon the said two persons [3] predeceasing the proprietor, the taluqa was held to devolve upon the heirs of the proprietor, and not upon the heirs of the said two persons. In another decision,[4] a remainder was to be taken except on the occurrence of a stated contingency. It was held that when the possibility of the occurrence of the stated contingency was entirely put an end to, the remainder became like a vested remainder in that it became attachable in execution prior to the determination of the prior interest.[4] In a third decision [5] the question whether the Shia law permits of the creation of a vested remainder in such an indeterminate body as the heirs of a living person, was characterized as a somewhat abstruse problem : much discussion of it had been heard, but it was found unnecessary to come to a conclusion upon it.[5]

Transfer of remainder before determination of particular estate.

Umes Chunder *v.* Zahoor Fatima, 17 I. A. 201.

[3] *Abdul Wahid Khan* v. (*Mt.*) *Nuran Bibi* (1885) 12 I. A. 91 (CAL.) The grantees are called "the two named persons" & not remainder-men, because the person preceding them did not hold "a particular estate" but was entitled to the whole interest : she was absolute owner (proprietor) : see *nn.* 16, 17. See s. 444A, com., pp. 511 f.

[4] *Umes Chunder Sircar* v. (*Mt.*) *Zahoor Fatima,* (1890) 17 I. A. 201 (CAL.).

[5] *Muhammad Raza* v. *Abbas Bandi,* (1932) 59 I. A. 236, 247 ; *Ma Hmyin*

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(3) It is submitted that under Muslim law, (*a*) an interest in the nature of a remainder (i.e. an interest that is to follow on the determination of a prior interest) may be granted to a remainder-man with a provision that in case he does not survive the determination of the particular estate, his heirs, or other persons, named or otherwise specified, shall be entitled to the remainder ; (*b*) a remainder may be granted with provisions either permitting or not permitting the remainder-man to deal with it prior to the determination of the particular estate,[6] and (*c*) a remainder may be granted with the provisions (*a*) and (*b*) combined.

Submission.

The term vested remainder seems[7] in English law to be closely associated with the notion of an "estate." Both terms seem to assume that the ownership of immovable property may be spoken of as subsisting at one time in a number of persons, who are spoken of as 'owners' for successive periods of time. The Muslim legal terminology refuses to speak of a person as being the owner of any property if his rights therein are limited in point of duration. Under Muslim law rights limited in duration, (however extensive they may be in other respects) are not spoken of as constituting ownership for the time being. Such rights are spoken of as constituting the right to take for the stated period the manafi or usufruct, or (to use Blackstone's expression) the right of enjoying the property for the time being. The "remainder" in Muslim law—"whether called an estate or not"[8]—must accordingly consist of the right to the usufruct[9] accruing after some other person has enjoyed the usufruct for a particular period of time, or subject to another person's prior claim in respect of particular rights.

1.—Can its incidents be annexed in Muslim Law ?

2.—Ownership cannot be for limited period under Muslim terminology.

v. *P. L. S. A. R. S. Chettyar Firm*, [1935] AIR (RANG.) 318 (broadly stated that life-estates & vested remainders unknown to Muhammadan law).

[6] The question of vested remainders was dealt with in earlier editions of this work under s. 357, see s. 356, *n.* 16. Only excuse that can be offered for its superficiality is that at time it was framed, the decisions seemed to be nearly conclusive against creation of any limited interests at all under Hanafi law. It therefore seemed futile to consider the question of the remainders that would follow "the particular estate."

[7] Present author must apologize for his necessary hesitation & caution in referring to English law : see s. 443 A, p. 490, *n.* 8(iv).

[8] The expression "rights to *usufruct* after some person has enjoyed *usufruct* for particular period of time," is preferred to the expression "*ownership* of remainder following grant to another person of *ownership* of property for limited period" & subject of grant is stated to be *usufruct* & not *property*, for reasons that have already been explained, viz. (i) since interest granted does not represent total proprietary interest in the property, or its full ownership, but represents only limited interests, the interest granted cannot under terminology of Muslim law, be spoken of as constituting ownership, (ii) since the interests consist of groups of rights limited in duration to life of grantee or *pur autre vie*, therefore those rights must consist of rights entitling grantee to enjoy the property or to derive some benefit from the property, this is what is called taking *manafi* or usufruct of property, (iii) since life tenant is in substance usufructuary—see *n.* 9, (iv) he is treated as such in Muslim law.

[9] See *Tagore case* L. R. I. A. SUPP. 47, 74, 75 : cited, pp. 485 f., *n.* 27, p. 489, *n.* 7, 490 ff. "The life-tenant is a usufructuary," Poll. & Maitl. *Hist. of Eng. Law*, II. 8.

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3.—"Remainder" in Muslim Law has double meaning.

The remainder may, it will be observed, take (under the Muslim terminology) one of two forms. It may consist either of (*a*) the rights remaining over, i.e. the rights that accrue after, the termination of a specified period during which "the particular" estate continues, or (*b*) where two persons are simultaneously entitled to rights in the same property, one person having certain specified rights therein and a second person having the remaining or residual rights of enjoying or using the property,—in such a case the second person may under Muslim law be said to have the remainder or residue of the manafi or usufruct (though his rights do not follow in point of time). The remainder may thus refer either to the right of enjoying the property in succession to a prior deviser, i.e. after him in respect of time; or it may refer to the enjoyment of the residue of rights that remain over with due regard and without prejudice to certain specific rights that another grantee is entitled to exercise over the same property and during the same period.

In the discussion that follows, however, the term "remainder" is understood in the first of the two meanings mentioned above,—viz. where (1) rights are granted to one person enabling him to enjoy the property for a limited period of time and the rights so granted are such that for the time being the grantee may be taken almost to be the owner (except that he can enjoy the property only for a limited period of time) and (2) similar rights are also granted to a second person, which are to come into effect upon the determination of that period during which the firstly mentioned grantee is to enjoy the property: in which case the second grantee is said to have the remainder (provided he has the usufruct for the whole remaining period) and is called the remainder-man.

4.—Two essential incidents of vested remainder.

The two essential characteristics or incidents of a vested remainder as understood in English law seem to be[7] that (i) on the death of the remainder-man the interest devolves upon his heirs; (ii) the interest is capable of being transferred by him immediately, prior to the determination of the prior estate when his rights are to be actually enjoyed. If the remainder has these two incidents it is a vested remainder, otherwise it is not.

Giving rise to two questions.

a.—Can a grant be made to his heirs?

Each of these two incidents must, it is submitted, be separately considered with reference to Muslim law. Each has been considered independently of the other in two decisions of the Privy Council.[10] Consequently two questions arise. (1) The first question is, does Muslim law allow the grant of such a remainder, viz. such a grant to A of the future usufruct (or of the right to enjoy the property in future) as includes the provision that if A dies before the time comes when he is to enjoy it, then A's heirs shall take A's place and

[10] *Abdul Wahid K.* v. (*Mt.*) *Nuran Bibi*, (1885) 12 I. A. 91 (CAL.); *Umes Chunder Sircar* v. (*Mt.*) *Zahoor Fatima*, (1890) 17 I. A. 201 (CAL.). To consider at large whether vested remainders may or may not be created under Muslim law, is liable to fallacies that beset argument when subject & predicate of proposition not reduced to as simple terms as possible: Mill, *Logic*, Bk. V. Ch. 7. This particularly the case in view of "immense multitude & prolonged series of facts which often constitute the phenomenon connoted by a name"—like 'vested remainder'—*ibid.* Bk. I. Ch. 5 § 5.

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be entitled to enjoy the usufruct? It is submitted that the answer to this question must clearly be in the affirmative. If a grant may be made in favour of A, it may surely be made also in favour of "A and his heirs." [11] So if the remainder can be the subject of grant, it may be granted to A and his heirs. The grant may be made in either form. The grantor may, if he likes, restrict his grant to the particular person named as remainder-man, or he may add that in case the named remainder-man dies before the arrival of the time when he is entitled to enjoy the property, then his heirs shall enjoy.[12] No objection can be raised, it is submitted, to the addition. If this may be done expressly, it may be done impliedly. The question thus becomes one of the construction of the grant—what has been granted? Was the grant intended to be restricted to A alone, or were his heirs to succeed on his predeceasing the prior grantee? The Fatawa Alamgiri gives, as illustrations, bequests to the child of Abdullah [13] or to the sons of such a one, and also of a bequest to one, and failing him to another. On the same lines, it seems clear a legacy may be granted to A and his heirs. Such a grant takes effect as a grant to A, and, failing him, to his heirs, since A's heirs can only be determined on his death. And this may or may not be treated by the law as being different from a grant to A of an interest transmissible to his heirs. That question is not at present material.[14]

Abdul Wahid *v.* (Mt.) Nuran Bibi. 12 I. A. 91.

The Privy Council had in one of the cases that came before them to consider whether, under Muslim law, a grant expressed to come into effect on the death of the grantor (who was full owner of the property granted) in favour of A and B, without any mention of their heirs, devolved [15] upon the heirs of A and B, if A and B died before the time when the grant came into effect, viz. before the death of the grantor. Sir Richard Couch [16] stated in the first sentence of his judgment that the question depended upon the construction of the document,[16] viz. of an instrument of compromise between (1) one

[11] That legacy may be given in such terms that on legatee's death it shall devolve on legatee's heirs, seems to require no authority. But as this power has occasionally been denied to Hanafi testators, reference might be made to Bail. I. 661 (*l.* 9) (672, *l.* 15) "his portion goes to his heirs"; *ib.* last *l.*: "goes to his own heirs." The *ill.* given are rather difficult to follow being grammatical explanations of bequests in Arabic: but what is enough for present purpose is that if bequest worded in certain terms, result follows in law, that on death of legatee his heirs take benefit granted to him. What may also be pointed out is that in terms of bequest "& his heirs" is not expressly provided.

[12] "Sometimes a testator who devises to the heirs of a person in existence shews by other expressions in the will that he uses the word 'heirs' in a popular sense to denote the individual who at the time of his will is the apparent or presumptive heir of a particular person, the law will construe it in the sense intended by the testator & the words ..confer a valid remainder on the individual designated:" Fearne, *Cont. Rem.*, (8th edn. 1829) 209 *n.*

[13] Bail. I. 633, 634 (645 *ll.* 7-14; 646, par. 2).

[14] Viz. rule in *Shelley's* case (1582) 1 Rep. 88b; 1 Rep. 936. Law of Property Act, 1925 (15 Geo. V. c. 20) s. 131 abolishes this rule.

[15] Claim alleged to be by virtue of inheritance: not grant: p. 97, last *l.*

[16] Sir L. Jenkins, C. J., in *Banoo Begum* v. *Mir Abed Ali*, (1907) 32 Bom. 172, 176, recognized that actual point decided in 12 I. A. 91 was one of construction, but (*submitted*) importance he gave to the observation that "vested interest similar to vested remainder under English law did not seem to be recognized by the Muhammadan law,"—would have been much less if it had been present to his

SECTION 444A. Gauhar Bibi and (2) two step-brothers, viz. Abdul Rahim and Abdul Samad. To construe the document, the position of the parties was first taken into account. Then on page 100 bottom it is said that the compromise could not be construed as admitting the right claimed by either party, since each party claimed to be the owner, which claims were inconsistent. "Further, Gauhar Bibi is not merely to have possession of the estate during her life. She is to be mistress or (as the District Judge has translated the petition, 'proprietor') of the taluqa. During her life the whole interest in the estate is to be in her."[17] This is the first step in the decision, and an extremely important step. Its importance has been overlooked. Secondly, the question is dealt with, "What is the interest given by the compromise to the two [step-brothers]"?[18] The words of the compromise are "I and my step-brother" viz., Abdul Rahim and Abdul Samad, "shall possess and enjoy" "shall become successors and proprietors." There is no reference to the heirs (of the two step-brothers). The second question may therefore be paraphrased thus: was the interest taken by the step-brothers such that it would devolve upon their (the step-brothers') heirs, in spite of their heirs not being mentioned?[15] The judgment answers this question in these terms: "To give the plaintiffs"—who claimed on the ground that they were heirs of the two step brothers, "A title to the estate, it [viz. the step-brothers' interest] must be a vested interest which, on the death of the step-brothers[17] passed to their heirs, and is similar to a vested remainder under the English Law. Such an interest in an estate does not seem to be recognized by the Muhammadan law." It is obvious that by this it could not have been meant that under Muhammadan law the grant of an estate descendible on heirs is not recognized. (See s. 590). But what follows explains the meaning: "the arrangement in the compromise would be called by the Muhammadan lawyers 'a tauris' or 'making some stranger an heir,' and cannot be regarded as creating a present or vested interest.' [In other words if A is named as heir to the propositus, it does not mean that A takes a present or vested interest similar to a vested remainder in the sense that should A predecease the propositus, it will be the heirs of A, and not the heirs of the propositus, who will succeed to the propositus.] "A mere possibility," continues Sir R. Couch, (p. 101) citing the judgment of Syed

i—There was no particular estate.

ii—Arrangement was tauris, or making heir.

mind that P. C. were construing document in which they held there was no remainder but in which by compromise, two persons were recognized as (presumptive) heirs, & that the position of persons so recognized was compared with that of persons who would be presumptive heirs by law. Position of remainder man was not under consideration at all. The interest prior to that of the two step-brothers was not a life-interest or other limited interest: "during his life the whole interest in the estate was to be in her." How could the two brothers be considered to have any sort of remainder vested or contingent? See *n.* 17.

17 "She should continue to be the proprietress & possessor of the estate as before & without any limitations, or restrictions which would divest her of ownership during her life-time...no doubt upon this point... her proprietary rights were not qualified in any such manner as to divest her wholly or partially of the incidents of ownership": 12 I. A. 101, *ll.* 5-13. Contrast with the view of the Judl. Commr. that Gauhar Bibi took life-interest in the property: p. 101, *l.* 3 from bottom.

18 To refer to them as *step-brothers* is more distinctive: in the P. C. judgment they are called *sons*, viz. of grantor.

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Mahmood, then District Judge, "such as the expectant right of an heir apparent is not regarded as a present, or vested interest, and 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."[19] The compromise was a tauris (deed making the two step-brothers her heirs) and the persons so made [presumptive] heirs could not stand in a better position than if they had, under the law of inheritance, really been her presumptive heirs. It will be observed that the first point decided as stated above, left no question of a remainder and its incidents, at all. Sir Richard Couch emphasized that Gauhar Bibi was not merely to have possession. She was to be the mistress, proprietor : the whole interest in the estate was to be in her.[20] Thus there was no particular estate. The step brothers' interest did not follow a limited interest. It was to take effect on the death of the mistress, the absolute proprietor. How can such an 'interest' be called a remainder? The 'interest' was no doubt construed to be one restricted to the step-brothers and not descendible to their heirs. Does it follow from so construing the document, that no proprietor of property can give an interest immediately following his own life which is to benefit not only the first grantee but also to descend on the grantee's heirs? Can no legacy provide that on the legatee predeceasing, his heirs shall take? Still less was it decided that a remainder cannot be granted on the terms that if the remainder-man dies prior to the determination of the particular estate, it shall devolve upon his heirs. In fact it was held that no remainder was in question at all : since the holder of the existing interest, Gauhar Bibi was herself the proprietress and possessor of the estate without any limitation or restriction.[17] The fact that the question was dealt with as one of construction, shows that it was not decided as a matter of law that the heirs of the step-brothers could not have been given the right to succeed in the event of the step-brothers not surviving to take the estate. It was deemed a question of construction, whether the intention was that the step-brothers' heirs shall succeed. The absence of such an intention was inferred from the facts that (1) the whole interest (not merely a life-estate) was conceded to Gauhar

i.e., no particular estate involved,—

nor remainder : but interest similar to that of heir presumptive.

[19] These observations are (*submitted*) correctly interpreted & followed in *Hasan Ali* v. *Nazo*, (1889) 11 All. 456, as referring to claim made by expectant heir (nephew) during life time of uncle. The reference to *Abdul Wahid's* case (1885) 12 I. A. 91 in *Haripal* v. *Lekhraj*, (1908) 30 All. 406, 420, does not (*submitted*) represent the true state of facts or decision.

[20] The compromise also provided (p. 99) "but she shall not without any special emergency alienate any property so as to deprive me of my right"—showing that she did not hold a mere life-interest, with remainder to the step-brothers. Yet Mirza, J. says twice over : "the P. C. have held that the Muhammadan law does not recognize vested estates in remainder :" *Rasoolbibi Usuf Ajam*, (1933) 57 Bom. 737, 744, 757, Rangnekar, J. at pp. 785-88 says "even supposing the sons (step-brothers) had taken vested interest such vested interest could not be recognized under the Muhammadan law."—Is this not self-contradictory?—What is the meaning of their taking vested interests & yet vested interests not being recognized? The case was concerned with only one incident of a vested interest : its transmissibility to heirs : is it meant that if the grantor had wished to grant an estate transmissible to heirs it would not have been recognized? See *n.* 11. In an argument the substratum of which is that Hanafi law cannot tolerate life-interests, must protagonists of that thesis insist upon reducing remainderman's interest in effect to a life-interest? *sunt risus argumentorum.*

SECTION 444A. Bibi and (2) the document was a tauris—making some stranger an heir [19] —and as the two named persons alone (and not their heirs on their predecease) were made heirs, it was held that on the death of the two persons named as heirs, the persons to succeed were not *their* heirs, but the heirs of the person who was stated to be the mistress and proprietor of the property and in whom during her life the whole interest in the estate was to be. Their Lordships' decision was that Gauhar Bibi's interest under the compromise amounted to full ownership. They held that the compromise did not create a limited interest followed by the remainder in favour of the two step-brothers. This decision—that there was no life-interest and no remainder—is emphasized (though it must be admitted also rather obscured) by the last two paragraphs of the judgment.[21] It was not held that no remainder can be granted with a provision that on the remainderman predeceasing, his heir shall take the remainder. But what was held was that the particular compromise made only the two step-brothers Gauhar Bibi's heirs presumptive : it did not make the heirs of the step-brothers Gauhar Bibi's heirs presumptive.

b.—Can remainder-man deal with the remainder ?

(2) The second question, arises out of the second main characteristic of a vested remainder,—whether the remainderman may deal with the remainder before he has become entitled to it in possession. In this respect—considering the question on principle,—the law may adopt the policy, either of allowing, or of prohibiting, such rights being dealt with in anticipation. The grantee would, if the first alternative is adopted, be deemed to stand on the same footing as a presumptive heir.[22] Though if that alternative is adopted, some distinctions between the position of the remainder-man and the presumptive heir are, it is submitted, overlooked : viz. the proprietor may (under English and other systems of law) displace by will the presumptive heir, and, since the proprietor continues till his death to be the owner, the person to succeed him must be determined with reference to himself, and be *his* heir, not the heir of the

[21] Penult. paragr. recites view taken by Judl. Commr. (contrary to Syed Mahmood's) viz. that " effect of compromise was to give Gauhar Bibi life-interest in estate," (consequently that step-brothers had the remainder) & that on their death " their heirs took their place," [i.e. became her presumptive heirs] " & had a right to the property on Gauhar Bibi's death." But " their Lordships did not take this view of the compromise " (p. 102, *l.* 3). They held in effect that there was no life-interest & no remainder, that the " ' reasonable construction of the compromise ' was that the arrangement was similar to that in (*Mt.*) *Humeeda B.* v. (*Mt.*) *Budlan*, (1872) 11 W. R. 525—in which H. C.'S decision—that " estate was vested in plaintiff for life, & after her death was to devolve on her son by way of remainder," had been rejected by P. C., with observations that have been misunderstood & misapplied for 60 years, but conclusion of which was that she did not take mere life-interest but full ownership & that her son did not take remainder, but took as her heir. If the heir presumptive predeceases the intestate, person to succeed is heir of intestate, not heir of heir presumptive. Heir presumptive's *spes successionis* is not, in this respect similar to vested remainder (viz. the *spes successionis* does not devolve upon the heirs of the heir presumptive) : and P. C. decided on same analogy that the step-brothers, who were made heirs presumptive by the compromise (*tauris*), did not take an interest descendible to *their* heirs, but that the interest which they took consisted in their being recognized as the heirs presumptive of the last full owner, viz. Gauhar Bibi, & Gauhar Bibi's estate devolved upon *her* heirs, not upon the heirs of the artificially created heirs presumptive. The COMPROMISE was certainly PECULIAR & UNUSUAL : special term, *tauris*, was applied to it : can its construction be taken as involving startling general principles ?

[22] This point alluded to *Banoo Begum* v. *Mir Abed A.*, (1907) 32 Bom. 172, 174.

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presumptive heir. The position of a remainder-man is or may be very different in these respects. Moreover when such rights "to be enjoyed in future" (in Blackstone's language) are transferred for consideration they can ordinarily be dealt with immediately. It may therefore seem that unless there are strong reasons to distinguish between the cases it should be permissible to grant of a remainder granting the remainder-man power to deal with his interest before he becomes entitled in possession.

Umes Chunder *v.* Zuhoor Fatima. 17 I. A. 29.

This question was dealt with in a case[23] that has given rise to much controversy. A remainder was there under consideration. Lord Hobhouse characterised the remainder which was to be taken except under a certain stated contingency, as "a definite interest like what we should call in English law a vested remainder, only liable to be displaced" on the occurrence of the said contingency. It was held that before the said remainder became an estate in possession it was attachable, and that at the time when it was in fact attached the contingency had been entirely put an end to, and in the eye of the law, there was no longer any contingency. Sir L. Jenkins, C. J., and Heaton, J., considered this case to affirm the possibility of the creation, by a Muslim, of a definite interest; that that interest would be like what would be called in English law a vested remainder, and that such a remainder, though liable to be displaced, was not a mere expectancy in succession by survivorship or other merely contingent or possible right or interest, but an interest that could be attached and sold. Cf. Transfer of Property Act, s. 6(*a*). The facts of the case before the Privy Council are very complicated. It is true that there is no discussion of the Muslim texts in the judgment. But, it is submitted, that there is no reason why a decision of the highest tribunal which has been followed by several judges including no less an authority than Sir L. Jenkins[24] should be disturbed. Muslim law, it has already been submitted, permits of the creation of present rights for future enjoyment. It is submitted that there seems no sufficient reason for holding that those rights may not be attached and otherwise dealt with.

Question *b*.—answered in affirmative.

The objections taken to this decision have in fact been on the part of those who were convinced that no 'estates' limited in point of time can under Hanafi law be granted. If that proposition is sound, then it follows that there can be no remainder, and if no remainder, there can be no vested remainder.

Objections taken to the decision.

[23] *Umes Chunder Sircar* v. (*Mt.*) *Zahoor Fatima*, (1890) 17 I. A. 201. Beaman J.'s observations on these two cases are (with respect) as often happened with that learned judge, full of acute reasoning, but with very little foundation, as his knowledge of Muslim law was very defective: *Casamally* v. *Currimbhoy*, (1917) 36 Bom. 214; *Jainabai* v. *R. D. Sethna*, (1910) 34 Bom. 604. See s. 11 c pp. 84-88.

[24] Followed in (i) *Banoo Begum* v. *Mir Abed Ali*, (1907) 32 Bom. 172; (ii) *Abdul Qayum* v. *Abdul Rahman*, (1932) 8 Luck. 602, 618 ("their lordships applied English notions of vested remainder to family settlement by Muhammadan husband in favour of favourite second wife.") (iii) *Annaji Dattatrava* v. *Chandrabai*, (1892) 17 Bom. 503; (iv) *Shidalaxmi* v. *Balvantrai*, (1903) 6 Bom. L. R. 625 (interests in question, held attachable & not mere expectancies.) (v) *Akbaralli* v. *Abdoolali*, (1907) 9 Bom. L. R. 295, 300 (the two cases considered very difficult to reconcile. *submitted*, they deal with entirely different points: both, no doubt, use expression "vested remainder" for analogical reasoning: but analogy in one case on totally different point from that in other).

SECTION 444A. Secondly, it has occasionally been considered that Abdul Wahid's case laid down that a vested remainder was not known to Muslim law. That view has already been dealt with. But to what has been already stated it must be added once more that the introduction of the term "vested remainder" is liable to lead to error. The meaning underlying that expression must be first determined in terms used in Muslim law. If that is done the question becomes much more definite. The question then becomes whether under Muslim law if a person is granted the right to take some interest in property in future (e.g. the right to enjoy the usufruct for a future period as it is described in Muslim texts) ought the grantee to be permitted to transfer that right to another person? To the question so put the answer must depend first upon the intention of the parties : does the grantor wish to grant the power of disposition or not? It is true, that whatever the grantor's intention may be, the law may step in and say either (i) that if the rights are granted, the power of disposition over them must follow and that any restrictions against such a power shall be void, or (ii) that there shall not be any such power of disposition and any provision purporting to grant such a power shall be void. (iii) Unless the law steps in, the intention of the parties must presumably be given effect to. It is submitted that there is no obstacle in the way of the decision given by the Privy Council being accepted and followed. In view of the fact that transactions must have taken place on its authority, it is submitted that it is most undesirable to disturb the rule laid down therein.

(D) (Hanafi law). Ruqba. Its meaning and effect.

445. A ruqba means a hiba (or gift of the absolute ownership of some specified property) with a condition that if the donee survives the donor, the subject of the hiba shall belong absolutely to the donee.[1] Abu Hanifa and Imam Muhammad, hold that a disposition may not be lawfully made by way of ruqba.[2] Abu Yusuf and latterly Imam Shafii held that such a disposition operates as a hiba, transferring the absolute estate in the subject of gift.[3] Shafii had at first expressed a different opinion[3] ; and it is stated in the Minhaj that both of Shafii's opinions have equal currency.[4]

[1] Emphasis on word *hiba* : as transaction described in first sentence seems indistinguishable from *ariyat* followed by legacy in terms that legacy shall lapse if legatee dies during testator's life-time : s. 590.

[2] (A) Expression *ruqba* used & understood in different senses ; cf. ss. 445, 446, 447(1), 451, comm. (B) Bail. I. 508 (516) seems to treat it as = contingent gift : "If thou diest it is mine, if I die it is thine." Cf. Bail. II. 226. (C) Is not such a disposition in effect a bequest & could not the desired effect be brought about by will (subject no doubt to s. 579 ff.) supplemented (if so desired) by an *ariyat* in favour of the grantee for his life-time : s. 443? (D) See also Hed. 489, col. i., par. 2, 3, (word spelt *rikba*). (E) See *Jamiush Shittat* cited in s. 445, com., p. 517. (F) See s. 5 C.

[3] Hed. 489 : Bail. I. 508 (516). For Shia law cf. ss. 446 (pp. 518) ff.

[4] *Minhaj*, Howard's Transl. Book 24, 234 (paramount authority on Shafii law); *Md. Ibrahim* v. *Abd. Latiff*, (1912) 37 Bom. 447, 458 = 14 Bom. L. R. 987, 1002. Shafii expressed two opinions on interpretation to be given to grant with condition that

SECTION 445. *Illustrations.*

(1) Under Hanafi law a gift in this form : "My mansion is thine ruqba," meaning, "if thou diest, it is mine ; if I die it is thine,"—is void.[5]

(2) A gift in this form : "This mansion," or "this land," or "this maid" or things "of which the benefit may be derived consistently with the substance of the thing itself, is minha,[6] of thee,"—it would be an ariyat loan, unless a hiba were intended. (See p. 480).

(3) A minha[6] of food or of money, or of anything else "of which the benefit cannot be derived except by consumption or destruction of the substance," would be a gift (hiba).[6]

There is little likelihood of any person in India making the experiment now-a-days of a grant by way of ruqba with the use of that Arabic term.[5] This section is however not of merely academic interest, as the subject of the grant of limited interests generally is of growing importance in India.

Ruqba : Shia and Sunni law.

A ruqba is valid in accordance with its terms under Shia law. In the Sharaiu'l-Islam ruqba is explained as a grant for a fixed term.[7]

Corpus.

The difference between the Hanafi and Shia law is referred to in an interesting passage in the Jami-ush-Shittat :—"If a declaration is made in the following terms : (1) 'I give this *house* to you by way of ruqba, and the same belongs to you so long as you live,' or (2) 'I give away to you the *corpus* of this house,[8] on condition that if you die before me, the same shall revert to me, and that if I die before you, it will continue to be yours,'—it has been contended that these words obviously must be interpreted to mean that the *corpus*[8] of the property is permanently alienated, as has been related by the above mentioned author, and by others, on the authority of the Sunni faqihs,[9] but (on the other hand) it is (equally) possible that the intention in making such a declaration refers to the enjoyment of the *usufruct* for the rest of the (donee's) life ; and this is clearly stated in the first of the two formulæ ;[10] (though) according to the Sunni view even that is not valid (i.e. cannot be take effect as a grant of the usufruct). It is possible that what is meant by him is that a hiba in this form is valid."[11]

Intention.

Usufruct.

on death of grantee subject of gift must return to grantor, or grant of life interest in house, or gift of it for life, i.e. if grantee predeceases grantor it must return to grantor, but otherwise it will be grantee's irrevocably. Nowadays both opinions have equal currency.

[5] Bail. I. 508 (*ll.* 5-7) (516). See s. 5 c. Does anyone use word *ruqba* in India ?

[6] Bail. I. 511 (519). *Minha* is translated as *donum* by Freytag, & as "gift" by Richardson. But the word *gift* has very wide meaning covering many kinds of transactions without consideration for some of which Muslim law has distinctive names. Bail. I. 511 (519) can be hardly understood unless the precise form of gift intended by a *minha* is defined. Hed. 487 (col. ii. par. 3); *minha* (spelt *moonha*) is defined as a species of loan,—which again is misleading : see s. 443 *n.*

[7] Bail. II. 226. *Ruqba* as defined in s. 445, expressly stated to be valid in Shia law ; see s. 447.

[8] Note that contest between the two constructions is, whether (i) house (or *corpus* of house) transferred, or (ii) its usufruct or benefit. See *n.* 1(c). See also s. 366A.

[9] Lit. "*faqihs* (canonical lawyers) of the more general sect," (viz. Sunni sect).

[10] I.e. "I give this house to you by way of *ruqba* the same belongs to you as long as you live" is interpreted as = "I give you the enjoyment of the usufruct for the rest of your life."

[11] I.e. "it is possible that the author intends to lay down that if a man really

§ 11.—Limited Interests in Shia Law.

I.—SHIA LAW : HABS OR LIMITED INTERESTS.

446. Unless there is anything indicating otherwise ss. 446-455 refer only to Shia law, and in the said sections,—

(A) TERMS : Creation of limited interests.

(1) When the owner of a property [12] empowers another to take its manafi or benefit or profits or usufruct, he is said to make a grant of, or to create, a habs or limited interest [13] in the said property.[14] By such a grant the absolute ownership of the property is not transferred but a group of rights therein not amounting to its absolute ownership.

Grantor, Grantee, Subject of grant.

(2) The owner so empowering is referred to as the "grantor" ; the person so empowered as the "grantee" ; the property as the subject in respect of which the grant is made ; [15] and the group of rights so transferred to the grantee as a "limited interest" therein.

Declaration and acceptance of grant.

(3) When the grantor signifies his intention to create a limited interest, he is said "to make a declaration of the grant" ; and when the grantee assents thereto, he is said to "accept the grant."

Vesting of limited interest.

(4) A limited interest is said to "vest" in the grantee when he becomes empowered to receive the manafi or benefit or profits or usufruct forming the subject of the grant, or to exercise the rights conferred by the grant.[16]

The term "habs" [17] is confined in this work to limited interests created

intends to make *hiba*, but uses terms such as above & his intention is clearly shown to give away corpus, then *hiba* of corpus, will take effect & not merely grant of usufruct as limited interest" : *Jawahiru'l Kalam*, IV. 618. See p. 354, *ill.* (7).

12 See *Sharh-Luma*, 233, (cited s. 450, com.); ss. 366 A, 443, pp. 380, 479.

13 Word 'ESTATE' avoided : see Blackst, *Com.* cited p. 487, *n.* 1, ss. 443, 444. "Rights of enjoyment" would come nearest to language of texts : but "LIMITED INTEREST" adopted, as grants & their translations are apt to adopt terminology of English law : it has been explained before that the result of granting the usufruct is the same as granting group of rights short of ownership.

14 Bail. II. 226 (*ll.* 2-5); "its object or the advantage to be derived from it (viz. 'this contract') is the empowering a person to receive the profit or usufruct of a thing with a reservation of the owner's right of property in it." See s. 366A.

15 The actual subject of the grant is the group of rights or the limited interest, not the (entire) property in which merely an interest is created in favour of the grantee. But loosely entire property spoken of as subject of grant. Failure to observe the distinction leads occasionally to error.

16 See pp. 516 ff., *nn.* 2, 4-6, 13-15 ; s. 446, com., p. 519.

17 HABS = "to prevent, restrain," "to protect a thing, to prevent it from becoming the property (*tamlik*) of a third person." *Habs* & *wakf* have originally same meaning : Sarakhsi, *Mabsut*, xii. 27. Heffening, *Enc. of Isl.*, iv. 1096, s.v. *wakf* : *habs* is *masdar* (infinitive). Among Malikis (in Morocco, Algiers & Tunis) *hubus* (pl. of *habis*) or syncopated form *hubs* (pl. *ahbas*) predominates. The French author Eug. Clavel, speaks of terms *habs* & *wakf* as being synonymous : *Droit Musulman, de Wakf ou Habous*, 2 Vols., Cairo, 1896. Bail. II. 226, spells it *hoobs* : *ib. n.* 2 he explains it as retention, or devotion to a particular purpose. Ameer Aii, *Mah. Law*, I. 80 (143) spells it *hubs*. The correct pronunciation seems to be *habs* with a *kasra* as the vowel. Meanings of *habs*, given in *Al Faraidu'r Raddiyya*,

SECTION 446.

in accordance with ss. 446-456, and distinguished from wakf.[18] So understood habs resembles wakf in this respect that in both[19] the manafi, or benefit, or usufruct of the property is set apart for the use of certain persons, and the corpus is unaffected by their rights ;[20] s. 366 A, com. But habs differs from wakf in that (1) a wakf is made from a religious motive, whereas habs is without any such motive. This distinction is similar to that between hiba and sadaqa. The mere use of the word habs does not take it out of the rules relating to wakf, if a religious motive is expressly or impliedly indicated.[21] (2) Habs is not necessarily perpetual. (3) There need not be an ultimate dedication to the poor or charity. (4) In a habs the interest of the original owner continues, subject to the provisions made in favour of other persons.[19] Whereas in a wakf the wakif's interest (except in Abu Hanifa's view) is entirely transferred away and the property becomes notionally the property of God [in the sense that the original owner can exercise no right over its corpus by way of transfer or inheritance], "the advantage of it resulting to His creature :" or it is detained "in the implied ownership of God so that its profits may be used for or be applied to the benefit of mankind" : see s. 457 A where the theory of Shia law is also referred to. But of course if a habs is to such effect that all the benefit to be derived from the property is granted away for all time then the interest that remains in the grantor may be merely notional, or it may consist barely of the right in him or his heirs to take the property when the grantee and the grantee's heirs become extinct.[22]

HABS distinguished from wakf : both grants of usufruct.

The question whether an interest in property which consists of rights to be exercised at some future time shall be capable of being dealt with by transfer or by devolution at any time before the rights are presently to be enjoyed, has been considered under vested remainders : s. 444 A, pp. 507 ff. Sect. 446(4) is not intended to affect that question. Under s. 446(4) the question would depend upon the terms of the grant : upon what the transferee is empowered to do by the grant. It has already been explained why, on general principles, it is submitted, that this must follow, unless the law interferes and prohibits or otherwise controls the grant of such powers, p. 516, s. 444 A, com.

Vested rights.

447. (1) If the grant limits the grantee's right of enjoyment to the grantor's or grantee's life, it is called an

(Shia law.) Umra. Sukna. Ruqba.

include : "To confine, To hold in custody, To detain, To give a thing as mortmain, To apply the produce of a thing to pious works."

[18] It is convenient to distinguish *wakf* & *habs* in this manner : *Sharaiu'l-Islam* seems to do so. Bail. II. 226. (Cf. distinction made between *agreement* & *contract* in Ind. Contr. Act, 1872, as precedent.)

[19] See *Banoo Begum* v. *Mir Abed Ali*, (1907) 32 Bom. 171, 178 (Ex. 4, 5, Ex. 6, p. 179 : "and whatever can be given away as *wakf* (i.e. an endowment) is lawful to be given away as *umra* or *ruqba*.")

[20] Significance of fact that *wakf* & *habs* both concerned with usufruct or benefit of property overlooked in *Mirza Hashim Mishkee* v. *Aga Abdul Hoosain Bindaneem* (1927) 5 Rang. 252, 257, 258 ; confirmed on different reasoning, 6 Rang. 343.

[21] Bail. II. 227 (par. 3) ; see another translation of this passage in s. 451, p. 527.

[22] See TAGORE CASE, L. R. I. A. (SUPP.) 47, 74, 75 (cited s. 443, com.) ; *Banoo Begum* v. *Mir Abed Ali*, (1907) 32 Bom. 171 ; exhibits 4-9.

SECTION 447. umra or life interest. If the right of residence is granted, it is called sukna.[23] If the rights granted are limited to a specified period of time the grant is called ruqba.[1]

Succession of limited interests.

(2) The grant may consist of an umra or other limited interest, to the grantee, followed by similar interests to the descendants of the grantee ; it may be lawfully provided that the grant shall continue binding on the grantor and his heirs, until the descendants of the grantee cease to exist, after which it will revert to the grantor or his heirs.[24]

Quaere, whether other limited grant.

(3) The texts mention the limited interests above referred to.[24] *Semble* other groups of rights not amounting to full ownership may be transferred.[25]

Illustrations.

(1) Saying " I have bestowed on thee this land for thy life," is a declaration of the grant of an umra.

(2) The declarations " I have given thee the residence (iskan in Arabic) of this mansion for thy life," or " the residence of this mansion is to thee while thou livest," are declarations of the grant of sukna.

(3) A declaration in the words : " I give this mansion to thee for the term of 20 years," is a declaration of the grant of ruqba.

(4) Certain legatees were described in a will as becoming maliks like the testator, but the dominant intention was that the property should pass to THREE PERSONS IN SUCCESSION, and thereafter to someone selected in a specified way. This intention being inconsistent with absolute interests, the will was construed as creating life-interests ; and " a gift of the same powers as the testator had," was read as a gift of such powers so far as is consistent with the subsequent provisions of the instrument.[26]

(5) Under a tamliknama (deed of settlement) property was settled on the

[23] Law relating to limited interests is little developed—see *Sharh Luma*, cited s. 450, com., p. 526. It would seem that in Shia texts right to residence is called *sukna* when period indeterminate. When it is limited for life or for a fixed term, it is *umra & ruqba*" : *Jawahiru'l Kalam*, IV. 618, 619, cited s. 451, com., p. 527.

[24] *Banoo B.* v. *Mir Abed A.*, (1907) 32 Bom. 172, 180 (Ex. 9) : *Jawahiru'l Kalam* IV. 619, cited pp. 521 f. 527. That passage seems primarily to be verbal explanation : s. 5c. According to the *Jawahir* " there is no difference so far as the legal effect is concerned between an *umra, sukna* or *ruqba* : " Ameer Ali, I. 79, *n.* 4 (142, *n.* 1). *Quaere*, if the three classes of interest may be created in succession to one another. Cf. Ameer Ali, I. 82 (146) : " a *ruqba* for an indeterminate period is valid but resumable at the will of the donor. A sale of the subject of the grant would put an end to the grant." No authority cited. Early law tends to give to FORMS much greater relative importance than to SUBSTANCE. It has been submitted several times that there is nothing in the Texts to prevent development of the law relating to the creation & transfer of, & other dealings with groups of rights not constituting full ownership in accordance with needs of our times.

[25] See s. 369, p. 388 ; s. 443, com., p. 487 ; s. 447, com. in particular from Ameer Ali, cited pp. 521 f. & reference to Koran ii. 177, in *Jawahiru'l Kalam*. See also s. 444, com., pp. 500 f. comparing incidents of (*a*) hiba & (*b*) transfer of usufruct.

[26] *Nisar A. K.* v. *Mohammad Ali K.*, (1932) 59 I. A. 268, 278, 279. See *Jamiu'sh Shittat*, cited s. 445, com., p. 517.

three minor sons of the settlor in equal shares. One of the provisions was that if any of the 3 died without leaving male issue his 1/3 should devolve upon the surviving brothers. In no case were the other heirs of the deceased to be entitled to the property left by him. Provisions for the maintenance of the settlor, his daughter, wife and mother were also made. Mutation of names was effected in favour of the 3 sons. *Held*, that the settlement was valid and must be interpreted as giving the property to the three sons with a gift over to the surviving sons if any of them died issueless. Assuming that it must be treated as creating life estates, according to Shia law the creation of a life estate is valid.[27] SECTION 447.

"The contract (Arab. 'aqd')[28] arises," it is said in the Jawahiru'l Kalam, a Shia Ithna Ashari text, "by the utterance of any of the following formulæ, 1.—Forms of declaration.

I give / you { this house, *or* this land, *or* this residence } for { your life, *or* my life, *or* a definite period } by way of { sukna *or* umra *or* ruqba, [respectively.]

or by an expression serving a similar purpose. There is no difference of view, or doubt as to such a contract being lawful (when made in such terms). However there is difference of opinion as to whether they are so restricted,"[28] i.e. whether these are the only formulæ by which such limited interests may be created; *quaere*, whether it is also implied that there are differences of opinion as to whether these are the only three classes of limited interests known to Shia law. Syed Saheb Ameer Ali, however, writes: "A person is entitled under Shia law to create other limited rights over his property. For example, a person may give to another a right of way over his land for a term, without giving rise to a perpetual easement, or may authorize him to take water from a cistern, etc. Such limited rights are called ruqba in a restricted sense. The word ruqba used in this connection implies a servitude."[29] 2.—Other limited interests? 3.—Easements.

Cf. "It is reported by Abi Abbas Sabah al Kanani about Abi Abdulla Imam Jafar as-Sadiq (blessings be on him) as follows: He was asked about sukna and umra. He replied; 'If he (the grantor) has created a sukna in favour of the grantee for life, then the grant must be given effect to (lit. the contract must be carried out as stipulated); and if he fixes it in his (the grantee's) favour, and in favour of his descendants after his death, to continue until his (the grantee's) descendants become extinct, it does not empower them (the descendants) to sell, or inherit the subject of the grant; after that (when they are extinct) the house reverts to the first owner (grantor).' And Murtuza Hamran was asked by me about sukna and umra. He replied, 'men must act in this matter according to stipulation :[30] if it is 4.—i—Sukna : ii—umra : iii—ruqba. 5.—Grant till descendants become extinct. 6.—Fulfil covenants : Koran ii 177.

[27] (*Mt.*) *Wahibunnisa* v. *Mushaf Husain*, (1926) 2 Luck. 187. The document also construed in *Siraj Husain* v. *Mushaf Husain*, (1921) 24 O. C. 321 = 9 O. L. J. 149 = [1922] AIR (OU.) 93.

[28] *Jawahiru'l Kalam*, iv. 618. [29] *Mahomm. Law*, I. 113 (181).

[30] "Having regard to the text already mentioned," viz. having regard to Koran, ii. 177 which says: "Righteous are those...who fulfil their covenants when they covenant," cited Intr. Chap. p. 6.

SECTION 447. stipulated for his (the grantee's) lifetime, he must live therein for his life ; if it is for his (the grantee's) descendants, then it is for them as stipulated, until the descendants become extinct ; thereafter the same will revert to the owner (the grantor) of the house.' And Hasan al Halabi quotes from the authority of Abi Abdullah who was asked about a man who makes sukna of his house in favour of another man, and after his death in favour of his descendants. He replied : ' it is lawful, but they cannot sell or inherit the same.' I said then, ' If a man makes another man live in his house for his life-time ? ' He replied : ' It is lawful,' I said : ' If a man makes another man live in his house and does not fix the time ? ' He replied : ' It is lawful, and he may turn him out whenever he wishes.' It is known, that the Mufti by pronouncing it lawful, means that it is so, having particular regard to the latter part of the tradition, and the text already mentioned,[30] which means that whatever condition is made the same is binding, and likewise it is the correct tradition quoted by Husain ibn Na'im on the authority of Imam Kazim (may the blessings of God be on him)." [31]

7.—Ruqba i—explained. " Now ruqba is obviously derived from irtiqab, which means waiting, and the contract is so called because each of the two parties waits for the contracted period ; or it is (perhaps) derived from ruqba, having regard to the fact that the house, etc. is given away to the donee for enjoying the usufruct for life ; and it is said on the authority of some of the learned that ruqba means the utterance of the formula, ' I place the service of this slave at your disposal for your life or my life '—which would imply that it is derived from ruqba, which means a slave, but this is more than doubtful, as is admitted by others." [32]

ii—Another explanation. Ruqba is stated by Syed Ameer Ali to be " a generic name for all limited estates under the Shia law. It includes both an umra and a sukna. When a house is given for a limited period it is generally called an umra. When a house is given for residential purposes it is called a sukna. Under the Hanafi law both these will come under the head of an ariyat, but whereas an ariyat is resumable at the will of the donor or his heirs, an umra or sukna is operative for the fixed period and cannot be resumed." [29]

iii—Daaimu'l-Islam on sukna, umra and ruqba. In the Daaimu'l-Islam, (1) sukna is explained as the grant of the right of residence for a fixed period, without any return or consideration ; (2) umra as the grant of the right of residence limited to the life of the resident, after which it reverts to the grantor or his heirs : in the absence of a stipulation to that effect, it is not revocable on the death of the grantor by the heirs of the grantor ; (3) ruqba, as a grant limited by the death of either : on which event it reverts to the grantor or to the grantor's heirs, as the case may be.

8.—Limited grants in Shia law and estates of English law. The decision holding that life-interests may be created under Shia law,[33] has been criticized.[34] It has been suggested that the Shia authorities mention

[31] *Jawahiru'l Kalam*, iv. 619. [32] *Jawahiru'l Kalam*, iv. 618-619.

[33] *Banoo Begum* v. *Mir Abed Ali*, (1908) 38 Bom. 172.

[34] *Jainabai* v. *Sethna*, (1910) 34 Bom. 604, 610, 613 : (i) overlooks distinction between *hiba* & other transactions ; (ii) between *corpus* & usufruct ; (iii) on p. 612 stated that gift to take effect on death of donor & revocable during his life time can

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only the right of residence or of use, and that, accordingly, a Shia may either (1) make a gift out and out of the whole dominium of the subject of gift, or (2) permit the donee to use the property by residing in it, or by taking its profits : that in the former there can be no restriction in point of time : and in the latter there is no right over the corpus [35] and so granting the latter is not creating a life-interest [36] (though the use may be limited during the life of a person). But (1) the right of use granted in such a manner is irrevocable ; and the grant of use may include the grant of the most extensive or the most restricted rights ; (2) the authorities in terms recognize the validity of a power given to the grantee to transfer his rights to others ; (3) the rights of the grantee devolve upon his heirs in cases in which they are not restricted to his life-time. So that the right to the use or usufruct of the property, during the grantee's life, is not distinguishable in material points from a life-interest. A life-tenant is in effect a usufructuary for life [37] : s. 366A, com.

(B) (Shia law.) POSSESSION.

448. A limited interest [1] vests in the grantee when the grantor makes a declaration of grant which the grantee accepts and thereafter possession of the subject of grant is transferred to the donee.[2] *Quaere,* whether where the grant consists of a succession of limited interests, the interests subsequent to the first vest when possession is transferred to the first grantee,[3] or at such time as the grant may provide, or

never be valid : such gift is obviously valid bequest ; (iv) analysis in *Tagore* case, L. R. I. A. 47, of what imported in life-estate, entirely lost sight of ; (v) observations pp. 612 f. overlook that development of Muslim law might be on juristic reasoning, in future, as it has been in past : " it is not to be thought of that this most ancient stream in bogs & sands should perish, & to evil & to good be lost for ever." *Casamally* v. *Currimbhoy,* (1911) 36 Bom. 214, 253, 254 = 13 Bom. L. R. 717, 767, 768. See ss. 11C, 366A, 443 ff.

[35] What is meant by *corpus*? The Muslim jurists distinguish—(1) an out & out transfer (*hiba*) which is called the transfer of the *corpus* from ; (2) a transfer of rights not amounting to full ownership called transfer of benefits, or usufruct, or profits, or use, viz. transfer of particular rights in the property entitling the transferee to take specific benefits out of or use thereof. Thus *corpus* so understood really refers to the full or absolute ownership of property, & is contrasted with rights not amounting to full ownership. Word *corpus* applied to a fund refers to principal, distinguishing it from its *revenue* or interest ; & something like this meaning apt to be used in connection with immovable property also.

[36] There is no reason (*submitted*) why such rights should not be said to create a life-interest, though under terminology of early English law it may not be styled free-hold life-estate, unless there was feudal seisin : see Blackstone, *Comm.* cited pp. 489 f., *n.* 1(i). With great submission (see p. 490, *n.* 8(iv).) it does seem as though error were frequently committed in India of forgetting (what appears from Blackstone) that every kind of interest in land can be described as an estate : any estate in land for any person's life-time is a life-estate. It is only whom a " free hold estate " is in question that " livery of seisin " is required. But in dealing with Muhammadan law, *submitted* best course not to introduce terms of English law except of simplest kind.

[37] See s. 366 A, p. 383 ; s. 443 A, pp. 492 f. Cf. Williams, *Real Prop.*, 16, 20, 64, 195, 324, 418, etc. TAGORE CASE, I. A. (SUPPL.) 47, 74, 75, cited p. 485, *n.* 27.

[1] Or a group of rights in property not amounting to full ownership.

[2] Bail. II. 226 (*ll.* 1-2, 13-15); *Banoo Begum* v. *Mir Abed Ali,* (1907) 32 Bom. 172, 179 (ex. 8).

[3] Bail. II. 214 (*third*), see com. cf. s. 446, pp. 518 f.

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when the interest of each successive grantee having opened out, he takes possession.[3]

1.—Wakf : limited interest : compared.

Sect. 448 is based on a passage in the Sharaiu'l-Islam referring directly to wakf ; but the possession required for the completion of a wakf is the same as for limited interests : the subject of disposition in both cases being the usufruct. The distinction between wakf and limited interests consists mainly in the perpetuity of wakfs and the presence of the religious motive : s. 446, p. 519. In Muslim law they are nearly related to each other as they both refer to the usufruct, (s. 466 A, p. 380). As to unborn persons it is said, " if one should make a settlement beginning with a person not yet in existence as for instance one to be born, or a foetus not yet separated from its mother, the wakf would not be valid. But if it were in favour of one not in existence, in succession to a person actually in being, it would be quite good." [3]

2.—Unborn person.

3.—Possession of limited interest.

With reference to the rule regarding possession, ambiguity is liable to arise from the fact that the subject of the grant may consist of such a group of rights that " taking possession of the rights," can only consist in exercising, in respect of some determinate physical object, the rights concerned. In such a case " possession " consists not of exclusive control (s. 382 A, pp. 406 f.) over the physical object concerned, but of exercising sufficient control over it to be able to enjoy the benefit in question, or to exercise the right granted : and perhaps exclusive to that extent. The subject of grant is not the total bundle of rights exercisable in respect of the physical object,—the grant is not its ownership. Nevertheless the two are apt to be confused, see p. 345, *n.* 12.

(c) FIRST GRANTEE of limited interest must be in existence and competent to own property.

449.[4] The grantee[5] of a limited interest[6] must be in

[4] Sect. 449 cited & applied : (*Mt.*) *Abbas Bandi B.* v. *Saiyad Muhammad Raza*, (1929) 4 Luck. 452, 472, 473, affirmed *Muhammad Raza* v. *Abbas Bandi B.*, (1932) 59 I. A. 236.

[5] In *Mirza Hashim Mishkee* v. *A. A. H. Bindaneem*, (1927) 5 Rang. 252 ; (1928) 6 Rang. 343, 345, 346 ; Chari, J. said that s. 449 of this work, Ameer Ali, *Mahom. L.* (4th ed. I. 62, 142) & Bail. II. 212 " were not based on authoritative texts " & were " opposed to fundamental conceptions of Muhammadan law," [contrast tone of P.C. : " as we understand the spirit of that (Hindu) law ": (*Sreemathy*) *Soorjeemony Dossee* v. *Denobundoo Mullick*, (1867) 6 Moo. I. A. 526, 555.] Not quite easy to understand what Chari, J. had in mind : only explanation seems to be either that he was not aware that Baillie, II. 214 represents *Sharaiu'l-Islam* (& that it is not correct to say : " Baillie in his Mahomedan law draws his deduction "); or of the authority that that text carries. [The decision in 4 Luck. 452 (*n.* 4) had not been given when 5 Rang. 252 was decided.] Chari, J.'s discussion would have been instructive. But (with all due respect), it is rendered practically nugatory by his failure to appreciate (i) weight to be given to *Sharaiu'l-Islam*, (ii) necessity for realizing that that text represents " fundamental principles of Muhammadan law," (iii) close connection between *wakf* & grants of limited interest (*habs*),—both of which consist of transfers of usufruct. In appeal (6 Rang. 343) case decided on another point, viz. that trust could not take effect because settlor had not divested herself of all interest in *corpus*, a proposition hardly consistent with some decisions noted in s. 369, com. No authority seems to have been referred to, justifying extension of rule governing *wakfs* to such a settlement as was then before Court. Case seems, however, to have been hard & great temptation to disallow plaintiffs' claim on some ground or other. Whole income during grantor's life having been reserved for grantor herself, disposition so far as it dealt with usufruct could, *semble*, have been treated as testamentary : see s. 580 A. But this point apparently not taken ; & is new & unsettled.

[6] Who may in other words be described as holder of rights in property not amounting to full ownership. See p. 345, *n.* 12.

existence at the time when the grant is made ; he must be competent to own property, and must be distinctly indicated ; provided that where a succession of limited interests is created by the same grant, the grantee of the first interest alone need be in existence at the time of the grant,[7] and if the succeeding grantees come into existence when their respective interests open out, the grants to them are valid. SECTION 449.

1.—No rule against perpetuity in Shia law, nor against unborn persons being grantees.

The Shia texts seem to contemplate a series of limited interests in succession ad infinitum : neither creating a perpetuity nor giving remainders to unborn persons seems to them to be objections invalidating settlements.[8] This, it is submitted, will appear from the authorities that are cited below.

Assuming that this is so, what is the effect of the rule in British India ? It is submitted that it must be given effect to in so far as it does not conflict with the rule [9] against creating perpetuities.[10] Whether the power of creating such interests should be so cut down as to conform to that rule, or should be given effect to in its entirety, is a question deserving of attention by the Legislature.

2.—Rule against perpetuities: public policy.

Where the legislature expressly requires the Muhammadan law of gifts to be enforced, without any directions as to the rule against perpetuities, the Shia law may perhaps be given effect to in spite of its infringing the rule against perpetuities. Where it is enforced as a matter of justice, equity, and good conscience, the Courts may have to consider whether the power in question should not be disregarded in so far as it infringes the rule against perpetuity.[11]

3.—Exception for charities.

The rule against perpetuities[11] is recognized in England independently of statutes, and is founded upon considerations of public policy, which the Privy Council held were as applicable to the conditions of such a place as Penang as to England : viz. to prevent the mischief of making property inalienable, unless for objects which are in some way useful or beneficial to the community : e.g. if land convenient for the purposes of trade or the enlargement of a town or port could be dedicated to a purpose which would for ever prevent such a beneficial use of it. The exception is also on grounds of public policy, in

[7] "But if it were in favour of one not in being, in succession to person actually in being, it would be quite good," Bail. II. 214. Under Hindu law only those persons who are living at time of the gift can take : *Tagore case*, (1872) I. A. (SUPP.) 47 64 ; *Madhavrao* v. *Balabhai*, (1927) 55 I. A. 74 (BOM.). Rule in *Shelley's case* 1 Rep. 94, does not apply in India : *Mithibai* v. *Limji*, (1881) 6 Bom. 151.

[8] See *n.* 4. Bail. II. 214 (*third*); s. 448, com. Shia texts admit succession of limited estates one after another : interposition of life estate in named person & his father before estate comes to third donee, seems to raise no difficulty : nor to involve necesssity for holding that on expiry of that life-estate, the estate vested in third donee must be an absolute estate : *Abbas Bandi B.* v. *Saiyad Muhammad Raza*, (1929) 4 Luck. 452, 470 (see p. 524, *n.* 4); *Jawahiru'l Kalam* iv. 619.

[9] *Quaere* would English or Indian RULE AGAINST PERPETUITY bind. See s. 12. Indian Legislature having chosen to alter English rule for India would indicate that English rule not "applicable to Indian society & circumstances."

[10] Willes, J. pointed out that "the LAW OF PERPETUITY has no application to such a state of things.... Assuming that on the GROUND OF POLICY such a law ought to extend to India, which the character of the law of gifts there seems to render unnecessary ;" *Tagore case*, (1872) L. R., I. A. (SUPP.) 47, 76.

[11] See Transfer of Property Act IV. of 1882, ss. 14 ff.

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favour of gifts for purposes useful and beneficial to the public, and which in a wide sense of the term are called charitable uses. The exception was also held to have passed with the rule into the law of Penang.[12]

4.—When some only of a class of grantees in existence.

"A grant may be made to A for life, and then to B absolutely, or a grant may be made to A for life, and then to A's children absolutely. There is some difference of opinion as to whether only children living at the time of the grant will take the remainder absolutely, or any children born to A after the grant, will take also. The approved opinion seems to be that *all* the children will take, whether living at the time of the grant or born afterwards. But when the grant is to A for his life and to his children for *their* lives, only the children living at the time of the grant will take with rights of survivorship."[13]

(D) Subject of grant : things not consumed by use.

450. Everything that may be the subject of a wakf, viz. everything that admits of use without destruction, may be the subject of the grant of a limited interest.[14]

A mansion, slave, horse, camel, donkey, furniture, are mentioned as being valid subjects of grants.[15] It is submitted that in fact it is the use of these articles which forms the subject of the grant : not the articles themselves.

"The subject of a habs may be either a slave or a horse or any of those objects which may be subjected to such use, [i.e. which may be used without being consumed or destroyed]. Where the beneficiary is a person, all kinds of objects may be dedicated for his use (lit. that he may enjoy all these benefits).[16] Where approach to God is sought, it is possible to dedicate a slave, a horse, a camel, a donkey, and similar objects. In the case of a masjid and the like, it is possible to dedicate a slave or a quadruped when any is wanted for carrying water, etc., otherwise its use may be fully made by letting it for hire, and then the proceeds may be applied in proper ways. The discourses of faqihs dealing with questions of this kind are very scanty."[17]

Scanty discussion of habs.

(E) Grant of limited interest.

(1) Normally irrevocable.

451. (1) The grant of a limited estate which has been made with a religious motive, or with provisions fixing its duration, cannot be lawfully revoked or altered after it has become vested in the grantee.[18]

12 *Yeap Cheah Neo* v. *Ong Cheng Neo*, (1875) L. R. 6 C. P. 381, 394 ; cf. TAGORE CASE. (1872) L. R. I. A. SUPP. 47, 76, *ll.* 5, 6. See also *Fatmabibi* v. *Adv.-Gen.*, (1881) 6 Bom. 42, 50.

13 Ameer Ali, *Mah. Law*, 111 (179). See ss. 5c, 448, 348, 444.

14 Bail. II. 227 (par. 2); *Banoo Begum* v. *Mir Abed Ali*, (1907) 32 Bom. 172, 178 (Ex. 8); land & everything that admits of use without destruction of the subject & of everything lawfully salable ; because such articles as admit of usufruct resemble land. Bail. II. 213. See s. 476 (as to subject of *wakf*).

15 Bail. II. 213 (trained dog or cat), 227 (*ll.* 17, 18, 28); in *l.* 28 "house" is a misprint for "horse."

16 These "benefits" are really "rights." 17 *Sharh Luma*, I. 233.

18 Bail. II. 226-227. Grant made with religious motive, irrevocable though duration not fixed : Bail. II. 227 (par. 3) see com.

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(2) Grant of limited interest can be revoked if indeterminate.

(2) Where the grant of a limited interest is made without a religious motive and without provisions fixing the duration of the grant (*a*) under the Shia Ithna Ashari law the grantor may at any time revoke the grant ; [19] it is determined by his death ; [20] on its being revoked or otherwise determined, the grantee's rights under the grant cease ; [21] (*b*) the Daaimu'l-Islam (governing the Daudi and Sulaimani Shias) seems to hold the grant to be revocable on the death of the grantor only if it contains a provision that on the death of the grantor his heirs may revoke the grant.[22]

(3) A term may be validly fixed for the duration of a grant, after which the grant expires. Where the duration of the term is left indeterminate it determines on the death of the grantor.[21]

(4) Where the grantee dies before the expiration or other determination of the grant, it devolves upon the grantee's heirs.[21]

(3) Irrevocability of habs or limited grants.

The last paragraph on Habs in the Sharaiu'l-Islam does not seem to be quite accurately translated by Baillie.[23] The translation ought to be as follows : " When a man has made a habs of his horse, in the way of God, or his slave for the service of the Kaaba or of a masjid, the act is irrevocable ; [24] and he cannot make any alteration, (in the terms of the settlement) howsoever long the subject be in existence. But when a habs is made of anything in favour of some (individual) person, and no term is fixed, and the grantor dies, that thing becomes part of his (the grantor's) heritage ; [25] and similarly if a term is fixed, and it expires, it belongs to the heirs of the grantor.[26] Some of our doctors maintain that it is not rendered obligatory,[27] while others maintain that it is so only when there is an intention on the part of the grantor of an approach to God. But the first opinion is the most common or generally received." [28] " When a term is specified for residence, the contract becomes binding by possession, and cannot lawfully be revoked until after expiration of the time. So also if the residence is for the life of the proprietor, the contract cannot be revoked, though the life-tenant should die, then what

[19] Bail. II. 227 (*l.* 4 of par. 3). In which case it is hardly more than mere license ; cf. Transf. of Prop. Act, IV. of 1882, s. 126.
[20] Beyond his life he may make usufructuary will, ss. 580, 580A.
[21] Bail. II. 226-227 ; see com., p. 527 & s. 455.
[22] *Daaimu'l-Islam* ; see also s. 447, com., p. 522, where explanations of *sukna, umra* & *ruqba*, as given in *Daaimu'l-Islam* are set out.
[23] Bail. II. 227 (par. 3).
[24] Because of religious motive : transfers with religious motive not revocable.
[25] There being no religious motive, & no term fixed, grant taken to be for life-time of grantor ; unless previously revoked, it enures for life-time of grantor.
[26] *Jawahiru'l Kalam*, iv. 622, mentions some precedents.
[27] Cf. s. 420, com., p. 465.
[28] Bail. II. 226 (*ll.* 15-19).

SECTION 452. was his is transferred to his heir, till the death of the proprietor." [29] Cf. "From Jafar Ibn Ali : He said sukna is like an ariyat [see s. 443]. If its owner wishes to take it back, he might revoke it, and if he wishes to leave it he may do so. This refers to an indeterminate sukna, but when it is limited for life, or for a fixed term, it is umra and ruqba, as you have already learnt." [30]

(F) Terms inconsistent with or derogating from a grant.

452. *Semble,* where a grant purports to create one of the particular kinds of limited interests mentioned in s. 447, words contained therein that are meaningless with reference to that kind of interest, are of no effect.[1]

Illustration.

G says to R, "I have given this mansion to thee for life and thy successor." It would be only an umra or for his own life, and there would be no transfer to the life-holder ['s successor] according to the most approved opinion ; just as if G had not said "to thy successor."[1] But if he says "I give this house to thee, and to thy descendants by way of umra (successively)," it will be binding so long as the descendants are existing.[2]

Sect. 452 is based on a passage in the Sharaiu'l-Islam, Baillie's translation of which is cited with a verbal alteration as s. 452, *ill.* first sentence. The underlying principle is not easy to see in the translation. See s. 5c. With reference to this Syed Ameer Ali says, "The passage in the Sharaia that a grant to A and his aqib only takes effect as a life-estate, as if the word aqib was not mentioned, refers to the case of an umra, the author of the Sharaia being of opinion that the mention of the word aqib (which signifies literally a person coming after) is not like the mention of descendants, and that therefore does not convey an absolute estate, whereas the author of the Mabsut is of opinion that a gift to A for life, and then for his aqib is tantamount to an absolute donation." [3] It is submitted that this is a question mainly of the construction of the words of the grant. Similar considerations apply to the following : "A grant to A in these terms, 'If you die before me, the property will revert to me, if I die before you, it will become yours,' will take effect according to some in case the donor predeceases the donee, as an umra in favour of the latter ; according to others as an absolute gift (if there is no other limitation)." [4]

Nasir Husain *v.* Sughra Begum. 5 All. 505.

An examination of this and other passages "convinced" [5] the judges in Nasir Husain's case.[5] "that there is no difference on this subject between the

[29] Bail. II. 227 (*ll.* 12-14 of par. 1, & see par. 3); *Banoo Begum* v. *Mir Abed Ali*, (1907) 32 Bom. 172, 179, (Ex. 8).

[30] *Jawahiru'l Kalam*, iv. 618, 619.

[1] Bail. II. 226-227. See s. 452, com. ; s. 5c.

[2] See pp. 521 f. citing *Jawahiru'l Kalam*, iv. 619.

[3] Ameer Ali, I. 81-83 (145), 112 (par. 3) (180).

[4] Ameer Ali, I. 82 (145), citing *Jawahiru'l Kalam*, Chapter on Gifts.

[5] *Nasir Husain* v. *Sughra Begum*, (1885) 5 All. 505. "There can be no doubt that this view is founded on a misapprehension of the Shia Law," says Syed Sahib Ameer Ali, I. 84, *n.* 1 (148, *n.* 1). Probably the judges not aware that Baillie's

two systems of Muhammadan law. In fact," they add, "while the Sunni law is very distinct, the Shia or Imameea law is silent on the subject, the intention in the latter system evidently being the adoption and application of the Sunni rule to Shias." As may be surmised from this preliminary, their Lordships' examination of the passage in question does not throw much light on the subject, for themselves or for succeeding students of law. See s. 11c.

SECTION 453. (G) Transfer of limited estate.

453. The grantee of a limited interest may, subject to s. 454, and to the limitations, if any, contained in the grant, transfer or alienate his interest.[6]

"The life-tenant or holder of an estate for a term has the right of letting the property for any period not exceeding his own interest, provided there are no limitations on his power or his mode of enjoyment. He is bound, however, to return the property on the expiration of the period of his interest in proper order, natural deterioration and the lawful enjoyment of the same excepted."

(H) Right of residence restricted to grantee and his family.

454. Unless there is anything to show that the grantee may permit others to reside in the subject of grant, or let it for rent,[8] the grant of a right of residence empowers only the grantee and his family and children to reside therein.[8]

(I) Reversion remains in donor.

455. On the expiration or other determination of the period for which a grant is made, the grantee's rights in the subject of the grant cease and they revert to the donor or the donor's heirs as the case may be.[9]

Thus when the donor says, "the residence of this mansion is to thee while thou livest," the remainder over will revert to the donor even though the donor does not expressly provide for it by the use of some such words as "when thou diest it will revert to me."[9]

work is literal translation of *Sharaiu'l-Islam*, as they say: "There is a passage in Baillie's Immamea Law, pp. 226-227, which, if *expressing undoubted Shia doctrine, perhaps* deserves *some* notice." Milton's words, "not knowing me, argues thyself unknown," & James, L. J.'s advice in *Hay's case*, (1875) L. R. 10 Ch. App. 593, 600, 605 = 44 L. J. (CH.) 721, 724, (Mellish L. J. entirely concurring) that some judgments ought to be "left *requiescere in pace* & their frailties not dragged forth to public gaze,"—come to one's mind.

[6] See s. 443, com.; s. 368 *ill.*

[7] Ameer Ali, I. 118 (180-181) (no authority cited).

[8] Bail. II. 227 (par. 2); *Banoo Begum* v. *Mir Abed Ali*, (1907) 32 Bom. 172, 179, (Ex. 8).

[9] Bail. II. 226 (*ll.* 20-27): *Banoo Begum* v. *Mir Abed Ali*, (1907) 32 Bom. 172, 179, (Ex. 8).

DIFFERENCE OF VIEWS AS TO WAKF.

Hanafi law.[1]			Shia law.
Abu Hanifa.	*Abu Yusuf.*	*Imam Muhammad.*	*Shia Texts.*
OWNERSHIP of wakif subsists.	OWNERSHIP of wakif abates, in favour of ownership of God.[2]		OWNERSHIP in beneficiaries.
(Wakf REVOCABLE unless (*a*) there is decree of court, or (*b*) wakf is testamentary.)[3]	Wakf IRREVOCABLE on mere pronouncing of dedication.	Wakf IRREVOCABLE after possession given to mutawalli : not before.[4]	Wakf IRREVOCABLE after possession given to beneficiaries or mutawalli.[11]
	Wakf of MUSHA valid except, if for mosque or tomb.[5]	(Wakf of divisible MUSHA invalid.)[3]	Wakf of MUSHA valid.[12]
Wakf must expressly purport to be in PERPETUITY.	PERPETUITY will be presumed if not stated.	Must expressly purport to be in PERPETUITY.	Must be PERPETUAL, ABSOLUTE and UNCONDITIONAL.[13]
If OBJECT OF WAKF FAILS, or is such that it may fail, wakf is void.[6]	If OBJECT OF WAKF FAILS, it will result in favour of poor.[6]	If OBJECT such as MAY FAIL, wakf void.[6]	If OBJECT FAILS, property reverts to wakif or his heirs.
	WAKIF may BENEFIT under his own wakf.	(WAKIF may not BENEFIT[7] under the wakf.)[3]	WAKIF may not BENEFIT under wakf.[14]
	Appointment of WAKIF as MUTAWALLI valid.[8]	(Appointment of WAKIF as MUTAWALLI, not valid and avoids wakf.[7])[3]	Appointment of WAKIF as MUTAWALLI valid.[15]
	If NO MUTAWALLI appointed, wakif will be considered mutawalli.[9]	(If NO MUTAWALLI appointed wakf void.[9])[3]	If NO MUTAWALLI appointed beneficiary acts as mutawalli unless wakf for some object of general utility.[15]
	Wakif may validly reserve to himself power of REMOVING MUTAWALLI—		
	If power not expressly reserved, it will be presumed to have been reserved.[10]	If power not expressly reserved, wakif may not remove mutawalli.[10]	

[1] *Bikani Mia* v. *Shuk Lal Poddar*, (1892) 20 Cal. 116, 171-172 ; (*Meer*) *Mahomed Israil Khan* v. *Shashti Churn Ghose*, (1892) 19 Cal. 412, 433.

[2] Shafii agrees with this ; *Minhaj*, 232, (Bk. 21, s. 3).

[3] Rules in ( ) not followed in India.

[4] Hanafi authorities equally divided on this point : Malik, Shafii, and Ibn Hanbal agree with Abu Yusuf in holding that nothing more is needed than dedication to make *wakf* irrevocable. See s. 462.

[5] Bail. I. 564 (573). [6] Bail. I. 567 (576). [7] Hed. 237 (559).

[8] Bail. I. 551 (559), 591 (607) ; *Minhaj*, 233. [9] Bail. I. 591 (601).

[10] *Shaikhs* of Bukhara said to accept Imam Muhammad's opinion in accordance with which *Fatawa Alamgiri* says *fatwa* given : *Shaikhs* of Balkh, however, adopt Abu Yusuf's view : Bail. I. 592 (602), 591 (601). See, however, s. 462.

[12] Bail. II. 214 (par. 1, *ll.* 5-7). [13] Bail. II. 218 (par. 2).

[14] Bail. II. 218 (par. 3). [15] Bail. II. 214 (par. 3).

CHAPTER X.

WAKF.

§ 1.—PRELIMINARY.

SECTION 456.
1. EXPLANATION OF TERMS.
Wakf.

456. Wakf[1] in British India implies the permanent dedication by a Muslim[2] of any property[3] for charity,[4] or

[1] Mussulman Wakf Validating Act, VI. of 1913 (hereinafter referred to as WAKF ACT, 1913 is given in appendix & its main provisions reproduced in s. 480A.

[2] Wakf Act, 1913 speaks of: (i) "persons professing the Mussulman faith" (preamble ss. 2, 3); (ii) follower of the Mussulman faith who conforms to the tenets & doctrines of the Hanafi school of Mussulman law," (s. 2(2).); (iii) "Hanafi Mussulman" (s. 3(*b*).). *Putli Kunwar* v. *Janki Das*, (1924) 46 All. 813; "*wakf*" by Hindu for temple is referred to.

[3] I. PROPERTY or *corpus* or thing itself distinguished from its *manafi*, or usufruct or use or advantage or produce: s. 366A. In *wakf* the PROPERTY ITSELF (*a*) is "tied up" (i.e. made *wakf* of) in sense that it no more remains subject to inheritance or alienation: see s. 458, *ill.* (1)(*i*)(*j*) = Bail. I. 558 (566 f.) (where it is said this house is free, viz. from inheritance & alienation, in sense that this house is dedicated); (*b*) its USUFRUCT or produce is to be devoted to religious or charitable objects. Cf. Bail. I. 549 (557), 652 (663); Hed. 231; *Hidaya*, Naval Kishore ed. II. 612; *Fat. Alamgiri* (Cal. ed.) II. 459: "devoting or appropriating of its profits or usufruct [not the property itself] on the poor or other good objects in the manner of an *ariyat* or commodate loan." But since entire usufruct is so devoted the property itself is reduced merely to a notion, a *scintilla juris*, cf. Bail. I. 652 (663). II. Bearing in mind (s. 345, com.) that property itself in law = ownership of property = bundle of rights, treated as a unit by law, it is necessary also to recognize that for purposes of *wakf* that bundle of rights is divided up into two units: (*a*) what is called usufruct, & (*b*) what is called *corpus* or property itself. III. This implies several steps. (i) A determinate physical object (say piece of land) taken as starting point; (ii) bundle of undefined rights which a subject may exercise over the land then takes in law place of notion of land itself: that bundle is called ownership; (iii) that bundle is then split up into two parts: (*a*) right to take benefits of the land or to enjoy its usufruct, or produce; (*b*) rest or residue of rights left in original bundle. Here arises cause of confusion: the residue of the rights—(*b*)—is again called *corpus* or property itself & distinguished from (*a*) the usufruct; whereas (*a*) added to (*b*) together composed "the property" at the start; moreover property or corpus in sense (*b*)—may consist of a residue that is almost non-existent. It may consist of right of transferring the property by act during life, or by inheritance: but with no benefits to be derived from the property by the transference. IV. At this stage importance emerges of fact that usufruct must (in circumstances in which the transaction is not revocable) be defined in respect of its duration: Hed. 441, col. ii. "and as in contracts regard is had to the spirit of the agreement, it is also necessary that the period of right to the usufruct be fixed."

[4] CHARITY in this chapter has its usual English acceptance: s. 457(9). Cf. *Saiyed Shabbir Husain* v. *Shaikh Ashiq Husain*, (1919) 4 Luck. 429. On necessity or ultimate dedication being for charity: *Ghulam Muhammad* v. *Ghulam Husain*, (1931) 59 I. A. 74, 86 (ALL.). "The real ordinary use of the word charitable.... always does involve the relief of poverty," said Lord Halsbury, *Commrs. of Inc. Tax* v. *Pemsel*, [1891] A. C. 531, 552; cited *Muhammad Ibrahim K.* v. *Ahmed Said K.*, (1910) 32 All. 503, 511; *Abdul Wahab* v. *Sughra Begum*, (1931) 54 All. 455 (provisions for individuals, e.g. faithful servants may, in accordance with Muhammadan law, be charitable object: s. 457 cited & applied).

SECTION 456. for religious objects or purposes, or for an object of public utility.[5]

Dedication of wakf.

457.[6] In this chapter unless there is something to show a different intention,—

Wakif.

(1) When[1] the owner of any specific property declares in good faith[7] that he "makes wakf"[8] of it, or that he "dedicates[9] it in perpetuity by way of sadaqa[10] or charity,"[3] he is called the "wakif, or the founder of the wakf, or the settlor, or dedicator," and is said to "make a dedication or declara-

[5] See Wakf Act VI. of 1913, s. 3; s. 457A, com. *Bikani Mia* v. *Shuk Lal Poddar*, (1892) 20 Cal. 116, 145: "a *wakf* is a permanent benefaction for the good of God's creatures; the *wakif* may bestow the usufruct but not the property upon whomsoever he chooses & in whatever manner he likes, only it must endure for ever"—Ameer Ali, J. (*diss.*). Observe that necessity for ultimate dedication to poor or to charity generally, is that there should be some unfailing object, always present to which usufruct may be applied in perpetuity: "the poor are always with us." See *Fathul Qadir* cited in (*Meer*) *Mahomed Israil Khan* v. *Shashti Churn Ghose*, (1892) 19 Cal. 412, 427; *Jagatmoni Chowdhrani* v. *Ramjani B.*, (1884) 10 Cal. 533: (i) objects must not be liable to extinction; (ii) dedication must be *in praesenti*; (iii) no stipulation for sale of property or for *wakif's* benefit. "The requirement of a valid *wakf* is a subtantial dedication of the usufruct of the property to charitable, religious or good purposes as understood in the Muhammadan law: no particular form is necessary; a *wakf* may be construed from Royal grants of properties made in favour of individual persons as long as it was for a perpetual religious, charitable or good purposes; the dedicator need not use the word *wakf* at all, or may not formally transfer the properties to the ownership of God." [Transfer to ownership of God, of course only notional: that notion not adopted by Abu Hanifa, nor by Shia authorities]. *Syed Shah Muhammad Kazim* v. *Syed Abi Saghir*, (1931) 11 Pat. 288, 314, 324.

[6] Sect. 457 & com. cited & applied: *Abdul Wahab* v. *Sughra B.*, (1931) 54 All. 455.

[7] Strictly, dedication ought with RELIGIOUS MOTIVE: but that has been more or less lost sight of in India: mentioned in (*Mt.*) *Rahiman* v. (*Mt.*) *Baqridan*, (1935) 11 Luck. 735, 755 (F. B.). On BONA FIDE INTENTION to dedicate: *Sahu Har Prasad* v. *Fazal Ahmad*, (1933) 60 I. A. 116, 122; *Mohammad Ali* v. (*Mt.*) *Bismillah*, (1930) 35 C. W. N. 324 (P.C.) = 33 Bom. L. R. 155; *Delrus Banoo* v. *Kazee Abdoor Ruhman*, (1875) 23 W. R. 453 = 15 Beng. L. R. 167, upheld in appeal: *Ashgar Ali* v. *Delroos Banoo B.*, (1877) 3 Cal. 324 (P. C.). *Ghulam Muhammad* v. *Ghulam Husain*, (1931) 59 I. A. 74 (must purport to create *wakf*); *Masuda K.* v. *Muhammad Ebrahim*, (1931) 59 Cal. 402, 424-429, 432.

[8] *Wakf* is a transfer of property generally without consideration: *Musharraf B.* v. *Sikandar J. B.*, (1928) 51 All. 40, 52: the religious motive is deemed as consideration in Islam: s. 348, com.

[9] This implies (see s. 462A; s. 458, *ill.* (1)(*i*); s. 556, *n.* 2) that the WAKIF DIVESTS HIMSELF *in praesenti* of his ownership & power of alienation: *Syed Ali Zamin* v. *Syed Akbar Ali Khan*, (1937) 64 I. A. 158, 168 (PAT.) mentions "the requirement that the settlor must divest himself of his proprietary right." *Mohammad Ali* v. (*Mt.*) *Bismillah*, (1930) 35 C. W. N. 326 = 33 Bom. L. R. 155 (P.C.) (*wakf* void as no intention to divest: last sent.); *Ali Raza* v. *Sanwal Das*, (1918) 41 All. 34 (Shia case); *Muhammad Yunus* v. *Muhammad Ishaq K.*, (1921) 43 All. 487 (Hanafi); *Muhammad Azizuddin Ahmad Khan* v. *Legal Remembrancer*, (1893) 15 All. 321; *Mohammad Yusuf* v. *Mohammad Shafi*, (1935) 33 All. L. J. 40. So when *wakif* reserves power to sell or mortgage the property no *wakf* created: *Amiruddin* v. *Muzaffarul Hasan*, (1922) 45 All. 107. Delay in mutation of names may be explained: *Ghazanfar Husain* v. *Ahmadi Bibi*, (1929) 52 Cal. 368, 371, 372.

[10] *Sadaqa* in this paragraph includes any purpose recognized by Mussulman law as religious or pious or charitable: cf. Wakf Act, 1913, ss. 2, 3.

tion of wakf or to dedicate the property by way of wakf," or shortly to "dedicate the property," or "to create a wakf" or "to make a settlement by way of wakf" ;[11] SECTION 457.

(2) the property dedicated is called the "subject of the wakf," or "the wakf property" or "dedicated property ;"[12] Wakf property.

(3) the purpose to which the wakif dedicates the income (the term income includes the usufruct or rents and profits or benefit) of the subject of wakf, or declares that the income shall be devoted to, is called the "object of the wakf or of the dedication ;"[13] Object of wakf.

(4) when the object of the wakf is to benefit any specified persons or class of persons they are called the "beneficiaries under the wakf," and the wakf is said to be "created or dedicated for their benefit ;"[14] Beneficiaries.

(4A) the objects of the wakf may be preliminary viz. such as must in course of time cease and come to an end (e.g. single persons or members of collective groups), and if so, the preliminary objects must be followed by ultimate, (viz. perpetual and never failing) objects ;[15] Objects : (i) preliminary (ii) ultimate.

(4B) a general charitable intention or purpose is a desire or purpose to devote certain property in any event to charity, though a particular object may be specified for giving effect to that paramount desire or purpose ;[16] Charitable intention : (i) general : (ii) particular.

(5) when the dedication is in writing, the document Dedication. wakfnama.

11 Last two terms : Wakf Act, 1913.

12 *Mauquf* (*mowkoof*) = property dedicated.

13 Texts often speak of "produce" of *wakf* property, many times assumed to be land under cultivation. See *n.* 14.

14 *Mauquf alehi.* = "towards (or for) whom (property) made *wakf*" used alike to represent object & beneficiaries. *Abdul Wahab* v. *Sughra B.*, (1931) 54 All. 455. "BENEFIT" in this chapter = usufruct, produce, rents & profits, and/or other advantages,—really rights relating to them. Cf. pp. 346 (*n.* 14), 380 (*n.* 1), 481 (*n.* 9).

15 Clause (4A) is not a definition but refers to a classification which is connected with important consequences : s. 580 A : which therefore it is useful to mention early. THE POOR sums up perpetuity in the texts : how modern the texts are.

16 Tudor, *Charities*, 5th ed. (1929) 140 ff. See s. 481, com. *Re London Univ. Medic Sc. Instit. Fund*, [1909] 2 Ch. 1 *per* Kennedy, L. J., citing Theobald, *Wills*, 7th ed. 373 (if gift is for charitable purpose question arises : is donor's intention (i) to promote some specific & well defined purpose, & that only, or (ii) is there a general charitable intention which donor wishes to carry out in a particular way ; in this case no general charitable purpose as distinguished from particular charitable purpose appeared : possible to give property in first instance for general charitable purpose & to graft on to general gift, direction as to desires or intentions of donor as to manner in which general gift to be carried into effect) ; *Re Wilson*, [1913] 1 Ch. 314, 321 (if there is general charitable intention, then, if impossible to carry out precise directions, Court by its administrative jurisdiction, directs scheme based on general intention or purpose or direction). *Re Standford*, [1924] 1 Ch. 73 ; *Moggridge* v. *Thackwell*, (1802) 7 Ves. 36, 69 ; *Mills* v. *Farmer*, (1815) 1 Mer. 56 = 19 Ves. 483.

SECTION 457. containing it, is called the wakfnama ; [17] a wakfnama includes an oral dedication or declaration of wakf ;

Testamentary wakf. (6) [18] when a dedication by way of wakf is so made as to come into effect after the death of the wakif it is called a " testamentary dedication of wakf ; " [18]

Mutawalli. (7) the person entrusted with the fulfilment of the object of the wakf, and the carrying out of the directions given at the time of its dedication, is called the mutawalli ; [19]

Khanqah. (7A) a khanqah [20] is a Muslim monastery or religious institution, where dervishes and other seekers after truth congregate for religious instruction and devotional exercises.[20]

[17] Legal effects do not differ whether declaration verbal or written.

[18] Sect. 457(6) cited & applied : *Ma E Khin* v. *Maung Sein*, (1924) 2 Rang. 495, 509.

[19] See s. 450 : *Muhammad Zain K.* v. *Nur-ul Hasan K.*, (1923) 45 All. 682, 684 ; *Muhammad Ismail* v. *Md. Ishaq*, (1921) 43 All. 508 (*wakf* was in fact testamentary : failure to recognize this turned controversy into, What was the subject of *wakf* ?) ; *mutawalli* (expression most often used in India) *nazir*, *qayyim* are also equivalent Arabic expressions.

[20] *Muhammad Hamid* v. *Mian Mahmud*, (1922) 50 I. A. 92, 103 ; s. 458, *ill.* (1)(*k*) ; s. 408, *ill.* (8) ; s. 49(4). I. KHANQAH = Muslim religious institution (for instruction of pupils in faith of Islam) analogous in many respects to *math* where Hindu religious instruction given : *Vidya Varuthi Thirtha* v. *Balusami Ayyar*, (1921) 48 I. A. 302, 312. *Khanqah*, generally founded by a DERVISH or SUFI, professing esoteric beliefs, whose teachings & personal sanctity have attracted disciples, whom he initiates into his doctrines. After his death he is often revered as saint, & his humble TAKIA (or abode)—see *Husain Shah* v. *Gul Muhammad*, (1924) 6 Lah. 140, 148—grows into *khanqah* & his DARGAH (or tomb) into RAUZA (or shrine). II. *Khanqah* usually under governance of SAJJADANISHIN (= one seated on prayer mat : s. 457(8).), who acts not only as *mutawalli* (or manager) of institution, & adjoining mosque, but also is spiritual preceptor of adherents. III. Founder generally first *sajjadanishin* : after his death spiritual line (*silsila*) extends through number of *sajjadanishins*, generally members of his family chosen by him, or according to directions given by him in life-time, or selected by *faqirs*—*Husain Shah* v. *Gul Muhammad*, (1924) 6 Lah. 140, 148—& *murids* ; & formally installed ; *Munnavaru Begam* v. *Mir Manapalli*, (1918) 41 Mad. 1033, 1035. IV. INCOME of institution usually received & expended by them (viz. *sajjadanishins*) : per Lord Cave, *Muhammad Hamid* v. *Mian Mahmud*, (1922) 50 I. A. 92, 96 (LAH.), approving *Piran* v. *Abdool Karim*, (1891) 19 Cal. 203. *Mohiuddin* v. *Sayiduddin*, (1893) 20 Cal. 810 ; *Vidya Varuthi Thirtha* v. *Balusami Ayyar*, (1921) 48 I. A. 302, 312, 315, 322 (MAD.) (SAJJADANISHIN is curator of dargah where his ancestor buried ; in him is supposed to continue spiritual line (*silsila*) : head of shrine or *dargah*, like that of *khanqah* is called *sajjadanishin* : governance (*towliat*) of endowment in his hands ; he is *mutawalli* with duty of imparting spiritual instruction to those who seek it) : *Ghulam Muhammad* v. *Abdul Rashid*, (1933) 14 Lah. 558 ; *Mahomed Oosman* v. *Essack*, [1933] Bom. 184. Head of *khanqah* called *sajjadanishin*. He is (i) teacher of religious doctrines & rules of life ; (ii) manager of institution ; (iii) administrator of its charities ; (iv) has in most cases larger interest in usufruct than ordinary *mutawalli* (p. 312). *Sajjadanishin* has no right in property belonging to *wakf* : property not vested in him : he is not trustee in technical sense. V. SAJJADANISHIN : *Mian Bakhsh* v. *Allah B.*, (1926) 8 Lah. 111 ; *Miran Bakhsh* v. *Ghulam Nabi*, (1933) 14 Lah. 625 (Khanqah Godar Shah at Kastiwal Gurdashpur, Punjab) ; *Bikani Mia* v. *Shuk Lal Poddar*, (1892) 20 Cal. 116, 151, par. 3 (preceptor called PIR & disciple MURID. Privilege of initiation = making *murids*, imparting to them spiritual knowledge, is one of functions that *sajjadanishin* performs or supposed to perform) ; *Jewun Doss* v. *Shah Kubeerooddeen*, (1840) 2 Moo. I. A. 390, 423 ; *Zooleka B.* v. *Syed Zunul Abedin*, (1904) 6 Bom. L. R. 1038, 1068 = s. 458, *ill.* (5) ; *Syed Shah Muhammad Kazim* v. *Syed Abi Saghir*, (1931) 11 Pat. 288, 359 citing *Kulb Ali*

(7B) a dargah [21] is a shrine or tomb [22] of a person honoured after his death as a saint ; SECTION 457. Dargah.

(7C) an imambara resembles a mosque, but unlike a mosque, it is not necessarily a public place of worship ; [23] Imambara.

(8) a sajjadanishin is a spiritual preceptor ; he may or may not be also the mutawalli of wakf property ; [24] Sajjadanishin.

Hussain v. *Syf Ali*, (1814) Sel. Rep. (S. D. A.) 139 ; (*Mt.*) *Quadira* v. *Shah Kabir-uddin*, (1924) 3 Sel. Rep. (S. D. A.) 544.

[21] DARGAH = "The shrine of a (Muhammadan) saint, a place of religious resort & prayer" (Yule). Word mentioned by Hodges, *Travels in India* (1793): "On some of the highest of these hills I observed *durgaws* or burial places with little chapels annexed belonging to the Musulmans." Word of Persian origin = "The King's Court, a port, portal, gate, door. The lower threshold, a court before a palace or great house ; a large bench or place for reclining upon ; mosque" see Wilson, *Glossary*, Johnson, *Arabic Dictionary*. *Ghulam Muhammad* v. *Abdul Rashid*, (1933) 14 Lah. 558 ; *Zooleka B.* v. *Syed Zunul Abedin*, (1904) 6 Bom. L. R. 1056, 1067, *l.* 7 ; *Mahomed Oosman* v. *Essack S. M.*, [1938] Bom. 189 (= s. 484, com., p. 608, *n.* 18).

[22] *Munnavaru Begam Sahebu* v. *Mir Mahapalli S.*, (1918) 41 Mad. 1033, 1037 (ASTANA = place inspiring respect & reverence, not necessarily indicating tomb or shrine ; though popularly = tomb or shrine).

[23] *Mohammad Yusuf* v. *Mohammad Shafi*, (1934) 33 All. L. J. 40 ; *Delrus Banoo* v. *Kazee Abdoor Ruhman*, (1875) 23 W. R. 453.

[24] *Sahib-e-sajjada, gaddinishin*, are variants. See ss. 11 B, 458(7A) *n.*, *Sec. of St.* v. *Mohiuddin Ahmed*, (1900) 27 Cal. 674 ; *Piran* v. *Abdool Karim*, 19 Cal. 203 ; *Zoolekha B.* v. *Syed Zunul Abedin*, (1904) 6 Bom. L. R. 1058 ; *Munnavaru B. S.* v. *Mir Mahapalli*, (1918) 41 Mad. 1033, 1037 ; *Syed Shah Md. Kazim* v. *Syed Abi Saghir*, (1931) 11 Pat. 288, 346 ; REMOVAL of SAJJADANISHIN ib. 347. *Sajjada Shah* v. *Shaw Habit*, (1919) 53 Ind. Cas. 677 = s. 491, *ill.* 3 (so called *sajjadanishin*, without any disciples (680) ; ceremonies to secure homage of IGNORANT MUSLIMS of neighbourhood (679) ; judgment of Abdur Rahim, J., very instructive : as report not easily available, full statement given : grant in 1776 of two villages to holy man, Hazrat Khaja Rahmatulla, for feeding poor : eight other villages transferred for nominal price, to be dedicated for poor & mosque : tomb of grantee (founder) gained considerable sanctity, so as to overshadow mosque. "There could be little doubt that pious founder himself would have been much surprised at the way his original objects were getting transformed : no doubt main intention by endowment to maintain mosque built by founder, in efficient condition, as house of prayer, so that religion of Islam might spread. Extent to which original objects which Khaja Sahib had in view, obscured in sixties appeared from prominence acquired by performance of *urs* & *fatihas* at tomb as feature of institution." "That, it is needless to point out, could not have been within the contemplation of the founder himself. When we come to more recent times, we find that the so-called *sajjadanishin* for the time being began to treat the *wakf* properties as if they were his private properties. Only some of the religious CEREMONIES were kept up, which no doubt SERVED TO SECURE THE HOMAGE OF THE IGNORANT MUSSULMANS OF THE NEIGHBOURHOOD for the holder of the office & his family... The mismanagement & misappropriation... became more & more flagrant....coming to a head."....Consequently appellant's removal directed by H. CT. "from the headship of the institution to which office the designation of *sajjadanishin* or rather *sajjada* was erroneously attached." H. CT. sent down issues whether functions of *sajjadanishin* in any way of a spiritual nature, & distinct from those of ordinary *mutawalli* & found that functions of "the so-called *sajjadanishin's* office were not, of spiritual or religious nature in any sense & that they had no disciples & no doctrines of Sufiism or anything else to teach....All that they had to do was to conduct the annual *urs* & to offer *fatihas* at tombs & none of these could be said to be functions incapable of being performed by other Muhammadans." [cf. *Mahomed Oosman* v. *Essack*, [1938] Bom. 184] Rahim, J. concludes : "wholly superfluous to retain the office of the so-called *sajjadanishin* in addition to that of a trustee or *mutawalli*. The term *sajjadanishin* is an absolute misnomer in connection with this institution, though this is not the only instance in which I have found the word wholly misapplied in this presidency : see for instance *Dost Muhammad Khan* v. *Nazir Ali Saheb*, (1917) 42 Ind. Cas. 474 = 6 L. W. 134.

SECTION 457.
Mujawar.

(8A) a mujawar is a caretaker of a shrine or mosque, or similar institution ; he may also sweep the premises ;[25]

Charity.

(9) "charity" means any purpose recognized by the Muslim law as religious, pious or charitable or any object of public utility ;[26]

Completing or perfecting wakf.

(10) the dedication of a wakf is said to be "completed" or "perfected" or property is said to be dedicated (by way of wakf) when all that the law requires for making the property subject to or impressed with the wakf, is complied with, so that the objects of the wakf must be given effect to in accordance with the directions of the wakif, or the dedication of wakf.[27]

The Mutawalli may be called a trustee; but his position is that of a superintendent, or manager, or receiver and not that of a trustee in whom the property is absolutely vested ; therefore a deed by which a mutawalli is appointed does not need to be registered.[1] He is trustee only of the usufruct : the corpus is "tied up" (made wakf of) but not transferred to him : s. 366A.

—WAKF UNDER TEXTS.

The following is taken from Syed Ameer Ali's learned work, which is particularly full on wakf, and to which and two of his memorable judg-

Early history. Tradition of Prophet. Definitions.

The attempt made by the defendant who has been guilty of every conceivable act of mismanagement in connection with the trust, to bolster up his position on the strength of the designation of *sajjadanishin* is utterly wanting in *bona fides*. His evidence in support of his pretensions is transparently false."

[25] See s. 11B ; *Allah Rakhi* v. *Mohammad Abdul Rahim*, (1933) 61 I. A. 50 (ALL.) ; *Munnavaru B. S.* v. *Mir Mahapalli*, (1918) 41 Mad. 1033, 1037 ; *Mahomed Oosman* v. *Essack*, [1938] Bom. 184 (= p. 608, *n.* 18).

[26] So that CHARITY includes (*a*) maintenance & support wholly or partially of *wakif's* FAMILY, children or descendants, & (*b*) if *wakif* is Hanafi, maintenance & support wholly or partially of (i) his family, children & descendants & also (ii) his own maintenance & support during his life-time or payment of his debts out of rents & profits of property dedicated—Wakf Act, 1913. But these purposes are NOT PERPETUAL. See s. 457(4A). Prior to Wakf Act it had been laid down that "CHARITABLE, PIOUS or RELIGIOUS purposes must be understood in their ordinary & natural meaning, i.e. in sense analogous to that of English law ;" (*Muthukana Ana*) *Ramanandham* v. *Vada Leevai*, (1909) 34 Mad. 12, 16 affirmed (1916) 44 I. A. 21 ; *Ibrahim Khan Ahmed Sayed Khan*, (1910) 7 All. L. J. 761, meaning of "CHARITY" elaborately considered : Karamat Husain, J. See also *Sayed Mustafa* v. *Amina B.*, (1904) 2 All. L. J. 519 ; (*Saiyed*) *Shabbir Husain* v. *Shaikh Ashiq Husain*, (1929) 4 Luck. 429. Charity under English law ; *D. I. Attia* v. *M. I. Madha*, (1936) 14 Rang. 575. "CHARITABLE" always involves RELIEF OF POVERTY : *Commrs. of Inc. Tax* v. *Pemsel*, [1891] A. C. 531, 552 (par. 3) : see s. 469A, com.

[27] See s. 462.

[1] *Muhammad Rustam Ali* v. *Mushtaq Husain*, (1920) 47 I. A. 224 ; *Vidya Varuthi Thirtha* v. *Balusami Ayyar*, (1921) 48 I. A. 302, 315 (on dedication taking place property not conveyed to *mutawalli*. Whatever property *mutawalli* holds for institution, he holds as manager with certain beneficial interests regulated by custom & usage. Curator whether called *mutawalli* or *sajjadanishin* or by any other name is merely manager. He is certainly not "trustee" as understood in English system).

[2] *Bikani Mia* v. *Shuk Lal Poddar*, (1892) 20 Cal. 116 (dissenting judgment); *Mahomed Israel K.* v. *Shasti Churn Ghose*, (1892) 19 Cal. 412 ; *Doe dem. Jaun Bebee* v. *Abdollah Barber*, (1838) 1 Fulton 345 (long note from D'Hosson, *Tabl. Gen. de L'Emp. Othom.* I. 309, ch. 4, p. 280, s. 3, ch. 5, Vol. 1, p. 307 ; also opinion of two Moulavis).

ments all authors writing after him on wakf must be indebted : "The validity of wakfs, says the Ghait-ul-Bayan, is founded on the rule laid down by the Prophet himself, under the following circumstances, and handed down in succession by Ibn Auf, Nafe and Ibn Omar, as stated in Jamaa-ut-Termizi : Omar had acquired a piece of land in (the canton of) Khaibar, and proceeded to the Prophet, and sought his counsel to make the most pious use of it, (whereupon) the Prophet declared, 'tie up the property (asl— corpus) and devote the usufruct to human beings ;[3] and it is not to be sold or made the subject of gift or inheritance ; devote its produce to your children, your kindred, and the poor in the way of God.' In accordance with this rule, Omar dedicated the property in question, and the wakf continued in existence for several centuries, until the land became waste."[4]

SECTION 457.

a.—Asl or ayn : *b.*—Usufruct.

In the following definitions of wakf note that the distinction between corpus and usufruct is scrupulously observed throughout.

1. "Wakf in its primitive sense means detention. In the language of the law according to Abu Hanifa—(i) "It signifies the appropriation of any particular thing [corpus] in such a way that (*a*) the appropriator's right in it shall continue,[5] and (*b*) the advantage[6] of it go to some charitable object ;"[7] or (ii) It "is[8] the (*a*) detention[9] of a specific thing [corpus] in the ownership of the wakif or appropriator, and (*b*) the devoting or appropriating of its profits or usufruct in charity, on the poor, or other good objects[10] in the manner of an ariyat,[11] or commodate loan."[12] According to the two disciples of Abu Hanifa—(i) "Wakf signifies the appropriation of a particular article [corpus] in such a manner as subjects it to the rules of divine property, whence (*a*) the appropriator's right in it is extinguished, and it becomes a property of God by (*b*) the advantage (usufruct) of it resulting to His creature ;[13] or (ii) "Wakf is (*a*) the detention of a thing [corpus] in

2.—HANAFI LAW : *a.*—Abu Hanifa : Wakif's right of ownership continues.

b.—His disciples : transference to God.

[3] See s. 366A.

[4] Ameer Ali, *Mah. Law* I. 125 (192).

[5] See however s. 464. Abu Hanifa's view is not followed.

[6] *Advantage* is rather vague : the rendering *profits* or *usufruct* (Bail. I. 549 (557) cited below) is more definite : s. 366A : but word *advantage* as rendering of *manafi* is suggestive as a bridge between *manafi* & "rights not amounting to full ownership" ; *jus in re aliena.*

[7] Hed. 231 : adding "meaning always of a pious or charitable nature."

[8] Bail. I. 549 (557).

[9] "The meaning of the word [WAKF] as given in the dictionaries is merely 'detaining' or 'stopping.'" Bail. I. 345 (557) *n.*

[10] "Mr. Hamilton has unnecessarily restricted the legal meaning to APPROPRIATIONS of a 'pious or charitable nature.' (*Hedaya*, II. 339 *n.* = Hed. 231) ; & he has been followed by Sir William Macnaghten, who renders the word by 'ENDOWMENT.' But it will be seen hereafter that the term is more comprehensive, & includes settlement on a person's self" [under Hanafi law], "& children."—Bail. I. 549, *n.* 3 (557).

[11] "'In the manner of an ARIYAT (see s. 433, com.) or commodate loan.' Bail. I. 544 (557) i.e. COMMODATUM in which "the thing is not so given to him as to become his, & therefore he is bound to restore the thing itself"—Just. 3, 14, 2 : In fact what is given is the use or benefit of *corpus*, which would continue to be property of original owner, but that, he renounces his powers over it by dedication. But *usufructus* is nearer to *ariyat* than *commodatum* : Hunter's *Rom. Law*, (3rd ed.) 475, 396-409. See also s. 366A.

[12] Bail. I. 549 (557).

[13] Hed. 231, Bail. I. 549 (557).

SECTION 457. the implied ownership of Almighty God in such a manner that (*b*) its profits (usufruct) may revert to or be applied for the benefit of mankind." [14]

3.—SHIA definition : transferred to beneficiary.

2. The Sharaiu'l-Islam says (Shia law): "Wakf is a contract the fruit or effect of which is (*a*) to tie up the original and (*b*) to leave its usufruct free" : [15] "the wakf or subject of appropriation [corpus] is transferred, so as to become the property of the mowkoof alehi, [or 'person on whom the settlement is made'] for he has a right to the advantage or benefits [usufruct] to be derived from it." [15] "It is a transfer of property and is like a permission to take the usufruct....it implies a pious intention" [16] The fact that both deal with the usufruct shows the connection between wakf and ariyat.[11] See ss. 366A, 443.

3. The definition contained in the Wakf Act is given in s. 456.

4.—Privy Council decisions differed from Texts.

The law of wakf as laid down in the decisions of the Privy Council [17] prior to the Wakf Act, 1913, diverged materially from Hanafi texts.[18] But, "the eyes ('fore duteous) now converted are, and look another way."

Religious motive in wakf.

One essential feature of wakf is that it is made with a religious motive—a desire to approach God. Approach to God may be made only by an act that is meritorious in Islam.[19] Thus sadaqa (or gift made with a desire to

[14] Bail. I. 550 (558).

[15] Bail. II. 211, 230, (*first*) 219 (*third*): this definition resembles that of Abu Hanifa, who holds however that ownership not transferred from *wakif*, but remains in him as in *ariyat* (cf. Bail. I. 549 (557), *Sharaiu'l-Islam* (Shia text) considers ownership of corpus transferred to beneficiaries. This results in difference also on point of revocability : under Shia law it is irrevocable : Abu Hanifa holds it revocable unless there is decree of Court, after which "the right of the appropriator abates" : Bail. I. 546 (555). But it should not be overlooked that question about ownership of property after dedication, refers merely to *scintulla juris*, supposed to remain undisposed of, although entire usufruct, (all benefit, profits, &c.) are assigned away. Question in whom property rests, therefore entirely academical : s. 366A.

[16] Bail. II. 217, *ll.* 9-12. To appreciate full significance of this, see s. 443, com. Hed. 478 & Shafii's objection to Hanafi definition or *ariyat* : leading to his classing *ariyat* simply as license to use property of another, settled with word *ibahit*. = license or permission.

[17] See e.g. *Tahiruddin Ahmad* v. *Masiuddin A.*, (1933) 60 Cal. 901.

[18] Leading case *Abul Fata* v. *Rasamaya*, (1894) 22 I. A. 76 = 22 Cal. 619. "Their Lordships have endeavoured to the best of their ability to ascertain & apply the Muhammadan law as known & administered in India, but they cannot find that it is in accordance with the absolute, & as it seems to them extravagant, application of abstract precepts taken from the mouth of the Prophet. Those precepts may be excellent in their proper application. They may, for aught their Lordships know, have had their effect in moulding the law & practice of *wakf*, as the learned judges say they have. But it would be doing wrong to the great law-giver to suppose, that he is thereby commending gifts for which the donor exercises no self-denial." Then follows passage on family wakfs & grounds on which they were condemned, cited in s. 366A, com. In this decision their Lordships seemed to refer for the law not to the recognized texts of Muhammadan law but to what must have been in mind of the Prophet—apparently in disregard of principles on which decisions usually given. See ss. 11, 12, 10, com., referring to conflict between customs & law. The underlying grounds of decision were no doubt rule against perpetuity & effect that family *wakfs* may have on rights of creditors.

[19] *Abdul Wahab* v. *Sughra Begam*, (1931) 54 All. 455 [1932] A. L. J. 171 (provision for the salary & pension of servants, valid) ; Bail. I. 550 *ll.* 7-10 (558) "detention of a thing in the implied ownership of Almighty God in such a manner that its profits may revert to or be applied for the benefit of mankind," Bail. II. 214 (*third*) 215 (par. 2) (charity allowable by one who has attained 10 years hence also *wakf*).

approach God, quicquid datur Deo sacrum, ut pars opum,)[20] may be made equally to the rich and the poor ; [21] and similarly wakf may strictly be made for any object not prohibited by Islam : Wakf Act, s. 2(1). SECTION 457.

5.—FAMILY WAKFS :

a.—Grounds on which condemned.

The Privy Council had prior to the Wakf Act, 1913 laid down that whether a particular object is to be deemed charitable must be decided in accordance with the definition of charity under English law. "A family wakf" had been characterized [22] as a gift "(i) for which the donor exercises no self-denial ; (ii) taking back with one hand what he appears to put away with the other ; (iii) forming the centre of attraction for accumulation of income and further accessions of family property ; (iv) carefully protecting so-called managers from being called to account ; (v) seeking to give to the donors and their family the enjoyment of property, free from all liability to creditors ; (vi) and not seeking the benefit of others beyond the use of empty words.[22] The form that a wakf alal aulad often takes in our times in India is no doubt open to several of these objections. But (1) except under Abu Yusuf's exposition of Hanafi law, no school of law permits the wakif to take any benefit under the wakf,—so that the gravamen of the criticism cannot apply to a wakf made in accordance with any other exposition of the law. Nor (2) is it correct to say that the donor exercises no self-denial : for even where, being governed by the Hanafi law, the wakif reserves the life-interest to himself, it is impossible for him to deal with the corpus of the property ; and few persons are so happily placed as to be able to part with this power without the feeling that it may cause them great inconvenience in unforeseen times of need. Next, (3) an important point has been overlooked when it is said that a wakf does not "seek the benefit of others beyond the use of empty words" : a wakf by way of a family settlement is the only mode in which two classes of descendants whom Islam takes specially under its protection—women and orphans—can often be provided for. The children of predeceased children, and of women, are in many cases excluded from inheritance and under a wakf they are often given shares with the other descendants and unless it is otherwise provided, men and women share equally.

b.—Wakif can benefit under wakf only under Abu Yusuf's exposition of Hanafi law.

c.—Self-denial by wakif.

d.—Charity underlying family settlements.

The Wakf Act, 1913, has brought the law more into accord with the original texts : though the power to make family settlements in perpetuity requires under modern conditions some check. "A wakf for a family settlement creates," it has been observed,[23] "a perpetuity of the worst description, for it prevents the alienation of the house for ever, and necessitates its use in a manner which the natural increase in the number of descendants would probably render impossible, even if they should be willing (which could hardly be expected) to live amicably under one roof throughout all generations. The absurdity of the settlement is sufficiently shown by the circumstance

e.—Evils of family settlements in perpetuity

[20] Freytag, cited in Bail. I. 545, *n.* 1 (554).

[21] Bail. I. 545 (554) (*l.* 6).

[22] *Abul Fata Md. Isak* v. *Rasamaya Dhur C.*, (1894) 22 I. A. 76 = 22 Cal. 619, 632. Cf. s. 366A, com.

[23] *Abdul Ganne Kasam* v. *Hussen M. Rahimtulla*, (1873) 10 Bom. H. C. R. 7, 10.

SECTION 457. that even during the life-time of the executing parties, family quarrels arose which rendered it impossible for them to continue to live together."

f.—Family settlements or agreements : i—construction :

Deeds in the nature of family settlements[24] may be "based on the assumption that there was an antecedent title of some kind in the parties, and the agreement acknowledges and defines what that title is."[25] They are construed in view of the object underlying them. Thus if a grant is for maintenance, that fact may, but does not necessarily, indicate, that it is for life only. Conditions may be inserted in family settlements which would not be valid or enforceable in ordinary deeds under ordinary law.[26] Family

ii—favoured.

arrangements are specially favoured :[27] but it would seem that a family arrangement implies that all the members of the family have agreed upon some settlement whose object is to promote goodwill amongst themselves,[28] and nothing in the nature of undue influence has been exerted.[29] A de facto guardian is not clothed for this purpose with the authority of a legal guardian.[30] Provisions for individuals may be a charitable object.[31] The validity of a settlement of a family dispute is not determined by the strength or validity of the claims of the parties.[32] A relinquishment or renunciation of a future right of inheritance is not in itself valid. It is not binding in this sense that the estate does not pass to the person in whose favour the renunciation is made. Yet there is nothing to prevent an heir from not claiming a share in the property which has devolved on him, or from so acting as to estop himself from claiming it.[33]

6.—CHARITIES IN FORMS OTHER THAN WAKF.

Wakf is perhaps the most prominent form that charity[34] takes amongst Muslims. But it has sometimes been the cause of a misapprehension that every charitable disposition must be classed as a wakf.[35] A gift being made

[24] See s. 352, com.

[25] *Rani Mewa Kuwar* v. *Rani Hulas Kuwar*, (1874) 1 I. A. 157, 166 (OU.); *Khunni Lal* v. *Gobind Krishna*, (1911) 38 I. A. 87, 103 (ALL.); (*Mt.*) *Abbas Bandi B.*, v. *Saiyad Md. Raza*, (1929) 4 Luck. 452, 473.

[26] *Chaudhry Ahmad Azim* v. *Chaudhry Safi Jan*, (1926) 2 Luck. 335.

[27] *Muhammad Raza* v. *Abbas Bandi*, (1932) 59 I. A. 236, 246. FAMILY SETTLEMENTS, conditions in : *Chaudhry Ahmad Azim* v. *Chaudhry Safi Jan*, (1926) 2 Luck. 335, *Mohammad Ejaz Husain* v. *Mohammad Iftikhar H.*, (1931) 59 I. A. 92 (OU.) (award affecting minors acted on for number of years : this fact does not make it binding as FAMILY ARRANGEMENT); *Latif Jahan B.* v. *Mohammad Nabi K.*, [1932] 30 All. L. J. 9 (FAMILY SETTLEMENT promoting GOODWILL between daughter-in-law & her husband); *Ghulam Mohammad* v. *Ghulam Husain*, (1931) 59 I. A. 74, 87, 88 ; *Syed Zainuddin* v. *Moulvi Mohammad Abdur Rahim*, (1932) 36 C. W. N. 973 = [1933] AIR (CAL.) 102 (arrangement cannot affect properties which were not properties of family but of endowment). See s. 369, com.

[28] *Latif Jahan Begam* alias *Sakkan Bibi* v. *Mohammad Nabi Khan*, [1932] 30 All. L. J. 9.

[29] *Sumsuddin Goolam Husein* v. *Abdul Husein*, (1906) 31 Bom. 165. See also *Mohammad Ejaz Husain* v. *Mohammad Iftikhar*, (1931) 59 I. A. 92 (OU.).

[30] *Anto* v. *Reoti Kuar*, [1937] All. 195 (F.B.). Sect. 230(3).

[31] *Abdul Wahab* v. *Sughra B.*, (1931) 54 All. 455, 457.

[32] *Azizul Hasan* v. *Mohammad Faruq*, (1933) 9 Luck. 401.

[33] *Latafat Husain* v. *Hidayat H.*, (1936) 58 All. 834, 839.

[34] WAKF is a species of gift : (*Khajah*) *Solehman* v. *Salimaullah*, (1922) 49 I. A. 153, 166 (CAL.); *Ma Mi* v. *Kallender*, (No. 1.) 54 I. A. 23.

[35] Cf. *Jainabai* v. *R. D. Sethna*, (1910) 34 Bom. 604 ; *Cassamally* v. *Currimbhoy*,

with a religious or charitable intention does not make it the less a gift though it is then termed sadaqa and being brought under the class of gifts with a return, it is irrevocable.[36] The Indian Trusts Act is applicable to Muslims, but it does not affect a trust for a charitable object, whether created in the form of a wakf or otherwise.

SECTION 457.

Indian Trusts Act.

A wakf and a trust have of course many things in common,[37] but they may be distinguished[38] in the following respects (1) wakf requires a religious motive ; necessity for such motive is all but forgotton by the Indian Courts, in giving decisions upon wakf cases.[39] Whether it is possible to give effect to the law as laid down in the Texts and to the requirements of a religious motive, is a different question.[40] (2) The author of a trust may be a beneficiary under it ; but except under the Hanafi law, the wakif may not reserve to himself any benefit under a wakf. (3) A trust may be made for any lawful object ; a wakf may be created only for charity[41] though its preliminary object may be a family settlement. (4) Any transferable property may be the subject of a trust : the Wakf Act, 1913, has brought the law of wakf and trust on the same footing in this respect. The texts are not unanimous, but they contain some limitations as to what may be the subject of wakf. (5) The mutawalli has, so far as the wakf property is concerned, more restricted powers than the trustee[42] has under the Indian Trusts Act, ss. 16, 20, 36, 40. The position of mutawallis is more analogous to that of receivers and managers appointed over property in England, who by virtue of their appointment have no estate (s. 443A *n.*) in the property which they are called upon to control ; and the appointment of others in the place of receivers and managers would by itself effect no transfer of ownership. The position of

7.—WAKF AND TRUST COMPARED.

a.—Motive.

b.—Benefit to wakif.

c.—Charity.

d.—Subject of *wakf*.

e.—Mutawalli.

Compared to i.—manager rather than ii.—trustee.

(1911) 36 Bom. 214 = 13 Bom. L. R. 717. On one point former decision altered on re-consideration.

[36] Cf. (*Muthukana Ana*) *Ramanadhan* v. *Vada Levvai*, (1909) 34 Mad. 12, 14, *wakf* & *sadaqa* compared & distinguished ; affirmed (1916) 44 I. A. 21 = 40 Mad. 116 (P. C.).

[37] Things common to WAKF & TRUST : e.g. (i) analogy of Indian Trusts Act, 1882, s. 88 applicable : *Muhammad Esuf* v. *Maulvi Abdul Sathur*, (1918) 42 Mad. 161 ; (ii) *Syed Ali Hussain* v. *Bibi Akhtari B.*, (1931) 10 Pat. 506 ; (iii) *Syed Shah Muhammad Kazim* v. *Syed Abi Saghir*, (1931) 11 Pat. 288, 337-341.

[38] *Ma Mi* v. *Kallandar* (No. 1), (1926) 54 I. A. 23, 27 ; *Syed Shah Muhammad Kazim* v. *Syed Abi Saghir*, (1932) 11 Pat. 288, 337 ff. : *Sattappa* v. *Mahomed Saheb*, (1935) 60 Bom. 516, 532 ; *Shailandranath Palit* v. *Hade Kaza Mane*, (1931) 59 Cal. 586.

[39] See, however, *Doyal Chund Mullick* v. *Keramut Ali*, (1871) 16 W. R. 116, 118 (par. 2, *l*, 4, elements of *wakf* : special declaratory words & "a proper MOTIVE cause," citing Bail. I. 551 (559).)

[40] See ss. 5D, 437 : perhaps law requiring existence of religious motive somewhat misunderstood.

[41] CHARITY : its significance very wide in Muslim law, particularly Shia law : *Saiyid Shabbir Husain* v. *Shaikh Ashiq Hussain*, (1929) 4 Luck. 429 (F. B.) ; *Balla Mal* v. *Ata Ullah Khan*, (1927) 54 I. A. 372, 374 (LAH.) : even before Act of 1913 made retrospective, P. C. said : test difficult : in applying it especially since passing of Act, Courts will NOT be disposed to CONSTRUE provisions of deed TOO STRICTLY.

[42] *Muhammad Rustam Ali* v. *Mushtaq Husain*, (1920) 47 I. A. 224, 232 (head-note wrongly states that *wakfnama* held not to require registration : wakfnama (of 1 Sep. 08) *was* registered : but trustee-nama of 9 Nov. 08 appointing trustees not registered : & held not to require registration ; cf. s. 489, com. ; ss. 490 ff.

SECTION 457. Mutawalli like i.—manager rather than ii.—trustee.

mutawallis is distinguishable from that of trustees. In trustees the property is absolutely the vested : though mutawallis are trustees in the general sense that every man is a trustee to whom is entrusted the duty of managing and controlling property that belongs to another.[43] The definitions by all authorities agree that " the property itself " is not transferred to the mutawalli : it remains either in the wakif or is transferred to God or to the beneficiaries : not being transferred to the mutawalli : he may be considered to be the holder or trustee of the usufruct (not the corpus) for the beneficiaries : s. 366A, com. He has control over the usufruct alone : and he has to see that the beneficiaries get the advantage of the usufruct. (6) The mutawalli may ask for reasonable remuneration, which the trustee may not (*ib.* s. 50). (7) A wakf is perpetual. (8) It is irrevocable. (9) Wakf property is inalienable. (10) A trust results for the benefit of its author when it is incapable of execution, or it does not exhaust the trust property ; in a wakf a general charitable intention may be presumed, and the cy pres doctrine applied unless a particular charitable intention is disclosed which cannot be given effect to : s. 457(4B).

f.—Remuneration.
g.—Perpetuity.
h.—Revocability.
i.—Alienability.
j.—Cy pres.

II. FORM OF DECLARATION OF WAKF. Writing not essential nor any special form.

458.[1] A dedication by way of wakf may be either oral[2] or in writing.[3] It may be in any appropriate words showing an intention[4] to dedicate the property[5] by way of wakf.[6] The use of the word wakf is neither essential[7] nor conclusive to

[43] See *Vidya Varuthi Thirtha* v. *Balusami Ayyar*, (1921) 48 I. A. 302, 311 (Syed Sahib Ameer Ali); *Muhammad Rustam Ali* v. *Mushtaq Husain*, (1920) 47 I. A. 224, 231 (though MUTAWALLI has not property transferred to him, he has sufficient interest to sue for it : really he is suing only for control over usufruct, however his interest in the property may be called); *Muhammad Qamar S. K.* v. *Muhammad Sulamat A. K.*, (1933) 55 All. 512 (MUTAWALLI CONSIDERED AS CO-SHARER under Agra Tenancy Act (Local Act) III. of 1926) ; *Allah Rakhi* v. *Muhammad Abdur Rahim*, (1933) 61 I. A. 50. *Saadat* v. *A.-G.*, [1939] A. C. 508 (mut. = manager).

[1] Sect. 458 cited & applied : *Saiyad Maher Husein* v. *Haji Ali Mahomed*, (1933) 36 Bom. L. R. 526, 536.

[2] *Ali Hammad* v. *Mohammad Nasir Ali K.*, (1929) 27 All. L. J. 517.

[3] *Ma E. Khim* v. *Maung Sen*, (1924) 2 Rang. 495, 511 ; *Shaikh Muhammad Ibrahim* v. *Bibi Mariam*, (1928) 8 Pat. 484 (when terms of *wakf* reduced to document no evidence can be given of those terms except document itself : Ind. Ev. Act, s. 91 ; Ind. Registr. Act, ss. 17, 49) ; *Shurbo Narain Singh* v. *Ally Buksh Khan*, (1863) 2 Hay, 415.

[4] Importance of INTENTION shown by such cases as *Sahu Har Prasad* v. *Fazal*, (1933) 60 I. A. 116 (ALL.) (= s. 477, *ill.* (6).) ; *Shaikh Muhammad Ibrahim* v. *Bibi Mariam*, (1928) 8 Pat. 484 ; *Zaffar Hussain* v. *Mohammad Ghias-ud-Din*, [1937] Lah. 276 (serai built out of funds set apart by munsif while distributing assets of deceased, not *wakf*, as no DECLARATION by owner dedicating). See also s. 346A.

[5] Dedicating property by way of *wakf* implies direction that its usufruct or profits (*manafi*) be applied in perpetuity to objects of *wakf*, & that property (*corpus*) itself be preserved : so that usufruct may be available for said objects ; cf. s. 366A.

[6] Bail. I. 541 (559), 558 (566-567). Provisions—(i) for upkeep of mosque & celebration of worship therein ; (ii) for benefit of settlor's family—may as matter of drafting be separate & severable dispositions : *Abdur Rahim* v. *Narayan Das*, (1922), 50 I. A. 81, 89 (CAL.).

[7] *Muhammad Hamid* v. *Mian Mahmud*, (1922) 50 I. A. 92, 104 ; *Piran* v. *Abdool Karim*, (1891) 19 Cal. 203-215 ; *Jewun Doss* v. *Shah Kubeerooddeen*, (1840) 2 Moo. I. A. 300 ; *Saliq-un-nissa* v. *Mati Ahmed*, (1903) 25 All. 418 (Shia law); *Mohammad Qasim* v. *Mohammad Mahdi*, [1937] AIR (OU.) 465.

show the intention so to dedicate.[8] Dedication may be inferred[9] from long user by way of wakf.[10] A scheme framed by the Court[11] may take the place of the dedication.[12]

SECTION 458. Dedication inferred from user.

(1) The following are valid dedications of wakf :[13]

Illustrations.

[8] *Abdul Ganne* v. *Hussen*, (1873) 10 Bom. H. C. R. 7; *Zoolekha B.* v. *Syed Zunul Abedin*, (1904) 6 Bom. L. R. 1058; *Muhammad* v. *Razia*, (1905) 32 I. A. 86 (ALL.); *Alimamma* v. *Amade Beari*, (1929) 58 M. L. J. 571; *Sheikh Ramzan* v. (*Mt.*) *Rahmani*, (1931) 7 Luck. 300, 309; *Shafiq-ud-din* v. *Mahbub Elahi*, (1930) 11 Lah. 633 (property called *takya*, held not proved to be *wakf*); *Mohammad Yusuf* v. *Mohammad Shafi*, (1934) 33 All. L. J. 40 (use of word *mutawalli* creates no inference of public trust); *Irfan Ali* v. *Offl. Recr.*, (1930) 52 All. 748; *Mohammad Qasim* v. *Mohammad Mahdi*, [1937] AIR (OU.) 465.

[9] Speaking of a public right of way, Luxmore, J. said : "such a right does not depend on USER, but on DEDICATION"—*Att. Gen.* v. *Mallock*, (1931) 146 L. T. R. 344, 346—a useful illustration.

[10] LONG USER : not from an isolated act : e.g. when cemetery is in question, one burial not enough : see *Ballabh Das* v. *Nur Mohammad*, [1936] AIR (P. C.) 83, 86 = 40 Cal. W. N. 449, 455 = s. 458, *ill.* (8) : *q. v.* (mere oral dedication as grave-yard may not be deemed complete until ONE BURIAL had taken place); *Zaffar Hussain* v. *Mohammad Ghias-ud-Din*, [1937] Lah. 276 (evidence of user considered). See s. 458, *ill.* (6); *Muhammad Waliul Haq* v. *Ludpud Upadhya*, [1937] 16 Pat. 389; *Muhammad Raza* v. *Yadgar Hussain*, (1924) 51 I. A. 192, 193 (CENTR. PROV.) (ACTINGS OR STATEMENTS OF GRANTEE or his successor may be lawfully taken into account as to INTERPRETATION OF ORIGINAL GRANT by them : method in which property treated in administrative RECORDS may also throw light on same problem; these things not conclusive but circumstances worthy of consideration); *Muhammad Hamid* v. *Mian Mahmud*, (1922) 50 I. A. 92 (LAH.) (see cases cited in *arg.*; evidence summarized, p. 103); *Munnavaru Begam Sahebu* v. *Mir Mahapalli*, (1918) 41 Mad. 1033, 1034, (Abdur Rahim, J.); *Court of Wards* v. *Ilahi B.*, (1912) 40 I. A. 18 (CAL.) = *Makhdum H. B.* v. *Ilahi B.*, [1913] P. R. No. 23, p. 93; *Bunting* v. *Sargent*, (1879) 13 Ch. D. 330, 335 (Jessel M. R.), followed *Adv. Gen.* v. *Yusufalli*, (1921) 24 Bom. L. R. 1060, 1089, *Miran Baksh* v. *Ghulam Nabi*, (1933) 14 Lah. 624 (dedication inferred from descent through 13 generations not to natural heirs but to succession of *gaddinishins* : *Indar Singh* v. *Fateh Singh*, (1920) 1 Lah. 540 followed : *gaddinishins* having been described as owners in REVENUE RECORDS, held of no great significance); *Mehraj Din* v. *Ghulam Muhammad*, (1931) 12 Lah. 540 (when long period elapsed from dedication, user can be the only available evidence whether property *wakf*); *Chhutkao* v. *Lala Gambhir M.*, (1930) 6 Luck. 452; (land used as burial ground, *wakf*), distinguished in *Baqar Khan* v. *Babu Raghoindra P. S.*, (1934) 9 Luck. 568 (evidence of user must be such that dedication may be presumed from it : burial of members of family in village owned by Hindu cannot raise presumption of *wakf*); *Noor Mohammad* v. *Ballabh Das*, (1931) 7 Luck. 198 (user as cemetery) on app. [1936] AIR (P. C.) 185 = s. 458, *ill.* (8); *Abul Hasan* v. *Haji Mohammad Masih Karbalai*, (1831) 5 Sel. Rep. 87(O.); 104(N.) (referred to in *Bikani Mia* v. *Shuk Lal Poddar*, (1892) 20 Cal. 116, 151); *Muhammad Esuf S.* v. (*Moulvi*) *Abdul Sathur S.*, (1918) 42 Mad. 161 (F.B.) (mosque); *Saiyad Maher Husein* v. *Haji Alimahomed*, (1933) 36 Bom L. R. 526; *Muhammad Waliul Haq* v. *Ludpud Upadhya*, [1937] 16 Pat. 366 (right to bathe in Saptadhara Kund = pool); *Fakhruddin* v. *Kifayat-ul-lah*, (1910) 7 All. L. J. 1095; *Abdul Ghafur* v. *Shiam S.*, (1912) 17 Ind. Cas. 303 (mere appropriation of rents & profits for charity may not be sufficient proof of dedication); cf. *Ismail* v. *Wahadani*, (1911) 36 Bom. 308; *Mahomed Ismail A.* v. *Ahmed M. D.*, (1916) 43 Cal. 1085, 1100; *Ghulam H.* v. *Gulzari*, (1912) 15 Ind. Cas. 42 (mere recital in deed that income of certain properties be spent for charity not sufficient); *Mutu Ramanadan Chettiar* v. *Vava Levvai Marakayar*, (1916) 44 I. A. 21, 27 (par. 3) = 40 Mad. 119, 122 (line 12 from bottom). See also s. 462, *Expl.* 1.

[11] See Civ. Pro. Code, s. 92 = s. 519B of this work.

[12] E.g. in *Mahomed Oosman* v. *Essack Md.*, [1938] Bom. 184 (= p. 608, *n.* 18.).

[13] Bail. I. 558 (556-567). Translation of deed of Arkam (an immediate disciple of the Prophet) dedicating "usufruct & proceeds of his house to his children"; "his descendants living in it, letting it out on hire & they alone appropriating its proceeds" : *Bikani Mia* v. *Shuk Lal Poddar*, (1892) 20 Cal. 116, 140.

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Illustrations.

Valid dedications.

(*a*) "This my land is a perpetually[14] endowed charity for the benefit of the poor."[15]

(*b*) "This my land is endowed for the poor."[15]

(*c*) "This my land is endowed for meritorious purposes."[16]

(*d*) "I devote this room of mine for the oil of such a mosque."[16]

(*e*) "This my land is a sadaqa or charity freed[17] (or detained) and perpetual,[15] during my life and after my death."[17]

(*f*) "This my land is a sadaqa endowed and tied up in perpetuity[14] during my life and after my death."[17]

(*g*) "This my land is wakf."[15]

(*h*) "This my land is dedicated to God Almighty for ever."[17]

(*i*) "This house is free[17] [i.e. from the claims of the wakif's heirs] for the mosque [the mosque being specified] on my death :"[15] s. 459.

(*j*) "I have made this house of mine free[17] for the leader (Imam) of such a mosque that he may pray and keep fasts on my behalf. [This expression makes the house wakf although its income is not sufficient for his prayers and fasts.]"[15]

(*k*) "I have made over this property to the Sajjadanishin[18] specifically for the expenses of the Khanqah."[19] But the word 'towliat' may be correctly translated "mastership" : it does not necessarily mean any spiritual office : mere use of the word does not impress the property with any trust or wakf.[20]

(*l*) "Ye should purchase from the rent of this house of mine every month ten dirhams' worth of bread and distribute it among the poor."[15]

(2) A dedication, not being for a religious purpose, may take the form of a deed, made with the consent (therein recited) of the OFFICIAL TRUSTEE, assigning to him the wakf property, upon the terms of his applying the income thereof for the objects of the wakf.[21]

(3) A dedication for a charitable, but not exclusively for a religious purpose, may take the form of a SCHEME settled by the LOCAL GOVERNMENT,

[14] Word perpetual unnecessary according to Wakf Act, 1913, as well as generally accepted view : Bail. I. 558 (par. 2) (567); s. 463. If he stops at word *sadaqa* without adding "& perpetual" there the disposition is not by way of *wakf*, but is *sadaqa* (s. 537) : *Bahr-ur-Raiq*, V. 205. But see s. 5c.

[15] Bail. I. 578 (588). Who are poor ? : *Bahr-ur-Raiq*, *Wakf*, V. 205-206 transl. by Karamat Husain, J. : *Fakhruddin* v. *Kifayatullah*, (1910) 7 All. L. J., 1095, 1009, 1111 ; *Mutu Ramanadan Chettiar* v. *Vava Levvai Marakayar*, (1916) 44 I. A. 21 (MAD.) (alms giving, p. 24).

[16] *Bahr-ur-Raiq* V. 205-206 : *Mahomed Ally* v. *Lakhmichand*, [1929] AIR (SIND) 52, to the contrary, is (*submitted*) erroneous.

[17] Cf. Bail. I. 558 (566-7)—"freed" viz. from alienation & liability to be inherited by heirs of *wakif* ; (see *ill.*) ; "detained" is translation of *wakf* : property is detained, or preserved against alienation or inheritance : see s. 456, *n.* 2 ; s. 457(1).

[18] *Piran* v. *Abdool Karim*, (1891) 19 Cal. 203.

[19] (i) *Jewun D. S.* v. *Shah Kubeerood-deen*, (1840) 2 Moo. I. A. 390 (based on *royal firmans* establishing a *khanqah*) ; *Muhammad Afzal* v. *Muhammad Mahmud*, (1925) 24 A. L. J. 307. (ii) SANADS : (1938) xvi. Bom. L. Journ. 258 ff ; (iii) *Maina* v. *Brijmohun*, (1890) 12 All. 587, 589 = 17 I. A. 187 (Mogul Emperor's order re Bisram ghat in favour of Hindu temples).

[20] *Zooleka* v. *Zunul Abedin*, (1904) 6 Bom. L. R. 1058, 1068 (*touliyat* or *muttawallishiр*) 1069, bottom.

[21] Official Trustees Act, XVII. 1814, s. 8.

on the application, and with the concurrence of the wakif for the administration of the wakf property.[22] SECTION 458.

(4) A SANAD of Shah Jahan, dated 1651, granted a village and other land in inam to one Syed Hasan,[23] "settled and conferred manifestly, and knowingly for means of subsistence of the children of the said Syed Hasan.... that they may engage themselves in praying for this ever-enduring Government;" *held*, that this grant did not constitute a wakf, that the property was not descendible per stripes, nor would the grant be forfeited or avoided by neglect to pray for the said Government, nor by its downfall.[23]

(5) One Syed Ahmad Rafai (*fl.* Busreh, circ. 500 A..H.) a SUFI TEACHER eminent in Arabia, was the founder of the family. He came to be called PIR. His descendants imputed to themselves religious attributes, and took upon themselves the office of spiritual teachers (SAJJADANISHINS) which was transmitted not by descent, but by appointment by the last holder. The sajjadanishin made disciples, who made offerings, or presents (NAZRANA). *Held*, that nothing specific having been done to dedicate the property thus acquired to charitable or religious uses, it was the private property of the sajjadanishin descendible on his heirs.[24]

(6) A lady, Mai Pak Daman, was revered as a saint, and her body buried in a shrine near Multan. Muslims began to bury their dead here and there in the waste land about her tomb, because of the desire to be buried near the body of a saint. For hundreds of years the land about her tomb was used as a BURIAL GROUND. In 1858 a representative public meeting of the Muslims was held for considering the question of Muslim graveyards for the city. The graveyard of Mai Pak Daman was one of the four resolved to be kept open. Though there was no direct proof of dedication as wakf, the High Court and the Privy Council concluded that long before 1858, it had become wakf by use.[25] [*Semble*, here there was not merely an inference drawn from long continued user that a dedication must have preceded such user, but the user itself was taken to constitute the dedication.]

(7) In ROYAL GRANTS notwithstanding the use of words like INAM & ALTAMGHA and the mention of individual petitioners as grantees, if the grants are clearly for maintaining a charitable institution, the wakf will be established.[26]

(8) A representative suit (under O. I. r. 8) was brought to establish that

[22] Charit. Endts. Act, 1890, ss. 2, 6, 8; *Abdul Hamid* v. *Abdul Aziz*, (1934) 13 Rang. 27.

[23] *Mahomed Ali* v. *Gobar Ali*, (1881) 6 Bom. 88 : see s. 353A. Extracts from 5 SANADS in (1938) XVI. Bom. L. Journ. 258-263.

[24] *Zooleka Bibi* v. *Syed Zunul Abedin*, (1904) 6 Bom. L. R. 1058, 1060-1061.

[25] *Court of Wards* v. *Ilahi Bakhsh*, (1912) 40 Cal. 279 (P. C.) "dedication by USER : see per Lord Macnaghten, *Att. Gen.* v. *Mallock*, (1931) 146 L. T. R. 344, 346; *Ehsan Beg* v. *Rahmat Ali*, (1934) 10 Luck. 547.

[26] (*Mt.*) *Qadira* v. *Shah Kubeer*, (1824) 3 Macn. S. D. Rep. 407 (CAL.); *Kulb Ali Hoosein* v. *Syf Ali*, (1814) 2 Macn. S. D. Rep. 110 (CAL.); approved *Jewun Doss* v. *Shah Kubeer*, (1849) 2 Moo. I. A. 390, 420; *Raideralli* v. *Saiyid Ghulam Mohiuddin*, (1934) 58 Bom. 623. Cf. *Maina* v. *Brijmohun*, (1890) 12 All. 587, 589 (royal grant).

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a plot of ground was a "graveyard (qabarastan) in the sense of the Muhammadan law, that is to say, extra commercium and dedicated for the benefit of Muslims in general, in such a sense that private ownership therein does not exist." *Held*, land does not become wakf necessarily and immediately upon the burial of a single person (86). "It is one thing to say that as a gift may be incomplete without delivery, so a mere oral dedication of a graveyard would not take effect until one burial had taken place. It is another thing altogether to say that one burial on a plot of land makes the land wakf. If a landowner were to allow one or two of his relations to be buried in his orchard he would not necessarily be held to have dedicated the land as a CEMETERY." But there may be records and maps of such a nature that a description of certain land in them by the word qabarastan or graveyard may mean prima facie, at all events, that the land is a graveyard in the sense known to the Muhammadan law. If dedication has to be made out entirely by direct evidence of burials being made in the ground and without any records of such a nature as above-stated, a number of instances would undoubtedly have to be proved, adequate in character, number and extent to justify the inference that the land was a cemetary. *Held* on the evidence that the whole of the plot was a graveyard.[27]

Burial of one person : may symbolize transfer of possession

but does not of itself make land wakf.

Necessity of some kind of declaration.

The necessity of some kind of declaration was illustrated by a case[28] where it was important to fix when if at all the wakf came into force. It was mentioned in the will as having been already made. The question arose whether such mention sufficed to give it retrospective force.

Oral declaration.

Mr. Karamat Husain suggested in argument and subsequently when on the bench, held that a wakf is not validly created unless there is an oral declaration to that effect.[29] It is submitted that the rule must be taken as having become inoperative either by desuetude or as being of no practical importance because a written declaration implies in oral declaration, or because of the presumption that the Courts would raise, of an oral declaration having preceded.

(B) Testamentary wakf :

459. (1) A testamentary wakf[1] may or may not form part of the general will of the wakif.[2]

[27] *Ballabh Das* v. *Nur Mohammad*, [1936] AIR (P. C.) (LUCK.) 83, 86 = 70 M. L. J. 455, 461 = 40 C. W. N. 449. See s. 462, *ill.* (3).

[28] *Banubi* v. *Narsingrao*, (1906) 31 Bom. 250 = 9 Bom. L. R. 91, 96-97 (Beaman, J., Jenkins, C. J., concurring).

[29] *Syed Mustafa* v. *Amina B.*, (1905) 2 All. L. J. 519 ; *Fakhruddin* v. *Kifayatullah*, (1910) 7 All. L. J. 1093.

[1] Often "testamentary *wakf*" = "testamentary *wakfnama*": s. 457(5), (6) : *wakf* made in DEATH-ILLNESS governed by rules in s. 459 relating to testamentary *wakfs* : ss. 459A, 600.

[2] I.—*Jaun Bebee* v. *Abdollah Barber*, (1838) Fulton, 345. II.—Shias as well as Sunnis may make testamentary *wakfs* : *Baqar Ali* v. *Anjuman Ara B.*, (1902) 30 I. A. 94 (ALL.). By this decision the Privy Council reversed *Agha Ali Khan* v. *Altaf Husain Khan*, (1892) 14 All. 429, 473 which had overruled *Murtuzai B.* v. *Jumna B.*, (1890) 13 All. 261 (*wasiat bil wakf* = testamentary direction to heirs for *wakf* ; *Wakf bil wasiyat* = *wakf* suspended or contingent upon death of *wakif*). III.—*Mahabir Prasad* v. *Mustafa*, [1937] AIR (P. C.) 174, 176 = 41 Cal. W. N. 933 = 39 Bom. L.

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(2) A testamentary wakf is (subject to s. 459(3).) valid and effective as to the bequeathable third,[3] and void as to the excess (if any)[4] unless the heirs of the wakif consent to the wakf operating in regard to such excess.[4] Within bequeathable third.

(3) Under Hanafi law a testamentary wakf for the benefit of a mosque, of property exceeding in value the bequeathable third [3] is wholly void, unless the heirs of the wakif consent ; and if they consent then it is wholly valid : [5] *quaere* whether under Shia law it is valid as to the bequeathable third without such consent.[6] For mosque.

(4) Under Hanafi law the benefit (if any) assigned to an heir of the wakif under a testamentary wakf is divisible amongst all his heirs in proportion to their rights of inheritance, notwithstanding any provisions to the contrary contained in the wakf unless, (after the death of the wakif) the heirs whose rights are affected by the said provisions consent to their being given effect to.[7] For heirs.

R. 990 (reversing (1933) 8 Luck. 246, 257 : distinction between *wasiat bil wakf* & *wakf bil wasiat* held to be one of form not of substance : *Baqar A. K.* v. *Anjuman A. B.*, (1903) 30 I. A. 94 : viz. (i) will which conveys property on death of testator to mutawalli as *wakf* or at least impresses property with character of *wakf* immediately on testator's death, & (ii) will which makes gift of property with direction to donee or heir or executor or other representative to create *wakf* as desired ; IV.— Grammatically the two expressions seem apt to represent documents of which will/*wakf* is respectively chief purpose & secondarily *wakf*/will : e.g. (i) " I direct my executor to give following legacies, & to dedicate this property " ; (ii) " I dedicate this property after my death & also leave following legacies : " distinction very slight. The two expressions do not seem to have been contrasted to each other in ancient texts as in 14 All. 429. V.— 30 I. A. 94 has much-desired effect of making Sunni & Shia law agree : though, one distinction between gift & *wakf* (necessity for existence of religious motive in *wakfs*) is apparently over-looked : the projection of religious motive to time of death is necessary concession to people who desire to put off their acts of charity till after their death. Courts, however, have not been paying attention to whether religious motive exists in mind of *wakif* at time of dedication ; & Wakf Acts have given legislative sanction to this course : cf. *Doyalchand Mullick* v. *Keramat Ali*, (1871) 16 W. R. 116 ; s. 5 D, com. *Abdul Karim* v. *Shofiannissa*, (1906) 33 Cal. 853.

[3] I.e. portion of estate over which Muslim has testamentary powers : s. 579(1). Abu Hanifa is reported to have expressly excepted testamentary *wakfs* from his general rule that decree of court necessary to complete *wakfs* : *Hidaya* (Hed. 233, col. i., par. 1, *l.* 18) regards this report as altogether unfounded. Imam Muhammad held that transfer of possession necessary : & his view of law agrees in most particulars with Shia law. E.g. *Muhammad Ismail* v. *Md. Ishaq*, (1921) 43 All. 508.

[4] Bail. I. 550 (558), 601 (612) (*ll.* 1-6), 602 (613) (*ll.* 7-12), *ibid.* (par. 2); Bail. II. 212 (par. 2); Hed. 233 (col. I., par. 3); *Ghulam Muhammad* v. *Ghulam Husain*, (1931) 59 I. A. 74, 85 (ALL.); *Baboojan* v. *Mahomed Nurool Huq*, (1868) 10 W. R. 375 ; *Ali Husain* v. *Fazal Husain Khan*, (1914) 36 All. 43 (Shia law) (*wakf* in death-illness, unless heirs assent, valid only up to 1/3 even if possession given).

[5] Bail. I. 605 (616) (par. 4). Reason being that *masjid* cannot be *musha* : it must be absolutely separated off from property not dedicated to God.

[6] Objection to *musha* not recognized in Shia law. Doubt arises, as recognition of testamentary *wakfs* in Shia law seems to be innovation : see *n.* 2.

[7] Bail. I. 601 (612), 602 (613). See s. 459, *ill.*

SECTION 459. Shia Ithna Ashari law.

(5) Under the Shia Ithna Ashari law, a testamentary wakf,[1] under which an heir of the wakif benefits to an extent within the bequeathable third, is valid without the consent of the other heirs.[8]

Illustrations.

(1) W, being governed by Hanafi law,—

(*a*) makes a testamentary wakf for his child, and his child's child, and his nasl " for ever so long as there are any, and after them for the necessitous : "[9] if the wakf land is in excess of the bequeathable third of W's property, the wakf is void as to the excess, unless W's heirs consent ;[10]

(*b*) if the value of the land forming the subject of the wakf in *ill.* (*a*) is within the bequeathable 1/3 and W leaves a son, daughter, widow, mother and father ; then under the terms of the wakf the son and daughter take the whole of the income of the wakf ; and as they are heirs, the wakf is (unless the others three heirs consent) inoperative and the whole of the said income is divisible amongst all the heirs in proportion to their rights of inheritance ;

(*c*) if W has, besides all the heirs mentioned in *ill.* (*b*), also a grandson and a granddaughter, then each of the two grandchildren and the son and daughter respectively would have received in accordance with the terms of the wakf 1/4 of the income :[11] the provision in favour of the grandchildren to take 1/4 each is valid, as they are not heirs ; but the 1/2 of the income which the son and daughter are given will be divisible amongst all the heirs in the proportion of their legal rights ;[12]

(*d*) the facts being as stated in *ill.* (*c*), if the son and daughter die after W's death, then the whole of the income of the wakf property will be divisible between the grandson and granddaughter alone, i.e. they will take 1/2 each, and the widow and parents will take nothing :[13] (because the grandchildren were not heirs of the deceased : but if the son and daughter had predeceased W the case would have been different, for then the grandchildren would have been heirs : this also illustrates the doctrine of lapse).

(2) If W had been governed by the Ithna Ashari Shia law all the wakfs (*a*) to (*d*) would have been valid, being within the bequeathable 1/3.

(3) W states in his will that he has at a former time given away or set apart a portion of his property to a charity. This does not form a testamentary wakf[13] though it may be evidence of a wakf having been made by W in his lifetime.[14]

[8] Singular includes plural & *vice versa*. Under Shia law bequests to heirs within bequeathable 1/3 valid without the consent of other heirs. The *Sharaiu'l-Islam* is silent ; Bail. II. 212.

[9] This would have been considered illusory under *Abul Fata Md.* v. *Rasamaya D. C.*, (1894) 22 Cal. 619 = 22 I. A. 76 ; but valid under Wakf Act, 1913 ; *Chaudhry Ahmad Azim* v. *Chaudhry Safi Jan*, (1926) 2 Luck. 335.

[10] Bail. I. 601 (612).

[11] On principle that each beneficiary shares in equal proportion : s. 512(1).

[12] Bail. I. 601-603 (612-614) & *n.* 2. [13] Bail. I. 602 (613).

[14] *Banubi* v. *Narsingrao*, (1907) 31 Bom. 250.

SECTION 459A.
(C) Wakf made in death-illness.

459A.[15] A wakf made in marz-ul-maut or death-illness[16] is subject to the legal incidents of a testamentary wakf (s. 459)[17] even though possession of the property dedicated is delivered to the mutawalli.[18]

III. COMPETENCE OF WAKIF.
(A) Majority.

460.[19] Any Muslim[20] who has attained majority and is of sound mind may make a wakf.[21] A wakf made by a minor has been held, by subsequent adoption, to have become valid and incapable of being avoided.[22]

Illustrations.

(1) One Fatmabibi sued in 1881 to have a wakf made by her in 1866 declared void, on the ground, that it was declared by her when she was 14 years old. *Held*, that though the dedication by a girl of 14 was not to be upheld without inquiry, yet the transaction never having been questioned by her husband (to whom she was married in 1866 and who had died in 1872) and that she having for 15 years confirmed her own act, by a continued acceptance of the profits of the estates from the trustees, could not with reason contend that the dedication was invalid on account either of its ceremonial defects, or want of an accompanying volition.[22]

1.—Wakf by Hindu.

(2) A grant of villages by Raja Raghoba Bhonsla to a Muslim physician as MUKHASA[23] for the IMAMBARA of FIR Husain for ever was alleged to be a wakf. The acts and statements of the grantee and the method in which the property had been treated in the administrative record, held to aid the interpretation of the grant : Courts in India had held that no wakf was created but merely a personal grant, because it was improbable that a Hindu ruler would create a wakf in the sense of Muhammadan law. The Privy Council did not pronounce on whether a grant by a Hindu to the Muslim community as the foundation of a wakf was incompetent.[24] They held the grant not to be a

15 Sect. 459A = s. 461A in last edition.

16 See s. 359B *expln.*; ss. 498, 579, 579C, 600.

17 (*Bibi*) *Jinjira K.* v. *Mohammad Fakirulla*, (1921) 49 Cal. 477, 484.

18 *Ali Husain* v. *Fazal Husain K.*, (1914) 36 All. 431 (Shia law). See s. 593, *n.* 13.

19 Sect. 460, com. cited & applied : *Venkata Subbarayudu* v. *Haji Silar S.*, (1929) 58 M. L. J. 524, 531.

20 *Muhammad Raza* v. *Yadgar H.*, (1924) 51 I. A. 192 : grant of villages by Hindu ruler to Muslim physician as *mohasa* for *imambara*. See s. 460, com.,p. 550 on *Fazlur Rahman* v. *Anath Banshi Pal*, (1911) 16 Cal. W. N. 114 (non-Muslim cannot make valid dedication in favour of mosque).A DAUDI BOHRA may create *wakf* in spite of theory of Mullaji's authority : *Adv.-Gen.* v. *Yusufalli*, (1921) 24 Bom. L. R. 1060, 1094 : s. 10(5A), p. 63.

21 Bail. II. 214 (par. 2); Bail. I. 552 (560); *Minhaj*, 230 (Bk. 23, s. 1). Cf. Ameer Ali, *Mah. Law* I. 137-142 (205-210). *Venkata Subbarayadu* v. *Haji Silar*, (1929) 58 Mad. L. J. 524 (distinction made between grant by ruling prince & private individual, p. 531) : see s. 353A.

22 *Fatmabibi* v. *Ad.-Gen.*, (1881) 6 Bom. 42. Cf. *Delroos B. B.* v. *Nawab Asghur*, (1875) 15 Beng. L. R. 167 (deed set aside, being by a *pardanishin*).

23 Connected with *khas* = own. MUKHSA (corrupted MUCASSA MUHASA, &c.) = land assigned rent-free or at low rent on condition of service ; or village held *khas* by State, revenue being paid to government direct.

24 *Muhammad Raza* v. *Yadgar Hussain*, (1924) 51 I. A. 192, 199 (NAG.). Cf. s. 471, *ill.* (2); Bail. I. 553 (*ll.* 5 ff) (561); *Miru* v. *Ram Gopal*, [1935] All. L. J.

SECTION 460. wakf but a personal grant subject to a condition, and that the plaintiff was entitled to be full mukhasadar and mutawalli.[24]

2.—Wakf by non-Muslim.

It has been held that a non-Muslim may not make a wakf for endowing a mosque, though he may make a wakf for other purposes, it being assumed that Muhammadan law must govern the question.[25] But the transactions of a Hindu would ordinarily be governed by the Hindu law. The Muhammadan law of wakf would, presumably be inapplicable except perhaps for discovering the intention of the dedicator. When on the other hand, a contract for valuable consideration is in question (as in the case referred to),[25] and a Hindu agrees to set aside property for the benefit of Muslims, the law of contracts would govern and the contract would (it is submitted) be upheld unless it is opposed to any law or public policy. Such a contract was apparently held to be illegal, because the Muhammadan law of wakfs does not contemplate a wakf for a mosque being made by a non-Muslim. It is submitted that such a contract would not necessarily be opposed to any law relevant to the transaction. Under Muhammadan law, there can be no wakf for a mosque by a non-Muslim, because wakf implies a religious motive, an act meritorious in accordance with the faith of the wakif. But in a contract by a Hindu to dedicate property for certain purposes which he calls wakf, no question of religious merit would arise. A Hindu is governed by a system of law which does not include the law of wakfs. When he speaks of making a wakf his words must therefore be understood in an analogical sense : an intention to enter into a transaction as like a wakf as his law recognizes : or an intention to furnish facilities for a wakf being made. The question would be merely whether the property had been impressed by the transferor with trusts, binding on the transferee. If the trusts are such as can be given effect to under the general law, there would apparently be no objection to the agreement.[26]

Dedication as result of contract.

But going a step further, would the Courts take upon themselves to hold that a non-Muslim cannot consider it meritorious to provide mosques for Muslims? or that the Hindu law prohibits entering into a transaction for consideration which results in a mosque being built? Moreover "there can be no legal impediment,... The owner of land can make a grant of the site even to persons of a different community and creed, and allow them then to dedicate that site by building a place of worship on it."[26]

3.—Indian Majority Act.

The Indian Majority Act, governs capacity in regard to wakf unless making a wakf be taken as a religious rite or usage.[27] The question may depend upon the objects or purposes of the particular wakf. It is unlikely that a wakf should, be considered to be, not a disposition of property, but a religious rite or usage. Though the law of Islam (like other systems based

1269, 1273 (where mosque found to have stood on piece of land for long time & worship performed, it is matter of inference for Court which is judge of facts, whether presumption justified that building allowed to be constructed for performance of such rites : no legal impediment to such dedication). *Maina* v. *Brijmohun*, (1890) 12 All. 587 (P. C.) = p. 544, *n.* 19(iii).

[25] *Fazlur Rahman* v. *Anath Bandhe*, (1911) 16 Cal. W. N. 114.

[26] *Miru* v. *Ram Gopal*, [1935] 33 All. L. J. 1269, 1273 (Sulaiman, C. J.).

[27] See ss. 5A, 292, 285, 578, comm.

on religion) assumes that every person will devote a certain amount of his property to charitable and religious objects, yet that duty is primarily discharged by donations not by wakfs. The Sharaiu'l-Islam mentions "a report which favours the legality of charity" by "one who has attained ten years only," but "the preferable opinion" is stated to be that wakf by him "is forbidden because the inhibition under which he is placed by reason of his youth is not removed until he has attained to puberty and discretion," implying that puberty is the period of life after which wakf is permissible because then the person is competent to act. SECTION 460.

461. A dedication cannot be validly made so as to defeat or delay the rights of creditors ; and a dedication having such effect may be avoided by any creditor whose rights are defeated or delayed.[28] (B) Wakf delaying or defeating creditors void.

Mufti Abu Saeed was asked, "whether it was valid for a man to dedicate his property for the benefit of his descendants and thus avoid payment of his liabilities. His reply was that it is not valid or binding and that Kazis are forbidden from enforcing and registering such trusts so far as the liabilities extend. So remember this."[29] "It is a further condition that the party making the appropriation is not under inhibition[30] at the time, either for facility of disposition or debt."[31] See s. 359, com.

461A.[32] The rules contained in s. 359A, relating to transactions by pardanishin women apply with the necessary modifications to wakfs.[33] (C) Pardanishin women.

462.[1] (1) Under Hanafi law a wakf is completed,[2] (*a*) IV. COMPLETION OF WAKF. (A) Hanafi law. (1) Mere declaration.

[28] *Mohammad Ali* v. *Bismillah B.*, (1930) 35 C. W. N. 324 = 33 Bom. L. R. 155 (P. C.); *Mohammad Ismail* v. *Hanuman P.*, [1938] AIR (P. C.) 290 (*wakf* only to save his other property from creditor SET ASIDE); *Ghazanfar Husain* v. *Ahmadi B.*, (1929) 52 All. 369, 371 ; *Bismillah Begam* v. *Tahsin Ali, K.*, (1930) 52 All. 710 ; *Ahmad Husain* v. *Kallu Mian*,, [1929] 27 All. L. J. 460 ; *Masuda Kh.* v. *Mahammad Ebrahim*, (1931) 59 Cal. 402, 428, cf. (*Muthukana Ana*) *Ramananadham* v. *Vada Leevai*, (1909) 34 Mad. 12 affirmed (1916) 44 I. A. 21 ; *Syed Ali Zamin*, v. *Syed Akbar A. K.*, (1937) 64 I. A. 158, 165 (this point is first settled); *Nabiunnissa B.* v. *Liaqat Ali*, (1928) 50 All. 830, 832, 837 (wife's claim to *mahr* alleged to be defeated : evidence not adduced on the point); *Mohammad Ahmad Saeed K.* v. *Kishori Lal*, [1932] All. L. J. 414.

[29] *Durr-ul-Mukhtar* (Text p. 417, Brij Mohan Dayal's trans. 358) cited (*Bibi*) *Jinjira Khatun* v. *Mohammad Fakirulla*, (1921) 49 Cal. 477, 485.

[30] Want of puberty mentioned as such "inhibition" : Bail. II. 214 (*second*); proceedings by Court of Wards may take place of such inhibitions : cf. *Muhammad Rustom Ali* v. *Mushtaq Husain*, (1920) 47 I. A. 224 (ALL.).

[31] Bail. I. 555 (par. 2) (553). [32] Sect. 461A = s. 461 B in last ed.

[33] Cf. ss. 359 B, 578 A, 600. *Farid-un-Nisa* v. *Mukhtar Ahmad*, (1925) 52 I. A. 342 (OU.) (court cancelled *wakf-nama* : no actual undue influence : *wakf-nama* explained : but onus not discharged of proving that actual import of *wakf-nama* brought home to *wakif's* mind); *Shaikh Muhammad Ibrahim* v. *Bibi Mariam*, (1928) 8 Pat. 484, 488, 489, 495 ; *Syed Amatul Fatima* v. *Diwan Abdul Alim*, (1920) 24 C. W. N. 494 (P. C.); *Sahu Har Prasad* v. *Fazal Ahmad*, (1933) 60 I. A. 116, 121.

[1] Sect. 462 cited & applied : *Ma E Khin* v. *Maung Sein*, (1924) 2 Rang. 495, 505 ;

SECTION 462. (2) (i) Appointment of mutawalli. (ii) Possession ; or (3) Decree.

according to Abu Yusuf, by the mere declaration ;[3] (*b*) according to Imam Muhammad, only if, after the declaration,[4] a mutawalli is appointed, and possession[5] delivered to him.[6]

Nabiunnissa v. *Liaqat Ali*, (1928) 50 All. 830, 833, *l.* 9 (*wakf* will not fail for want of *mutawalli*). See s. 490, com.

[2] (i) ABU YUSUF : mere declaration of *wakf* completes dedication, operating as transfer from *wakif* to implied ownership of God. (ii) IMAM MUHAMMAD : three elements necessary : (*a*) declaration, (*b*) appointment of *mutawalli*, (*c*) transfer of possession to *mutawalli*. (iii) ABU HANIFA : decree necessary for extinguishing *wakif's* power to resile from *wakf* ; decree obtainable by procedure somewhat analogous to fines & recoveries of Eng. law : "The way to obtain which (viz. decree of *Kazi*) is for appropriator to deliver the subject of the *wakf* to the *mutawalli* or superintendent, & then require it back from him, on the ground that it is not obligatory (=*lazim* : cf. s. 420, com.) ; whereupon the judge may pronounce the decree that it shall be obligatory." Hed. 253 ; Bail. I. 550 (558) ; s. 420, com. This refers primarily to revocability, not completion of wakf, but it may be said that wakf not brought to entire completion unless made irrevocable ; the more so, as, according to Abu Hanifa, *wakf* property continues to be detained in ownership of the *wakif*. *Quaere*, does not *Kazi's* pronouncing it to be obligatory against claim of *wakif* mean that it was already complete & irrevocable when matter brought up for his adjudication ?—or was it part of special jurisdiction of *Kazi* to sanction or so to say accept *wakfs* ? see s. 11B, p. 83,—theory of transference to IMPLIED OWNERSHIP OF GOD being rejected by Hanifa : Bail. I. 549 (*l.* 3) (557). (iv.) Cf. however Ameer Ali : "It is a transfer to the legal ownership of the Almighty for substantial consideration, viz. His reward which is obtained the moment the *wakf* is created," I. 143 (211). Religious merit or APPROACH TO GOD is likened by texts to "RETURN" or consideration. Similarly : "In the matter of charity it has been cited as a proof of its being obligatory (i.e. irrevocable) that, inasmuch as a RETURN FROM GOD (on which see index) is also an *iwaz*, so it falls under the head of a gift with a return" : *Jami-ush-Shittat, Hiba*, 392. Accordingly Abu Hanifa holds all *wakfs* to be revocable, as he holds that there is no transfer to God, no "approach to God," hence no return to *wakif*. (v) There are fallacies lurking in the pretentious metaphor about man transferring property to the ownership of God. Real thoughts of most men, including Muslims, when engaged in act of religious charity better expressed by Nawab Azmat Ali Khan : "God the real owner, the owner of the universe....my temporary possession known as proprietary possession" : *Muhammad Rustom Ali* v. *Mushtaq Husain*, (1920) 47 I. A. 224, 236.

[3] Hed. 233, 239 (col. i. par. 2), 240 (col. ii.) ; Bail. I. 551, (*ll.* 1-3) (559), 591 (par. I) (601). "The opinions of the learned seem to be nearly balanced between them, two authorities declaring that the *fatwa* is with Abu Yusuf, while two more allege that it is with Muhammad" : Bail. I. 551 (*ll.* 4-7) (559). *Husseibhai* v. *Adv.-Gen.*, (1920) 22 Bom. L. R. 846 (Abu Yusuf apparently followed : but *wakif* was *mutawalli* : Pratt. J. "wonders if even Imam Muhammad would require transfer of possession") ; (*Syed*) *Zainuddin Hussain* v. *Moulvi Md. Abdur Rahim*, [1933] AIR (CAL.) 102. Cf. *Doyal Chand M.* v. *Keramut Ali*, (1871) 16 W. R. 116 (chief elements of *wakf* : (*a*) special words of declaration, (*b*) proper motive). *Wakif* must DIVEST HIMSELF *in praesenti* of his ownership & powers of alienation : *Ali Raza* v. *Sanwal Das*, (1918) 41 All. 34 ; *Muhammad Yunus* v. *Md. Ishaq*, (1931) 43 All. 487 ; *Muhammad Azizuddin* v. *Leg. Rem.*, (1893) 15 All. 321. If no *mutawalli* appointed, Imam Muhammad holds *wakf* void, but Abu Yusuf that *wakif* presumed to be *mutawalli* : Bail. I. 591 (601) ; *Ma E Khin* v. *Maung Sein*, (1924) 2 Rang. 495, 511 ; *Nabi-un-nissa* v. *Liaqat Ali*, (1928) 50 All. 830, 833. "If the *wakif* appoints as MUTAWALLI a person WHO IS ABSENT, the *Kazi* has the power of nominating in his place another for the time being, & when the *mutawalli* appointed by the *wakif* arrives, the trust will revert to him.—Ameer Ali, I. 348 (446-447) citing "*Fatawa-'l-Ankariwia* II. 217, from *Asaf*."

[4] *Zaffar Hussain* v. *Mohammad Ghiasuddin*, [1937] Lah. 276.

[5] On possession : see ss. 382A ff.

[6] (i) Cf. (*Muthukana Ana*) *Ramanadham* v. *Vada Levvai*, (1909) 34 Mad. 12 affirmed, (1916) 44 I. A. 21 = 40 Mad. 116 : (ii) *Khajeh Solehman Quadir* v. *Salimullah*, (1922) 49 I. A. 153, 166 (CAL.) (Lord Cave incidentally : "*waqfnamas* were gifts & were therefore subject to the rule of Muhammadan law that a gift shall be accompanied by DELIVERY ; but the agreements of 1881, are not gifts but contracts

(2) Abu Yusuf's[7] view has been adopted by most of the High Courts. But the Allahabad High Court[8] has given preference to Imam Muhammad's view,[8] and there are dicta of the Privy Council favouring the necessity for transfer of possession.[9] There is not (*submitted*) such a cleavage between the two views as may at first sight appear.[9] SECTION 462.

(3)[10] Under Shia law a wakf is not completed unless either (*a*) possession[11] of the wakf property is delivered to the first beneficiaries, or (*b*) they are authorized to administer it (s. 490), or (*c*) where the dedication is for the benefit of a Shia law, possession.

for valuable consideration"); (iii) *Ma Mi* v. *Kallandar Ammal* (No. 2). (1926) 54 I. A. 23 (Sir John Wallis questions whether *wakfs* form exception to ordinary rule of Muhammadan law which requires gifts to be perfected by possession & undoubtedly applies to *wakfs* among Shias); (iv) *Abadi* v. *Kaniz*, (1926) 54 I. A. 33, 36 (Shia); (v) *Muhammad Rustam Ali* v. *Mushtaq Husain*, (1920) 47 I. A. 224, 231 (ALL.) (*waqfnama* recited: *wakif's* divesting himself of possession: changing his temporary possession as owner into that of *mutawalli* as trustee for beneficiaries: Shia case); cf. (vi) *Ballabh Das* v. *Nur Muhammad*, [1935] AIR (P. C.) 83, 86 = p. 546, s. 458, *ill.* (8) (one burial in case of graveyard may = delivery: but does not necessarily mean dedication).

[7] (i) *Doe, d. Jaun Beebee* v. *Abdoollah*, (1833) Fulton, 343 (*wakif* had declared himself *mutawalli*). Abu Yusuf's opinion followed "after obtaining all information through *moulvies* & authorities." Cf. (ii) (*Khajah*) *Hossein Ali* v. *Hazara B.*, (1869) 12 W. R. 344 (*per* Kemp, J. (affirmed *ib.* 498): decisions primarily according to Abu Yusuf, next Im. Muhammad). Ameer Ali, I. 128-129 (195-196): "Abu Yusuf's enunciations recognized as law throughout Sunni world" (citing *Fat. Al.* II. 454); also by Malik, Shafii & Ibn Hanbal & bulk of learned; followed by jurists of Balkh, & on that is *fatwa*: so in *Fathul Kadir* & *Munich*. And on that is *fatwa*; so says *Siraj-ul-Wahaj* also." "Muhammad's views adopted only by some of Bokhariot schoolmen, & have no application in any other part of Sunni world" (citing *Tashil* & *Fat. Al.* II. 455). (iii) *Doe d. Jaun B.* (1833) Fulton 345, followed *Ramzan Mistri* v. *Zahur Hossein*, (1913) 18 Ind. Cas. 241 (CAL.) (appointment of *mutawalli* not essential for completion of *wakf*). See also (iv) *Jinjira Khatun* v. *Mohammad Fakirulla*, (1921) 49 Cal. 479; (v) *Abdul Rajak* v. *Bai Jimbabai*, (1911) 14 Bom. L. R. 295; (vi) *Husseinbhai* v. *Adv.-Gen. Bom.*, (1920) 22 Bom. L. R. 846; (vii) *Pathu Kutti Umma* v. *Nedimgadi*, [1938] Mad. 148; (viii) *Shaikh Muhammad Ibrahim* v. *Bibi Mariam*, (1928) 8 Pat. 484, 492 (par. 3) (held that *wakf* not executed: so observations of Chatterji, J. must be taken as *obiter*); (ix) *Muhammad Said* v. (*Mt.*) *Sakina K.*, (1934) 16 Lah. 432, 435 (transfer not necessary where *wakif* first *mutawalli*); (x) *Ma E Khin* v. *Maung Sein*, (1924) 2 Rang. 495, 501 (*wakf-nama* stated that teaching of Abu Yusuf relied upon in drawing it); (xi) (*Mt.*) *Rahiman* v. (*Mt.*) *Baqridan*, (1935) 11 Luck. 735 (F. B.).

[8] (i) *Muhammad Azizuddin* v. *Leg. Rem.*, (1893) 15 All. 321 = s. 462, *ill.* (4): (ii) *Muhammad Yunus* v. *Muhammad Isaq K.*, (1921) 43 All. 487; (iii) *Abdul Jalil K.* v. *Obedullah Khan*, (1921) 43 All. 416, 422 ("we must follow the opinions of Abu Yusuf & Muhammad"); (iv) *Banubi* v. *Narsingrao*, (1907) 31 Bom. 250; (v) *Mulla Veettil Ussain* v. *Subramania Aiyar*, (1916) 31 Mad. L. J. 431. Cf. s. 11 A.

[9] See s. 462(2), com.: submitted that decisions may to great extent be reconciled & their effect shortly stated: as explained later.

[10] Sect. 462(3) cited & applied: *Syed Ali Zamin* v. *Syed Md. Akbar A. K.*, (No. 2) 7 Pat. 468, 474.

[11] Bail. II. 212 (ll. 8-9), 182 (*ll.* 27-29); *Abadi* v. *Kaniz* (1926) 54 I. A. 33 (PAT.) *Syed Ali Zamin* v. *Syed Muhammad Akbar Ali K.*, (1918) 7 Pat. 468 reversed (1937) 64 I. A. 158 (*wakif* must completely divest himself: that may be done even when *wakif* is first *mutawalli*: transfer of possession may under Shia law be effected by change in character of possession).

SECTION 462.

body of persons, a mutawalli is appointed, and possession is delivered to him.[12]

Completing wakf by giving effect to it.

Explanation I.—The dedication being given effect to, or the wakf property being put to the uses [13] to which it has been dedicated (especially where the wakif is himself expressly or impliedly appointed the first mutawalli)[14] have the same legal effects as delivery of possession under s. 462(1), (3).[15]

Presumption of non-completion if not acted upon.

Explanation II.[16]—Where the declaration of a wakf is not acted upon by the wakif, and its objects not given effect to nor the property utilized for them, it may be presumed that the wakf was not completed ;[17] or that the wakif had no bona fide intention [18] to create a wakf and did not divest himself of the ownership of the property : the presumption that the wakf was not completed may be very strong in favour of creditors.[19]

[12] *Ali Raza* v. *Sanwal Das*, (1918) 41 All. 34. See s. 490. Shia law seems nearer Imam Muhammad's view : but see s. 462, com. p. 559.

[13] But such use is not conclusive proof, nor in itself sufficient to create *wakf* : payments out of rent for expenses of mosque not proof of itself that property endowed : *Shurfoonnissa* v. *Koolsoom*, (1876) 25 W. R. 447 ; cf. s. 458 INFERENCE OF DEDICATION FROM USER : see *n.* 6(vi).

[14] (i) *Muhammad Said* v. (*Mt.*) *Sakina B.*, (1934) 16 Lah. 432 ; (ii) *Syed Ali Zamin* v. *Syed Md. A. Khan*, (No. 2), (1928) 7 Pat. 468, 476 reversed (1937) 64 I. A. 155 (see *n.* 15) ; *Muhammad Zain K.* v. *Nurul Hasan K.*, (1923) 45 All. 682.

[15] See *ill* : *Expl. I., II. & III.* are complementary, to be read together. *Syed Ali Zamin* v. *Syed Akbar A. K.*, (1937) 64 I. A. 158, 164 (PAT.) reversing (1928) 7 Pat. 426. Under Shia law which insists upon transfer of possessions. *Muhammad Zain K.* v. *Nur-ul-Hasan K.*, (1923) 45 All. 682.

[16] *Expl. II.* referred to *Muhammad Ali Md. K.* v. (*Mt.*) *Bismillah*, (1930) 35 Cal. W. N. 324 = 33 Bom. L. R. 255 (P. C.) (deed executed without any INTENTION of DIVESTING himself of ownership : real intention being to utilize document should it become necessary against appellant). See also s. 457, *n.* to "good faith." *Sahu v. Fazal*, (1933) 60 I. A. 116 = s. 477, *ill.* (6).

[17] *Hamid Ali* v. *Mujavar Husain Khan*, (1900) 24 All. 247 (if *wakif* sincere in desire to divest himself of his property he would at once obtain mutation : & in absence of such mutation, possession held not surrendered) : approved : *Abadi B.* v. *Kaniz Zainab*, (1927) 54 I. A. 33, 43 = 6 Pat. 259, 272 ; *Syed Ali Zamin* v. *Syed Muhammad Akbar*, (1928) 7 Pat. 424, 455 ; *Muhammad Azizuddin A. K.* v. *Leg. Rembr.*, (1893) 15 All. 321 ; *Delroos B. B.* v. *Nawab Asghur A.*, (1875) 15 Beng. L. R. 167 = 23 W. R. 453 (*wakf* purported to be made, but held not validly created on evidence of (i) ceremonies ; (ii) privacy of place for worship, public being excluded ; (iii) distribution of charity being considered as "matter of individual charity" ; (iv) ABSENCE OF INTENTION that *wakf* should come into operation ; (v) alleged *wakif* being ignorant *pardanishin*, who did not understand meaning of deed ; (vi) no intention of divesting herself of proprietary rights, p. 187 ; (vii) absence of professional assistance ; (viii) dealings with property as her own, p. 188) ; *Zooleka Bibi* v. *Syed Zunul Abedin*, (1904) 6 Bom. L. R. 1058, 1066 ff. See however *Abdul Rajak* v. *Bai Jimbabai*, (1912) 14 Bom. L. R. 295 (where *wakif* was himself first *mutawalli*) & com. on it, p. 557.

[18] *Sahu* v. *Fazal*, (1933) 60 I. A. 116 = s. 477, *ill.* (6) ; *Musharraf Begam* v. *Sikandar Jahan B.*, (1928) 51 All. 40, 44, *ll.* 1-5.

[19] Cf. s. 346, prov. (2), & com.

SECTION 462. After completion not affected by breach.

Explanation III.—After the dedication of wakf has been completed, its validity is not affected by the misfeasance of the mutawalli [20] nor by the debts or liabilities of the wakif arising subsequently.[21]

Illustrations.

(1) A Shia purports to make a wakf, but dies without giving possession to the mutawalli or to the beneficiaries. The wakf is void, unless the beneficiaries are the wakif's minor children, or the minor children of his sons, or (according to the better supported opinion) he is the executor of the father or grandfather of such minor children.[22]

(2) W makes a wakf in favour of B, and after him for BA, and then to the poor : if possession is given to B, it is sufficient under Shia law, and all regard to possession ceases in the subsequent steps.[23]

(3) When a plot of ground is designated or specified by a Hanafi Muslim for being dedicated by way of wakf as a cemetary, the wakf is completed, according to Abu Yusuf, by the mere declaration of wakf ; according to Imam Muhammad by (such a declaration followed by) the burial of at least one person in it.[24] and according to Abu Hanifa by a decree of the Court, unless the wakf is made under a will. Under Shia law the wakf is completed by formal words of declaration, and by the burial of the first individual.

(4) On 1 June 1882 the defendant's father, W, executed and registered a wakf-nama. The deed recited that W the wakif made an endowment of the village of Para to the extent of Rs. 90 a month net profits for the use of the poor and the needy, designating his sons as mutawallis. W registered the deed, took it home and never carrried his recorded intentions into effect, nor spent any portion of the income of the village in accordance with the terms of the document. He did not transfer possession to his sons, the mutawallis, but retained exclusive possession and enjoyment of the village and its income till his death on 27 Feb. 1886. The document was not produced by either side, the Court told that W destroyed it ; *held*, (1) unnecessary to determine whether the deed was bad for want of terms of appropriation and for uncertainty as to its objects ; (2) Imam Muhammad's opinion on the question when the wakf is completed, must be preferred to that of Abu Yusuf ; (3) in respect of this wakf, the income of which was never employed for the declared

[20] *Doyal C. M.* v. *Keramat A.*, (1871) 16 W. R. 116 : *Reasut A.* v. *Abbot*, (1869) 12 W. R. 132 ; *(Syed) Zainuddin Hussain* v. *Md. Abdur Rahim*, [1933] AIR (CAL.) 103, 105, col. ii. But see s. 462, *Expl. II.* : where *wakif* is himself *mutawalli* & has never given effect to *wakf*, it naturally raises doubt whether *wakf* ever intended to be created, & if so, whether intention ever actually given effect to : see s. 462, *ill.* (4) ; *Kulsom B.* v. *Golam H.*, (1905) 10 C. W. N. 449 : s. 462, com.

[21] *Fegredo* v. *Mahomed Mudessur*, (1871) 15 W. R. 75 ; cf. as to prior mortgage, etc. *Hajra B.* v. *Khajah Hossein A. K.*, (1869) 4 Beng. L. R. (A. C.) 86 = 12 W. R. (344), 498.

[22] Bail. II. 218, (*ll.* 27-35), s. 400, relating to gift.

[23] Bail. II. 219 (par. 3).

[24] This is for purpose of showing that dedication acted upon : not that from single burial dedication may be inferred : *Ballabh Das* v. *Nur Muhammad*, [1935] AIR (P. C.) 83 = 70 M. L. J. 455, 457 = s. 458, *ill.* (8).

SECTION 462.

1.—Important to know when wakf completed.

purpose, the appropriator having retained exclusive proprietary possession, which possession passed by inheritance under the law to his two sons, there never was a valid and operative wakf, but an inchoate endowment only which stopped short at the written and registered declarations of the wakif. [25]

A wakf being a voluntary transaction, the law on principle will not oblige anything left undone, to be done. Hence, it is important to note when a wakf will be considered to have been completed.[26]

a.—Imam Muhammad : i—Declaration, ii—Mutawalli, iii—Possession. *b.*—Abu Hanifa : decree of Court.

The completion of a wakf is, of course, distinct from the acting upon a wakf after it has been completed. But the failure to act upon a declaration of wakf may be evidence [27] to show (1) whether it has been completed, e.g. where transfer of possession is necessary, acts of ownership show unequivocally whether such transfer has been made : see s. 462, *expl.*, s. 490, com. The wakif's acts and conduct also show (2) whether there was any intention that the declaration should take effect. There may be difficulty in proving that an overt act (e.g. pronunciation of dedication) was not done with the intention that it signifies.[28] But subject to that difficulty, presumably the pronunciation of mere words without any intention that they should have effect, cannot give the words any effect.[29] "There is no magic in words." [30]

2.—Bona fide intention necessary.

Where there is a written dedication, the conditions may, by operation of the Indian Evidence Act, ss. 91, 92, have to be gathered from the document alone ; and evidence of the wakf having been acted upon, or not, would be excluded where it is sought thereby to contradict, vary, add to, or substract from its terms.[31] But a person may have fully intended to create a wakf, and yet not

Facts irrelevant as to interpretation of wakf may be relevant as to completion.

[25] *Muhammad Azizuddin Ahmad K.* v. *Leg. Rem.*, (1893) 15 All. 321 ; *Bikani Mia* v. *Shuk Lal Poddar*, (1893) 20 Cal. 116 (F. B.) cited, as though majority of full bench decided that opinion of Im. Muhammad preferable to Abu Yusuf (this question does not seem to be referred to in any judgment except Ameer Ali, J.'s); *Doyal Chund Mullick* v. *Syed Keramat Ali*, (1871) 10 W. R. 116, distinguished as having reference to Shia & not Hanafi law. See s. 457 on GOOD FAITH & s. 462.

[26] *Muhammad Ismail* v. *Muhammad Ishaq*, (1921) 19 All. L. J. 452 instructive : testamentary direction to make *wakf*, of certain property : Courts proceeded as if dedication were completed by will. Result arrived at was (with great respect) correct : but no *wakf* created by will : the will directed that *wakf* should be made.

[27] *Salig Ram* v. *Amjad Khan*, (1906) All. W. N. 159 ; cf. (*Ranee*) *Khajoorunnissa* v. (*Mt.*) *Roushan Jehan*, (1876) 3 I. A. 291, 307, 308 = 2 Cal. 184, 197 (Sir B. Peacock : [actual delivery of possession would not be necessary] "but the mode in which the father dealt with the profits would be important as regards the *bona fides* & completeness of the gift as throwing light upon the intention") : (passage cited s. 410, com., p. 457) ; see also *Ashna B.* v. *Awaljadi B.*, (1916) 44 Cal. 698, 702 ; *Mulla Veettil Ussain* v. *Subramania Aiyar*, (1916) 31 M. L. J. 431.

[28] *Ma E Khin* v. *Maung Sein*, (1924) 2 Rang. 495, 499 (*wakif* registered property as *wakf* in Town Lots Office) ; *Shaikh Muhammad Ibrahim* v. *Bibi Mariam*, (1928) 8 Pat. 484.

[29] *Sahu Har Prasad* v. *Fazal Ahmad*, (1933) 60 I. A. 116 (ALL.) = s. 477, *ill.* (6), (want of intention to make *wakf* fatal). *Shaikh Muhammad Ibrahim* v. *Bibi Mariam*, (1928) 8 Pat. 484 ; *Ghazanfar Hussain* v. *Ahmadi B.*, (1929) 52 All. 369, 371 (intention examined) ; *Syed Ali Zamin* v. *Syed Akbar A. K.*, (1937) 64 I. A. 158, 166 (*ll.* 19-23 (PAT.).

[30] Cf. *Syers* v. *Syers*, (1876) 1 App. Cas. 176, 183 (per Lord Cairns) ; *Crowther* v. *Thorley*, (1884) 50 L. T. 43, 45 (Lord Coleridge).

[31] *Shaikh Muhammad Ibrahim* v. *Bibi Mariam*, (1928) 8 Pat. 484; *Kulsom Bibee* v. *Golam Hossein*, (1905) 10 C. W. N. 449, 484 ("It is of course clear that if there was a real INTENTION TO GIVE EFFECT to the documents as *wakfs*, & *wakfs* were

have completed it : in which case his mere intentions will be inoperative. And thus even where there is a written dedication, evidence as to its never having been given effect to, may show that it was never completed,[32] and indeed in some cases giving effect to the wakf by acting upon it may form an integral part of its completion. See ss. 404, 490, 514, comm. It has been observed that upon the line of reasoning followed in s. 462, *ill.* (4),[33] "it will be impossible ever to hold an appropriator who had constituted himself the first mutawalli, to the terms of his wakf-nama." [34] This observation, it is submitted, assumes not only that a mere declaration of wakf (1) completes it,[35] but that it (2) conclusively proves an intention to dedicate. It overlooks the distinction between acting upon a wakf that has been already completed, and acts of ownership exercised by the wakif over the subject of the wakf, adduced as evidence that the wakf was never intended to be made or never in fact completed. The Court, it is presumed, will not complete an inchoate wakf, any more than any other voluntary act. See s. 366, com., p. 380. SECTION 462. Court will not complete inchoate wakf.

The wakif may merely make a declaration of wakf, and thereafter continue in possession of the property, utilizing it just as though it were not dedicated. This state of things would in many cases constitute important evidence showing that there was no intention to dedicate,[36] in which case, presumably no wakf would be held to be created, especially if the interests of creditors were involved. See s. 490, com. Thus in one case "on a careful consideration of the whole evidence their Lordships came to the conclusion that the deed of wakf had been executed but without any intention of divesting himself of his ownership of the property, and that his real intention was to utilize the document should it become necessary as a shield against any claims that the appellant (or creditor) might have against him either then or at any future time." [37] It Giving effect to wakf is evidence of bona fide intention to create it. Fictitious transactions : defeating creditors.

formally constituted & *perfected*, it is wholly immaterial, in this suit, whether their provisions were carried out or not, for that is a matter of breach of trust only" *per* Woodroffe, J.); cf. *Luchmiput Singh* v. *Shah Amir Alum*, (1882) 12 Cal. L. R. 22, 26 (penult. par. of judgt.).

[32] *Zooleka Bibi* v. *Syed Zunul Abedin*, (1904) 6 Bom. L. R. 1058, 1067, (par. 2).

[33] *Muhammad Azizuddin* v. *Leg. Rem.*, (1893) 15 All. 321.

[34] *Abdul Rajak* v. *Bai Jimbabai*, (1911) 14 Bom. L. R. 295, 301.

[35] Reliance is placed on *Re Way's Trusts*, (1864) 2 De J. & S. 365, in which Turner, L. J. says : "If the deed is executed, effect must be given to it, notwithstanding the retainer & the absence of notice." But (with great respect) this result follows under English law, where execution of deed by itself effects transfer of the property : divesting settlor of ownership : under Muslim law declarations, neither oral nor written, by themselves transfer ownership : [executing] a deed is [making] a formal written declaration ; & registration is a solemn admission of a previous deed or declaration.

[36] *Muhammad Ali Md. K.* v. (*Mt.*) *Bismillah*, (1930) 35 C. W. N. 324 = 33 Bom. L. R. 155 (P. C.); *Mulla Veettil Ussain* v. *Subramania Aiyar*, (1916) 31 Mad. L. J. 431. See *nn.* 37, 38.

[37] See ss. 346, 352, comm. *Muhammad Ali Muhammad K.* v. (*Mt.*) *Bismillah Begum*, (1930) 35 C. W. N. 325, 332 (P. C.) = 33 Bom. L. R. 155, 167 (*wakf* declared void); similarly in *Watson & Co.* v. *Ramchund Dutt*, (1890) 18 I. A. = 18 Cal. 10, 18 (Pudmalochun executed on 24 July 1877, deeds purporting to divest himself of property & dedicate it to trustees for worship of family idols : From 24 July 1877, until P.'s death (3¼ years) no change in accounts, or in management of, or dealings with, business or estates, or proceeds thereof. Mortgages executed in which P. joined, everything appears to have gone on in same manner as

SECTION 462. was therefore held that no wakf was created. On the other hand where the broad effect of the evidence was that the wakif had done what was necessary to change the character of the possession and to give possession to the mutawallis (he himself being one of the two mutawallis) so as to discontinue his own possession as proprietor, their Lordships remarked that mutation of names was not for the present purpose the only method by which possession can be given or altered.[38] The wakf was given effect to.

3.—Divergent views how reconciled.

As the result of all the decisions, it is submitted (s. 462(2).) that, for the reasons stated below, in spite of the formal differences of opinion as to whether Abu Yusuf's or Imam Muhammad's exposition ought to be followed, the law in India is fairly well settled ; and that in the present-day conditions of life, the question whether the exposition of Abu Yusuf or of Imam Muhammad ought to be adopted is of little importance, since there are considerations which necessarily modify the views of both exponents, and, in the result, their expositions are brought very near to convergence.

In the present context, the points of difference between the two exponents have reference to the necessity of (1) appointment of a mutawalli, (2) transfer of possession to him. These points lose their poignancy for the following reasons :

a.—Abu Yusuf's view in practice.

As to Abu Yusuf's view, the danger of allowing a person to set up as against his creditors a wakf on the strength of his having barely made a declaration which has never been acted upon (and which therefore can be kept secret) is frequently illustrated.[39] If there is a real, bona fide intention to divest himself of his ownership—and this is a necessary concomitant,—then the question naturally arises why has he acted contrary to that intention ? When the wakf is kept secret, it easily becomes an unconscionable shield against future creditors from whom credit may meanwhile be obtained on the misrepresentation, tacit or express, that the possessor continues to be the owner of the property. The dedication, if kept secret at the start may be made public only when the pressure of creditors effectuates a belated disclosure.[39] The position of heirs is certainly, but may not be altogether, distinguishable from that of creditors. When the wakif provides for his own maintenance and support during his life-time these considerations gather additional weight. Even from a purely theoretical view of the law, the anomaly of allowing wakf, which is a species of gift, being completed without delivery, has been pointed out by the highest

Creditors' interests.

Juristically possession necessary.

if deeds had never been executed, except that family idol removed to P.'s house. No act done by P. or his brothers, in which P. described as *shebait* : P. C. held : no intention of P. or his brothers that deeds be acted upon, or that P. should thereby divest himself of the property. "The deeds were merely fictitious or benami." Not much importance was attached to fact that P.'s daughter (Ramasundari) received 3 monthly payments of allowance provided for her by the deed ; these receipts held not inconsistent with fact that deed NOT INTENDED TO TAKE EFFECT).

[38] *Syed Ali Zamin* v. *Syed Akbar Ali Khan*, (1937) 64 I. A. 149, 174 ; *Phul Bee Bee* v. *R. M. S. Chettiar*, (1935) 13 Rang. 679 ; *Muhammad Zain K.* v. *Nurul Hasan K.*, (1922) 45 All. 682 (no MUTATION, though *wakif* lived 8 years after dedication).

[39] *Muhammad Ali* v. (*Mt.*) *Bismillah*, (1930) 35 C. W. N. 325 (P. C.) = 33 Bom. L. R. 155 ; (*Nabob Amiruddaula Muhammad Kakya*) *Husain Khan B.* v. *Nateri S. Charlu*, (1871) 6 Mad. H. C. R. 35 (secret contract narrowing visible means on which credit given, iniquitous).

authorities.[40] The necessity for the property being divested has also been insisted upon. Since little attention is given to the existence of a religious motive in creating wakfs, that safeguard (such as it might be) against wakfs being made in bad faith is in the majority of cases absent. Therefore acting upon the wakf is almost a necessity for its declaration being considered valid and bona fide. It must follow that the wakif must either act himself as the mutawalli or must permit (or request) someone else to do so. All these considerations, (which are admitted as affecting the questions by all Courts in India) help to make the exposition of the law by Abu Yusuf, assuming that it is adopted, far more rigid in actual operation, than a mere verbal statement and literal interpretation of it would indicate. These considerations narrow the space between Abu Yusuf's and Imam Muhammad's expositions.

SECTION 462.

Religious motive.

b.—Imam Muhammad's view in practice.

Turning now to the exposition of Imam Muhammad, the edge of his insistence upon the appointment of a mutawalli is dulled by (*a*) the ease with which it may be presumed that the wakif is the first mutawalli, (*b*) by the fact that "there can be no doubt that the Muhammadan jurists were alive to the importance of the doctrine that a wakf or trust should never fail for want of a trustee, and have given effect to this doctrine in their writings,"[41] and (*c*) by the necessity of some action being taken upon the declaration as evidence of good faith in making the declaration : and the consequent tendency to regard such action as almost a part of the declaration itself.

So that the latitude of Abu Yusuf's exposition is greatly restricted and the stringency of Imam Muhammad's is greatly relaxed.[42] See also s. 11 A, p. 78.

c.—Result formulated.

It is submitted that the true effect of all the authorities is represented by the following propositions applicable to Sunni as well as Shia law :—

"Dedication by way of wakf is completed when the wakif makes a declaration in good faith with a real intention of divesting himself of the ownership of the property which he intends to dedicate : (*a*) if he nominates another person as mutawalli such intention is ordinarily evidenced by delivery of the wakf property to him as mutawalli ; failure so to deliver needs at least some explanation : want of such intention may be inferred if there is no explanation ; (*b*) the fact that no person is nominated as mutawalli, does not necessarily show a want of such intention ; it may (in proper cases) be presumed that the wakif himself intended to act as mutawalli : but this last presumption may be rebutted by evidence that the wakif did not act as such, and neither himself gave, nor requested (or permitted) another to give, any effect to his declaration, or by evidence of similar circumstances : and the circumstances may warrant the inference that the declaration was not made in good faith and that the owner had no intention of divesting himself of the ownership of the property : in which case no valid dedication will take place."

4.—Civil Procedure Code, s. 92.

Should it be deemed necessary in any case to get a decree of the court

[40] See p. 552, *n.* 6 (ii), (iii) = 49 I. A. 153 ; 54 I. A. 23.

[41] *Nabi-un-nissa Bibi* v. *Liaqat Ali*, (1928) 50 All. 830, 832.

[42] Whatever their verbal differences, "in their 'life' [in India] they are not divided."

ECTION 462. vesting the waqf property in a mutawalli, the Civil Procedure Code, s. 92, will apply. See s. 519 B, p. 651 below.

§ 2.—Legal Incidents of Wakf.

CONTINGENT wakf void.

462 A.[1] A dedication purported to be made subject to a contingency is void.[2]

ostponement f effect.

A deed of wakf providing that it shall come into force from the date of its registration was held to be contingent and thus void. But it is submitted that the deed merely provided that it was not complete till the wakif had taken a further step : that further step was taken when the deed was in fact registered : after which all element of contingency disappeared.[3] This is very different from the case where the wakif, after having made a declaration, " suspended upon a condition " takes no further steps in the matter.

r for objects at will fail. Abu Yusuf issenting).

I. Wakf for LIMITED PERIOD void.

463. (1) A wakf purported to be made only for a limited period of time is void.[4]

[1] Sect. 462A = s. 468 in earlier editions.

[2] Bail. I. 556 (564-565) ; Bail. II. 218 (*fourth, ll.* 5, 6, 25, 26); (*Mt.*) *Ali Begam* v. *Badrul-Islam Ali K.*, (1938) 65 I. A. 298 (LAH.) (where property is not intended to become *wakf* till after death of life-tenant, dedication is not valid : but where on death of testator property is to become *wakf*, it is lawful to reserve life-interest in its usufruct for named person); *Pathukutti* v. *Avathalakutti*, (1888) 13 Mad. 66 (contingent on *wakif* dying without issue, but *semble* this would have been valid as testamentary *wakf*, see ss. 457, 456, 466); *Kalub Hossein* v. *Mehrum B.*, (1872) 4 N. W. 155 (Shia parties); *Fatmabibi* v. *Adv.-Gen.*, (1881) 6 Bom. 42 ; *Casamally* v. *Currimbhai*, (1911) 36 Bom. 214 = 13 Bom. L. R. 717, 772 ; *Bikani Mia* v. *Shuk Lal Poddar*, (1892) 20 Cal. 165, 166 ; cf. *Rasamaya Dhur Chowdhuri* v. *Abul Fata Mahomed Ishak*, (1891) 18 Cal. 399, *upheld* (1895) 22 Cal. 619 = 22 I. A. 76.

[3] *Aga Ali K.* v. *Altaf Hasan K.*, (1892) 14 All. 429 (F. B.) overruled *Baqar Ali K.* v. *Anjuman A. B.*, (1905) 30 I. A. 94 = 25 All. 236.

[4] Hed. 234 ; Bail. I. 557 (565), II. 218 (*fourth*). Where, however, dedication not clearly for LIMITED PERIOD texts take divergent views which now settled by Wakf Act, 1913 (= s. 463 of this work). Under texts : HANAFI LAW : (A) dedication not expressed to be temporary must, Abu Yusuf holds, be presumed to be perpetual, & effect must be given to it as such. [" As the terms ' appropriation ' or ' charity ' do clearly argue thus much " : Hed. 234 ; Bail. I. 557 (565-566). Abu Yusuf says : " if any object is named which is not perpetual it would be valid, & the *wakf* would be for their benefit (viz. of the poor) after it (the named object) ceases ; although he does not mention them "—*Fathul Qadir*, II. 863. See table of different views, p. 530. Abu Yusuf's opinion is impliedly accepted in Wakf Act, 1913, s. 3.] (B) Abu Hanifa & Imam Muhammad hold that *wakf* for objects that will fail is void. Abu Yusuf holds such *wakf* valid, presuming that, on failure of specified objects it is for benefit of poor in perpetuity : Bail. 557-558 (565-566). (C) As to Shia law : (i) when *wakf* restricted to particular time or made dependent on some quality of future occurrence, it is void : Bail. II. 218 *ll.* 9-11 [e.g. if one should say, " I have appropriated when the beginning of the month has come, or if Zaid shall arrive, the appropriation would not be valid] ; (ii) when *wakf* is in favour of persons who will probably fail & it is not mentioned what is to be done after they fail,—(*a*) *Sharaiu'l-Islam* supports view of the authorities who hold that effect should be given to the purpose actually named : Bail. II. 218, *ll.* 17-19 : & when they fail the *wakf* property will revert to heirs of the *wakif* (Bail. II. 218, *ll.* 19-21). (*b*) Other Shia authorities hold that the *wakf* property will revert to heirs of *maukuf alaihi* (= beneficiaries) : but this view is stated in *Sharaiu'l-Islam* to be less well supported by traditional authority : Bail. II. 218 *ll.* 21-24. (*c*) Some Shia authorities hold the *wakf* to be void from beginning : Bail. II. 218 *ll.* 11, 12, 15-17—a view in respect of which the *Sharaiu'l-Islam* states that view (*a*) is more reasonable.—Bail. II. 218 *l.* 19. (*d*) *Semble*, such *wakfs* valid, under all schools, provided that their object is religious

SECTION 463.

Implied permanent reservation.

(2) The ultimate benefit of the wakf property may be expressly or impliedly reserved for any purpose recognized by the Muslim law as a religious, pious or charitable purpose of a permanent character.[5] It may be inferred from such express or implied reservation or otherwise that the wakf was intended to be permanent.[6] Where the objects mentioned are such as may fail and neither a general charitable intention (s. 457(4B).) nor an intention that the dedication shall be permanent is indicated, it may be inferred that the dedication was intended to be only for a limited period of time,[7] and as such void.[8]

Perpetuity inferred from objects.

Illustrations.

(1) A says " I make a wakf of this house for a month, and afterwards the wakf will cease." The wakf is void ab initio.[8]

(2) A says, " I have made a wakf in favour of B," or " for B and his sons and daughters." Abu Hanifa and Imam Muhammad (also a minority of Shia lawyers) hold the wakf void. Abu Yusuf holds the wakf valid, and that after B, or B and his sons and daughters (as the case may be), the wakf property will be devoted to the poor. The Sharaiu'l-Islam holds that the wakf property will, after B (and his sons and daughters), revert to A or his heirs.[9]

(3) Imam Muhammad holds a wakf in favour of " my son," or " the poor of my kindred, being good persons," to be invalid as the objects would fail, but Abu Yusuf holds it valid. According to him a dedication in favour of the poor is to be implied after the death of the persons expressly mentioned : so that if a man dedicates property to A and B or to their children, they would be entitled to the produce of the wakf property and, after their death, the produce would be given to the poor.[10]

pious or charitable & general charitable intention is shown, but not otherwise, (*quaere*, whether not even under Shia or Shafii law). Cf. *per* Macleod, J. in *Mahomed Abdulla* v. *Abdul Rehman Jitakar*, (1907) 9 Bom. L. R. 998. When specified object fails, *wakf* property would be applied to other charities : s. 481. (D) *Fatmabibi* v. *Adv.-Gen.*, (1882) 6 Bom. 42, 51 : (necessity for express reservation suggested as better opinion, citing Bail. I. 567); *Abdul Ganne* v. *Hussen*, (1873) 10 Bom. H. C. R. 7. See however 10 Bom. H. C. R. 13 f. ; *Nizamuddin Gulam* v. *Abdul Gafur*, (1883) 13 Bom. 264 (dedication for benefit of wife, daughter & descendants of daughter ; no provision at all ultimately for religious or charitable object : *wakf* held void) ; *Amrutlal Kalidas* v. *Sheik Husein*, 11 Bom. 492, 504.

[5] Wakf Act, 1913, s. 3 implying preference for Abu Yusuf's opinion : *n.* 4. See s. 462, com. & table on p. 530.

[6] The second & third sentences of s. 463(2) follow, it is submitted, from the previous provisions.

[7] See s. 463, com.

[8] Bail. I. 557 (*ll.* 15-20) (565-566), Bail. II. 218, (*ll.* 8-9).

[9] Bail. II. 218 (*ll.* 11-16, 18-19). Under the Wakf Act, 1913, it would have to be determined whether there is implied dedication in perpetuity. *Submitted* : Shia law deals also with private settlements in favour of individuals & not charitable in the English sense, nor necessarily permanent : see *habs*, ss. 446 ff., pp. 518 ff.

[10] Bail. I. 559 (567-568). Viz. it is assumed that there has been created a *wakf* in the sense of a perpetual dedication of land with religious motive : rule as enunciated by Abu Yusuf founded on notion that " the property " (viz. its *asl* or *ayn* or corpus)

SECTION 463. Divergent views of the three Hanafi exponents.

The divergence in the views of the different exponents is made clear by the illustrations. Abu Yusuf is most favourable to the validity of wakfs. He does not require it to be expressly provided (1) that the wakf is to operate perpetually; nor that (2) objects that can never fail should be expressly mentioned in the wakf-nama: if the objects that are expressly mentioned fail, then the poor are (according to him) to be taken to be the beneficiaries by implication. See table on p. 530.

Construction of wakf.

Under the Wakf Act, 1913, the question is of the construction of the wakf-nama. That Act, it is true, refers in terms only to family wakfs. But acting in accordance with principle and analogy the Courts follow the same rule as regards other wakfs. If it appears that the settlor's real intention was to dedicate only for a fixed period, then his intention cannot be given effect to as a wakf. Such an intention may appear by (1) failure to mention that the wakf is to prevail in perpetuity, or (2) failure to mention objects that will continue in perpetuity.[11] But, failure to do either is not, it is submitted, in itself necessarily conclusive: from the surrounding circumstances and from the terms of the wakf-nama it may appear that the dedication was intended to be in perpetuity; and that such objects as would never fail were also intended to be benefited: the case then is analogous to settlements for charity in which a general charitable intention is indicated.[12] Abu Yusuf favours a presumption in every case that the wakf is valid in both particulars, and holds that such an intention may be read into every wakf. Abu Hanifa and Imam Muhammad hold otherwise.

Objects such as may fail.

III. INALIENABILITY OF WAKF PROPERTY.

464. After the dedication of a wakf is complete the property dedicated[13] passes out of the ownership of the wakif.[14] Subject to s. 467A, it cannot be alienated or trans-

already parted with absolutely, *wakif* having left nothing in himself: the property having been 'freed' from human ownership, & "transferred to God": ss. 457, 464. Then as to usufruct, *wakif* has indicated what is to be done with it for a limited period of time: after that it is assumed to be dedicated to the poor. See s. 366A.

[11] *Nizamuddin* v. *Abdul Gafur*, (1888) 13 Bom. 264 affmd. (1892) 19 I. A. 170 = 17 Bom. 1 (specified part of property for object that must fail: no ultimate reversion express or implied to charitable or religious objects: property *held* to continue to be private & heritable: not impressed with any *wakf*); *Pathukutti* v. *Avathalakutti*, (1888) 13 Mad. 66. Bom. H. C. had declined (prior to the Wakf Act, 1913) to uphold *wakfs* creating FAMILY SETTLEMENTS, & containing no express reference to any object that could never fail: Court proceeded to a great extent on its unwillingness to recognize family settlements in perpetuity: *Amrutlal Kalidas* v. *Shaikh Husain*, (1887) 11 Bom. 492; *Fatmabibi* v. *Adv.-Gen.*, (1881) 6 Bom. 42; *Phatc Saheb Bibi* v. *Damodar Premji*, (1879) 3 Bom. 84. Cf. *Mahomed Abdulla* v. *Abdul Rehman Jitakar*, (1907) 9 Bom. L. R. 998.

[12] E.g. *Baqaullah K.* v. *Ghulam Siddique K.*, [1935] 33 All. L. J. 647, (= s. 480A, com., Wakf Act, 1913, s. 3, prov. *n.*).

[13] *Abdur Rahim* v. *Narayan Das*, (1922) 50 I. A. 84, 91, (CAL.) (where whole property is subject of *wakf*, partly for family & rest for purposes that would under English law be deemed charitable or pious, no part of the property is alienable: its mortgage void: argued but not decided if mortgagee ought to have charge over that severable portion of property which was settled for family: 50 I. A. 89).

[14] Hed. 235; *Jewun Doss* v. *Kubeerooddeen*, (1840) 2 Moo. I. A. 390; *Doyal C.* v. *Keramut*, (1871) 16 W. R. 116; *Hidaitoonnissa* v. *Afzul Hossein*, (1870)

ferred either by the wakif [14] or the mutawalli. Their heirs have no right to inherit it.[15] It is not liable to be sold in execution of a decree based on private [16] debts due by the mutawalli.[17] His interest in the property (if any) is not such as can be sold in execution of such a decree ; but a receiver of the rents and profits may be appointed when the mutawalli is entitled to remuneration or maintenance out of them.[19]

SECTION 464.

Explanation.—Where part only of a property is dedicated, the portion that is not dedicated may be alienated and inherited : [20] and where there is a charge upon some property in the

Alienation of part of property, another part of which is wakf.

2 N. W. 420 (Shia case); *Kuttayan* v. *Mammanna Ravuthan*, (1912) 35 Mad. 681. Cf. *Ismail* v. *Mahomed*, (1893) 20 Cal. 834 (claim for declaration that plaintiff sole absolute owner ; but only relief given : declaration of lawful title to possession); *Kuttayan* v. *Mammanna Ravuthan*, (1911) 35 Mad. 681, 683 : for the words "view of....Abu Hanifa" read : "prevalent view of Hanafi law"; *Abdur Rahim* v. *Narayan Das*, (1922) 50 I. A. 84 (CAL.) (= *n.* 13); *Ma Mi* v. *Kallander* (No. 1), (1926) 54 I. A. 23, 27 : *wakf* & gift coupled with trust. But see *Venkatasubbarayudu* v. *Haji Silar S.*, (1929) 58 M. L. J. 524 ; *Mohammad Ahmad Saeed K.* v. *Kishori Lal*, [1932] 30 All. L. J. 414.

15 *Jaafar M. S.* v. *Aji Mohiuddin*, (1863) 2 Mad. H. C. R. 19 ; *Fegredo* v. *Mahomed*, (1871) 15 W. R. 75.

16 PRIVATE DEBTS as distinguished from debts incurred (with leave of Court) for *wakf* purposes : ss. 500, 501 ; *Zubaida Sultan* v. *Dawood Ismail*, [1937] 1 Cal. 99.

17 Secs. 464, 496A, 496B, 497A, (inalienability of *wakf* property) should be read together. *Bishen Chand B.* v. *Syed Nadir H.*, (1887) 15 I. A. 1 (CAL.); *Abdur Rahim* v. *Narayan Das*, (1922) 50 I. A. 84 (CAL.) (= *n.* 13); *Mahabir Prasad Marwari* v. *Syed Shah Md. Yehyea*, (1935) 15 Pat. 88 (carefully considered judgment); *Shah Mohammad Naim Ata* v. *Mohammad Shamshuddin*, (1926) 2 Luck. 109, 122 ; *Sattappa* v. *Mahomed Saheb*, (1935) 60 Bom. 516, 546-544, citing *Narayan Singh* v. *Niranjan*, (1934) 51 I. A. 37, 52, 53 ; *Shailandranath Palit* v. *Hadi Kaza Mane*, (1931) 59 Cal. 586 ; *Bikani Mia* v. *Shuk Lal Poddar*, (1892) 20 Cal. 116, 150-1, citing *Qadira* v. *Kubeeruddin*, (1824) 3 Sel. Rep. 470(O.), 523(N).

18 *Bishen Chand* v. *Nadir Hossein*, (1887) 15 I. A. 1 = 15 Cal. 329 (MUTAWALLI'S right of REMUNERATION (see s. 496), might give him a sort of beneficial interest in *wakf* property); cf. *Mohiuddin* v. *Sayiduddin*, (1893) 20 Cal. 810 : yet corpus of estate cannot be sold in execution of personal decree against him, nor any specific portion of it taken out of his hands on basis of margin of profit being left after performance of all religious duties : *Sattappa* v. *Mahomed Saheb*, (1935) 60 Bom. 516, 542-44 ; *Sarkum Abu Torab* v. *Rahaman Buksh*, (1896) 24 Cal. 83 (office incapable of being attached in execution : custom that office transferable by sale is opposed to public policy); cf. ss. 492 G, 492 H.

19 *Syed Waziruddin* v. *Syed Bashiruddin*, [1937] Nag. 534 (fields for maintenance & as remuneration for service as KAZI); following *Rajindra Narain* v. *Sundara B.*, (1928) 52 I. A. 262 = 47 All. 385 (right to future maintenance cannot be attached & sold but RECEIVER can be appointed to recover rents & profits of villages to pay the maintence & to apply balance towards decree); *Mir Mahebuballi* v. *Ahmada B.*, [1933] AIR (NAG.) 266 (receiver appointed for benefit of judgment-creditor, of rents & profits of inalienable & unattachable jahagir granted for maintenance : suitable allowance being made for judgment-debtor); *Nawab B. of Murshid* v. *Karnani B. K.*, (1932) 58 I. A. 215 = 59 Cal. 1 (RECEIVER OF ESTATE settled as inalienable by statute).

20 *Futtoo B.* v. *Bhurrut L. B.*, (1868) 10 W. R. 299 ; *Kuneez Fatima* v. *Saheba*, (1866) 8 W. R. 313 ; *Khaja Surwar Hossein* v. *Khaja Syed Hossein*, [1858] S. D. A. (CAL.) 1028 (property is (i) *wakf* if it is "devoted to the Deity on relinquishment of proprietory right," (ii) it may be held subject to certain trusts, in which inheritance may be claimed subject to the trusts); citing *Moohummud Sadik* v. *Moohummud Ali*, (1798) S. D. A. (SEL. CAS.) Ed. W. H. Macn. (CAL.) 17 ; *Mahomed Munnoo*

SECTION 464. nature of a wakf, the property may be alienated and inherited subject to the charge.[21]

Legal ownership of wakf property.

Wakf being a perpetuity, its object must be to provide for a series of persons. It is obvious that none of the beneficiaries individually becomes the owner of the property. They become successively entitled to take its recurring benefit. Such a purpose must, therefore, in accordance with the theory of Muslim law, be effected by dealing with the usufruct of the property or its recurring profits or produce, by creating in favour of the beneficiaries or objects, rights limited in point of duration : not by a transfer to them of the ownership of the property itself. This is explained at length in s. 366A, com. The usufruct being so disposed of, and the uses to which it is to be put being determined, what is to become of the ayn, i.e. the property itself, its corpus?

(1) Abu Hanifa holds that the ownership of wakf property continues in the wakif,[22] [and on the death of the wakif devolves on his heirs]. His view is that the wakif remains the bare owner of the corpus, or rather of the husk of the property of which the benefit is entirely devoted and dedicated to the beneficiaries or objects of the wakf. This view is not illogical. It proceeds on the basis that only the right to the recurring produce or usufruct has been disposed of, and the rest remains where it was : the distinction between corpus and produce being always kept in mind : s. 366A.

(2) Abu Yusuf and Imam Muhammad hold that the property is "in the implied ownership of God."[23] "The fatwa is in conformity with the opinion of the two disciples."[23] "In fact," explains Sir Abdur Rahim, "the ownership of the property....becomes reverted in God as he is originally the owner of all things. But as God is above using or enjoying any property its usufruct must necessarily be devoted to the benefit of human beings."[24] The purely metaphorical sense in which alone the expression ownership of God can be used in the present context must not be overlooked. It cannot form the basis

"Ownership of God" is metaphorical.

Chowdree v. (*Mt.*) *Hajra Beebee*, [1858] S. D. A. (CAL.) 1218; *Dalrymple* v. *Khoondkar Azeezul-Islam*, (1858) S. D. A. (CAL.) 586 (endowment may be wholly *wakf*, i.e. all profits arising therefrom devoted to religious purposes. "But when the office of *mutawalli* is hereditary, the incumbent has a beneficial interest in the property, we look upon it as a heritable estate burdened with certain trusts, the proprietory right of which is vested in the *mutawalli* & his heirs, & in such a case there appears no sufficient reason why the incumbent should not exercise a right possessed by other proprietors to grant leases even in perpetuity"); *Mohammad Ahmad Saeed K.* v. *Kishori Lal*, [1932] 30 All. L. J. 414 (*wakif* reserved right to transfer part of dedicated property for payment of his debts). Cf. Wakf Act XLII. of 1923, s. 2(*a*). See Hals. *Laws of Eng.* IV. 143, § 225 : "A charitable trust may be so limited as to affect part only of the property granted or devised, as when property is given subject to or in trust to make specified charitable payments which do not exhaust the whole estate. In those cases where the donor has not expressed a GENERAL INTENTION to devote the whole property to CHARITY the donee takes beneficially, subject only to the specific appropriation." Cf. Ind. Trusts Act, II. of 1882, s. 83; s. 478.

21 See s. 478 (subject of wakf may be undivided part of, or charge upon property).

22 Bail. I. 549 (*ll.* 2-3) (557).

23 Bail. I. 550 (*ll.* 8-9) (558); *Moohummud Sadik* v. *Moohummud Ali*, (1798) 1 S. D. A. Cal. 17.

24 Abdur Rahim, *Muh. Jurispr.* 304, citing *Hidaya* & *Fathul-Qadir* v. 416-22. See s. 462(1), p. 552, *n.* 2.

of any practical reasoning. What is important to note is the distinction between the corpus and the usufruct. The corpus in this case is a mere notion. SECTION 464.

(3) The Shia authorities consider the property to be transferred to the beneficiaries or the object of the wakf.[25] The Shia law relating to the grant of limited interests (ss. 446, ff.) is closely allied to that of wakf. The two differ mainly in this, that wakf is (*a*) perpetual (*b*) made with the intention of "approach to God."[26]

Wakf : Legal incidents.

The property dedicated "is not merely charged" with trusts, "while remaining his property, and in his hands. It is in very deed God's acre, and this is the basis of the settled rule that such property as is held in wakf is inalienable, except for the purposes of the wakf."[27]

Reason why wakf property inalienable.

The reason of the rule has been thus explained : that the property may not be taken out of the hands of the trustee and put into the hands of a purchaser, who might be the follower of a religion other than Islam : that a non-Muslim would be unqualified for providing funds for an Islamic purpose and taking care that the ceremonies be duly and properly performed.[28] It is submitted that the texts contemplate the state religion to be Islam, and the suggested danger is unlikely to have been present to the minds of the authors. The real explanation of the inalienability of wakf property seems to be in the very essence of the transaction. The wishes of the wakif have been laid down and have to be given effect to. The property is "tied down," i.e. made inalienable. The purpose of the wakif is to benefit the specified charities in perpetuity. The person who has charge of the property is given control over it as a trustee to see that the wakif's purpose is given effect to. The beneficial interest in the usufruct, is thus completely disposed of by the wakif : the destination of the usufruct having been laid down for all time by the dedication. The mutawalli has to give effect to the wakif's directions as regards the usufruct. As to the corpus, its alienation can only mean that the mutawalli disregards his own duties of putting the wakf property to its proper uses, and gives it into the charge of another person who obviously intends to use its produce and benefits for his own purposes. The alienation of the corpus without the usufruct would mean the alienation of the bare husk. Even the alienation of that bare corpus, subject to the charge or duty of giving effect to the wakif's direction to put the profits to the stated uses,—that also the mutawalli has no right to effect. He can not transfer his trust : ss. 492 F, 496(2). The alienation of wakf property can validly be effected only for the purpose of varying the investment (as to which see s. 466(2).). The

[25] Bail. II. 229 (*first appendage*). See s. 465.

[26] It is dangerous to adopt English terminology. But if it may be cautiously done, Shia authorities may be said to hold that legal estate passes away to *c. q. tr.* who have equitable interest. But again it is respectfully pointed out that all this discussion is purely academical.

[27] *Abdur Rahim* v. *Narayan Das Aurora*, (1922) 50 I. A. 84, 90 (CAL.) (Lord Sumner); see s. 464 *expl.*

[28] *Bishen Chand* v. *Nadir Hossein*, (1887) 15 Cal. 329 ; 15 I. A. 1.

SECTION 464. alienation contemplated by Sir Barnes Peacock [28] is rather a transfer of the right of the mutawalliship than of the property (see s. 495 A). As regards competence to act as mutawalli, being a non-Muslim is not necessarily fatal (s. 489). Though that fact may make the person so unfit in regard to particular species of wakfs, as to render it extremely undesirable that he should be recognized as a mutawalli. But the position is that the original owner (wakif) has not transferred to the mutawalli any power except the power of giving effect to the dedication : the power of transferring even the mutawalliship (if any such power is conferred) is restricted to the appointment of a successor.

Alienation of property not itself subject of wakf but forming part of that which is subject of wakf.

Where part only of a property is the subject of the wakf, there is nothing to prevent the alienation of the other part, which does not form the subject of wakf and which therefore not having been "tied up," has either remained in the wakif's ownership, or, on his death, devolved upon his heirs. But where only part is settled on the wakif's family and the rest for general charity, the whole is wakf.[28]

Any person acquiring wakf property with notice of the charity charged upon it, is bound by it,[29] even though the mutawalli purports to sell it for his private debts. The Indian Limitation Act, art. 136, does not apply to a wakf.[30]

Sect. 465 in earlier editions is now s. 519 C.

IV. REVOCATION OR ALTERATION.

466.[1] (1) A wakf cannot be revoked after its dedication has been completed.[2] Dedication subject to a power of revocation (the wakf not being for a masjid :[3] s. 575A) is void and of no effect.[3]

[29] *Charitable Donations Commrs.* v. *Wybrants*, (1845) 2 Jo. & Lat. 182, 198. Cf. *Muhammad Esuf S.* v. *Moulvi Abdul Sathur*, (1928) 42 Mad. 161 (F. B.) (grant of land for mosque confirmed by Inam Commissrs. : Government resumed the land : presumed that lands remained subject to trust for mosque).

[30] *Vidya Varuthi T.* v. *Balusami Ayyar*, (1921) 48 I. A. 302 ; *Abdur Rahim* v. *Narayn Das*, (1922) 50 I. A. 84 (CAL.).

[1] Sect. 466 cited & applied in (*Mt.*) *Rahiman* v. *Mt. Baqridan*, (1935) 11 Luck. 735, 752 (F. B.) ; *Ma E. Khin* v. *Maung Sein*, (1924) 2 Rang. 495, 503. The section now incorporates the decisions pronounced since the last edition.

[2] Hed. 231-232 ; Bail. I. 550 (558), II. 212 ; *Ma Mi* v. *Kallendar Ammal* (No. 1), (1926) 54 I. A. 23, 29 (*ll.* 4-6) (RANG.) (if *wakf* perfected by transfer of possession. donor has no power to revoke) ; *Fatmabibi* v. *Adv.-Gen.*, (1881) 6 Bom. 42 : "The *wakf* was created by a living man & is therefore irrevocable," : *Ashna B.* v. *Awaljadi B.*, (1916) 44 Cal. 698 ; cf. *Baqaullah* v. *Ghulam Siddique*, [1935] 33 All. L. J. 647, 648 ; *Masuda Khatun* v. *Mahammad Ebrahim*, (1931) 59 Cal. 402, 434-436 ; *Syed Ali Zamin* v. *Syed Muhammad Akbar*, (1928) 7 Pat. 468, 476, 477 (upto moment of completion *wakif* may make any changes he likes) ; *Abdul Wahab* v. *Sughra B.*, (1931) 54 All. 455.

[3] *Wakf* must not be subject to OPTION : *Fatmabibi* v. *Adv.-Gen. of Bombay*, (1881) 6 Bom. 42 ; *Abdul Satar* v. *Adv.-Gen.*, (1932) 35 Bom. L. R. 18, dissenting from *Assoobai* v. *Noorbai*, (1905) 8 Bom. L. R. 245, 250 f. on question of construction : holding that deed, cl. 12, empowered complete revocation of dedication as whole, not merely permitted substitution of trusts *ejusdem generis*. HANAFI LAW : Abu Yusuf & Imam Muhammad disagree on whether right of revocation or alteration may be validly reserved in dedication. *Hidaitoonnissa* v. *Afzul Hossein*, (1870) 2 N. W. 420 ; *Cassamally* v. *Currimbhoy*, (1911) 36 Bom. 214 ; Imam Muhammad holds dedication subject to option to revoke, void ; Abu Yusuf holds option limited for three days, permissible. Bail. I. 557 (*ll.* 5-9) (565). Three days is period for which law permits

SECTION 466.

Altering rules of administration.

Varying investments.

(2) *Semble,* unless the power to alter has been reserved in the dedication none of its terms may be altered after the dedication has been completed.[4] A power may be reserved to the wakif to alter the trusts, and to substitute new trusts of a charitable nature or to alter the rules relating to administration,[5] or exchange the wakf land for other land, or sell it and purchase another land ; so that the land so taken in exchange or purchased becomes subject to the wakf.[6] *Quaere,* whether similar powers may be conferred on subsequent mutawallis.[7]

options in sale & other transfers of property ; Hed. 238. Rule permitting an OPTION but restricting it to THREE DAYS is in modern circumstances of no practical effect & may be neglected. But two exceptions are stated to this rule. *First exception* which is important—Abu Yusuf & Im. Muhammad are agreed that dedication FOR MASJID with option for revocation (whether or not restricted to three days) operates as irrevocable dedication,—option being void. Where two exponents differ : s. 11A may be brought into operation & thus on equitable principles dedication with option to revoke held void : see *Abdul Satar* v. *Adv.-Gen.,* (1932) 35 Bom. L. R. 18, 25 *ll.* 15-18. But as regards *wakf* for *masjid* both disciples agree & it may be more difficult to disregard their views, unless it be on ground that Abu Hanifa's view is not known. The *second exception* is only apparent : TESTAMENTARY dedication may be revoked at any time ; its validity not affected by express provision permitting revocation either on happening of a contingency or absolutely : *Muhammad Ahsan* v. *Umardaraz,* (1906) 28 All. 663 ; but see *Pathukutti* v. *Avathalakutti,* (1888) 13 Mad. 66. Cf. s. 474.

[4] See ss. 474, 474A ; e.g. *Niamatunnissa* v. *Hafizul Rahman,* (1933) 8 Luck. 442 444 ; *Adv.-Gen.* v. *Fatima Sultani B.,* (1870) 9 Bom. H. C. R. 18 (*wakif* having laid down that *mutawalli* be selected from specified class of persons, cannot appoint someone outside class) : see *ill.* Cf. Ameer Ali, I. 341 (437) citing the *Surrat-ul-Fatawa,* p. 425 which again refers to *Khazanat-ul-Fatawa,* ch. on *wakf* where stated that author of *Manah* was asked about deed of *wakf* containing condition to effect that *wakif's* male descendants should be *mutawallis,* but later another deed discovered of prior date, in which male as well as female descendants nominated ; on question which deed should be acted upon, he answered that 'If *wakif* in first deed or at time of dedication reserved to himself power of altering provisions regarding management, etc. then, second deed should be acted upon. But if no such power reserved, in that case the first deed, viz. in which there was restriction should be acted upon.' "In the *Asaaf* it is stated the *wakif* cannot go beyond the conditions laid down at the time of dedication."..... "in the *Fawaid* it is stated from Khassaf that where there are two contradictory conditions made by a *wakif,* the second is to be acted upon, unless it is beyond his powers."..... "When there are two contradictory provisions in a *wakf-namah,* the one which follows will be given effect to, according to us (Hanafis) as the last condition overrides the first."—*Surrat-ul-Fatawa,* p. 425.

[5] He may reserve POWERS TO ALTER rules, etc. relating to MANAGEMENT : *Ma E Khin* v. *Maung Sein,* (1924) 2 Rang. 495, 506. Power of varying trusts to others *esjusdem generis* seems to be conceded in *Abdul Satar* v. *Adv.-Gen.,* (1932) 35 Bom. L. R. 18, 25, 26 ; *Abdul Wahab* v. *Sughra B.,* (1931) 54 All. 455 (power may be reserved to name beneficiaries subsequent to execution) ; Bail. I. 588 (598) ; ss. 474, 474A ; *Masuda K. B.* v. *Muhammad Ebrahim,* (1931) 59 Cal. 402, 529 (POWER TO VARY INVESTMENT).

[6] This sentence = s. 467 in previous editions.

[7] Bail. I. 586-587 (596-597) : if dedication empowers *wakif* to EXCHANGE LAND for another, *wakif* may not exchange land more than once, nor exchange land for mansion. But see s. 5c. This in accordance with opinion of Abu Yusuf from whom Imam Muhammad dissents. Cf. Ind. Trusts Act VI. of 1882, s. 40 (trustee may from time to time VARY INVESTMENTS) : Trustee Act, 1893, (56, 57 Vict., c. 53) s. 1. *Hume* v. *Lopes,* [1892] A. C. 112, Stroud, *Jud. Dict.,* s. v. *Vary, Trust Funds.*

SECTION 466. *Illustrations.*

(1) A dedication purporting to reserve power to sell the wakf property and to expend its proceeds on the wakif is void.[8]

Reservation of power to sell avoids wakf.

(2) Land granted in inam in trust for a mosque was resumed by Government, and re-granted to the trustees in their individual capacity, on full assessment, *held* the trust did not cease, the grantees were bound to hold the land in trust.[9]

1.—Irrevocable only after completion.

Abu Hanifa holds a wakf to be revocable unless there is a decree of the Court confirming it. This is the usual form in which the rule is stated. Its effect is that a person who has purported to make a wakf may resile from his declared intentions and acts, notwithstanding that he may have acted upon such declarations, so long as he has not obtained an order of the Court confirming his declaration. But the opinion of Abu Yusuf and Imam Muhammad is opposed to Abu Hanifa's. The fatwa is in conformity with their opinion.[10] The opinion of Abu Hanifa has never been given effect to. Another opinion is attributed to Abu Hanifa that "the appropriator's right of property is extinguished in consequence of his suspending that upon his decease."[11] This alleged opinion is alluded to in the Fatwa Alamgiri[12] but the Hidaya denies any foundation for the opinion being so attributed.[11]

Wakf why irrevocable—

Previous to Islam "appropriations were," it is said, "absolute (i.e. irrevocable), but our law has rendered them otherwise,"[13] viz. according to Abu Hanifa, who is alone in holding them to be revocable. The ground he gives is that the Prophet said : "property cannot, after the decease of the proprietor, be detained from division among his heirs." No one else shares this view with Abu Hanifa ; and whether a wakf was revocable or not previous to Islam it is under Muslim law irrevocable, because, though a voluntary transaction,

—it brings return : religious merit.

it brings an iwaz to the wakif in the form of approach to God (qurbat)[14] and such transactions are irrevocable : s. 348, com. Abu Hanifa does not consider qurbat a necessary constituent of wakf, hence he classes wakfs amongst revocable transactions.

The revocation of a testamentary wakf may be evidenced in the same manner as the revocation of a bequest generally may be evidenced, e.g. by the way in which the testator subsequently deals with the subject of the wakf.[15]

2.—Reservation of power to alter.

With reference to reserving a power to alter the terms of a declaration of wakf,—

[8] Bail. I. 556 ; *Fatmabibi* v. *Adv.-Gen. of Bombay,* (1881) 6 Bom. 42.

[9] *Muhammad Esuf S.* v. *Moulvi Abdul Sathur,* (1918) 42 Mad. 162 (F.B.).

[10] Bail. I. 549-550 (557-558). Bail. I. 549 (last line) "OBLIGATORY" = (in effect) IRREVOCABLE (opposed to "VOLUNTARY"); see s. 420, com.

[11] Hed. 233 (col. i. par. 1, 3).

[12] Bail. I. 550 (*ll.* 3-7) (558), 606 (*l.* 7 of par. 3) (616), 609 (*l.* 6) (620), i.e. a testamentary *wakf.*

[13] Hed. 232 (col. i. *ll.* 35-42) : by Shirrah.

[14] *Qurban,* often spelt *korban,* (sacrifice) is, I believe, well known in Jewish & English theology, derived from same root (*qurb*) as *qarabat* = nearness (to God) : *qurban* has become synonymous with "sacrifice."

[15] *Abdul Karim* v. *Shofiannissa,* (1906) 33 Cal. 853 ; cf. Bail. I. 618 (par. 2) (628), 619 (629); II. 231 (par. 2).

SECTION 466.

a.—HANAFI LAW. Employment of produce at option—

(1) For Hanafi law, see Fatawa Alamgiri : "When a man has said : 'my land is a sadaqa appropriated to Almighty God for ever, on condition that I may employ the produce as I please, he may lawfully do so.'[16] But if he should apply it to the indigent or in pilgrimage or to a particular individual he cannot reclaim it, even though he should say in doing so : 'I have given it to such an one.'[17] He may give it to one set after another. Yet if he were to apply it to himself, the wakf would be void. It would be different if he had said : 'on condition that I may give it to whomsoever I please.' When a man has settled his land on condition that he may give the produce to whom he pleases, the wakf is lawful, and he has the power of doing so while he lives, but it ceases on his death, and he cannot eat of the produce himself. He may, however, bestow it on the rich, or even on one such person in particular. A man makes a wakf of his estate on condition that the administrator may give the produce as he pleases ; this is lawful, and he may give it to rich and poor. If he should say 'on condition that such an one may give the produce to whomsoever he pleases, it is lawful, and the power may be exercised during the life of the appropriator and after his death ; and the person authorized may give to his own child and nasl and also to the child and nasl of the appropriator but not to himself."[18]

(i) of wakif,

(ii) of mutawalli,

(iii) of a third party.

b.—SHIA LAW—

(2) The Shia law is thus stated in the Sharaiu'l-Islam :—"If one should make an appropriation with a condition that the property is to revert to him in case of need, the condition would be valid, but the wakf void,[19] and the property would remain in the condition of a habs[20] until the occasion should arise, while if he should die, it would go to his heirs. And if he made it a condition that he shall have the power of excluding whomsoever he may please, that would invalidate the wakf.[21] But if the condition were that he may add to those in whose favour the appropriation has been made, some yet to be born, the condition would be lawful, whether the appropriation were for others or his own children. If again the condition were that he may make an entire transfer from those on whom the settlement has been made to others subsequently to come into being, that would not be lawful, and the wakf would be void. Some have said that when one has made a settlement on his young children, he may lawfully make others participate with them without reserving any express power to that effect ; but this opinion is not to be relied upon."[22]

(i) Reversion to wakif makes wakf void : turns it into HABS.

(ii) power to exclude avoids.

(iii) power to add valid.

(iv) power to transfer avoids.

(v) can power to add be exercised without express provision ?

[16] *Mujibunnissa* v. *Abdur Rahim*, (1900) 28 I. A. 15, 24, 26-27 = 23 All. 233, 243-245 (*mutawalli* to use income in way he thinks proper according to provisions of law & conditions of *wakf-nama* : no one having right to demand account ; prior to Wakf Act, 1913 this was held not to constitute *wakf*, as dedication not to charity but substantially for maintenance & aggrandizement of family estates & for family purposes).

[17] I.e. though he purports to give it merely as gift, it is not revocable ; being impressed with *wakf*.

[18] Bail. I. 587-588 (598) ; cf. next paragraph for Shia law.

[19] Under Shia law any condition for benefit of *wakif* avoids the *wakf*. See s. 486, *ill.* (4).

[20] Spelt *hoobs* by Baillie ; but correct form seems HABS = retention, devotion to particular purpose, Bail. II. 226, *n.* 2. See s. 446, com., pp. 518 f. *nn.*

[21] Probably on ground that this = power to revoke *wakf*.

[22] Bail. II. 219 (par. 2). See ss. 474, 476A.

SECTION 467. V. VARYING INVESTMENTS.

467. The Court may in a proper case order the original wakf property[23] to be sold and another property to be purchased with the sale proceeds[24] notwithstanding that the dedication contains a provision that the property dedicated[23] shall not be changed or replaced.[25]

The inalienability of the wakf property does not militate against the power in a proper case,[26] with the sanction of the Court, to "vary the investment."[25] Thus Bahr-ur Raiq[26] refers to (1) the wakf property being reduced to such a condition that the objects of the wakf cannot be given effect to, so that the beneficiaries are unable to derive any benefit from it, in which case it is provided that the Kazi may order the sale of the property, and direct that the sale proceeds be invested in the purchase of another property ;[26] (2) to the sale of property dedicated to a mosque (not the mosque itself), provided that the property has become useless for the purposes of the mosque ; (3) the Fatawa Kazi Khan[26] suggests that in some cases wakf property may be sold, and another purchased out of the sale proceeds merely because the variation of the investment would be beneficial to the wakf.

The force of these rules becomes clearer when contrasted with those relating to land dedicated as a mosque, which may not thereafter be utilized for any other purpose. Though the site and building of a mosque become unfit for their original object they cannot be alienated with the intention of their being put to other use and of another site and building being purchased for the mosque.

Sect. 468 in the earlier editions is now s. 462A.

VI. APPLICATION OF INCOME OF WAKF PROPERTY :

(1) Repairs : not improvements.

469. The income[1] of the wakf property must be applied to the following four purposes in the order in which they are mentioned below :

(1) The maintenance, and repairs of the wakf property,[2] i.e. its preservation in the state in which it was at the time of

[23] *Zubaida Sultan Begum* v. *Dawood Ismail Makra*, [1937] 1 Cal. 99 (before passing decree which may operate on *wakf*, Court must be satisfied as to *mutawalli's* right of indemnity against *wakf* property); *Sayad Arsad Husain* v. *Sm. Naresh Nandini*, (1936) 40 C. W. N. 584 (permanent lease of *wakf* property, valid against *mutawalli* granting it, during his life).

[24] Cf. *Imambandi* v. *Mutsaddi*, (1918) 45 I. A. 73, 91 (CAL.) (discretion of judge to sanction VARYING of INVESTMENTS in interest of minor : see s. 272, com. (3)(*c*).).

[25] *Bahr-ur-Raiq*, V. 241, even if there is condition that *wakf* property should never be changed, *Kazi* can authorize changing & replacing it, if advisable ; *Mahomed Ismail Ariff* v. *Ahmed M. D.*, (1916) 43 I. A. 127 = 43 Cal. 1055 ; s. 493, com. On VARYING INVESTMENT (Ind. Trusts Act, s. 40) : see s. 466(2), p. 567, *n.* 7.

[26] *Bahr-ur-Raiq*, V. 223, 237 ; *Fatawa Kazi Khan*, III. 302, 383.

[1] See s. 456(3). Income may take form of OFFERINGS AT DARGAH : s. 369A, *n.*

[2] Hed. 236 ; Bail. I. 565 (574) (income of *wakf* to be expended on necessary REPAIRS whether appropriator has made it condition or not) ; Bail. I. 568-569 (577-578), 596 (*l.* 3) (606). TAXES : *Fatawa Alamgiri* : right to produce accrues to beneficiary when produce exceeds actual expenses, including land tax, (*kharaj*) & compulsory cesses,—"which are a debt for which the crop is liable." Bail I. 568-9

SECTION 469. Suspension of wakf to provide for repairs.

dedication (but not for improvements) :[3] where, under the dedication, repairs are not the first charge on the income, the Court may suspend the application of the income to the objects specified, and order the repairs to be made thereout ; but the mutawalli is not authorized do so without an order of the Court.[4] (2) The specified[5] objects of the wakf.[2] (3) That which is necessary for the general purpose of the specified objects.[6] (4) The benefit of the poor,[7] or other object recognized by the Muhammadan law as a religious, pious or charitable object of a permanent character, for which the ultimate benefit of the wakf property has been expressly or implied reserved.[8]

(2) Objects of wakf.
(3) Necessities.
(4) Benefit of poor.

Illustrations.

(1) A says : "I have given the produce to B for a year (or two years) and after that to the poor," and makes it a condition that the repairs are to be made out of the produce, the repairs are to be postponed to the right of B unless the postponement of them should be for the manifest injury of the wakf, in which case the repairs must first be made.[9] This is evidently a question of construction, (see s. 5c) the decision adopted by the Fatawa Alamgiri being that, in the circumstances mentioned, the object of A was in effect to give one or two years' produce to B.[10]

(2) If property is dedicated for the residence of a beneficiary, A, and after him for the poor, the repairs are to be made by A ; and if he refuse, or is poor, the Hakim (or Court) is to let the property, and to make repairs out of the rent ; and when these have been completed he should restore it to the beneficiary.[11]

Wakf premises to be let when not in use.

Under Hanafi law Abu Yusuf always assumes that the ultimate destination of wakf is the benefit of the poor.[12] The Wakf Act, 1913, implies that other objects may be mentioned as fit objects for the ultimate benefit. "The benefit

(577-8); *Jaffar El Edroos* v. *Mahomed E. E.*, (1936) 39 Bom. L. R. 277.

[3] Hed. 236 (col. ii); but see Bail. I. 608 (par. 2) (619): minaret may be added to mosque if necessary for making call to prayers heard ; cf. s. 270, also *Re Casamally Jairajbhai Peerbhai*, (1906) 30 Bom. 591.

[4] Hed. 236, col. ii = s. 469, *ill.* (2), cf. s. 498.

[5] The specified objects = preliminary objects : s. 457(4A), p. 533 ; s. 480A, com. : Wakf Act, s. 1913, speaks only of ultimate objects.

[6] Bail. I. 565 (574); *Jugatmoni* v. *Chowdrani Ramjani Bibee*, (1884) 10 Cal. 533 : excess income to be devoted to same purpose as original specified.

[7] Bail. I. 558 (par. 1, 2) (66-567), 559 : see com. See also s. 457(4A).

[8] Cf. ss. 463, 481, 457(4A).

[9] Bail. I. 565 (574). But see s. 5c.

[10] The Settled Land Act, 1882 & Conveyance Acts, 1881, &c., in England may occasionally afford useful guidance.

[11] Bail. I. 565-566 (574-575); Hed. 236, col. ii.

[12] Bail. I. 588 (par. 1, 2) (598), 589 (599), 610 (621); (*Khajah*) *Hossein Ali* v. *Hazara Begum*, (1869) 12 W. R. 344 (affirmed *ib.* 498): "The poor are provided for which is the primary object of every *wakf*." (Kemp, J.); *Bikani Mia* v. *Shuk Lal Poddar*, (1892) 20 Cal. 116, 157 (Ameer Ali, J.); Cf. *Radd-ut-Muhtar*, III. 670, cited Ameer Ali, I. 291 (381). See *n.* 14 (per Lord Halsbury).

SECTION 469.

of the poor" seems indeed synonymous with "a [religious, pious or] charitable object of a permanent character." [12] The Fatawa Alamgiri states that, if the express object of the wakf is to provide residence for pilgrims,—"When the days of the season (of haj) have passed, it should be let, and kept in repairs out of the rents; and the surplus, if any, distributed amongst the poor," [13] and according to Abu Yusuf, if an intention to create a wakf is validly declared, but no object is expressed, the wakf does not become void, but it will be for the benefit of the poor.

Poor ultimate beneficiaries.

Charity means relief of poverty.

"The real ordinary use of the word 'charitable'," said Lord Halsbury "always does involve the relief of poverty." [14] So that really when the texts say 'for the poor' it means for charity in the broadest sense. Abu Yusuf's ruling that ultimately the beneficiaries under a wakf are always the poor, has a threefold aspect:—Assuming that there is a valid dedication the property being already impressed with a wakf: (1) if the objects of the wakf are not mentioned, the property will be devoted to the poor. The doctrine of cy pres applies when "a general charitable intention" has been manifested, but not otherwise. The result is not quite easy to state. But probably, it would be correct to say that, (*a*) in a case where the wakf-nama is silent, if the mutawalli were (without any order of the Court) to apply the wakf property for the benefit of the poor, e.g. for feeding, or clothing, or educating the poor, there would be no breach of trust, (s. 481A) but that (*b*) the Court might, in framing a scheme, specify the objects more definitely; (2) if the objects fail, there is a resulting wakf for the poor. This second case is contemplated by Abu Yusuf chiefly where the preliminary object of the wakf is to provide for individual beneficiaries, and, in particular, for the descendants of the wakif. Thirdly (3) if the objects of the wakf exhaust only a part of the income, the rest of the income will, according to Abu Yusuf, be for the poor. The Court may (i) in some cases hold that only a part of the property is the subject of the wakf, and that the rest is not dedicated and is outside the scope of the wakf, hence that the latter part continues to be the private property of the wakif and remains alienable and heritable. (ii) Where the wakif dedicates the whole of the property as wakf, but omits to lay down how the whole of the income is to be utilized, or the income increases to such an extent as to be only partly exhausted by the specified purposes of the wakf, the surplus would be for the poor. The question is discussed from another aspect in s. 481, com., pp. 598 ff. See also p. 575.

Unexhausted or unappropriated part devolves on poor.

Charge on property.

VII. LEASE or alienation by beneficiaries.

469A.[15] Shia law permits the beneficiaries under a wakf to make a lease [16] of the wakf property or otherwise transfer or alienate [17] it, for the period during which they are entitled to its benefit, but so that such lease or transfer or alienation

[13] Bail. I. 610 (par. 1) (621). Cf. Ameer Ali, I. 150, 151 (219, 220).

[14] *Commrs. of Inc.-Tax* v. *Pemsel*, [1891] A. C. 531, 552 (Halsbury, L. C.).

[15] Sect. 469 = 464(2) in last edition. [16] Bail. II. 222. See com.

[17] Mortgage good so far as interest of beneficiary concerned: *Amrutlal* v. *Hussein*, (1887) 11 Bom. 492. This case overruled so far as it held *wakf* valid though it

does not prejudice the rights of any succeeding beneficiaries.[16] Hanafi law seems to be to the same effect.[18] SECTION 469A.

The result stated in s. 469A seems to follow from the theory of Shia law that the subject of wakf vests in the beneficiaries. The Sharaiu'l-Islam discusses the question whether a lease granted by the beneficiaries becomes void on the death of the grantors, and holds that the beneficiaries themselves, having only a life-interest, cannot, in any event, grant a lease for a longer period. The authorities are divided on the question whether even the owner of private property may make a lease that should continue in force after his death.[19] "If then a person should appropriate his share in a slave, and subsequently emancipate him, the emancipation would not be valid, because the right of property in the slave has passed out of him; not neither would it be valid if the mauquf alaihi (beneficiary) should emancipate the slave, because of the right which future generations have in the slave."[19] Cf. Indian Trusts Act, ss. 58, 56. Lease or alienation by beneficiaries.

470. Where, under a dedication several objects or beneficiaries are entitled to take the benefit, they will (in the absence of anything to indicate a different intention) take simultaneously, and in equal shares.[21] VIII. BENEFIT : Equal : simultaneous.

471. Under Shia law where the beneficiary who in point of time, is to benefit in the first instance, fails, the whole wakf becomes void.[22] Subject as above, where some of the objects of a dedication fail, or cannot be given effect to, the validity of the other objects is not thereby affected,[23] except that, *semble*, the failure of the prior object may accelerate a later.[24] *Quaere*, whether under Shia law also a subsequent object of wakf may be accelerated by the failure of a prior one.[25] IX. Failure of first object. Failure of some objects. Acceleration.

created perpetual family settlement; *Abul Fata* v. *Russomoya*, (1894) 22 Cal. 619 = 22 I. A. 76. But Wakf Act, 1913, proved a Hercules to this Alcestis.

18 Cf. Ind. Trusts Act, s. 56. But Shia law contemplates beneficiaries taking much more active part in management of *wakf* property: Hanafi law expects all administration to be done by the *mutawalli*.

19 *Sharaiu'l-Islam* (Case 9) (Calc. ed.) p. 239; Bail. II. 222 (*sixth*).

20 Bail. II. 220 (par. 2).

21 Cf. Bail. II. 221 (*ll.* 10-12); I. 579 (par. 3) (589), cited s. 485, com. See also s. 512(1), *Makhlachor Rahman* v. *Faizur Rahman*, (1916) 35 Ind. Cas 880 (CAL.).

22 Bail. II. 214 (*third*), 218 (last lines).

23 Bail. I. 553 (561); *Bikani Mia* v. *Shuk Lal Poddar*, (1897) 20 Cal. 166 (F. B.) (*per* Prinsep, Ghose & Ameer Ali, JJ.,—Petheram, C. J., & Trevelyan, J., diss.); but see *Ramanadhan* v. *Vada*, (1910) 34 Mad. 12, 18-20, confirmed (1916) 44 I. A. 21 = 40 Mad. 116 (P. C.); s. 471, com.; *Kalub Hossein* v. *Mehrum Bee*, (1872) 4 N. W. 155, 159 f. (valid *wakf* only of 1/3; 2/3 invalid as reserved for *wakif*); *Nizamuddin* v. *Abdul Gafur*, (1888) 13 Bom. 264; affirmed (1882) 17 Bom. 1 = 19 I. A. 170; *Syed Shah Mohammad Kazim* v. *Syed Abi Saghir*, (1931) 11 Pat. 288.

24 See s. 471, *ill.* (2); Bail. I. 553 (561). But see *Fatima Bibee* v. *Ariff Ismailjee Bham*, (1881) 9 C. L. R. 66.

25 When the one that fails is first of those mentioned in *wakf*, all subsequent

SECTION 471. *Illustrations.*

(1) W purported to dedicate for the benefit (*a*) of his family (to receive Rs. 400 a year), (*b*) of the poor (Rs. 75 a year), and (*c*) on failure of his descendants, upon the poor of Dacca. Prior to the Wakf Act, 1913, it was held that the provisions in favour of the family were void; but that the provision for payment of Rs. 75 annually to the poor was valid.[26] Under the Wakf Act, 1913, the dedication would be wholly valid.

(2) "If a non-Muslim says, 'devote the produce to such and such a temple, and then if the temple is ruined, the produce should be given to faqirs and the indigent'; in such a case the produce will be devoted to the faqirs and the indigent and not to the temple: so it is stated in the Muhit."[27]

Family wakf.

Abu Yusuf's view that on a dedication of wakf the failure, or even the illegality, of its object does not make it void, but that the property must be applied cy pres, to other valid objects of wakf,—was, prior to the Wakf Act, 1913, applied with the proviso, that where the settlor's real intention was to make a family settlement, the use of the word wakf was considered a mere verbal fiction on his part, which did not change the nature of the property, nor subject it to wakf; the settlor being held to have intended not to create a valid wakf but a family settlement, disclosing nothing like a general charitable intention, or, (to paraphrase that expression) nothing like a general intention to devote the property to purposes that are valid objects of wakf, on which the Court could proceed cy pres. Where, of course, apart from the use of the word wakf, a general charitable intention is shown, or rather the intention is shown that in any case the property is to be dedicated by way of wakf, which implies both (i) that the wakif's ownership is divested, and (ii) that the ultimate benefit is expressly or impliedly reserved for purposes recognized by Muhammadan law as religious, pious or charitable—see s. 457(4B), p. 533—and the particular object that is mentioned is illegal, the benefit is diverted to other lawful objects of charity.[28] See s. 481, com.

Application of cy pres doctrine.

General charitable intention.

English law.

In England "a personal bequest attached to a void charity as an endowment must fail."[29]

X. When beneficiaries unascertainable poor take it.

472 Under Hanafi law, Abu Yusuf holds that,—

(1) where the dedication identifies the beneficiaries or the

objects fail. But it is said that "the seizin that is required is that of the first of the *mauquf alaih*, or persons for whom an appropriation is made; & all regard to possession ceases in the subsequent steps."—Bail. II. 219 (par. 3). So if second. object fails, would third be accelerated?

[26] *Bikani Mia* v. *Shuk Lal Poddar*, (1892) 20 Cal. 116 (F.B.) (see *n.* 23).

[27] *Fatawa Alamgiri, Wakf*, Ch. I.; cf. Bail. I. 553 (*ll.* 5, ff.) (561). Endowment in favour of temple being void; s. 482; see s. 460.

[28] *Ramanadhan* v. *Vada*, (1910) 34 Mad. 12, 18-20 affirmed (1916) 44 I. A. 21; *Salebhai* v. *Bai Safiabee*, (1911) 36 Bom. 111; see *A. G.* v. *Vint*, (1850) 3 De G. & Sm. 704 (for supplying alcoholic drink to workhouse); *Moggridge* v. *Thackwell*, (1802) 7 Ves. 36, 75, citing *A. G.* v. *Baxter*, (1684) 1 Vern. 141 (charity for ejected ministers); *De Costa* v. *De Pas*, (1754) Amb. Part. I., p. 228 (by Jew for establishing Jesuba or assembly for reading law, & instructing people in Jewish religion).

[29] *A. G.* v. *Whitchurch*, (1796) 3 Ves. 141. See also *Thomson* v. *Shakespeare*, (1860) 1 De G. F. & J. 399.

objects of the wakf, in terms not applicable to any existing persons or objects, the benefit is taken by poor Muslims, provided that if, thereafter, the said terms apply accurately to any other persons or objects they take the benefit ; [1] SECTION 472.

(2) where the beneficiaries consist of a number of persons, and,—

(*a*) they all disclaim their interest in the wakf, the whole of the benefit is taken by the poor ; [2] but,— Interest disclaimed by beneficiaries accrues to poor (if general charitable intention is shown).

(*b*) if some of them disclaim and others accept it, (as where the object of a wakf is the benefit of the members of a community holding specified religious tenets, and some of them secede by renouncing the said tenets) [3] then,— Seceders from a community.

(i) if the beneficiaries are identified in the dedication as a class, under a general description, applying to those who have accepted, they take the whole benefit ;

(ii) if the beneficiaries are named or otherwise specifically identified, the share of those who disclaim is taken by the poor.[4]

Abu Yusuf's view of Hanafi law is that if the intention of creating a wakf is shown, the transfer will be presumed to be, (1) in perpetuity, and (2) ultimately for the benefit of the poor, that purpose being supposed to be the appropriator's design, though he should fail to mention it.[5] (Hanafi law) Presumption of perpetuity : ultimately for poor.

There may be mere charges [6] upon the profits of the estate for objects that are, or are not, charitable, and which may fail ; if these charges are on the whole of the wakf property, then, on their failure, the whole property is devoted to the charity, free from the said charges. If the charges are on a specific portion of the property and the said portion never goes to charity at all, or the charity with reference to it is illusory, and the said portion has not otherwise been dedicated by way of wakf at all ; then on failure of those charges the property is free of any trust and must result to the original owner or his heirs.[6] See s. 481, com., pp. 598-605. Charges on property.

[1] Bail. I. 57 (par. 3). But see s. 469 : plural includes here singular.

[2] The words " or other purpose recognized by the Mussulman law as a religious, pious or charitable purpose of a permanent character " seem necessary after the word " poor " to bring the statement into conformity with the Wakf Act, 1913.

[3] See s. 481, *ill.* (2); other rules of similar nature : s. 512.

[4] Bail. I. 600 (par. 2) (610-611); cf. Bail. I. 574 (par. 2) (584); cf. s. 512 & *n.* 3.

[5] Bail. I. 558 (par. 1, *ll.* 7-8 of par. 2) (566-567), 559 (par. 1) (567); Ameer Ali I. 142 (par. 2) (211); *Ramanadhan* v. *Vada Levvai*, (1911) 34 Mad. 12, 18-20; approved (1916) 44 I. A. 21.

[6] See s. 478. E.g. *Muhammad Raza* v. *Yadgar Hussain*, (1929) 51 I. A. 192, (CAL.) (grant was not *wakf*, but was grant *sub conditione* : condition two fold : p. 157, *l.* 8 from bottom ; interests of IMAMBARA paramount : p. 198, *l.* 7).

SECTION 473. XI. PROVISIONS VALID IN WAKF.

473.[7] The dedication may contain provisions similar to life-interests or other limited interests for the benefit of a succession of persons, during their lives, or during specified periods ; and notwithstanding that at the time of the dedication the said persons are not in being.[7]

(A) Life-Interests.

Wakf Act does not refer to wakfs in favour of strangers.

The Wakf Act, 1913, contains no reference to provisions in favour of others than members of the family, children and descendants of the wakif. The texts, however, seem to be clear that provisions may be made in favour of strangers. Thus, in the Fatawa Alamgiri after a wakf in favour of "my child," has been construed, it is added : "Everything that has been said of 'my child,' is applicable to the words 'child of such an one.'"[8] Later on reference is made to a settlement on the heirs of Zeyd.[9]

(B) Defeasible interests.

474.[10] (1) The dedication may validly provide that, on the happening of a certain future event, a beneficiary therein named should cease to take any benefit.[11]

Power to add beneficiaries valid—not to exclude.

(2) Under Shia law the wakif may reserve to himself the right of adding to the beneficiaries others yet to be born, but not of excluding from the benefit of the wakf any person that he may choose,[12] nor of transferring the benefit from the existing beneficiaries to others subsequently to come into being.

Benefit to cease on marriage.

"It is permissible for a man to make a habs of his property in favour of his daughters, with the condition that such of them as marry shall be excluded from the benefit of the habs, but on her becoming a widow, she shall regain her right."[13] The Indian Contract Act, s. 26, apparently does not affect this rule of law. See s. 466.

[7] Bail. I. 570-584 (579-594). Sect. 473 cited & applied : *Musharraf B.* v. *Sikandar Jehan B.*, (1928) 51 All. 40, 46 ; *Abdul Wahab* v. *Sughra B.*, (1931) 54 All. 455, 457 (provisions for individuals) ; *Saadat Kamel* v. *Att.-Gen.* (PALESTINE), [1939] A. C. 508 (P. C.) = [1939] AIR (P. C.) 185, 189 (*wakf* not governed by rule against perpetuity : successive future life-interests in favour of unborn persons valid). There seems to be no rule of Hanafi law that, first beneficiary should be in existence : cf. s. 449, for Shia law : disposition for benefit of individuals under Shia law would no doubt be considered in nature of a *habs* rather than *wakf*. Sect. 486, *ill.* (4) ; Bail. II. 219.

[8] Bail. I. 570 (579).

[9] Bail. I. 574 (584). *Zeyd* is first name given to hypothetical person ; like John Doe or Richard Doe in Eng. Real Prop. law.

[10] Sect. 474 cited & applied : *Latafatunnisa* v. *Shaharbanu*, [1932] AIR (OU.) 108 (widow of co-sharer to forfeit benefit on re-marriage, held good) ; cf. *Abdul Wahab* v. *Sughra B.*, (1931) 54 All. 455.

[11] Bail. I. 589 (par. 2) (599). Observe that these rules refer primarily to individual beneficiaries. See s. 474, com.

[12] Bail. II. 219 (par. 2). See s. 466, com.

[13] Bail. I. 589 (par. 2) (599). *Daaimu'l-Islam, Kitabul Ataya, Sadaqa* (Shia Ismaili law) to exactly same effect. Other conditions : going out of named city, pursuing legal studies, leaving sect of Abu Hanifa & adopting that of Shafii, or apostatising : *Latafatunnisa* v. *Shaharbanu*, [1932] AIR (OU.) 108.

475.[14] The dedication may validly provide that a person who is not in being or not identifiable at the time of the dedication, should benefit thereunder when he comes into being or can be identified.[15]

SECTION 475. (C) Provision in favour of unborn persons.

Illustration. In a wakf for the wakif's child (walad), and after him, "upon the poor, or on any child and the children that may be born to me, and when they fail, upon the poor," the child who may be in existence at the time of the existence of the produce, enters into the benefit of the wakf notwithstanding that there may be no child in existence at the time of the dedication.[16]

§ 3.—SUBJECT OF WAKF OR WAKF PROPERTY.

476. The texts provide with great particularity which classes of property besides immovable property may be the subject of wakf, and are not agreed with reference to money and things consumed by use. The Courts have followed the Wakf Act, 1913, under which wakf is defined as the permanent dedication of 'any' property.[17]

I (A) Any may be dedicated.

The view (now adopted : s. 476) that wakf may be made of money or any other property had, after a full discussion of all the authorities,[18] apart from

[14] Sect. 475 = s. 474A in earlier edd. Present s. 519B = s. 475 in earlier edd.

[15] Bail. I. 567-8 (576-7). [16] Bail. I. 567-8 (576-7).

[17] (i) *(Mirza) Yaqub* v. *(Mirza) Rasul Beg*, [1923] AIR (OU.) 254, 265 (WAKF OF CASH VALID : on appeal, P. C. "without indicating any dissent from the opinion of the Court of Judicial Commr. their Lordships thought it unnecessary to express any opinion of their own" : *(Mirza) Fida Rasul* v. *(Mirza) Yakub Beg*, [1925] AIR (P. C.) 101, 102. (ii) *Mohammad Sadiq* v. *Fakr J.*, (1931) 59 I. A. 1, 17-18 (wakf of GOVERNMENT PROMISSORY NOTES : Courts in India held (1928) 13 Luck. 521 valid : "taking modern ideas into account" (59 I. A. 17) : P. C. did not disturb decisions holding *wakf* valid, since members of family had for 75 years & more recognized *wakf* as valid. Solution of problem whether interest bearing securities may be subject of dedication to God, held unnecessary) : this confirms tendency of Courts in India to hold WAKF OF ANY PROPERTY VALID. (iii) *Amir Ahmad* v. *Muhammad Ejaz Husain*, (1935) 58 All. 464 (grove-holder's right may be subject of *wakf*, Sulaiman, C. J. & Bennett, J.). (iv) *Abdulsakur* v. *Abubakkar*, (1929) 54 Bom. 358, 369-70 ; *Abu Sayid Khan* v. *Bakar Ali*, (1910) 24 All. 190.

[18] (i) Bail. I. 538 (566-567) (IMMOVABLE PROPERTY) ; I. 561 (*ll.* 1-4) (570) (MOVABLE property accessible to immovable) ; I. 562 (par. 1) (571) (KORANS or other BOOKS) ; I. 562 (par. 2) (571) (such other property as it is CUSTOMARY to make *wakf* of ; (ii) cf. Hed. 481, col. ii. par. 1 : effect of "GENERAL CUSTOM" of what is usually done on interpretation to be put on transactions ; (see s. 10, pp. 66 ff.) ; (iii) *Banubi* v. *Narsingrao*, (1906) 31 Bom. 250, 257 (MOVABLES may be subject of *wakf* : also FUNDED MONEY) : *Adv.-Gen.* v. *Yusufalli*, (1921) 24 Bom. L. R. 1060, 1105 ; *Fatima* v. *Ariff*, (1881) 9 C. L. R. 66 ; (iv) *Kulsom* v. *Gulam Hossein*, (1905) 10 Cal. W. N. 449 (MONEY not valid subject) ; *Fatmabai* v. *Gulam Hossein*, (1907) 9 Bom. L. R. 1337, (do.) ; (v) *Kadir* v. *Md.*, (1909) 33 Mad. 118 (RIGHT TO RECOVER MONEY under decree not valid subject in absence of custom authorizing such appropriation) ; (vi) *Sakina Khanum* v. *Luddun Sahiba* app. from O. D. 110 of 1900 decided 10 June, 1902 ; *unreported*—referred to Ameer Ali I. 182, *n.* 1 (255) (MONEY valid subject) ; (vii) Bail. I. 558 (566) (SHEEP, together with their wool & milk, valid) : Bail. II. 212 (par. 3) ; (viii) *Puran Atal* v. *Darshan Das*, (1911) 9 All. L. J. 709 (mere right to USUFRUCT, such as rent charge, or revenue of villages, cannot be subject : *submitted* erroneous view : as appears sufficiently from texts : what is really dedicated, in sense of being put to use of the charity, is USUFRUCT. Of course if *wakif* does not divest himself of all his rights—or if the rights that he does "tie up" will not last in perpetuity, difficulties may arise : s. 463 ; observe that here doubt arises from

SECTION 476. **Wakf of usufructuary mortgagee's rights.**

the Wakf Act, 1913, been submitted as correct in the previous editions of this work. It has been held that the rights of a usufructuary mortgagee in immovable property may not be dedicated by way of wakf.[19]

PROPERTY dedicated being liable to fail; in s. 463 OBJECTS fail); (ix) Hed. 234 KORANS, all are agreed, may be dedicated: Im. Muhammad holds, (Abu Yusuf dissenting, Hed. 235, col. i. *l.* 29) that OTHER BOOKS may also be dedicated. "Most lawyers have passed decrees according to the opinion of Imam Muhammad." *ibid.* citing *Kazi Khan*; (x) SHAFII & SHIA LAW: LAND & everything from USE of which ANY BENEFIT CAN BE LAWFULLY derived with preservation of thing itself (Bail. II. 213), everything which admits of use without destruction of subject, everything lawfully salable; because such articles as admit of USUFRUCT resemble land, horses or arms, may be subject of *wakf*, Hed. 235; (xi) as to applicability of TRANS. OF PROP. ACT, II. of 1882, s. 8, on NECESSITY OF PROPERTY BELONGING TO WAKIF, see *Sahu Har Prasad* v. *Fazal Ahmad*, (1933) 60 I. A. 116 (ALL.) = s. 477, *ill.* (6); (xii) SHIA LAW: ABSCONDED SLAVE cannot be subject of *wakf* as he cannot be delivered; trained dog or cat may be subject: Bail. II. 213, not hogs, which are *extra commercium*: Bail. II. 213; see however s. 476(3); (xiii) cf. Hed. 234 (col. i., *ll.* 29). Imam Muhammad holds *wakf* of MOVABLES UNRESTRICTEDLY valid: Abu Yusuf, of such movables as form subject of business transactions—so stated in *Mujtaba* on authority of *Siyar*, cited in *Fath-ul-Qadir*, & *Bahrur-Raiq*: Ameer Ali I. 177 (248) (251) I. 178 (par. 5) (250), I. 177 (*ll.* 5-6) (248), (*ll.* 9-11) (251), I. 181 (par. 1) (254), (par. 2) (254); (xiv) *per* Woodroffe, J., in *Kulsom* v. *Golam Hossein*, (1905) 10 Cal. W. N. 449: correct translation of passages referred to in Ameer Ali, should be: "Everything which it is the PRACTICE to make *wakf* of"; (xv) Ameer Ali, I. 176 (par. 5) (250): CUSTOM & PRACTICE regulate what MOVABLES can be subject of *wakf*; [citing *Kazi Khan*] : 181 (par. 2) (254), [citing *Wajiz-ul-Muhit*]; 184 (par. 1) (256) [citing *Raad-ul-Muktar*], I. 180 (par. 5) (253-254); (xvi) SHAFII MALIK & IBN HANBAL hold that everything, sale of which valid & which can be renewed from time to time by its USUFRUCT, or otherwise, may be validly dedicated; as to Shafii, Ameer Ali 181 (par. 2 (254) citing from *Wajiz-ul-Muhit*; Bail. II. 213 (*first*), 212 (par. 3): *Daaimu'l-Islam*; (xvii) *Fatima Bibee* v. *Ariff Ismailjee*, (1881) 9 C. L. R. 66, Wilson, J. *held* that SHARES IN COMPANIES cannot be made *wakf* of, on the reasoning that "if money cannot be appropriated, POSSIBILITY OF RECEIVING MONEY hereafter, in the form of dividends, cannot be": in this reasoning (*submitted* with greatest respect) income of subject of *wakf* confused with the corpus: what has to be applied to the objects of *wakf* is always RENT or PRODUCE, corpus being tied up or dedicated to God, i.e. rendered incapable of alienation or inheritance. If Wilson J.'s reasoning were correct, then, since possibility of receiving money as rents of houses could not be the subject of *wakf*, therefore dedication of a house with provision that its rents should be utilized for objects of wakf would be invalid. Again (*submitted*): SHARES in Company cannot be classed as money: if necessary to bring this quite modern transaction under one of transactions known to Muslim texts written six centuries ago, more correct analogy, would be to include SHARES under *muzaribat*: shareholders are partners: some of them contribute labour (with capital) others only capital: profits are divided by all. Holland, *Jurispr.* 275, *n.* 3 "Savigny, *Oblig.* II. 112, truly observes that ordinary SHARES IN COMPANIES are NOT OBLIGATIONS but parts of ownership, producing therefore, not interest but dividends"; cf. *Colonial Bank* v. *Whinney*, (1885) 30 Ch. D. 261; (1866) 11 App. Ca. 426.

[19] (*Mt.*) *Rahiman* v. (*Mt.*) *Baqridan*, (1935) 11 Luck. 735, 753-755 (F. B.) (elaborate judgment holding that rights of USUFRUCTUARY MORTGAGEE in immovable property cannot be subject of *wakf*: *rationes decidendi*: (1) usufructuary mortgagee is not owner of mortgaged property & has no permanent control over that property: Ameer Ali, I. 266 (4th ed.) cited. [With great respect property purported to be dedicated is not the mortgaged property, but mortgagee's rights over it: those rights are owned by the mortgagee—though not of permanent nature]; (2) right to hold possession of mortgaged property = right to receive interest though not in form of cash: taking interest is forbidden: therefore mortgagee's rights themselves unlawful: "*wakf* being act of piety....absurd for Muslim to make *wakf* of property which his religion considers unlawful to acquire." [But on interest, see s. 4: interest recognized on *mahr*]. Contrast s. 477, *ill.* (3), (4). 11 Luck. 735 may be supported on short ground that *wakf* consists of directions as to use to which usufruct of some property has to be put in perpetuity. As usufructuary mortgagee has control over usufruct for limited period (till his debt is paid off) & not in perpetuity he cannot dedicate his temporary rights by way of *wakf*).

477. The property dedicated must be owned[20] by and in the possession[21] of the wakif at the time of dedication.[22]

SECTION 477. (B) Wakif's ownership and possession.

Illustrations.

(1) A usurps certain property belonging to B, and purports to dedicate it. A thereafter purchases it from B, the rightful owner. The wakf is invalid.[23] But if B, the rightful owner, ratifies the wakf, it is valid.[24]

(2) A bequeaths certain land to B, who purports to dedicate it in A's lifetime. Then A dies. The wakf is not valid.[23]

(3) A makes a lease of his land, and then dedicates it before the term of the lease expires, or is otherwise determined; subject to the lease, the wakf is valid.[25]

(4) A pledges his land (gives a mortgage with possession) and then declares that it is subject to a wakf; subject to the pledge (mortgage) the wakf is valid.[26]

(5) The right to recover money under a decree cannot validly be the subject of wakf.[27] But see s. 476

(6) One Manzur Ahmad, a Hanafi, made on his death-bed a nominal sale, but really a gift, of two villages to his mother Rahim Bibi. The alleged price was 2 lakhs of rupees,—Rs. 10,000 out of which was said to have been paid, and the balance retained by the vendee (the mother) to be applied to charity. Ten months later she executed a wakf-nama, stating the terms of the fictitious sale, and declaring that she, therefore, dedicated the two villages subject to a charge for the Rs. 10,000 and the amounts she had already spent in charity. The fictitious sale was subsequently set aside by the Court. The son having died, the mother became heir to 1/3 of his estate,—which share she sold. The mutawallis under her dedication claimed that the wakf attached to the 1/3 as she was at the time capable of transferring it: Transfer of Property Act, 1882, s. 8. *Held*, that the transaction had to be considered as a whole, and the INTENTION of the wakif was TO DEDICATE only what she thought had been entrusted to her by her son for the purpose, and to make no contribution to the

[20] *Ehsan Beg* v. *Rahmat Ali*, (1934) 10 Luck. 547. Cf. *Masihuddin* v. *Ballabh Das*, (1912) 35 All. 68 (this obvious principle basis of decision).

[21] Hence absconded slave may not be dedicated: Bail. II. 213. See *n.* 18,(xi),(xii).

[22] Bail. I. 554 (562); II. 213, 214 (*l.* 1).

[23] Transf. of Prop. Act, II. of 1882, s. 43 (subsequent acquisition of interest in property unauthorizedly transferred). But see *Sahu* v. *Fazal*, (1933) 60 I. A. 116(ALL.) = s. 477, *ill.* (6): Transf. of Prop. Act, s. 8 (unless different intention expressed or implied, transfer passes all interest which transferor is then capable of passing).

[24] Bail. I. 554 (*ll.* 3-10) (562); II. 214 (*ll.* 1-4); *Masihuddin* v. *Ballabh Das*, (1912) 35 All. 68.

[25] Bail. I. 555 (*ll.* 16-21) (563): lease determined under Muslim law by death either of lessor or lessee (*ib. ll.* 33-35): contrast with *ill.* (3) & (4); (*Mt.*) *Baqridan* v. (*Mt.*) *Rahiman*, (1935) 11 Luck. 735, 753-5 (F. B.).

[26] Bail. I. 555 (563-564). In *ll.* 25-2, instead of: "it should remain for *two* years in the hands of the pledger," read "*some* years." See 4 Beng. L. R. (A. C. J.) 90.

[27] *Kadir Ibrahim Rowther* v. *Mahomed Rahumudulla R.*, (1909) 33 Mad. 118 follows *Kulsom Bi* v. *Golam Hossein Cassim Ariff*, (1905) 10 Cal. W. N. 449, 494, on which see s. 476, com. But after Wakf Act, 1913, Courts try & SUPPORT VALIDITY of *wakfs*: *Balla Mal* v. *Ata Ullah*, (1927) 54 I. A. 372 (LAH.) (DEED NOT CONSTRUED TOO STRICTLY); *Amir Ahmed* v. *Mohammad Eyaz Hussain*, (1935) 58 All. 964.

SECTION 477. wakf from her own property. It is at least doubtful if s. 8 has any application. But the "different intention" was clear. The wakf therefore failed.[28]

(c) Musha as subject of wakf.

478.[1] The property dedicated may consist of musha[2] (undivided part of property) notwithstanding that it is divisible.[3] A charge upon property,[4] or a part only of the income of specified property[5] may be dedicated ; provided that under Hanafi law if only a part of any property is dedicated for a masjid or a tomb, that must be divided off otherwise the dedication is not valid.[1]

Charge on property.

Illustrations.

Sect. 478 is in accordance with Abu Yusuf's exposition of Hanafi law.[6] Imam Muhammad held that an undivided part of property which is capable of division may not lawfully be the subject of wakf, "because as actual possession is held by him to be essential....so in the same manner that, without which possession cannot take place, is also an essential, namely, division ; and this can only be in a thing capable of division."[7]

[28] *Sahu* v. *Fazl*, (1933) 60 I. A. 116 ; cf. s. 462, *expl.* II ; s. 477, *ill.* (2), & *n.* 23.

[1] Sect. 478 cited & applied : *Badrul Haq* v. *Shah Hasan Ahmad*, [1935] 33 All. L. J. 400 (*musha* cannot be dedicated for cemetary).

[2] See s. 374, com.

[3] Hed. 233 ; Bail. I. 564 (*ll.* 12 ff.) (573), II. 214 (par. 1). *Mahomed Hamidulla K.* v. *Lotful Huq*, (1881) 6 Cal. 744 ; (1/4 share of property) ; *Ghazanfar Husain* v. *Ahmadi B.*, (1924) 52 All. 368 (shares in zamindari property) ; *Hyatee Khanum* v. *Koolsoom K.*, (1807) 1 S. D. A. Sel. Rep. 214(O) = 285(N), fully cited *Bikani Mia* v. *Shuk Lal Poddar*, (1892) 20 Cal. 116, 149 ; (*Hajee*) *Kalub Hossein* v. (*Mt.*) *Mehrum*, (1872) 4 N. W. 155, 159 f. (*wakf* invalid as to 2/3 in which *wakif* reserved to herself benefit of income : but 1/3 absolutely & permanently appropriated to purposes other than temporal benefit of *wakif* : deed, *held* valid as to 1/3 of income of property).

[4] In *Ma Mi* v. *Kallandar* (No. 1), (1926) 54 I. A. 23, 27 (Sir J. Wallis put two alternatives : (1) deed was *wakf-nama*, constituting *wakf* under Wakf Act, 1913, or (2) mere deed of gift coupled with trust). See s. 464, *expl.* ; *Ambalavana Pandari Sannidhi* v. *Meenakshi*, (1920) 47 I. A. 191, 199, par. 3 (MAD.) ("property of endowment may consist partly or wholly of RIGHT TO ENJOY REVENUES OF PROPERTY which in possession of persons who have right & duty to manage the property, collect revenue & hand it over, when collected, to be used in proper manner for purposes of endowment : " a Hindu case : but fallacy in plaintiff's argument to which Lord Moulton refers is instructive). Under Hanafi law this may be species of *musha* ; or manager of the property may in a sense be considered to be partly *mutawalli*. Again question may be, e.g. (*a*) whether heirs are true beneficiaries, subject to charge for purposes of *wakf*, or (*b*) other objects of *wakf* are true beneficiaries subject to charge in favour of heirs or specified relatives for their upkeep or maintenance. *Pande Har Narayan* v. *Surja Kunwari*, (1921) 48 I. A. 143, 148 (par. 4) (Hindu parties : clause that savings after defraying temple expenses & servants' pay, to be used by testator's heirs to meet their own expenses, assisted greatly in construction of deed,—that property descended according to will, subject to burden of worship expenses & charges for idol).

[5] As in *Sheik Mahomed Ahsanulla C.* v. *Amarchand Kandu*, (1889) 17 I. A. 28, 37 ; *Mahomed Hassan* v. *Md. Ibrahim*, (1903) 5 Bom. L. R. 624 ; *Abdul Rajak* v. *B. Jimbabai*, (1911) 14 Bom. L. R. 295, 302 ; *Husseinbhai* v. *Adv.-Gen. Bom.*, (1920) 22 Bom. L. R. 846 ; *Mohammad Irfan A. K.* v. *Mohammad Tahir A. K.*, [1933] 31 All. L. J. 97.

[6] "The moderns decide according to Abu Yusuf, & that is approved : " Bail. I. 564 (par. 2). Cf. Clavel, *Droit Musulman* : *Statut Personnel et Des Successions* (1895) Tome II. 176, § 751.

[7] Hed. 233 (col. ii).

Dedication in favour of a mosque, does not become void by there being a charge upon the profits of items which must lapse in the course of time, leaving the whole benefit to the mosque.[8]

SECTION 478. Property subject to charge.

478A. " Nazrana," or offerings given at a shrine or dargah either in a ghalla (offering box) or otherwise, may become consecrated to God, or impressed with a trust, in which case they must be used for religious or pious purposes.[9]

(D) Offerings at dargah.

The donations are voluntary, though much pressure is often brought on visitors. Much (*submitted*) depends upon the object and intention of the person making the nazrana or offering, and on implied or express terms on which the offerings are received. The majority of donors through ignorance or indifference or from a desire to escape importunities pay no attention to these questions. The offerings are often made in the belief that there is religious merit in making them, irrespective of any interest being taken in what becomes of them. They are generally invited by representations (express or implied) that they will be utilized for religious or charitable purposes. See ss. 369 B, 497 A.

479. A dedication made without its subject being defined with certainty, is void.[11]

II. Certainty.

Illustrations.

(1) A dedication of land, excluding the trees upon it, is invalid under Hanafi law, on the ground that its subject is not certain.[12]

(2) The dedication of " a horse " or " a mansion " without specifying which, is void.[13]

(3) W purports to dedicate [for the benefit of his family[14]] and provides that concurrently a sum to be fixed by the mutawalli at his discretion should be given to charity. The gift to the charity is void because its subject[15] is uncertain.[16]

[8] *Muzhurool H.* v. *Puhraj D. M.*, (1870) 13 W. R. 235 (dedication for (i) expenses of *masjid*, (ii) alms to mendicants, (iii) education of poor, (iv) surplus for marriages, burials & circumcision of *mutawalli's* family : valid).

[9] (i) *Adv.-Gen.* v. *Yusufalli*, (1921) 24 Bom. L. R. 1060, 1095, 1099, 1104 ; (ii) *Zooleka B.* v. *Syed Zunul Abedin*, (1904) 6 Bom. L. R. 1658, 1061 (*ll.* 1-5), 1069 par. (2) (offerings treated as income of *dargah*); (iii) *Mahomed Oosman* v. *Essack S. Md.*, [1938] Bom. 184 (= p. 68, *n.* 18) (part of income of trust); (iv) *Haidaralli* v. *Saiyad Ghulam Mohiuddin*, (1934) 58 Bom. 623 ; (v) *Muhammad Hamid* v. *Mian Mahmud*, (1922) 50 I. A. 92, 105, § 4 (LAH.) (whole income not necessarily at disposal of *sajjadanishin*); (vi) *Muhammad Ali* v. *Muhammad Naqi*, (1933) 15 Lah. 136 (custom of sale of right of *khadims* to receive shares of offerings : this right liable to attachment) following ; (vii) *Digambar Tatya* v. *Hari Damodar*, [1929] AIR (BOM.) 143 = 29 Bom. L. R. 102 ; distinguishing (viii) *Khajah Habibulla* v. *Kaviraj*, [1929] AIR (CAL.) 252 = 33 C. W. N. 282. See ss. 369 A, 496 ff. ; (ix) *Maina* v. *Brijmohan*, (1890) 17 I. A. 187 (ALL.) (claim for 1/3 of donations by pilgrims : not established).

[10] Cf. e.g. James Morier, *Haji Baba of Ispahan*, ch. 9, 10 *et passim*.

[11] Bail. I. 555-556 (563-565) ; II. 213 ; *Fatmabibi* v. *Adv.-Gen.*, (1881) 6 Bom. 42.

[12] Bail. I. 556 (564-565). Cf. *musha* doctrine : ss. 374 ff., 382.

[13] Bail. II. 213.

[14] See s. 480.

[15] As to its object, see s. 481. On general charitable intention, see s. 457(4B).

[16] *Mujibunissa* v. *Abdur Rahim*, (1900) 28 I. A. 15 = 23 All. 233.

SECTION 479. Subject and object.

Certainty is required in the subject of wakf. If a general charitable intention is disclosed, the Court will apply the property to charity though the object may not be specified clearly.[15]

§ 4.—OBJECT OR PURPOSE OF WAKF.

1. VALID OBJECTS.

(A) Prior to 1913 Act.

480.[17] Under the law relating to wakfs as enforced prior to the Mussulman Wakf Validating Act, 1913,—

Substantial charity.

(1) to constitute a valid wakf the property forming its subject had to be substantially[18] dedicated to a charity ;[19]

Provisions for family.

Objects other than charity.

(2) a dedication could contain provisions for the family of the wakif,[20] or for the benefit of specified individuals other than the wakif and the members of his family, or for the benefit of objects that are not charitable,[21] provided that the property was substantially dedicated[22] to charitable purposes,[23] and the charity was not illusory[24] either by the small proportion that it bore to the whole wakf property, or from the uncertainty and remoteness of the time when the provisions relating to charity were to take effect ;[25]

Settlement in perpetuity on family with ultimate charity.

(3) a perpetual dedication could not lawfully be made for

[17] See s. 480A, *ill.* com. Sect. 480 was retained in the last edition, as the Wakf Act, 1913, was originally not retrospective. It is now practically only of historical interest—it may help to understand decisions, prior to Wakf Act, 1913.

[18] E.g. if half of net income to be devoted to specified pious purposes, the *wakf* valid : *Abdur Rahim* v. *Narayan Das*, (1922) 50 I. A. 84, 89.

[19] See ss. 456, 457 : Bail. II. 215 (par. 2) ; *Mahomed Ahsanulla C.* v. *Amarchand Kundu*, (1889) 17 I. A. 28 = 17 Cal. 498 ; *Abul Fata Mahomed Ishak* v. *Rasamaya Dhur C.*, (1894) 22 I. A. 76 = 22 Cal. 619 ; *Mujibunnissa* v. *Abdul Rahim*, (1900) 28 I. A. 15 = 23 All. 233. See *ill.* (1)(*p*), *n.*

[20] As to validity of provisions in favour of *wakif* himself, see s. 486.

[21] *Muzhurool H.* v. *Puhraj D. M.*, (1869) 13 W. R. 235 ("mere CHARGE UPON PROFITS of estate of certain items which in course of time must necessarily cease, being confined to one family, & which after they lapse, will leave whole property intact for original purposes for which endowment was made, does not render the endowment invalid under Muhammadan law"—*per* Kemp, J.) : cited with approval : *Mahomed Ahsanullah C.* v. *Amarchand K.*, (1889) 17 I. A. 28 = 17 Cal. 498.

[22] Note distinction between (i) property being substantially dedicated to charity, & (ii) gift to charity being substantial : *Balla Mal* v. *Ata Ullah*, (1927) 54 I. A. 372, 380 (LAH.).

[23] *Md. Ahsanulla C.* v. *Amarchand Kundu*, (1889) 17 I. A. 28 = 17 Cal. 498 : approving *Muzhurool H.* v. *Puhraj D. M.* (1869) 13 W. R. 235 ; *Deoki P.* v. *Inait U.*, (1892) 14 All. 375 ; *Bazlul G. M.* v. *Adak P.*, (1913) 17 Cal. W. N. 1018 = 19 Ind. Cas. 896 ; *Abadi Begum* v. *Kaniz Zainab*, (1926) 54 I. A. 33.

[24] *Balla Mal* v. *Ata Ullah*, (1927) 54 I. A. 372 (LAH.) (TEST difficult of application : in applying it Courts especially after Wakf Act, 1913, will NOT CONSTRUE DEED TOO STRICTLY) : *Amir Ahmed* v. *Md. Ejaz Husain*, (1935) 58 All. 464.

[25] *Abul F. M.* v. *Rasamaya*, (1894) 22 I. A. 76 = 22 Cal. 619, 634 (may be "illusory, whether from its small amount, or from its uncertainty & remoteness,") followed in *Muhammad Munawer A.* v. *Rasulan B.*, (1899) 21 All. 329. *Mahomed Ibrahim* v. *Abul Latif*, (1912) 37 Bom. 447 = 14 Bom. L. R. 987. These decisions over-ruled by Wakf Act, 1913

the family of the wakif : a provision for the benefit of the poor or other charitable object[26] on the extinction of the wakif's family, was deemed too remote to validate the dedication.[27] SECTION 480.

In respect of making provisions for the family of the wakif, the Shafii law was held to be the same as the Hanafi law.[28] Shafii law.

480A. (1) Under the Mussulman Wakf Validating Act, 1913,[1] herein called the Wakf Act, 1913, it is lawful[2] for a Muslim wakif to make a permanent dedication of any property, provided that it is in all other respects in accordance with the provisions of the Mussulman law, and that the ultimate benefit is expressly or impliedly reserved for the poor, or for any other purpose recognized by the Mussulman law as a religious, pious or charitable[3] purpose of a permanent character. The preliminary[4] benefit of the wakf property may be reserved—(*a*) for the maintenance and support wholly or partially of the wakif's family, children or descendants, and (B) Wakf Act, 1913. Ultimate benefit. Preliminary benefit.

[26] *Abul Fata Md. I.* v. *Rasamaya D. C.*, (1894) 22 I. A. 76 = 22 Cal. 619 ; *Murtuzai* v. *Jamuna* (1890) 13 All. 261 (testamentary *wakf* by Shia : no Shia authority) : *Maulvi Saiyid Muhammad Munawwar* v. *Razia*, (1905) 32 I. A. 86 = 27 All. 320 ; *Hamid* v. *Mujawar H. K.*, (1902) 24 All. 257 ; *Fazlur R. A.* v. *Mahomed Obedul A. A.*, (1903) 30 Cal. 666 ; *Mujib-un-nissa* v. *Abdur Rahim*, (1900) 28 I. A. 15 = 23 All. 233 ; *Bikani M.* v. *Shuk Lal Poddar*, (1892) 20 Cal. 116.

[27] Settlor used word *wakf* merely as "veil to cover arrangements for aggrandizement of family," & to "make property inalienable," *Mahomed Ahsanulla* v. *Amarchand K.*, (1889) 17 I. A. 28 = 17 Cal. 498, 511 ; cf. *Abdul Ganne K.* v. *Hussein M. R.*, (1873) 10 Bom. H. C. R. 7.

[28] *Mahomed Abdulla Jitaker* v. *Abdul Rahiman Jitaker*, (1907) 9 Bom. L. R. 998 (under Shia law right to create life-interests in form of dispositions which Courts do not class as *wakfs*, recognized). See ss. 446 ff. See also *Mahomed Ibrahim* v. *Abdul Latif*, (1912) 37 Bom. 447.

[1] The Wakf Act, 1913, is set out in s. 480 A, com., p. 589.

[2] *Wakfs* created prior to 7 Mar. 1913 (on which date Wakf Act, 1913, came into operation) are validated by Wakf Act, XXXII. of 1930, so that Wakf Act, 1913, "shall be deemed to apply to *wakfs* created before its commencement, [viz. before 7 Mar. 1913], provided that nothing contained" in Wakf Act, 1930, "shall be deemed in any way to affect any right, title, obligation or liability already acquired, accrued or incurred before" 25 July, 1930 (on which date Wakf Act,1930, came into operation). Wakf Act, 1913, provided that "it *shall be* lawful" & was not in terms retrospective ; & was held merely to enable Muslims in future [i.e. after 7 Mar. 1913] to create *wakfs* which under previous decisions were liable to be set aside : *Khajeh Solehman Q.* v. *Salimullah*, (1932) 49 I. A. 153 (CAL.) ; *Balla Mal* v. *Ata U. K.*, (1927) 54 I. A. 372 (LAH.) ; *Amirbibi* v. *Azizabibi*, (1914) 39 Bom. 563 ; *Rahimunnissa* v. *Shaikh M. J.*, (1914) 10 Cal. W. N. 76 ; *Mahomed Bukth M.* v. *Dewan Ajman R.*, (1915) 43 Cal. 158 ; (Jenkins, C. J. doubted whether the Gov.-Gen. would make legislative pronouncement that repeated decisions of P. C. were erroneous) ; *Naimul Huq* v. *Mohammad Subhanulla*, (1918) 16 All. L. J. 841.

[3] *Ghulam Muhammad* v. *Ghulam Husain*, (1931) 59 I. A. 74, 86 (charity necessary) ; *D. I. Attia* v. *M. I. Madhe*, (1936) 14 Rang. 575 ("CHARITY" considered : trust for benefit of poor relations or descendants is charity).

[4] The word PRELIMINARY is added to contrast with ULTIMATE benefit. See s. 457(4A). Instead of saying "the preliminary benefit of the *wakf* property may be reserved," it may be worded, "the income may in the first (preliminary) period be reserved for."

SECTION 480A. also (*b*) in case the wakif is a Hanafi, (i) wholly or partially for his own maintenance and support during his life-time, or (ii) for the payment of his debts [5] out of the rents and profits of the property dedicated : and the ultimate benefit above referred to may be postponed until after the extinction of his family children and descendants.[1]

(2) Nothing in the Wakf Act, 1913, affects any custom or usage whether local or prevalent among Muslims of any particular class or sect.[6]

(3) Nothing in the Wakf Validating Act, XXXII. of 1930, affects any right, title or obligation or liability already acquired, accrued or incurred before 25 July, 1930.[2]

Illustrations. (1) The following are valid objects of wakf,— [7]

(*a*) to perform HAJ every year out of the income, if the ultimate object is a perpetuity for the poor,[8]

(*b*) to bestow every year in charity (in expiation) instead of my sins of omission, if the ultimate object is a perpetuity for the poor,[8]

(*c*) to pay my DEBTS, with an ultimate dedication to the poor,[9]

(*d*) for JIHAD, or religious wars,[10]

(*e*) for endowing a TEACHER for a school,[11]

(*f*) the salary of an IMAM or leader of prayers.[11]

(*g*) SHROUDS for the dead, or for digging their graves,[8]

(*h*) FUNERAL expenses [8] of or distributing food to poor people,[8]

(*i*) sinking WELLS or TANKS,[8]

(*j*) celebrating the BIRTH OF ALI, 3rd Khalifa and son-in-law of the Prophet,[12]

[5] *Jinjira Khatun* v. *Mohammad Fakirulla Mia*, (1921) 49 Cal. 477.

[6] The Wakf Act, 1913, does not "affect any CUSTOM OR USAGE whether local or prevalent among Mussulmans of any particular class or sect." See s. 10 of this work. But under SHARIAT ACT, 1937, s. 2 : "notwithstanding any custom or usage to the contrary, in all questions (save questions relating to agricultural land) regarding.... *wakfs* (other than charities & charitable institutions, & charitable & religious endowments) the rule of decision in cases when the parties are Muslims shall be the Muslim Personal Law (*shariat*)." In the result CUSTOM & USAGE may be recognized regarding (i) questions relating to agricultural land & (ii) charities & charitable institutions, & charitable & religious endowments, but (iii) not regarding other *wakfs*.

[7] Bail. I. 566 (575).

[8] Bail. I. 566 (575); Hed. 240; *Fatmabibi* v. *Adv.-Gen.*, (1881) 6 Bom. 42; *Assoobai* v. *Noorbai*, (1905) 8 Bom. L. R. 245; *Kuttayan Ravuthan* v. *Mammanna R.*, (1912) 35 Mad. 681.

[9] Bail. I. 566 (575); *Luchmiput S.* v. *Amir Alum*, (1882) 9 Cal. 176.

[10] Bail. I. 565 (575).

[11] Hed. 240; Bail. I. 565 (574); *Abur Rafey K.* v. *Banni B.*, (1912) 15 Ind. Cas. 36; *Mazhar Hussain K.* v. *Abdul Hadi K.*, (1911) 33 All. 400.

[12] *Biba Jan* v. *Kalb Hussain*, (1909) 31 All. 136; *Ramanadhan* v. *Vada*, (1910) 34 Mad. 12, affd. (1916) 44 I. A. 21 = 40 Mad. 116 (P. C.) (customary *fateha* for ancestors, alms giving, residue to family); *Mazhar H. K.* v. *Abdul Hadi K.*, (1911) 33 All. 400; *Adv.-Gen.* v. *Yusufalli*, (1920) 24 Bom. L. R. 1060, 1089, 1100. See s. 480, *n.* to "charitable," s. 480A *ill.* (1)(*h*); *s.* 480A, *ill.* (2)(*d*).

(*k*) making TAZIAS in the month of Muharram,[12]

(*l*) celebrating the anniversary (barsi) of the death of the wakif, and members of his family,[12]—*sed quaere*,[13]

(*m*) performance of qadam-i-sharif,[14]

(*n*) reading the Koran in public or in a private house,[15] *sed quaere*,[16]

(*o*) works of general utility, like BRIDGES & MASJIDS,[17]

(*p*) a FEAST for the community,[18] feast in honour of a saint.[19]

(*q*) the[20] performance of FATIHA[21] (in the sense of distribution of alms to the poor, accompanied with prayer for the welfare of the souls of deceased persons) which, so far as it involves the expenditure of money, consists in feeding the poor.[20]

(*r*) the kindred of the Prophet,[22]

(*s*) travellers [but it is to be applied to the poor among them excluding the rich],[22]

(*t*) the due and proper observance of the annual "festival" (*quaere*) of the MUHARRAM,[23]

(*u*) provisions for residence in the wakf property of the wakif's brother and his descendants.[24]

[13] *Kaleloola* v. *Nusserudeen*, (1894) 18 Mad. 207; *Fakhruddin* v. *Kifayatulla*, (1910) 7 All. L. J. 1095, 1100-1103.

[14] *Phul Chand* v. *Akbar Yar K.*, (1896) 19 All. 211.

[15] *Mazhar H. K.* v. *Abdul Hadi K.*, (1911) 33 All. 400. Cf. *Nizamudin* v. *Abdul G.*, (1888) 13 Bom. 264, affid. (1892) 19 I. A. 170 = 17 Bom. 1; *Kunhamutty* v. *Ahmad Musaliar*, (1934) 58 Mad. 204.

[16] See *ill.* (2)(*b*). Cf. *Assoobai* v. *Noorbai*, (1905) 8 Bom. L. R. 245, 246.

[17] Bail. II. 215. Though rich also benefit: see s. 488.

[18] So held in *Heptulla A. A.* v. *Sharaf A. M.*, Suit 334 of 1909 O. S. per *Macleod*, J. in Chamber, 22 June, 1909, Bom. H. C.: see also *Assoobai* v. *Noorbai*, (1905) 8 Bom. L. R. 245, 246; *Salebhai Abdul Kader* v. *Bai Safiabu*, (1911) 36 Bom. 111; *Adv.-Gen.* v. *Yusufalli*, (1921) 24 Bom. L. R. 1060, 1089, 1100.

[19] *Adv.-Gen.* v. *Yusufalli*, (1921) 24 Bom. L. R. 1060, 1100.

[20] (*Mutukana Ana*) *Ramanadhan Chettiar* v. *Vada Levvai Marakayar*, (1909) 34 Mad. 12; affd. (1916) 44 I. A. 21 = 40 Mad. 116; *Mukarram A. K.* v. *Anjuman-un-nissa B.*, (1922) 45 All. 152.

[21] FATIHA = opening, viz. opening (or first) *sura* or chapter of Koran. Reading *Fatiha* (to which Mr. Lane-Poole refers as Lord's Prayer of Muslims) forms part of almost every religious ceremony of Muslims. Hence ceremonies of most varied kinds may be referred to as *Fatiha* ceremonies. In *Fakhruddin* v. *Kifayat-ullah*, (1910) 7 All. L. J. 1093, 1097, Karamat Husain, J. describes ceremonies popularly styled *Fatiha* & *Urs*, pp. 1097, 1099, 1104, ff. See *ill.* 2(*d*). In *Azimunnissa* v. *Ali Khan*, (1926) 29 Bom. L. R. 434, 439 *Fatiha* ceremony held—*sed quaere*—to be religious & charitable objects, Mirza, J., dissenting from that extremely learned Judge, Karamat Hussain, J. without indicating that he appreciated that Court must first determine what parties exactly mean by *Fatiha* ceremony before pronouncing upon its validity—Karamat Husain, J. has carefully described ceremony which he holds (with great respect, correctly) to be no part of Islam & involving no charity. Mirza, J.'s decision may possibly be correct on evidence before him: but his unceremonious dissent from Karamat Husain, J. without adequate appreciation of the issue, or gist & importance of the judgment he was disregarding, prevent Mirza J.'s judgment from carrying much weight. See also *Adv.-Gen.* v. *Yusufalli*, (1920) 24 Bom. L. R. 1060.

[22] Bail. I. 566 (575).

[23] *Ramcharan L.* v. *Fatima B.*, (1915) 42 Cal. 933. *Muharram* ceremonies, see s. 480A, com.

[24] *Badrul Islam A. K.* v. (*Mt.*) *Ali B.*, (1935) 16 Lah. 783.

SECTION 480A.

(*v*) an assurance in perpetuity for the benefit of a community is valid,[25]

(*w*) the Raddi Mazalim fund is an endowment partly public and partly private for religious and charitable purposes.[26]

(2) The following are not valid objects of wakf :—

(*a*) for lawyers,[27]

(*b*) for reading the Koran at graves,[27]—*sed quaere*,

(*c*) for the rich alone,[29]

(*d*) for the performance of the FATIHA and URS ceremonies.[30]

(3) The decisions prior to the Wakf Act, 1913, held "the creation of a FAMILY ENDOWMENT" not to be "a religious and meritorious act"; and "the perpetual application of the surplus income in the acquisition of new properties to be added to the family estate," was held not to be "a charitable purpose." Neither was considered a valid object of a wakf.[31] That view of the law is however no more applicable : Wakf Acts, 1913, 1930.

(4) The following are stated in the Fatawa Alamgiri not to be valid objects of wakf[32] ; *sed quaere* :—

(*a*) for mankind,[33]

(*b*) for the people of Baghdad, and, when they fail for the poor,[33]

(*c*) for reading the Koran,[34]

(*d*) for the students in a school,[33]

(*e*) for the teacher in a masjid.[33]

(5) W transfers property to his son upon trust to support, out of its income, such of his descendants and kindred as might be in great want and in need of support, and subject thereto for certain charitable objects. The object of the wakf being charitable, the wakf was held (even prior to Wakf Act, 1913), not invalidated by the provisions in favour of W's descendants and kindred.[35]

25 *Adv.-Gen.* v. *Yusufalli*, (1921) 24 Bom. L. R. 1060, 1083.

26 *Nawab Mirza Mohammad Sadiq Ali* v. *Nawab Kazim Ali*, (1934) 9 Luck. 507.

27 Bail. I. 566 (*ll.* 21-22 of par. 2) (575).

28 Cf. *ill.* (1)(*n*); *Kaleloola* v. *Nusseerdeen*, (1894) 18 Mad. 201. Cf. *Zooleka* v. *Syed Zunul A.*, (1904) 6 Bom. L. R. 1058 ; *Salebhai A. K.* v. *Bai Safiabu*, (1911) 36 Bom. 111 ; *Biba Jan* v. *Kalb H.*, (1908) 31 All. 136 ; *Kunhamutty* v. *Ahmad Musaliar*, (1934) 58 Mad. 204. It is said in *Adv.-Gen.* v. *Yusufalli*, (1921) 24 Bom. L. R. 1060, 1096, that these decisions influenced by decisions in Madras & England, holding gifts of property for masses for dead to be invalid on grounds of public policy,—which English decisions are now over-ruled : *Bourne* v. *Keane*, [1919] A. C. 815 "and presumably a similar course will be taken elsewhere." But Islam & its law have their own principles, which ought not to be overlooked. Cf. *ill.* 4(c).

29 Bail. I. 566 (575). But incidental benefit of rich not derogatory : *Adv.-Gen.* v. *Yusufalli*, (1920) 24 Bom. L. R. 1060, 1079 : *Commrs. of Inc.-Tax* v. *Pemsel*, [1891] A. C. 531, 533 ; *In re Vaughan*, (1886) 33 Ch. D. 187, 191. Cf. also s. 481 A.

30 Cf. *ill.* (1)(*q*) & *n.* 21 as to FATIHA. *Fakhruddin* v. *Kifayat-ullah*, (1910) 7 All. L. J. 1093, 1097-1099. URS separately dealt with : 7 All. L. J. 1104 ff.

31 *Mujibunnissa* v. *Abdur Rahim*, (1900) 28 I. A. 15 = 23 All. 233.

32 Bail. I. 566 (575).

33 Apparently because rich & poor alike benefit : see ss. 488, 483,.

34 Bail. I. 566 (*ll.* 21-22 of par. 2) (575); but held otherwise : see *ill.* (1) (1)(*m*) & s. 481A.

35 *Deoki P.* v. *Inaitullah*, (1892) 14 All. 375 ; *Mukarram A. K.* v. *Anjuman-un-nissa B.*, (1922) 45 All. 152.

(6) W purports to dedicate property yielding Rs. 850 per year, for (*a*) the benefit of his family, (*b*) charities according to the custom of the family. Prior to the Wakf Act, 1913, it was held that (i) if the customary charities required expenditure of Rs. 500 per year, the dedication would be valid,[36] but if (ii) they did not entail more expense than was becoming in a Muslim family of the same social position as that of W to give in charity, or if the amount to be expended in charities is left entirely to the discretion of the mutawalli,[37] then the dedication would be void.[38] Such wakfs would be valid under Wakf Act, 1913.

(7) W dedicates four houses valued at Rs. 1,50,000, appointing his son M mutawalli. The dedication provides (i) that W and M and all succeeding mutawallis (who were to be members of W's family) should have a right of residence in the largest house (valued about Rs. 1,10,000); (ii) that W's wife, *F*, and her children should, subject to clause (v) below, have the same right; (iii) that the rates, taxes, etc., be paid out of the income of the wakf property; (iv) that the net income should then be divided into three equal parts, to be spent respectively for (*a*) the repairs and maintenance of the wakf property, (*b*) expenses of a mosque, (*c*) feeding of learned men from Mecca, Medina, Baghdad, Samarqand, Bukhara and other places noted for learning; (v) that the said house should, subject to the rights under clause (i), be for the accommodation of the said learned men; *held*, dedication valid.[39]

(8) W and WA executed a deed purporting to be a wakfnama. (i) Commencing with an invocation to God, (ii) proceeded to describe the objects of the wakf: "For the benefit of our children, the children of our children and the members and relatives of our family, and their descendants in male and female lines, and, in their absence, for the benefit of the poor, and beggars and widows and orphans of Sylhet on valid conditions and true declarations hereinafter set forth below." (iii) W and WA declared themselves to be the first mutawallis, and (iv) that the wakf properties were thenceforth taken out of their ownership and enjoyment in a private capacity, and (v) that, in order to maintain the name and prestige of their family, they would make reasonable and suitable expenses according to their means and position in life, (vi) the objects of the wakf were stated: that "the properties may be protected against all risks and the name and prestige of the family, maintained," etc. (vii) There was no reference to religion except the invocation to God to perpetuate the family, and preserve the property and the casual mention of religious purposes, etc. (viii) There was a gift to the poor and to

[36] *Phul C.* v. *Akbar Y. K.*, (1896) 19 All. 211, see *n.* 37.

[37] *Mujibunnissa* v. *Abdul Rahim*, (1900) 28 I. A. 15 = 23 All. 233.

[38] *Mahomed Ahsanulla* v. *Amarchand K.*, (1889) 17 I. A. 28 = 17 Cal. 498.

[39] *Kulsom Bibi* v. *Golam Hossein*, (1905) 10 C. W. N. 449, 485 (under Shia law clause (i) would invalidate the *wakf*: see s. 486(2). If there is lack of learned men & object of *wakf* fails, "court will, on being invited to do so, doubtless apply it *cy pres*. If the learned men come, & *F* & her children do not vacate the house for their accommodation, there would be a breach of trust for which the *mutawalli* may be removed.")

SECTION 480A. *Illustrations.*

widows and orphans, but they were to take nothing, not even the surplus income, until the total extinction of the blood of the settlors, whether lineal or collateral: *held* prior to the Wakf Act, 1913, (*a*) that Muhammadan law was applicable to the case, but (*b*) the texts cited[40] were of an abstract nature and the precedents very imperfectly stated; and that there was not material enough to judge whether they would be applicable at all; (*c*) that no answer was given or attempted, nor could their Lordships see any answer to the question, how it came about that by the general law of Islam, at least as known in India, simple gifts by a private person to remote unborn generations of descendants, successions, that is, of inalienable life-interests, were forbidden; and whether it was to be taken that the very same dispositions which were illegal when made by ordinary words of gift, became legal if only the settlor says that they are made as wakf in the name of God, or for the sake of the poor,[41] (*d*) that a charity postponed till all the members of a family are extinct cannot be held to be any real charity, or to validate a wakf[42] without making words of more regard than things, and form more than substance, (*e*) hence that in this case there was no substantial gift to the poor; for (*f*) a gift may be illusory whether from its small amount[43] or from its uncertainty and remoteness.[44] The dedication would be valid under the Wakf Acts, 1913 & 1930. The reasoning is considered in s. 366A, com.

(9) The income of property purported to be dedicated prior to the Wakf Act, 1913, was Rs. 1,500 per annum, out of which Rs. 600 were to be devoted to charity and the rest to the family and descendants of the grantors. The Privy Council upheld the wakf, remarking that though only 2/5 of the income was devoted to charities, and 3/5 to the members of the family, yet (*a*) the figures may vary; (*b*) the income may fluctuate; (*c*) the number of people usually relieved may increase (as the only necessary qualification was that they should be Muslims and be poor; and they were not required to be inhabitants of any particular locality; and the number would depend upon the distress prevailing amongst the Muslim population); (*d*) the expense of the fatiha would be increased by the death of the two grantees; (*e*) "the contention that because the share of the income going to the family is at present larger than that going to the charities, the effect of the deed is to give the property in substance to the family, and that, therefore, it is invalid as a

[40] Ameer Ali, J. in *Meer Mahomed Israil Khan* v. *Shashti Churn Ghose*, (1892) 19 Cal. 412 & in *Bikani Mia* v. *Shuk Lal Poddar*, (1892) 20 Cal. 116.

[41] See s. 366A, com. where an answer is submitted.

[42] As by Syed Ameer Ali, J. in 19 Cal. 412; 20 Cal. 116 (see *n.* 40); West, J. in *Fatmabibi* v. *Adv.-Gen.*, (1881) 6 Bom. 53; & Farran, J. in *Amrutlal Kalidas* v. *Shaik Hussein*, (1887) 11 Bom. 492.

[43] "As if a man were to settle a crore of rupees & provide ten for the poor, that would be at once recognized as illusory": P. C.

[44] *Abul Fata* v. *Rasamaya*, (1894) 22 I. A. 76 = 22 Cal. 619. Remoteness & uncertainty are thus referred to: "It is equally illusory to make provisions 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."

deed of wakf is, their Lordships think, entirely unsound" : the paramount purpose was to provide for the needs of the charities up to the limit of the trust funds : it is the residue which may be a dwindling sum that is given to the family ; (*f*) their Lordships also refused to accede to the argument that inasmuch as no particular sum was named that the trustees were required to spend on any or on all of the charitable objects mentioned in the deed, they might spend on them as much, or as little, as they pleased, and might, if they felt inclined, starve these charitable trusts and that therefore, the provisions for charities were illusory : the Advocate-General or other authority having control over the administration of charities could, in a Court of law, compel them to do their duty and surrender administration of the trust fund.[45] SECTION 480A.

Valid objects of wakf.

The objects referred to in the Fatawa Alamgiri, for which wakfs may be validly created, fall under the heads of (1) relief of the poor, (2) provisions for individuals, mainly the family of the wakif himself, or of specified persons,[46] (3) masjids,[46] (4) caravanserais, aqueducts, roads, bridges, etc.

Provision for poor.

Though the poor have been mentioned first,[47] and they are made the ultimate destination of every wakf so that permanency may be given to the objects, still far the greatest number of illustrations and rules refer to wakfs for the benefit, in the first instance, of members of the family of the wakif himself, and of other persons whom the wakif may name in the wakfnama.

Individuals primarily contemplated as beneficiaries under wakf.

The Sharai'ul-Islam also mentions first the mauquf alaihi "or person on whom the wakf is made," and then (as though it were an extension or application of the primary rule relating to wakfs) that "a wakf for masalih or works of general utility, such as bridges, and masjids, or places of worship, is quite valid ; for such a wakf is in truth a settlement on all Mussulmans though some only can participate in their advantages."[48]

THE MUSSULMAN WAKF VALIDATING ACT, VI. OF 1913.

"*An Act to declare the rights of Mussulmans to make settlements of property by way of "wakf" in favour of their families, children, and descendants.*"

Preamble.

"Whereas doubts have arisen regarding the validity of wakfs created by persons professing the Mussalman faith[1] in favour of themselves, their families, children and descendants and ultimately for the benefit of the poor[2] or for other religious, pious or charitable purposes ; and whereas it is expedient to remove such doubts. It is hereby enacted as follows :—

"1. (1) This Act may be called the Mussalman Wakf Validating Act, 1913.[3] (2) It extends to the whole of British India.

[45] *Mutu Ramanadhan Chettiar* v. *Vava Levvai Marakayar*, (1916) 44 I. A. 21 = *Ramanadhan Chettiar* v. *Vava Levvai Marakayar*, (1916) 40 Mad. 119, 123, 124 (P. C.) upholding 34 Mad. 12.

[46] Cf. *Abdul Wahab* v. *Sughra Begam*, (1332) A. L. J. R. 171 (provisions for salary & pension of servant valid).

[47] Cf. *Commrs. of Inc. Tax* v. *Pemsel*, [1891] A. C. 531, 552.

[48] Bail. II. 214 (*third*) 215 (par. 2).

[1] See s. 9, pp. 54 ff. [2] Bail. I. 578 (588) on who are poor.

[3] Act VI. of 1913, herein referred to as "Wakf Act, 1913," received assent of Gov.-Gen. on 7 Mar. 1913.

SECTION 480A. Definitions.

"2. In this Act unless there is anything repugnant in the subject or context,—

"(1) 'Wakf' means[4] the permanent dedication by a person professing the Mussalman faith of any[5] property for any purpose recognized by the Mussalman law as religious, pious or charitable.[6]

"(2) 'Hanafi Mussalman' means a follower of the Mussalman faith who conforms to the tenets and doctrines of the Hanafi school of Mussalman law.[7]

Power of Mussulmans to create certain wakfs.

"(3) It shall[8] be lawful for any person professing the Mussalman faith[9] to create[10] a wakf which in all other respects is in accordance with the provisions of Mussalman law, for the following among other purposes :—

"(*a*) for the maintenance and support, wholly or partially, of his family[11] children or descendants,[12] and

"(*b*) where the person creating a wakf is a Hanafi Mussalman, also for his own maintenance and support during his lifetime or for the payment of his debts[13] out of the rents and profits of the property dedicated :[13]

[4] This definition is for purposes of Act, not necessarily exhaustive : question whether particular deed is *wakf-nama* cannot be considered exclusively with reference to this definition : *Ma Mi* v. *Kallandar Ammal*, (1926) 54 I. A. 13, 27 (RANG.).

[5] "ANY PROPERTY" : so that property other than immovable, (e.g. money, shares, &c.) as to which law used to be uncertain, may be subject of *wakf* : see s. 376.

[6] So that purpose (or object) for which *wakf* declared must under Muhammadan law, be deemed to be religious, pious or charitable.

[7] See s. 9, pp. 54 ff, above. Note : (1) "professing the Mussalman faith," Wakf Act, pr., s. 2, (1), s. 3 ; (2) "follower of the Mussulman faith," s. 2(2) ; (3) "who conforms to the tenets & doctrines of the Hanafi School," s. 2(2) ["I dislike finding fault with statutes," said Lord Bramwell, "there is nothing so difficult to draft" : *Netherseal Colliery Co.* v. *Bourne*, (1889) 14 Ap. Cas. 228, 236.]

[8] Wakf Act, 1913, was not originally retrospective : cf. s. 6A(3), p. 49, *n.* 14 (s. 480A, "lawful" *n.* 2). But Act of 1930 gave retrospective effect to Act of 1913.

[9] Definition of *wakf* in s. 2(1) makes the words "a person professing the Mussulman faith" redundant.

[10] Pre-amble refers to "*making* settlements by way of *wakf*" : s. 3 to "*creating* a *wakf*."

[11] Word "FAMILY" used in its broad sense so as to include all relatives more or less dependent on the settlor," e.g. DAUGHTER-IN-LAW : *Musharraf B.* v. *Sikandar Jehan B.*, (1928) 51 All. 40, 47. *Imdad Ali* v. *Ashiq Ali*, (1928) 4 Luck. 101 (BROTHER is member of family though living in different country & self-supporting) ; *Ghazanfar Husain* v. *Ahmadi B.*, (1929) 52 All. 369, 379, 381 (family = persons descended from one common progenitor & having a common lineage). These three cases dissent from *Abdul Mabub Khan* v. *Nawazul A. K.*, [1925] AIR (OU.) 30 (which restricted FAMILY to persons whose maintenance can be deemed to be more or less incumbent on plaintiff, so that providing for it is fulfilment of pious obligation) ; *Abdul Nabi* v. *Mazhar Ali*, [1930] AIR (SIND) 318 (some members of family may be beneficiaries excluding others) : Bail. I. 569 (578) ; *Badrul Islam Ali K.* v. (*Mt.*) *Ali B.*, (1935) 16 Lah. 782 (family includes relatives who depend upon *wakif* for support or residence : e.g. BROTHER & HIS DESCENDANTS).

[12] For an instance see *Khajeh Solehman Quadir* v. *Salimullah*, (1922) 49 I. A. 153 (CAL.) ; with which see *Habibulla* v. *Janki Nath*, [1930] AIR (P. C.) 38 = 34 C. W. N. 313 = 58 M. L. J. 253 ; *Bibi Jinjira Khatun* v. *Mohammad Fakirulla*, (1921) 49 Cal. 477 ; *Sheikh Ramzan* v. (*Mt.*) *Rahmani*, (1931) 7 Luck. 300 ; *Ghazanfar Husain* v. *Ahmadi B.* (1929) 52 All. 368, 380 (DESCENDANT = individual, irrespective of sex, proceeding from an ancestor in any degree, e.g. DAUGHTER'S DAUGHTER, & descendants in female line not residing with *wakif*).

[13] *Khaliluddin* v. *Sri Ram*, (1933) 56 All. 293 ; *Musharraf B.* v. *Sikandar J. B.*, (1928) 51 All. 40-51 (payment of DEBTS OF WAKIF for which he is personally liable,

"Provided that the ultimate benefit is in such cases expressly or impliedly[14] reserved for the poor or for any other purpose recognized by the Mussalman law as a religious,[15] pious or charitable[16] purpose of a permanent character.[17] SECTION 480A.

"4. No[18] such wakf shall be deemed to be invalid merely because the benefit reserved therein for the poor or other religious, pious or charitable purpose of a permanent nature[19] is postponed until after the extinction of the family, children or descendants of the person creating the wakf.[18] Wakf not invalid if benefit to poor remote.

"5. Nothing[20] in this Act shall affect any custom or usage whether local or prevalent among Mussalmans of any particular class or sect." Saving of local and sectarian custom.

The general object and intention of the Act (as indicated in the preamble) are not to remove the doubts as to the existing law, regarding the validity of wakfs in general, but of one specified kind of wakfs,—(see ss. 9, 460) (1) in favour of wakifs themselves, their families, children and descendants, and (2) ultimately for the benefit of the poor or for other religious, pious or charitable purposes. The preamble does not refer to a wakf under which individual strangers are preliminary beneficiaries. No general principle is laid down 1.—SCOPE OF WAKF ACT, 1913. Restricted to establishing validity of family wakfs.

not allowed to be made an object of *wakf* : but where property is already charged with some payment, discharge of that may be provided for in *wakf-nama*) ; *Bibi Jinjira K.* v. *Muhammad Fakirulla*, (1921) 49 Cal. 477 (here, *submitted* with great respect, there was no *wakf* for payment of *wakif's* debts, but mortgaged property was dedicated with provision for payment off of existing mortgage, & whole property, when unincumbered, was to be *wakf*).

[14] Ultimate benefit may under the Act be RESERVED IMPLIEDLY (though texts differ on question whether reservation for poor may be implied, or must be express) : *Baqa-Ullah K.* v. *Ghulam Siddique K.*, [1935] 33 All. L. J. 647 (1/16 of income permanently reserved for charity from start : 15/16 for descendants of daughter : no express RESERVATION : held to be IMPLIED FROM : (i) clear intention to make *wakf* under Act VI. of 1913 ; (ii) property dedicated in perpetuity not only for maintenances of family but also *fi sabil-allah* = in way of God ; (iii) provisions prescribed for appointment of *mutawallis* showed intention that *wakf* should operate for ever ; (iv) application of 1/16 income to charity for ever ; (v) though no provision that 15/16 should, on extinction of line of *wakif's* daughter, be dedicated to charity, yet such extinction contemplated : so that ultimate devotion to charity must have been contemplated, as dedication was in terms not only for descendants, but *fi sabil-allah*). But (*Mt.*) *Rahiman* v. (*Mt.*) *Baqridan*, (1935) 11 Luck. (F. B.) 735, 755-7 ; *Irfan* v. *Offl. Rec.*, (1930) 52 All. 748 (mere use of word *wakf* does not imply ultimate reservation) ; *Tahiruddin Ahmad* v. *Masihuddin A.*, (1933) 60 Cal. 901 : (no reservation express or implied : merely from use of word *wakf*, intention to devote ultimately to poor, cannot be inferred : though 1/16 income from date of death of *wakif* to be paid for ever to poor).

[15] Cf. e.g. *Bishen Chand Basawat* v. *Syed Nadir Hossein*, (1887) 15 I. A. 1 = 15 Cal. 329, 337 ; *Delrus Banoo B.* v. *Kazee Abdoor Ruhman*, (1875) 23 W. R. 453.

[16] *Ghulam Muhammad* v. *Ghulam Husain*, (1931) 59 I. A. 74, 86 (wills did not purport to create *wakf*, nor anything that could be regarded as gift of ultimate residue to charitable purpose & no suggestion of *wakf* was made in any of previous suits : held no *wakf* created).

[17] Sect. 3 refers to "a purpose of a permanent *character*" : s. 4 to "a purpose of a permanent *nature*."

[19] Sect. 4 is in reality in nature of explanation to s. 3.

[19] *Tahiruddin Ahmad* v. *Masihuddin A.*, (1933) 60 Cal. 901.

[20] Wakf Act, 1913, s. 5 saves effect of custom & usage. But under the SHARIAT ACT XXVI. of 1937, s. 2, notwithstanding any CUSTOM or USAGE to the contrary in all questions (save questions relating to agricultural land) regarding *wakfs* other than charities & charitable institutions, & charitable & religious endowments, the rule of decision in cases where the parties are Muslims, shall be the Muslim personal law (*shariat*).

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covering all objects recognised by Muslim law to be religious, pious or charitable. (It is not laid down that property may be permanently dedicated for certain stated objects and no other). But the ambit of the Act is merely to validate dedications with the specified preliminary objects, provided that ultimately a religious, pious or charitable purpose of a permanent character is to benefit.

2.—POINTS INVOLVED IN WAKF ACT, 1913.

Certain matters are, however, implied in the Act : on some of which the texts take divergent views :

a.—What property may be subject of wakf.

(1) "Any property" (s. 476) may be the subject of wakf : s. 2(1), though it is also provided that the wakf shall in "all respects be in accordance with the provisions of Mussulman law," and the texts are not unanimous as to whether certain classes of property may validly be dedicated. The Courts, following the Act, have allowed any property to be made wakf of (s. 476), provided that the property is not held in contravention of the principles of law of Islam,[21] [and the property is permanent and not consumed by use].

b.—Charity.

(2) The benefit of the property dedicated by way of wakf may under the Act be impliedly reserved for (*a*) the poor[22] or other religious, pious or charitable purpose, (*b*) of a permanent nature. The texts are not agreed as to whether an express reservation to this effect is necessary, or implied reservation sufficient. That question is settled by the Act.

c.—Postponement of charity.

(3) Whether or not any purpose is religious, pious or charitable and is of a permanent nature has (for determining whether the wakf is valid)[23] to be determined in accordance with Muslim notions and not English law.[24]

d.—Ultimate and preliminary objects.

(4) The ultimate benefit may be deferred until the extinction of the family of the person creating the wakf : *quaere*, whether it may be so deferred for an indefinitely long period by the intervention of some object other than the maintenance and support of the family of the wakif.

e.—Maintenance of family is charity but not permanent.

(5) The objects for which a wakf may be created are referred to in the Act under two heads : (*a*) the ultimate, and (*b*) what in this work have been called preliminary objects.[25] The support and maintenance of the wakif's family, &c. would seem under the Act to be deemed a purpose recognized by the Muslim law as religious, pious or charitable : s. 2. This view was put forward by Ameer Ali, J., with great learning in his dissenting judgment in Bikani Mia's case :[26] "When a wakf is created, constituting the family or

[21] (*Mt.*) *Rahiman* v. (*Mt.*) *Baqridan*, (1935) 11 Luck. (F.B.) 735, 753-5 (*wakf* of USUFRUCTUARY MORTGAGEE'S right not valid : s. 476, com.).

[22] See s. 285, com. & Bail. I. 578 (588) on who are poor.

[23] But not for purposes of Inc. Tax Act XI. of 1922, s. 4(3)(*i*) : *Umar Bakhsh* v. *Commr. of Inc. Tax*, (1931) 12 Lah. 725 (F.B.).

[24] CHARITY UNDER ENGLISH LAW = (1) relief of POVERTY, (2) advancement of EDUCATION, (3) of RELIGION, (4) other purposes BENEFICIAL TO COMMUNITY : *Morice* v. *Durham* (*Bishop*), (1805) 10 Ves. 522, 533, arg. of Romilly ; Hals. IV., 109, § 145.

[25] PRELIMINARY OBJECTS may also be called SPECIFIED OBJECTS (in contrast to ultimate objects which may be IMPLIED) e.g. see ss. 457(4A), 469(2).

[26] *Bikani Mia* v. *Shuk Lal*, 20 Cal. 106, at pp. 145-146, see also p. 139, citing *Mishkat-ul-Masabih* I. 453 ; Kanhaiya Lal, J. says same in *Muhammad Afzal* v. *Muhammad Mahmud*, (1925) 24 All. L. J. 307 (well considered judgment) ; *Mujib-unnissa* v. *Abdur Rahim*, (1900) 28 I. A. 15, 26 (ALL.) ("indeed the theory of the

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descendants of the wakif the recipients of the charity so long as they exist, the poor are expressly or impliedly brought in not for the purpose of making the wakf charitable (for the support of the family and descendants is a part and parcel of the charitable purpose for which the dedication is made), but simply to impart permanency [27] to the endowment." [28] The Act seems to be based on the same view, though its provisions are not as clear as they might have been. The word charity has to be interpreted for the purpose of enforcing Muhammadan law, as understood in that law. (But for construing the Income Tax Act XI. of 1922, s. 4(3)(*i*), the ordinary acceptation of the word in English must prevail, and income enjoyed by descendants of the wakif is not exempt from income-tax.)[27]

3.—JUDICIAL DECISIONS prior to Wakf Act :

a.—Charity necessary.

The following dicta may be of interest as showing the trend of decisions leading up to Abul Fata's [28] case : (1) "To constitute a valid wakf there must be a dedication of the property solely to the worship of God or to religious or charitable purposes." [29] (2) There must be a substantial dedication to charity some time or the other.[30] (3) The instrument would not operate to establish wakf, as it did not devote a substantial part of the property to religious or charitable purposes ; the property must be substantially and not merely colourably dedicated to such purposes.[31] (4) A mere charge for some charitable purposes on the profits of an estate strictly settled on the family of the wakif is not sufficient to validate the wakf.[32] (5) A wakf, the "purpose of which is merely to create a family settlement without a charitable object, is void." [33] (6) It is doubted whether a family trust is invalid without

deed seems to be that the creation of FAMILY ENDOWMENT is of itself a RELIGIOUS & MERITORIOUS ACT, & that the perpetual application of the surplus income in the acquisition of new properties to be added to the family estate is a charitable object"). THEORY OF WAKF in law of Islam seems (*submitted*) to be that property may be dedicated by way of *wakf*—which involves religious motive in dedication—for any purpose with which religious motive may be associated, Bail. II. 220 ; cf. s. 481, com. *cy près* ; (*Mt.*) *Rahiman* v. (*Mt.*) *Baqridan*, (1935) 11 Luck. (F. B.) 735, 755 : ASSOCIATION OF RELIGIOUS MOTIVE necessitates (i) that object not opposed to Islam ; (ii) according to systems other than the Hanafi, that the *wakif* must divest herself of all interest in the property ; this requirement is also necessitated by the considerations referred to in s. 366, com. ; (iii) that any act not evil in itself which benefits any human being may be so associated ; (iv) expenditure of money or dedication of property in favour of persons whose support or maintenance is enjoined or favoured by Islam, may *a fortiori* be as associated (but indiscriminate alms are not so favoured : s. 285, com.); (v) supporting members of one's family is highest charity : *Ghazanfar Husain* v. *Ahmadi B.*, (1929) 52 All. 369, 376 ; *Bikani M.* v. *Shuk L. P.*, (1893) 20 Cal. 116, 139 (*Mishcat-ul-Masabih* I. 453), 146, 163 ; *Meer Mahomed Israil* v. *Shashti Churn Ghose*, (1892) 19 Cal. 412, 430 ; *Vidya Varuthi Tirtha* v. *Balusami Ayyar*, (1921) 48 I. A. 302," 312 ("donor may mention ANY MERITORIOUS OBJECT as the recipient of the benefit") cited & followed : *Allah Rakhi* v. *Mohammad Abdur Rahim*, (1933) 61 I. A. 50, 56 ; *Abdul Wahab* v. *Sughra B.*, (1931) 54 All. 455 (provisions for individuals may be charity).

[27] *Umar Bakhsh* v. *Commr. of Inc. Tax*, (1931) 12 Lah. 725 (F. B.).

[28] *Abul Fata* v. *Rasamaya* (1894) 22 I. A. 76 = 22 Cal. 619.

[29] *Mahomed Hamidulla Khan* v. *Lotful Huq*, (1881) 6 Cal. 744 ; *Abdul Ganne Kasam* v. *Hussen Miya Rahimtula*, (1873) 10 Bom. H. C. R. 7, in identical terms.

[30] *Abdul Gafur* v. *Nizamuddin*, 19 I. A. 170 = 17 Bom. 1.

[31] *Mahomed Ahsanulla Chowdhry* v. *Amarchand Kundu*, (1889) 17 I. A. 28 = 17 Cal. 498.

[32] *Muhammad Munawar Ali* v. *Rasulan B.*, (1899) 21 All. 329.

[33] *Fatima Bibee* v. *Ariff Ismailjee Bham*, (1881) 9 C. L. R. 66.

SECTION 480A. *b.*—Ultimate charity did not validate family settlement.

express mention of a charity in favour of beneficiaries who cannot fail.[34] (7) Family settlements can only be valid when the term sadaqa is used, and even supposing they were then valid, the wakif must reduce himself to a state of absolute poverty.[35] (8) If the condition of ultimate dedication to a pious and unfailing purpose be satisfied, a wakf is not rendered invalid by an intermediate settlement on the founder's children and their descendants.[36] Dedication of 1/3 of the income to charitable purposes was held to be a substantial dedication to charity.[36]

The Wakf Act, 1913, has now taken the law back to the ancient texts : placatumque nitet diffuso lumine coelum.

4.—Life-interest reserved to wakif and to others.

The reservation of a life-interest in favour of the wakif himself, and his creating life-interests in favour of others, fall under two distinct heads ; and different considerations apply to them : (1) The reservation in a wakf of any benefit whatever, (whether consisting of a life-interest or otherwise) in favour of the wakif is not permissible under any system of Muhammadan law except the Hanafi ; and even under the Hanafi law it is valid only according to the exposition of Abu Yusuf—whose opinion, however, prevails, and is given effect to in the Wakf Act, 1913. No other school permits the wakif to participate in the benefit of the wakf property : he is required to part with all his interest in it : see s. 366A, com. (2) Secondly, the creation of life-interests in favour of others than the wakif have been attacked on the erroneous assumption that life-interests are a kind of estate not known to Muhammadan law at all. But it is quite clear, apart from the question of the validity of life-interests created in modes other than by way of wakf, that where a wakf is declared for the purpose of making a family settlement, series of life-interests are permitted by the texts. It is hoped that the effort that has been made in ss. 366 A, 443 ff to explain how interests limited in point of duration may be created by transfers of the usufruct, makes it unnecessary to deal with this argument over again.

Life-interests known to Muslim law.

5.—Muharram ceremonies.

The expression "annual festival of Muharram," occurs in a deed that came before the Court : *ill.* (1)(*i*).[37] But the word festival is singularly inappropriate for referring to the commemoration of the tragedy that took place in Muharram. In the words of Arnould, J.,[38] " its narrative " " is among the most pathetic in all history." " The noble son of Ali and Fatima, the favourite grandson of the apostle of God, after deeds of valour romantic even in an Arab of that age, fell pierced through and through with the arrows and javelins of the cowardly assailants who did not dare to come within the sweep of his arm. One of his sons and a nephew had already been slain in his sight. His other son, his wife and his sister were carried away captive to

a.—Tragedy of Muharram.

[34] *Phate Saheb Bibi* v. *Damodar Premji*, (1879) 3 Bom. 84 ; see s. 463, com.

[35] *Fatmabibi* v. *Adv.-Gen. Bom.*, (1881) 6 Bom. 42 ; followed *Amrutlal Kalidas* v. *Hussein*, (1887) 11 Bom. 492.

[36] *Bazlul Ghani Mia* v. *Adak Patari*, (1913) 17 Cal. W. N. 1019.

[37] *Ram Charan Law* v. *Fatima B.*, (1915) 42 Cal. 933.

[38] *Adv.-Gen.* v. *Muhammad Husen Huseni* (otherwise known as AGA KHAN), (1866) 12 Bom. H. C. R. 323, 331 (FIRST AGA KHAN CASE).

Damascus. They smote off the head of the son of Ali and paraded it in triumph through the streets of Cufa. As it passed along, the brutal Obeidollah, the Governor of the city, struck the mouth of the dead man with his staff. 'Ah' cried an aged Mussulman whom horror and just wrath made bold, 'What a foul deed is that!—on those lips I have seen the lips of the apostle of God.'" In the deed, however, though the object of the wakf seems to have been described as the celebration of a festival, the real purpose of the wakf was the "observance of the Muharram," and "the keeping up of Muharram as an institution with all its moral effect on the general public," which, as Imam, J. mentions in his judgment "entails the feeding of the poor, and the distribution of alms to the needy." He adds: "The dedication of the property to such use constituted the service of man and the good of humanity though to a limited section. Apart from the help to the poor and the needy, the commemoration of the historic events of Karbala, keeping alive as it does some of the best traditions of Islam, is to my mind as good a purpose as the followers of a faith can have."

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b.—Observance of Muharram.

c.—Commemoration of the tragedy.

Where, however, property is sought to be dedicated for the purpose of festivities being held during Muharram, that would not, it is submitted, be a valid object for a wakf as it would be opposed to the sentiments of the followers of Islam.

II. Cy pres doctrine.

481. (1) Where a dedication by way of wakf expresses or implies a general charitable intention,[1] but either specifies no objects, or specifies objects that have failed, the property may, by an order of the Court, be devoted to the poor,[1] or to charitable objects approximating to those that have failed.[2]

Wakf for "good objects" shows general charitable intention.

(2) A dedication made generally [1] for charity [3] or for good objects,[3] without specifying [4] them, may be given effect to, if

[1] A dedication generally for charity = gift showing GENERAL CHARITABLE INTENTION: see s. 457(4A). *Muthukana Ana Ramanadhan* v. *Vada Levvai*, (1909) 34 Mad. 12, 17 affd. (1916) 44 I. A. 21 (left to discretion of trustees to fix portions of income to be spent in charity: *held* each object to benefit equally).

[2] *Salebhai* v. *Bai Safiabu*, (1911) 36 Bom. 111; *Adv.-Gen.* v. *Hormusji*, (1905) 29 Bom. 375 (Jenkins, C. J., & Batty, J.). See s. 481, com.; *ill.* p. 598. Cf. as to CY PRES: "when the purpose of a *wakf* fails, it is lawful to apply the income of the *wakf* property to an object NEAREST IN ITS NATURE TO THE ORIGINAL PURPOSE (*jins-i-qarib*). For example, if the object of a *wakf* is a fountain the income may be applied to a tank or canal; if it is a mosque the income is to be applied to another mosque, or to fasting, prayers, etc."—*Fatawa Kazi Khan*, III. 298; see also *Raddul Mukhtar*, III. 574. RELIEVING POVERTY appears in texts as equivalent of CHARITY: This entirely accords with Lord Halsbury's dictum: "the real ordinary use of the word charitable always does involve the relief of poverty," *Commr. of Inc.-Tax* v. *Pemsel*, [1891] A. C. 531, 552. Hence to devote ultimately for poor = to indicate general charitable intention.

[3] *Mukarram Ali K.* v. *Anjuman-un-nissa Bibi*, (1922) 45 All. 152 (*umur-i-khair* = CHARITABLE PURPOSES). Cf. *Shailendranath Palit* v. *Hade Kaza Mane*, (1931) 59 Cal. 586, 601.

[4] Bail. I. 533 (*ll.* 9-12) (561), 558 (last 3 *ll.*) (566-567), 559 (par. 1, last 3 *ll.*) (567), 625 (635) *ll.* 25-28; II. 216 (last *l.*), 217 (*ll.* 1-2); *Sheikh Ramzan* v. (*Mt.*) *Rahmani*, (1931) 7 Luck. 301, 310 (religious & charitable objects shall continue to be performed: no specification in deed of such objects, *held* NON-SPECIFICATION OF RELIGIOUS & CHARITABLE OBJECTS does not render dedication vague: such objects can

SECTION 481. necessary, by the Court framing a scheme.[5]

If no objects mentioned.

Explanation.—Where a dedication by way of wakf is purported to be made without specifying its objects and the wakif takes no step to give effect to the dedication or to utilize the property for objects which may lawfully be the objects of a wakf, an inference may be drawn that no dedication was in good faith intended or completed : s. 462.[6] Under Abu Yusuf's exposition of Hanafi law, if a declaration of wakf is made, it is conclusive proof[7] of a general charitable intention ; but, it is submitted that the true effect of the law at the present time is as stated and explained above.

Illustrations.

(1) In the will of a Khoja Muslim, written in the English language and form, a gift of a fund "to be disposed of in charity as my executor shall think right," is a valid charitable bequest, and it will be referred to the proper officer of the Court to settle a scheme for the application of the fund to charitable objects, by analogy to Statute, 43 Eliz. c. 4. Where, however, the will is in the native language, and the word dharm or dharam is used, that word is *held* too vague and uncertain for the gift to be carried into effect by the Court, as it includes many objects not comprehended in the word "charity" as understood in English law.[8]

(2) A Shia Ismaili missionary, PIR SADRUDDIN, came to India about the middle of the 15th century, and converted to Islam a number of persons, who called themselves KHOJAS, which means both "the honourable and worshipful persons" and "the disciples" [343]. The Khojas transmitted voluntary

be ascertained from texts : this matter relates to administration not construction of *wakf*) ; *Ghazanfar Husain* v. *Ahmadi Bibi*, (1929) 52 All. 368, 377 ; *Fatmabibi* v. *Adv.-Gen.*, (1881) 6 Bom. 42 (after specifying objects : income to be spent in such other manner "as trustees may think fit") : *Gangabai* v. *Thavar Mulla*, (1863) 1 Bom. H. C. R. 71 (to be disposed of in charity as my executors shall think right) ; *Adv.-Gen.* v. *Yusufalli*, (1921) 24 Bom. L. R. 1060, 1110 (such other charity as the Mullaji or his successor in office may from time to time select) ; *Smith* v. *Massey*, (1906) 30 Bom. 500, 505 (such charity as the trustee may think deserving).

[5] *Adv.-Gen.* v. *Hormusji*, (1905) 29 Bom. 375 (Jenkins, C. J. & Batty, J. : "for the use of the trustees, absolutely to be expended & used by them for SUCH CHARITABLE PURPOSES AS THEY MAY THINK FIT" : held valid : scheme directed : see issues, 1, 2, 5 on p. 377, Answers on p. 385) ; cf. *Masuda K. B.* v. *Mahammad Ebrahim*, (1931) 59 Cal. 402, 421 ; Abdur Rahim, *Muh. Jurispr.*, 305.

[6] Cf. s. 462. *Sharaiu'l-Islam* states the proposition much more broadly : "If a man should make an appropriation without mentioning its objects, the appropriation would be void. So also where the objects are not distinctly specified, as if he should say, 'for one of these two, or for one of the two "*murshids*"' ; or 'two "*fureeks*,"' the whole would be void." Bail. II. 217 (par. 3). But the words "without mentioning its objects" must not be taken by themselves without considering what is laid down a few lines before (Bail. II. 216, par. 3), viz. if dedication is for such, (i.e. for good & pious purposes) generally, it is to be expended on poor & indigent & in way by which approach is made to God : see s. 481, com., where this passage is set out : pp. 599 f. See also *nn.* 1-5.

[7] Cf. *Ma E. Khin* v. *Maung Sen*, (1924) 2 Rang. 495, 511.

[8] *Gangbai* v. *Thavar Mulla*, (1863) 1 Bom. H. C. R. 71. See s. 481, com. pp. 599 ff. "*Wakf* in way of God."

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offerings out of religious feeling to the Imam for the time being of the Ismailis, whom they revered as their murshid or religious head, and made pilgrimage to Persia. They also paid to the IMAM fees on births, deaths, marriages, at new moons, etc., and people outside Bombay paid a percentage of their income, but out of these offerings and contributions (which were primarily paid to the imam,) the necessary local expenses of the various KHOJA JAMAATS were defrayed. With a few exceptions, the Khoja community would make no contributions at all for public or caste purposes except in the name and primarily on account of the Imam [347]. The AGA KHAN claims and is recognized by the Khojas to be the present Imam [363]. Some of the Khojas having refused to pay the said percentage, they were outcasted; and re-admitted only on payment of it. Later the same members were outcasted a second time, as they opposed the Aga Khan on the question whether the Hindu or the Koranic law of inheritance governed the Khojas. In 1861 the Aga Khan published a paper asking the Khojas to profess openly the SHIA IMAMI ISMAILI creed, and no more to perform their "marriages, ablutions, and funeral ceremonies" [349] in accordance with the Sunni forms, as they had hitherto done [350] out of taqia, (i.e. mental reservation, or rather concealment of their own religious opinions, and adoption of alien religious forms, either from a desire to avoid giving offence, or from dread of persecution [335, 355-357]), and to sign in a book their adherence to that sect. The vast majority of the Khojas signed accordingly; the only exceptions being (*a*) a few families in Bombay who said that they were Sunnis, and (*b*) others in Bhavnagar who said they were already Shias, and there was no need to sign the book. The former were excommunicated, after being given an opportunity to pay the fees, and to agree to abide by the rules framed by the whole Jamaat. They accordingly instituted a suit for an account against the mukhi (treasurer) and kamaria (accountant) of the Khoja community of all property held in trust by them for or belonging to the Khoja community; for their removal; for a declaration that no person professing Shia opinions in matters of religion can share in the said property, or have any voice in its management; for a scheme; and for an injunction against the Aga Khan interfering with the said trust property, and in the affairs of the Khojas. *Held*,[9] when the Court in the exercise of its charitable jurisdiction is called upon to adjudicate between the conflicting claims of dissident parties in communities held together or distinguished by some religious profession or denomination, the rights of the litigants will be regulated by reference to what, upon inquiry, turn out to have been the religious tenets

[9] *Adv.-Gen. ex rel. Daya Muhammad* v. *Muhammad Husen*, (1866) 12 Bom. H. C. R. 323 = AGA KHAN (FIRST) CASE (pages of 12 Bom. H. R. cited in [ ]); cf. SCOTCH KIRK CASE = *Free Church of Scotl.* v. (*Lord*) *Overton*, [1904] A. C. 515, 613-617, (*per* Lord Halsbury); 643-645 (*per* Lord Davey); *Ibrahim Esmael* v. *Abdul Carrim Peermamode*, (1908) 35 I. A. 151 = [1908] A. C. 526 = 13 C. W. N. 26 (P. C.) (mosque founded for whole Muslim congregration, Mauritius: one section (Cutchhis) formed themselves into new association: no right to transfer all property to such new association & exclude rest of congregation from membership & participation in management of mosque); *Mahomed Ismail Ariff* v. *Ahmed Moolla Dawood*, (1916) 43 I. A. 127 = 43 Cal. 1085, 1101 (P. C.). See s. 588.

SECTION 481. Failure if members of community secede.

and opinions held by the community in its origin, or at its foundation. A dedication for the benefit of a COMMUNITY OF PERSONS, holding particular RELIGIOUS TENETS, will enure for the benefit of the persons professing the religious tenets held by the said community in its origin, so long as they exist; and the SECESSION even of a vast majority of those who originally formed the said community does not mean that the said object has failed, nor will it affect the operation of the dedication.[9] A minority, however numerically small, holding fast by these opinions, will be entitled to prevail against a majority, however numerically large, which can be shown to have seceded from or renounced them [329]. Hence the suit was dismissed with costs.[10]

(3) The doctrine of CY PRES was applied in a case[11] where the descendants of a person referred to as the 2nd SAJJADANISHIN, were paid certain allowances, payments being "based entirely on the practice which clearly came to be prevalent owing to the misconduct of a succession of men in charge of the trust properties." Abdur Rahim, J. said: "supposing we are in a position to impute to the founder the intention of benefiting the descendants of the man whom he had nominated as his successor, with some portion of the income of these properties, the present method does not in my opinion carry out the intentions in the true sense. With every generation the allowance available for each individual must necessarily diminish, and it could not be for the benefit of the family....that every individual....should get insignificant doles on a steadily decreasing scale..... Now it cannot be questioned that the ELEEMOSYNARY DOLES are as demoralizing and mischievous in their effect in this country as elsewhere. The history of this very family is but an illustration of the way in which doles have the effect of pauperizing the recipient. Having regard to the change of circumstances the MAINTENANCE AND SUPPORT OF POOR MUHAMMADAN STUDENTS, giving preference to those amongst the descendants of the 2nd Sajjadanishin, would undoubtedly best carry out the benevolent intention of the founder. For this purpose a fund should be formed out of the surplus left after meeting the expenses of the repair or maintenance of the tomb, the salaries of the trustees and the sajjadanishins and the necessary establishments, and expenses in connection with the celebration of the urs and fatiha ceremonies..... The persons named.... shall receive their allowances during their life-time. As each one dies, the amount payable to him or to her shall lapse into the fund for the support of poor Muhammadan students.[12]

Unauthorized allowances: misconduct of trustees.

Eleemosynary doles demoralizing.

Maintaining poor students.

CY PRES IN MUSLIM LAW.

1.—Implied reservation for poor.

In wakfs governed by the Wakf Act, 1913, s. 3, the ultimate benefit may be impliedly reserved for the poor or other purpose recognized by the Mussulman law as a religious, pious or charitable purpose of a permanent character.[13] Presumably an implied reservation would be a provision less definite than that in s. 491, *ill.* (1) in which charity is expressly mentioned: and an implied

[10] Citing *Shore* v. *Wilson*, (1839) 9 Cl. & Fin. 155.

[11] The cases are collected later: see pp. 600-604, *nn.* 22-27.

[12] *Sujjada Shah* v. *Shaw Habit*, (1919) 53 Ind. Cas. 677, 680: p. 535, *n.* 24.

reservation in the vaguest terms would apparently save the wakf : in which case the Court would have to frame a scheme. The view has occasionally been expressed that this provision of Muslim law is outside the province reserved for that law in India. But in determining the limits of the province so reserved, the Wakf Act, 1913, cannot be ignored any more than the functions exercised by the Courts in England to which reference is made in detail in the sequel. The administration of wakfs was one of the special quasi-judicial functions assigned to the Kazi in Muslim law : see s. 11B, com. : an interesting parallel with the jurisdiction of the British Courts to frame schemes for charities. See p. 603, *n.* 27. SECTION 481.

Cf. " Where a person has made an appropriation ' in the way of God ' it is applied to whatever is productive of reward in a future state, such as religious warfare, the greater and lesser pilgrimages, and the erection of masjids or places of worship, and bridges. So also, if he should say, ' in the way of God, and way of rewards, and way of goods,' the purposes are all considered as one and the same, and there is no necessity for dividing the proceeds of the wakf into three different parts."[13] 2.—Wakf in way of God or for charity in general.

It is laid down in the Fatawa Alamgiri that where " a man makes a wakf of his estate, on condition that the administrator may give the produce as he pleases, this is lawful, and he may give it to rich and poor. If he should say ' on condition that such an one may give the produce to whomsoever he pleases,' it is lawful, and the power may be exercised during the life of the appropriator, and after his death." [14] 3.—Option to mutawalli to give to one of several objects.

" The Sirajul Wahaj states that ' when a person constitutes a wakf generally without designating the object to which it should be applied,[4] it is lawful —and this is correct,'—and then goes on to say that there are several words which are express in their meaning, and the use of which clearly constitutes a wakf : because they convey in themselves the intention to dedicate : for example, wakafto, haramto, habasto, sabalto, etc. ' I have dedicated, ' I have consecrated, ' I have tied up,' ' I have given in the way of God ' [15]. . . . According to the Wajizul-Muhit, if a man were to say " this my land is mouqoofa (dedicated) or muharrama (consecrated) or mahboosa (tied up)," it would constitute a valid wakf according to Abu Yusuf, and this is most correct, for he (the wakif) has mentioned wakf unrestrictedly [16] and an unrestricted wakf is for the poor by custom and practice, and what is customary is as if conditioned." [17] 4.—The object of wakf not mentioned : *a*.—Intention of wakf if clear,— *b*.—benefit of poor resulting. Custom.

The first sentence of the following passage from the Sharaiu'l-Islam seems hardly to differ from a statement of the cy pres doctrine of English law : " If one should make an appropriation for a maslahat, or object of general utility, which has ceased to be used, it is to be applied to any good and pious purpose. And if it is for such purposes generally, it is to be expended on the poor and 5.—Cy pres doctrine compared.

[13] Bail. II. 220. " In the way of God " seems as technical an expression in Muslim law as *charity* in English law. See s. 588.

[14] Bail. I. 588 (598); (" I may employ produce as I please," " to give the produce to whom he pleases "); cf. Bail. II. 217 (par. 3).

[15] Ameer Ali, I. 149 (218).

[16] I.e. without defining its objects.

[17] Ameer Ali, I. 150 (par. 2) (219).

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a.—For specified objects of general utility which fail.

indigent, and in any other way by which an approach is made to Almighty God." [18] Sir A. Rahim, has stated the same (Hanafi law): "If however the specified objects be limited or happen to fail, but a general charitable intention [see s. 457(4B)] is to be inferred from the words of the grant, the wakf will be good, and the income or profit will be devoted for the benefit of the poor, and in some cases to objects as near to the objects which failed, as possible. This rule is analogous to the doctrine of cy pres of the English law." [19] The principle underlying the doctrine of cy pres is deeply rooted in Muslim law. This is strikingly illustrated by the passage from the Nahrul Faik (other references also throw light), cited s. 485(2), p. 611, *n.* 29, which applies the principle to the case where a dedication is made for an object not yet come into actual existence. E.g. a grant for a madrasa not yet erected is to be applied for the support of students attending lectures elsewhere.

b.—General charitable intention : analogy.

The development of English law leading up to the theory of a general charitable intention seems closely analogous. Where a wakf was for family purposes and concurrently for charities, (1) it was assumed that each object was intended to benefit equally, (2) benefiting the family not being formerly deemed a valid object of wakf, it could not be given effect to, and (3) therefore the whole benefit was held to accrue to the charity.[20] The Hanafi law as expounded by Abu Yusuf, seems to be to the effect, if the language of English law may be permitted, that by the very declaration of wakf a general charitable intention is shown.[21] The Wakf Act, 1913, must now be kept in mind. Moreover, there may be other circumstances besides the mere declaration of wakf showing or disproving a general charitable intention.[22] The argument cannot, however, be pressed too far, without moving in a circle. For, if once it is held that there is the intention to create a wakf, it must imply that there is an intention to devote the property ultimately to some purpose recognized by the Mussulman law as religious, pious or charitable.[21] Abu Yusuf holds the mere use of the word wakf as conclusive evidence of the intention to make a wakf. That, it is submitted, is not the law in India, see ss. 458, 562 : there must be a dedication in good faith, and that implies a great deal. However that may be, Abu Yusuf's view to the extent that the

i—Wakf implies relief of poor,—

ii—which is charity in general sense.

[18] Bail. II. 216 (par. 3); cf. p. 596, *n.* 6; s. 457(4A), p. 533, & *nn.*

[19] A. Rahim, *Muham. Jurispr.*, 305, cited with approval; *Salebhai* v. *Bai Safiabu*, (1911) 36 Bom. 111; see s. 481, *ill.*

[20] (*Muthukana Ana*) *Ramanadham* v. *Vada Levvai*, (1910) 34 Mad. 12 (instructive judgment *per* A. Rahim, J.); affd. *Mutu Ramanadhan Chettiar* v. *Vava Marakayar*, (1916) 44 I. A. 21; cf. *Abul Fata* v. *Rasamaya*, (1894) 22 I. A. 76 = 22 Cal. 619.

[21] This is cited & applied : *Ma E Khin* v. *Maung Sein*, (1924) 2 Rang. 495, 511.

[22] It would be better to say "[general] intention to make a *wakf* :" *wakf* implies charity, hence intention to dedicate as *wakf* must include charitable intention : charity always involves relief of poverty [*Commrs. of Income-tax* v. *Pemsel*, [1891] A. C. 521, 552 (par. 3): ultimate destination of *wakf* always relief of the poor : making provisions for family was held by P. C. to show no charitable intention, hence no intention to make *wakf* : under Wakf Act, 1913, providing for family is under law applicable to Muslims valid object : *wakfs* being governed by Muslim definition of charity not definition of English law. But provision for family is valid only as preliminary object of *wakf* : ultimate objects must be perpetual, s. 457(4A), p. 533 : the poor are always with us : poverty is perpetual : so is its relief.

ultimate benefit of the dedicated property need not be expressly reserved for the poor, but may be impliedly so reserved, has been accepted by the Legislature, and it may be argued that inasmuch as in the case of a wakf with preliminary provisions for the wakif and his family, the Legislature permits the ultimate benefit to be impliedly reserved for the poor, the same rule ought to be applied to a wakf where there are no individual beneficiaries. SECTION 481.

c.—Wakf for "good objects" not rejected as uncertain.

"Suppose a non-Muslim makes a wakf for 'good objects,'" says the Fatawa Alamgiri, "now in his opinion building temples, or repairing a fire temple, or giving by way of sadaqa to the poor, would equally be good objects; hence the proceeds will be devoted to the poor, and the other objects will be rejected. This is in the Havi."[23] Observe that the result reached is different from that in decisions under Hindu law in which bequests for dharam are held to fail on the ground that dharam includes not only charity, but other objects of too general and vague a nature (p. 602, *n.* 26). The Fatawa Alamgiri on the contrary lays down that where a composite expression such as 'good objects' includes within its significance objects that have to be 'rejected,' as well as objects that are valid, the valid objects alone will prevail and the bad rejected: the bequest will not fail as a whole: the Muslim law "bereaves" the bequest "of its bad influence, and its good receives."

d.—Diversion to any kind of benefit of poor allowed by texts.

The question has been raised, whether the law of Islam (so far as its enforceability in India is concerned) defeats its purpose by being so wide as to be incapable of being enforced by the Courts as constituted in India. The real question that arises has (it is submitted) not always been kept as much in the foreground as it deserves. The real question is whether the Muslim law relating to a dedication without any object being specified, could only have been given effect to, if the Courts could have undertaken such duties and the performance of such functions, as they cannot in fact undertake or perform. The matter under consideration is the upholding by the Courts of a wakf for unspecified objects. At the very threshold stands the vital distinction between

[23] *Fatawa Alamgiri, Wakf*, Ch. I.; cf. Bail. I. 553 (*ll.* 5, 10 ff) (561), s. 481, *ill.* (1); *Runchordas* v. *Parvatibai*, (1899) 23 Bom. 735; *Bikani Mia* v. *Shuk Lal Poddar*, (1892) 20 Cal. 116 (F. B.); *Mahomed Hassan* v. *Mahomed Ibrahim*, (1903) 5 Bom. L. R. 624; *Abdul Rajak* v. *Bai Jimbabai*, (1911) 14 Bom. L. R. 295; note that dedication by way *wakf* is necessary: & this brings position entirely in line with *Morice* v. *Bishop of Durham*, (1804) 9 Ves. 399, (1805) 10 Ves. 522 (very first words of judgment: "The only question is whether the trust....be a trust for charitable purposes:" substitute *wakf* for *charitable*); Lewin, *Trusts*, Ch. IX. s. 7, cited lower down: s. 481, com.; *Re Lambeth Charities*, (1853) 22 L. J., (CH.) 959 (income (or usufruct) of the property dedicated will be applied as nearly as possible to object specified by donor); *Moggridge* v. *Thakwell*, (1802) 7 Ves. 36, 69 (to dispose of same in such charities as he shall think fit); *Mills* v. *Farmer*, (1815) 1 Mer. 55; *Att.-Gen.* v. *Mayor of Bristol*, (1820) 2 Jac. & W. 294, 308; *Chamberlayne* v. *Brockett*, (1872) 8 Ch. 206; *Att.-Gen.* v. *Price*, (1908) 24 T. L. R. 763; *Re Prison Charities*, (1873) L. R. 16 Eq. 129, 146. The Muslim texts say that it should be devoted to the poor, which = that it should be devoted to charitable purposes. See p. 595, *n.* 2 (charity = relief of poverty): p. 600, *n.* 22 & s. 11 A. Ameer Ali I. 300 (386): "If there are no provisions in the *wakf-namah* for the carrying out of the purposes of the trust, the Kazi or Judge has absolute DISCRETION TO FRAME A SCHEME"—citing *Kiniatu'l Munia*. *Adv.-Gen.* v. *Boultbee*, (1794) 2 Ves. 380, 388 (direction of founder varied): *Clephane* v. *Edinburgh Cor.*, (1869) L. R. 1 Sc. & Div. 417, 421 (change of mode of charity: charity failing by reason of illegality, it devolves upon crown to declare what form of administration to be adopted); cf. s. 481, *ill.* (3).

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the principle prevailing in English law and that stated from the Fatawa Alamgiri in the last paragraph, above. Under English law, expressions which are too wide (such as "philanthropic" or "benevolent purposes") by their vagueness and uncertainty make the whole bequest invalid. Under Muslim law, if the wider expression includes purposes which are valid objects of wakf, as well as purposes which cannot validly form objects of wakf, the valid objects prevail, the rest are rejected : the wider expression is cut down and given effect to only to the extent to which it includes valid objects of wakf. It is submitted that the reason for this distinction rests in part on the fundamental distinction between wakf and trust, which is considered thirdly below. Secondly, the cases having reference to bequests with nothing to indicate whether they are for charity, stand on a different footing altogether. The distinction between the position of such wakfs and of such bequests is, that where it is conceded that the property has been dedicated by way of wakf, it is conceded that the property is dedicated for charity,[24] that ultimately it is expressly or impliedly reserved for a charity (see p. 591, *ll.* 1-3); and as soon as it is part of the hypothesis that the property is set apart for charity, the principle of the Bishop of Durham's case [25] is satisfied. That crucial step, viz. dedication for charity, is taken when a dedication by way of wakf (with its concomitant renunciation of private property) is postulated : the fact that an intention of charity has been given expression to, distinguishes a wakf from a bequest governed by Hindu law using the word dharam,[26] which expression may have reference to charitable

6.—Distinction between wakf and bequest for dharam.

[24] *Re Macduff*, [1896] 2 Ch. 451 has been cited, but (*submitted*) misconceived : that case shows that purposes may be such as cannot be brought under description CHARITABLE—albeit they are PHILANTHROPIC. But here, since we start with hypothesis that dedication is by way of *wakf*, it must be conceded that that dedication is for charity. Argument must not be permitted to run in circle. Similarly indefinite purpose not charitable may vitiate bequest : *Hunter* v. *Att.-Gen.*, [1899] A. C. 309 Lord Halsbury, p. 315). *In re Willis*, [1921] 1 Ch. 44 (discretion to one who was neither executor nor trustee to select charitable institution or society for bequest : *held* valid gift to charity); *Shahabuddin* v. *Sohan Lal*, (1907) 42 Punj. Rec. 389 (No. 75, Civ. Jmts.) contains careful judgment, but (with all respect) in dealing with *In Re Jarman's Estate*, (1878) 8 Ch. 584 point missed that bequest there was not for 'charitable purpose,' but for 'charitable *or benevolent* purpose' (see p. 586 last line); & *benevolent* purpose (unlike a *charitable* purpose) is vague & indefinite : if it had been bequest for charitable purposes alone this objection could not have been allowed; *Bai Bapi* v. *Jamnadas*, (1897) 22 Bom. 774 (*sara kam* = good works); *Runchordas* v. *Parvatibai*, (1899) 23 Bom. 735; *Adv.-Gen.* v. *Hormusji*, (1905) 29 Bom. 375; (s. 481, *n.* 5); *Salebhai Abdul Kader* v. *Rai Safiabu*, (1911) 36 Bom. 111, 115; Abdur Rahim, *Muham. Jurispr.* p. 305.

[25] *Morice* v. *Bp. of Durham*, (1805) 10 Ves. 522; (1804) 9 Ves. 399.

[26] DHARAM see very learned note 1 Bom. H. C. R. 76, 76A. Subramania, J.'s vigorous protest in *Parthasarathy Pillai* v. *Tiruvengadu*, (1907) 30 Mad. 340 against interpretation of DHARAM in 26 I. A. 71 : & cases referred to in *Muthu Krishna* v. *Ramchandra*, (1918) 37 M. L. J. 489, 496; *Runchordas Vandravandas* v. *Parvatibai*, (1899) 26 I. A. 71 = 23 Bom. 725 has been (*submitted*) wrongly applied to *wakfs* : there word was DHARAM = law, virtue, legal or moral duty : decision of Lord Eldon in *Morice* v. *Bp. of Durham*, 10 Ves. 522 distinguishing such vague dispositions from dispositions for charity held to apply : but *wakf* postulates charity : s. 451(1), Wakf Act, 1913. In *Mahomed Ali* v. *Lakhmichand* (No. 1), [1931] AIR (SIND) 75, it is said there would appear to be very little difference in the meaning of "*dharama*" & "*khairat*" : "There is no more vicious line of argument" said Jessel M. R. "than....of comparing one contract with another, & saying it differs very little; you arrive ultimately at identifying wholly different contracts" : *Southwell* v. *Bowditch*, (1876) 1 C. P. D. 374, 377. Whether [1931] AIR (SIND)

objects, but may also include other objects that do not fall within the definition of charity, and for which a perpetuity is not permitted. Thirdly, the matter may be looked at from still another aspect. Wakf is a very special kind of trust. If it is once clear that the intention is to create a wakf, the intention is determined in respect of several more points than is the case when all that is known is that a trust is intended to be created. A trust may be for charity or it may be for other purposes. A trust in perpetuity is permissible only if it is for charitable purposes. From the fact, therefore that the intention is expressed that a trust should be created, there is no indication whether (1) the trust is to be in perpetuity, (2) whether it is to be for a charity. But when the intention to create a wakf is clear, it necessarily implies both perpetuity and charity. The Court must under the Wakf Act, 1913, recognize and enforce all wakfs expressly or *impliedly* reserved for any purpose recognized by the Mussulman law as religious, pious or charitable. Where there is a mere implied reservation for charity to come into effect after the family of the wakif becomes extinct, the position conforms in every material respect to that now under discussion. For where there is no express dedication for charity, but it is merely implied that the property should be so utilized, the cases must be few (assuming that there can be any) in which the exact purpose is implied. Nor is it provided in the Act that the precise charity should be (impliedly) laid down : the implication that benefit should be reserved for charity (or according to the language of the Texts, for the poor) generally, is enough. Moreover, on a dedication by way of wakf being made, a very specific form is given to the disposition, not only in respect of the particulars already referred to, but in that the substance of the property is tied up (being notionally considered to become God's property in a special way), and only the usufruct is left free for man. The mutawalli is expected to act as a manager for carrying out this scheme.

SECTION 481. Implications of wakf : *a.*—Charity. *b.*—Perpetuity. *c.*—No owner : mutawalli not trustee : mere manager.

Finally, the law with reference to charitable settlements is different (in respect of resulting trusts) from that of other settlements. This has occasionally been lost sight of.[27]

7.—Charity and resulting trusts.

75 was rightly decided depends on whether document showed no general charitable intention. Importance of presence or absence of intention to make *wakf* overlooked, also in *Mahomed Ali* v. *Lakhmichand*, [1929] AIR (SIND) 52 where bequest to utilize balance money (of specified rents) in "*khairat purposes.*"—The judgment runs : "It will not be seriously disputed that *wakf* in favour of *khairat* is treated as lawful in ancient texts," & proceeds to hold that though this was a *wakf* it was void : *submitted* question was whether there was intention to create *wakf* (which means that there was dedication to charity) & if there was such intention, then, under *Bishop of Durham's* case, Court ought to have given effect to the *wakf*. To *Mariambi* v. *Fatimabai*, (1928) 31 Bom. L. R. 135 similar submission applies. In *Abdul Sakur Haji Rahimtulla* v. *Abu Bakkar Haji Abba*, (1929) 32 Bom. L. R. 215, no question of *wakf* : direction to executors "to make a proper outlay in connection with my death ceremonies" : since words used were *dharma kriya* it was solemnly but ineffectually argued that the poor testatrix was to be lodged like Ophelia unsanctified till the last trumpet : *tantum* DHARMA *potuit—vel audax ad conandum—suadere malorum.*

[27] OPERATION OF WAKF FOR GOOD OBJECTS GENERALLY : TRUST FOR UNPARTICULARIZED CHARITY : (i) In Ameer Ali, *Mahom. Law*, I. 324 (414) stated that principle laid down in *Morice* v. *Bishop of Durham*, (1805) 10 Ves. 522 not applicable to trusts or consecrations under Muhammadan law : this proposition has been criticised as being "founded on a misapprehension of the principle, which, if rightly understood,

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a.—General intention of charity but no object particularized.

This distinction is made very clear in Lewin on Trusts,[28] on resulting trusts. "It may be noticed" he says, "that settlements to *charitable* purposes are an exception from the law of resulting trusts;[29] for upon the construction of instruments of this kind,... (i) where a person makes a valid gift and expresses a general intention of charity,[30] but either particularizes no objects, or such as do not exhaust the proceeds, the Court...will take upon itself to execute the general intention, by declaring the particular purposes to which the fund shall

is seen to be involved in the very nature of civil jurisdiction." (ii) This criticism, *submitted*, seems not to take note of real point,- which involves two questions,—(*a*) must not every disposition by way of *wakf* be taken to be disposition for charity? *answer*: a disposition cannot be held to be *wakf* unless its object is charity—unless general charitable intention is expressed or implied. (*b*) Then, is there any reason why English doctrine of *cy pres* (Muslim law being at least as comprehensive) be not applied?—Neither Sausse, C. J., nor Jenkins, C. J., nor Batty, J., nor Batchelor, J. seem to have seen any reason: *Gangbai* v. *Thaver Mulla*, (1863) 1 Bom. H. C. R. 71 = s. 481, *ill.* (1); *Adv.-Gen.* v. *Hormusji*, (1905) 29 Bom. 375. (iii) Does not argument that if a trust "for good purposes unspecified is construed as exempting the trustee from all judicial control, it is no trust at all, but a beneficial bequest to him personally,"—confuse "trust for good purposes unspecified" with "*wakf* for unparticularized charity," overlooking that *wakf* is a species of trust—a trust for charitable purposes? Cf. *Sheikh Ramzan* v. (*Mt.*) *Rahmani*, (1931) 7 Luck. 301, 310)—& that, as such, it is, if necessary, subject to control of Court in its administrative jurisdiction of directing SCHEME? (iv) Syed Sahib Ameer Ali is alleged to have construed such trusts as empowering Hakim (ruler or Court) to frame scheme at his own discretion. But Syed Sahib speaks of *wakfs*, & of property consecrated or dedicated by way of *wakf*,—which makes the disposition not an indefinite trust but a trust with a general charitable intention without particular charities specified. (v) Function exercised in this connection by Courts in England styled not judicial but administrative; *per* Lord Parker, then Parker, J.: "the Court by virtue of its administrative jurisdiction can direct a scheme as to how it" (viz. "a general charitable purpose rather than a particular charitable purpose") "is to be carried out:" *Re Wilson*, [1913] 1 Ch. 314, 320. Cf. *Pyne in re* [1903] 1 Ch. 83 ("where property is bequeathed for charitable purposes & objects not specified, or indefinite, proper mode of carrying out general charitable intention is by SCHEME"). (vi) Powers of *Kazi* seem to offer very interesting parallel. *Kazi* was specially empowered to deal with *wakfs*: see ss. 11 B, 492 A, pp. 83, 622. (vii) *Submitted* on basis of Wakf Act, 1913, s. 3, Lewin's *Trusts*, Tudor's *Charities* & decisions cited here & in s. 481, com., that Muslim law is enforceable in India. When discretion accrues to private individual of selecting charity (*wakif* though "saturated & satiated with the idea of charity yet not having mind enough himself to determine upon the particular objects": *Moggridge* v. *Thackwell*, (1802) 7 Ves. 36, 83, *per* Lord Eldon) such discretion is subject to directions by Kazi, or (is is submitted) by Court framing SCHEME. (viii) As soon as property becomes *wakf*, it becomes inalienable, no private ownership subsists in it (or rather it cannot be said to be made *wakf* of unless it is made inalienable & uninheritable, by *wakif* having divested himself of ownership): there is no one to whom it can "result," interest of *mutawalli* merely that of manager for life. He is not trustee & cannot lap up the beneficial interest. (ix) The "distinction was taken by Lord Hardwicke, Chancellor, that where the devise is to a superstitious use, & made void by statute, or to a charity & made void by statute of mortmain, there it should belong to the heir at law; but where it is in itself a charity but the mode in which it is to be disposed is such that by the law of England it cannot take effect,.... there the Crown, by sign manual, directed to the Att.-Gen., may give orders in what charitable manner it shall be disposed:" *De Costa* v. *De Pas*, (1754) Amb. Part. I., p. 228. (x) *Farley* v. *Westm. Bk.*, [1939] A. C. 430, 437.

[28] Lewin *Trusts*, Ch. IX. s. 1, under 7th (last) observation, (12th ed. 1911), 181 (13th ed. 1928), 176, 177, 14th ed. 1939) (language altered) 148, 472, 473.

[29] *Morice* v. *Bishop of Durham*, (1805) 10 Ves. 522, cited for proposition that where (i) intention expressed not to benefit grantee, and yet (ii) no trust declared; there is resulting trust in favour of grantor (Lewin, 169). Lord Eldon carefully distinguished "liberality" (word used by testatrix), from "charity," saying at p. 530; "the meaning of liberality is so extensive that it is impossible to define it."

[30] Sect. 457(4 B). There cannot be valid *wakf* without charitable intention nor without complete divestment of the property & renunciation of its ownership.

be applied; (ii) where....in consequence of an increase in the value of the estate, an excess of the income subsequently arises, the Court will order the surplus, instead of resulting, to be applied in the same or a similar manner, with the original amount; (iii) but even in the case of charity, if the settlor do not give the land or the whole rents of the land, but, noticing the property to be of a certain value, appropriates part only to the charity, the residue will then, according to the circumstances of the case, either result to the heir at law, or will belong to the donee of the property subject to the charge, if the donee be [as in the case of a charitable corporation] itself an object of charity." [31]

b.—Ambiguity or indefiniteness no objection to charitable gift.

"The CY PRES principle" says Tudor, "is the outcome of the rule that AMBIGUITY OR INDEFINITENESS, which in any other case would be fatal, is NO OBJECTION TO A CHARITABLE GIFT. Wherever a testator manifests a general charitable intention, that is to say, where he has manifested a desire in any event to devote a fund to charity, that intention is carried into effect, although no definite purposes are named, or although the objects which are named are incapable of being effected." [32] See s. 457(4 B).

c.—General charitable intention: effect of.

Lord Hardwicke's observation (*n.* 27(ix).) and exception I, in Lewin seem to cover the case under consideration, where the general intention to devote the property to wakf is expressed, but the particular objects are not specified. It is submitted that the Muslim law does not differ on this point from English law; nor does the difficulty that the State should estimate the goodness of different purposes by a Muslim standard seem formidable. The Advocate-General as the guardian of charity has the power, which is liberally made use of, to take the assistance of the community in arriving at a decision and in preparing the scheme for laying before the Court. Where necessary the Court takes evidence on the point.

d.—Settlement of scheme.

Referring to the exceptions cited above, it has been said as a matter of legal history, "that they were established [in England] at an early period when the doctrine of resulting trusts was imperfectly understood. The interest of the heir was shut entirely out of sight, and the question was viewed as between the charity and the trustee. Were the subject still unprejudiced by authority, there is little doubt but the Court would at the present day follow the general principle, and hold a trust to result." [33] These considerations apply perhaps with less force to the Muslim doctrine of cy pres in a wakf, in which the wakif is required solemnly and in the name of God to divest himself of all interest in the property and to render it uninheritable and inalienable: this is in respect of the corpus, the property itself: the trusts apply to the usufruct

e.—History of resulting trusts.

[31] See *n.* 28. *Sheikh Ramzan* v. (*Mt.*) *Rahmani*, (1931) 7 Luck. 301, 310, 311.

[32] Tudor, *Charities* (4th ed. 1906) 140, 141; 5th ed. 1929 altered in form. See Ch. IV. Indefinite gifts & cy pres, pp. 125-173.

[33] Lewin *Trusts*, (12th ed. 1911) 183; (13th ed. 1928) 177. Theory also adopted that Court merely alters means for attaining end (charity); it does not "take a charity which was intended for one purpose & apply it to a purpose altogether different:" *Clephane* v. *Lord Provost of Edinburgh*, (1869) L. R. 1 Sc. & Div. 417 (House of Lords). *Sheikh Ramzan* v. (*Mt.*) *Rahmani*, (1931) 7 Luck. 301, 310 (administration & construction of *wakf* differentiated).

SECTION 481. —which is not tied up like the corpus but "free" for the benefit of mankind. The case may be considered (in view of all the implications that have been above referred to) more nearly analogous to that of a gift to a charitable corporation, to which Lewin refers in the last sentence of (iii) cited above.

The interesting parallel that the Kazi was specifically entrusted with the administration of wakfs is elsewhere referred to : ss. 11 B, 492 A, comm.

II. Objects within trustees' choice.

481A. It is malversation to apply funds set apart for public or charitable uses, for persons who are not objects of the trust. Those who are the objects of the trust must have all the benefit they require, and if there is a surplus, it must be left to the Court to make a cy pres application of it.[1] But

Surplus applied cy pres.

where the object of such a trust or charity is the rendering of some convenience or service of such a nature that it will not hurt the lawful recipients if others share with them, the trustees may, but they are not bound,[2] to exclude persons who

Convenience or service shared if no hurt to lawful recipients.

have no legal title to share. If they choose to admit to the benefit of the convenience or service, other persons (not in such large numbers, nor so disorderly or unpleasant in their habits, as in any way substantially to interfere with the convenience or benefit of those for whom the endowment was created), the Courts will not encourage the mere claim of a beneficiary that another person, because he is not within the terms of the foundation, shall not share in such benefit.[1]

III. OBJECTS THAT ARE NOT VALID.

482. A dedication cannot lawfully be made for an object prohibited by Islam[3] : such as the erection, repair or support

If prohibited by Islam : churches : temples.

of a place of worship in accordance with the tenets of a religion other than Islam ; but the benefit of no human being (though a non-Muslim or an apostate, provided that he is not the subject of a hostile State)[4] is prohibited by Islam.

Benefit of human beings always lawful.

[1] *Saklat* v. *Bella*, (1925) 53 I. A. 42, 54, 55 = 3 Rang. 582, 600, 601. "...charity extends. | So that the more aspirants to that bliss | Are multiplied, more good is there to love, | And more is loved ; as mirrors, that reflect, | Each unto other, propagated light."—Dante, *Purg.* xv.

[2] Cf. *Syed Ahmad* v. *Hafiz Zahid*, [1934] AIR (ALL.) 732, 734.

[3] See com. Cf. *Rex* v. *Lady Portington*, (1712) 1 Salk. 162 : "The king as head of the commonwealth is obliged by the common law....to see that nothing be done to the PROPAGATION of a FALSE RELIGION." Cf. *sanads* for Hindu temples, e.g. *Maina* v. *Brijmohun*, (1890) 12 All. 587, 589.

[4] Bail. II. 215 : (*Meer*) *Mahomed Israel Khan* v. *Shasti Churn Ghose*, (1892) 19 Cal. 412, 428, Ameer Ali, J. citing from *Fathul Qadir*. Cf. Bail. II. 217 (par. 2) : "A *wakf* in favour of a *zimmee* or infidel subject is lawful, because it IS A TRANSFER OF PROPERTY, and IS LIKE A PERMISSION TO TAKE THE USUFRUCT. Some say, however, that it is not valid because it implies a PIOUS INTENTION, & is good only when made for the benefit of a parent ; while others maintain that it is good when for the benefit of any relative. But the first opinion (which sustains it generally)

SECTION 482.

"Nearness" between the wakif and object.

"It is a further condition," it is said in the Fatawa Alamgiri, "that there be a nearness, that is, some relation between the appropriator (wakif) and the objects of the appropriation," [5]—else how can the act be done with a religious motive? The illustration in the Alamgiri runs: "appropriation by a Muslim or a zimmi for a temple, or a church, or for the poor of the enemy, is not valid." As the Muslim texts govern only Muslims, Muslims alone may make wakfs,[6] and therefore wakfs must have "nearness" to Islam. But, under the law of Islam, non-Muslims may make a wakf for purposes "which have nearness to themselves"—though they may not make wakfs for a temple or "house of fire." [7] But, apart from this particular exception, "Even though he (viz. a non-Muslim) should make the wakf to his son and his descendants, and then to the poor, on condition that if any of his children become Muslims they shall be excluded from the charity, the condition would be binding; so also if he should say, Whoever turns to any other religion than Christian is excluded, regard would be paid to the condition. It is stated in the Fatawa of Aboo Leith that when a Christian makes a settlement (wakf) upon his children and his children's children for ever, so long as there are any descendants, or makes the ultimate destination to the poor as is customary, and some of his children become Muslim they are nevertheless to receive." [8]

Wakf by a non-Muslim.

"An exception no doubt arises, in a case in which the proposed object of the endowment is one which is directly contrary to the public law of the State, even in a wider sense." [9]

"A Muslim cannot make a settlement on an alien enemy, though a blood relation; but he may make it on a zimmi or infidel subject, even though a stranger or in no way related to him. Yet an appropriation by him for Jewish synagogues or Christian churches is not valid. So also if he should make an appropriation in favour of fornicators or highway robbers, or drinkers of wine or for the copying of what are now called the Towrect and Injeel (the Law and Gospels), for they are altered and perverted versions. But if the appropriation were by an infidel it would be lawful." [10] See s. 456, com.

Valid so long as object not opposed to Islam.

Sect. 483, is now incorporated in s. 482.

484.[11] A wakf may be made for the tomb of a saint,[12] but is the most approved. So also a settlement in favour of an *apostate* is valid, while there is some doubt as to one in favour of an alien enemy, the more approved opinion being entirely against it."

Private tomb not valid object.

[5] Bail. I. 552 (560), 553 (561).

[6] *Putli Kunwar* v. *Janki Das*, (1924) 46 All. 813 (well and temple found to be *wakf*).

[7] Bail. I. 552 (560-561). [8] Bail. I. 552 (560).

[9] Per West, J., *Fatmabibi* v. *Adv.-Gen.*, (1881) 6 Bom. 42, 51, citing *Thrupp* v. *Collect.* (1858) 26. Beav. 125 (bequest for purchasing discharge of poachers committed to prison for non-payment of fines, void); *Rex* v. *Lady Portington*, (1712) 1 Salk. 162 (for propagation of FALSE RELIGION); Lewin, *Trusts*, Ch. VI.

[10] Bail. II. 215 (par. 3).

[11] Sect. 484 cited & applied: *Saiyad Maher Husain* v. *Haji Alimahomed*, (1933) 36 Bom. L. R. 526, 536 (Broomfield, J.).

[12] *Adv.-Gen.* v. *Yusufalli*, (1920) 24 Bom. L. R. 1060, 1063, 1067, 1096-8 (when is a person called saint or *wali*?). See this case indexed p. 64, *n.* 30.

SECTION 484. not for the repairs and upkeep [13] of a private tomb.[14]

Illustration. *W* purports to dedicate certain movable and immovable properties for the upkeep of her husband, H's tomb, and for the expenses of lighting, frankincense, flowers, and salaries of repeaters of the Koran, and readers of benediction, etc. as well as for H's annual fatiha ceremonies and after *W's* death for her own annual fatiha ceremony. A traveller's inn was erected by *W* as an appurtenance to the tomb. The performance of the ceremonies necessarily involved the distribution of charity, and the lights at the tomb were of use to the passers by ; *held* (reversing Davies, J.) that no valid wakf was created.[15]

1.—Tombs not property—

2.—yet sources of income.

Tombs, as such, cannot under Muslim law, be owned.[16] While Islam enjoins special reverence for the remains of the dead, it strongly disapproves of any proprietary rights in them, and rejects as superstitions, ceremonials, etc. at the tomb. Tombs, however, are occasionally spoken of, even in the reports of judgments, as property.[17] This may be excusable, as tombs do sometimes produce a sort of income, consisting of the offerings made at them by visitors or so-called pilgrims. It is clearly in the interest of those having some kind

[13] *Adv.-Gen.* v. *Yusufalli*, (1920) 24 Bom.L.R. 1060, 1100 (UPKEEP of saint's tomb: FEASTS); *Mahomed Oosman* v. *Essack S. M.* [1938] Bom. 184 (= p. 609, *n.* 18).

[14] *Kaleloola S.* v. *Nuseeruddeen S.*, (1894) 18 Mad. 201 ; Macn. Apx. 423, No. 36, citing Sel. Rep. I. 17 (1857); cf. *Zooleka B.* v. *Syed Zunul A.*, (1904) 6 Bom. L. R. 1058 ; followed *Salebhai* v. *Bai Safiabu*, (1911) 36 Bom. 111, 115 ; (*Muthukana Ana*) *Ramanadham* v. *Vada Levvai*, (1909) 34 Mad. 12, 16, 17 affd. (1916) 44 I. A. 21 ; *Adv.-Gen.* v. *Yusufalli*, (1920) 24 Bom. L. R. 1060, 1063, 1064, 1095-8 ; *Mahomed Oosman* v. *Essack Saleh Md.* [1938] Bom. 184 (indexed *n.* 18); *Masuda Khatun B.* v. *Mahammad Ebrahim*, (1931) 59 Cal. 403, 422-423 ; *Kunhamutty* v. *Ahmad Musaliar* (1934) 68 Mad. L. J. 107, 110 ; (*Mt.*) *Zinat B.* v. (*Mt.*) *Aimna & Karam Din*, (1917) 52 Punj. Rec. 421, 423 (No. 107); *Khwaja Mahmud* v. *Khwaja Md. Hakim*, (1917) 52 Punj. Rec. 120, 137 (No. 33). Cf. " If the *wakif* purports to direct that the KORAN be READ for over his GRAVE, the direction may be disregarded : " *Bahr-ur-Raiq* V. 246. *Nazira* v. *Sukdarshan Lal*, [1936] 34 All. L. J. 651 (BURIAL of one dead body said to involve that land is consecrated : *sed quaere* : actual tomb of six feet occupied by corpse no doubt treated with respect : but one burial does not make land *wakf*) : *Ballabh Das* v. *Nur Muhammad*, [1936] AIR (P. C.) 83, 86 (LUCK.) = s. 458, *ill.* (8).). Of course SINGLE BURIAL may be intended to SYMBOLIZE use to which dedicated land is to be put, & to operate as transfer of possession to *mutawalli*. Cf. *Futto B.* v. *Bhurrul Lal Bhukul*, (1868) 10 W. R. 299 (UPKEEP OF PIR'S TOMB, a trust binding heritable property); *Delroos Banoo B.* v. *Asghur Ali*, (1875) 15 Beng. L. R. 167 (see s. 462(3), *expl.* II., p. 554, *n.* 17); *Zinat B.* v. (*Mt.*) *Aimna & Karam Din*, (1917) 52 Punj. Rec. 421, 423 (No. 107) (PIRI MURIDI seriously referred to as MEANS of making LIVING on strength of ancestor, " reputed saintly man, whose descendants make a little MONEY from OFFERINGS one day in the year " : property left by testator said to INCLUDE RAUZA OR TOMB, " recorded in revenue papers as personal property of testator," & so described in will & disposed of as such. " If testator can be called *sajjadanishin* of the tomb, such title can only be.... courtesy title, for the tomb or shrine cannot be by any stretch of language regarded as a public religious institution " : *held*, no wakf proved : property heritable—respectfully *submitted* : sound judgment : but it might well have been more firm & decisive); *Badr-ul-Haq* v. *Shah Hasan Ahmad*, [1935] 33 All. L. J. 400 ; (oral *wakf* for burial, held invalid under *musha* doctrine ; see s. 478); *Sujjada Shah Mahamad Usuf* v. *Shaw Habit*, (1919) 53 Ind. Cas. 677 = s. 481, *ill.* (3), p. 598.

[15] *Kaleloola Sahib* v. *Nuseerudeen Sahib*, (1894) 18 Mad. 201 ; cf. *Zooleka Bibi* v. *Zunul Abedin*, (1904) 6 Bom. L. R. 1058.

[16] *Mahomed Oosman* v. *Essack Saheb Md.*, [1938] Bom. 184, 194.

[17] See, e.g. (*Mt.*) *Zinat B.* v. (*Mt.*) *Aimna & Karam Din*, (1917) 52 Punj. Rec. 421, (No. 107); *Adv.-Gen.* v. *Yusufalli*, (1920) 24 Bom. L. R. 1060, 1094.

of connection with or control over tombs to encourage such offerings being made. Offerings are easily misappropriated; and ceremonies are so contrived as to be profitable to their organizers. But there is no doubt about the attitude of Islam with regard to such practices.[18]

SECTION 264B.
3.—Offerings as income.
4.—Ceremonies profitable to organizers.

485.[19] (1) Under Shia and Shafii law a dedication is void and of no effect,[20] unless the beneficiaries[21] under it are at the time of the dedication[22] (*a*) in existence,[20] (*b*) competent to hold property,[23] and (*c*) distinctly indicated.[23]

3. WAKF FOR INDIVIDUAL BENEFICIARIES
(*a*) Competence to benefit under wakf.

Explanation.—A dedication purporting to be for the benefit of a succession of persons is (under Shia and Shafii[24]

[18] See, *e.g. Mishcat-ul-Masabih*, cited *Kaleloola Sahib* v. *Nuseerudeen S.*, (1894) 18 Mad. 201; *Mahomed Oosman* v. *Essack Saheb Mahomed Vanjara*, (HAJI ALI DARGAH CASE) [1938] Bom. 184 = 39 Bom. L. R. 502. [In this *note* numbers = pp. of [1938] Bom. 184; in ( ) = pp. of 39 Bom. L. R. 502; iss. = issue.] BURIAL religious duties 199 (513); CEREMONIES calculated to bring profit to those who organize them 216 (523); DARGAH 189-f (507-f); 194-f (510); 193-f (509-f); administration of dargah 189-f (507); "FOUNDING" DARGAH 197 (512); 231, iss. i. (532); growth of stages of progress, 193-f. (509-f.); income of 193 (509); meaning of 190 (507); GHALLA = offertory box 208 (519), 210 (520); private persons keeping boxes (ghallas) not conducive to decorum 210 f. (520), 237; iss. xiv. xv. (535); INCOME of 193 (509); INTERCESSION with or by PIR 201-205 (514-16); Koran discountenances theory of private intercession 203-5; KHANQAH 190 (508); MUJAWAR 187 (506), 200 (514), 207 (518), 219-f. (525); removal of 212 (521-f.), 237 iss. xix. (535); functions imputed to *mujawars* consist of ordinary amenities 214 (522); 225 (528); OFFERINGS = charity dispensed immediately or mediately through institution 193 509), 194 (510), 196 (511), 207-f. (518), 211 (520), 215 (522), 233-f. iss. xiii.-xxiv. (532-f.): see GHALLA. Koran discourages teachers seeking remuneration 205-f. (517) misappropriation of offerings easy 227(*d*)(530(*d*).); PIR 201-205 (514-16); PREDILECTION religious, of judge, 189 (507); PROCESSION 210 (519); RAUZAH 190 (507) see *dargah*; RELIGIOUS DUTIES in regard to burial & tomb, 199 (513); RELIGIOUS PREDILECTION of judge 189 (507); TOMB, endowment for, 192-f. (509); as religious object 191 (508): see *dargah*; no property over, 193-f. (510); religious ceremonies at 198-f. (513); service at 198 (513); Pir's tomb 204 (516); VISITING GRAVES 199 (513). See also s. 11 B, p. 81, *n.* 18; s. 369 A, p. 392, *n.* 2 on this case.

[19] Sect. 485 cited with approval: *Musharraf B.* v. *Sikandar Jehan B.*, (1928) 51 All. 40, 46-47; see also *Abdul Wahab* v. *Sughra B.*, (1933) 54 All. 455, 457.

[20] Bail. II. 214-215; cf. Ameer Ali, I. 322 (based on Hanafi authorities): "The object of *wakf* may be non-existent in two ways:—Firstly, the beneficiary may be non-existent when the *wakf* is made, when it is called *wakf muntaqa-ul-awwal* (cut off initially): & secondly, the persons for whom the *wakf* is made, may cease to exist after the creation of the *wakf*, when it is called *wakf muntaqa-ul-wasat* (cut off in the middle). Examples of both classes are given by *Kazi Khan*, e.g. a man makes a *wakf* for the children born of his loins; if he has no children at the time, it is *wakf muntaqa-ul-awwal*, & the rents & profits will be applied to the poor," (*Kazi Khan* IV. 87). "If children are born to him afterwards then the rents & profits will be paid to them." "Similarly as stated in the *Asaf* where a settlement is made in favour of one's *walad* (child) & there is no *walad* existing at the time, but there is a grandson, the income of the *wakf* will be given to the grand-child until a child is born to the *wakif*," citing *Raddul Mukhtar*, III. 341. Contrast Hindu case: *Chundi Charun Barna* v. *Rani Sideshwari Debi*, (1888) 15 I. A. 149 (grant to persons yet unborn who may happen to be living descendants of grantee named, void).

[21] *Abdul Wahab* v. *Sughra B.*, (1931) 54 All. 455, 457, (INDIVIDUALS may be BENEFICIARIES).

[22] Bail. II. 214, *third*: "he must be one over whom it is not unlawful to make a *wakf*"; 215 (*ll.* 5-12).

[23] Bail. II. 214 (*third*); 217 (par. 3).

[24] *Minhaj*, 231 (Bk. 23, s. 1): *wakf*, without designating original beneficiary

SECTION 485. Succession of beneficiaries.

law) valid if the first beneficiary is, at the time of the dedication,[20] in being, and competent to benefit under a wakf,[25] and notwithstanding that a succeeding beneficiary is not in being or otherwise not competent so to benefit. Where the first beneficiary is, at the said time, not in existence or incompetent to own property[26] or to benefit under a wakf,[27] the Sharaiu'l-Islam pronounces the more approved Shia opinion to be that the wakf fails, notwithstanding that the next succeeding beneficiary is in existence, and competent so to benefit, though some authorities insist that the dedication ought to be sustained so far as it concerns the persons in being.[28]

"Shifting" of benefit.

(2) Under Hanafi law the benefit of a dedication in favour of a person who is not in being, or cannot be ascertained at the time of the dedication, will (*a*) until he is in being and can be ascertained, go to the poor or to the other religious, pious or charitable object to which the benefit is ultimately dedicated, or, on failure of the said person, *semble* to the object next entitled under the dedication to succeed to the benefit ; and (*b*) when he comes into being, or can be ascertained, it will accrue to him.[29]

capable of enjoying it immediately, is void ; (e.g. "in favour of the child I shall have") ; but *wakf* is valid though one of intermediary beneficiaries does not exist.

[25] Bail. II. 214 (*third*). "But if it were in favour of one not in existence in succession to a person actually in being it would be quite good" ; cf. *Mahomed Ahsanulla* v. *Amarchand Kandu*, (1889) 17 I. A. 28 = 17 Cal. 408.

[26] Instance given of slave. Bail. II. 215 (*l.* 10).

[27] This is not expressly stated.

[28] Bail. II. 215 (*ll.* 3-4). There might be great difficulty in taking view, supported by the *Sharaiu'l-Islam* : Court may elect to follow different rule. The *Sharaiu'l-Islam* distinguishes the cases : (i) "where the commencement is made with one who is not in existence ; & (ii) "where the person first in order is one who cannot be the owner of property & he is followed by one who can,"—pronouncing better opinion to be that *wakf* is void in both cases : but as to case (ii) says there is some room for doubt."

[29] Bail. I. 574-5 (584) par. 3 : "If one should make a settlement on the heirs of Zeyd, & Zeyd is living, there is nothing for his heirs, & the whole produce passes to the poor [because his heirs cannot be ascertained while he is living, but only after his death]. "But if Zeyd should die," [in which case his heirs could be ascertained] "the whole of the produce must then be divided among his existing heirs, according to the number of them, males & females sharing alike, & if some of them should die, their shares would belong to those alive at the time of the coming of the produce" [the produce (or usufruct) being something that accrues from time to time] "while if only one survived, half of the produce would be for him & the other half to the poor" [in that case two classes of beneficiaries become entitled : (i) the surviving heir, (ii) the poor ; these classes divide in equal shares : s. 470]. "If instead of" [making the settlement on] "the heirs, he should say 'the children of Zeyd, being such an one & such an one,' naming them up to five, none but the five would be entitled, & if a child were born subsequently he would have no share." Cf. "Where a *wakf* is declared for the benefit of Zeyd's children, (& Zeyd has no children existing at the time) or for a *masjid* which has not been erected, the

Explanation.—Under Hanafi law a child is deemed to be in existence at the time of the dedication if it is born six months thereafter ;[30] *quaere* whether the Shia law is to the same effect.[31]

SECTION 485. Period of gestation.

486. (1) Under Hanafi law the dedication may validly contain provisions in favour of the wakif.[1]

(*b*) The wakif as a

(2)[2] Under Shia law the wakif cannot lawfully reserve to himself any benefit[3] under the wakf ;[4] provided that in a dedication in favour of a class of persons, if the wakif after the dedication has been completed, comes within the class, he may become entitled to participate in the benefit.[5]

(i) beneficiary. Shia law.

(3) The wakif may appoint himself as the mutawalli,[6] but cannot lawfully evade the rule in s. 486(2) by purporting to reserve a salary for himself in excess of the salary of succeeding mutawallis.[7]

(ii) Benefiting as mutawalli.

appropriation is valid, & until children are born to Zeyd or the *masjid* is erected the rents & profits will be applied to the support of the poor,"—*Fatawa Qazi Khan*, III. 316. Syed Ameer Ali, I. 322 (413) cites passage to same effect from *Raddul Muhtar*, 641, which refers to *Imadia* for the proposition, & then continues : " In the *Nahr-ul-Faik* it is stated further that when the object for which the settlement is made, has not come into actual existence, but the purpose can be carried into effect, the rents & profits will be applied to THAT PURPOSE SO FAR AS IT IS POSSIBLE to do so. For example, when a man makes a grant for the support of students of a *madrassa* which has not been erected, if lectures are given to students in any other building, such students are entitled to support from the *wakf*."

30 Bail. I. 568 (677) (last sentence).

31 The *Sharaiu'l-Islam* seems to point the other way ; Bail. II. 214-215.

1 Bail. I. 567 (576), 585-586 (595-596); Hed. 237 (col. i, par. 6). *Fatimabibi* v. *Adv.-Gen.*, (1881) 6 Bom. 42 (to pay the profits to *wakif* during his life-time without power of anticipation); *Abdul Wahab* v. *Sughra B.*, (1932) 54 All. 455 (salaries & pensions to *wakif's* servants : names & amounts unspecified); *Tafazzal B.* v. *Majid Ullah*, (1923) 5 Lah. 59 (*wakf* for mosque ; Rs. 2 per month to daughter : valid); *Luchmiput* v. *Amir Alum*, (1882) 9 Cal. 176.

2 Sect. 486(2) referred to : *Abadi B.* v. *Kaniz Z.* (1926) 54 I. A. 33, 39 (PAT.).

3 Viz. worldly benefit : *wakf* of course ought to be made with intention of acquiring spiritual benefit after death : *Mohammad Qasim* v. *Mohd. Mehdi* [1937] AIR (OU.) 465, 466, c. 2, 467, col. 1.

4 *Abadi Begam* v. *Kaniz Zainab*, (1926) 54 I. A. 33, 37 (PAT.) (this work referred to p. 39), *Mohd. Qasim* v. *Mohd. Mehdi*, [1937] AIR (OU.) 465, 466, col. 2, 467, col. 1. Bail. II. 219 (par. 1), P.C. " as at present advised not prepared to hold on authority of this case (*Kalub Hossein* v. *Mehrum Beebee*, (1872) 4 N. W. 155) that *wakf* in which *wakif* reserves bulk of income for herself as *mutawalli*, fixing modest salary for succeeding *mutawallis*, can be held valid even to extent of unreserved income : *Abadi* v. *Kaniz*, (1926) 54 I. A. 33, 41. Decision would be different under Wakf Acts, 1913, 1930, unless transaction governed by Shia law : *Mohd. Qasim* v. *Mohd. Mehdi*, [1937] AIR (OU.) 456.

5 Bail. II. 219 (par. 1).(" But if one should make an appropriation for the poor & should himself become poor, or for lawyers & himself become a lawyer, there is no objection to his participating in its benefits.") : s. 486, *ill.* (3).

6 SAJJADANISHIN stands on DIFFERENT footing : *Syed Shah Md. Kazim* v. *Syed Ali Saghir*, (1931) 11 Pat. 288, 321, 322. Cf. s. 481, *ill.* (3).

7 *Abadi* v. *Kaniz Z.*, (1926) 54 I. A. 33, 41 (settlor as *mutawalli* can take salary

SECTION 486. *Illustrations.*

(1) The following are valid forms of dedication under Hanafi law [8] :—

(*a*) "My land is sadaqa settled on myself." [9]

(*b*) "I have settled my land on myself and after me on such an one and then upon the poor." [10]

(*c*) "My land is settled on such an one, and then upon me." [11]

(*d*) "My land is settled upon my child, and after him on the poor."

(*e*) "My land is settled on my child, and the children that may be born to me, and when they fail, upon the poor." [11]

(2) Under Shia law (*a*) & (*b*) above are void ; [12] (*c*) is void so far as it is a settlement on the wakif himself ; [13] (*d*) & (*c*) are valid.[10]

(3) W dedicates for the poor, or for lawyers ; W subsequently becomes poor, or a lawyer. The wakf is valid, and W may, on becoming poor, or a lawyer, participate in its benefits.[14]

(4) W, a Shia dedicates property with a condition that it is to revert to himself in case of need. The condition is valid but the wakf is void [i.e. the transaction does not take effect as a wakf] : the property will remain in the condition of habs [14] until the occasion should arise, while if W dies it will devolve on his heirs.[14] Similarly if the condition is that on the wakif's going for haj to Mecca, the manager shall from time to time send money for expenses from the income of the wakf, either at Mecca or to other place.[15]

(5) A Shia in a dedication provided that she should be the first mutawalli, and have a remuneration of Rs. 1,500 a year, and that succeeding mutawallis should have Rs. 360. The total annual income of the wakf properties was Rs. 19,000, *held*, that under guise of fixing her salary as mutawalli, the settlor was really reserving for her life-time a portion of the income or usufruct far in excess of what was assigned to future mutawallis, or could reasonably have

fixed for *mutawallis* generally : this "is really no exception for in the case he takes in his capacity as *mutawalli* & not in his capacity as settlor....There is in fact in all these cases no reservation at all") ; cf. s. 366 A, p. 386. *Hosain Kasim Dada* v. *Commr. of Inc.-Tax*, [1937] 2 Cal. 160 (of course *wakif* as *mutawalli* cannot be said to be partner with himself in his individual capacity, & with other persons) ; *Mahabir Prasad* v. *Syed Mustafa*, (1932) 8 Luck. 246, 263, 265 (LARGER REMUNERATION as mutawalli to WAKIF upheld in special circumstances) ;—This case was reversed [1937] AIR (P. C.) 174 = 41 C. W. N. 931 (no *wasiyat bil wakf* nor oral will) ; *Salona B* v. *Zubaida B.*, [1932] 30 All. L. J. 855 (*wakif* old man : as he had to incur greater expense to collect rents, larger remuneration was permitted).

[8] Bail. I. 567-568 (576-577).

[9] This accords with Wakf Act, 1913, giving effect to Abu Yusuf's opinion, who takes dedication in perpetuity to poor to be implied. According to Abu Hanifa & Imam Muhammad it would have to be express. Bail. I. 557 (565). But see s. 480.

[10] *Fatimabibi* v. *Adv.-Gen. of Bom.*, (1881) 6 Bom. 42. But see s. 480.

[11] In which case, child who may be in existence at time of produce, enters into benefit of *wakf*, whether or not it were born at time of dedication. But see s. 485.

[12] Bail. II. 218 (par. 3). [13] Bail. II. 220 (*Third*).

[14] Bail. II. 219 (par. 2) ; *Abadi* v. *Kaniz*, (1926) 54 I. A. 33, 41. On HABS (spelt *hoobs* by Bail.) see s. 446, com. ; s. 466, com. (2) ; *Mahomed Hamidulla K.* v. *Lotful Huq*, (1881) 6 Cal. 744, 748 f., (prior to Wakf Act, 1913, settlement on A & his descendants said to fall under designation of *wakf* only when term *sadaqa* used ; & that even supposing it could be so treated it would be necessary for validating it that *wakif* should reduce himself to state of absolute poverty : Hed. 238, *n.* = 2 Hed. 351, *n.* cited, but *submitted*, it is torn from its context & misread).

been assigned to them. It consequently rendered the dedication wholly void.[15] SECTION 486.

487. The dedication may contain grants or annuities to individuals in their own right[16] for subsistence for life, or for fixed periods.[17]

(c) Other individuals as beneficiaries. Grant for subsistence.

488. A dedication in favour of the rich alone is not valid.[18]

Grant for rich alone not valid.

As an exception to the rule, in s. 488 the kindred of the Prophet may be made beneficiaries under a wakf. The Fatawa Alamgiri states that a wakf for travellers is valid, but it is to be applied for the poor amongst them to the exclusion of the rich.[18] Syed Ameer Ali however cites from the Fath-ul-Qadir : " The wakif may give the produce to whomsoever he likes, and the reason of it is that though a desire to approach the Deity should form the ultimate motive of all wakfs, yet if without such an (immediate) desire, a person were to dedicate a property in favour of the affluent, the wakf would be valid in the same way as a wakf in favour of the indigent, or for the purposes of a mosque, for in giving to the affluent there is as much qurbat (nearness) as in giving to the poor, or to a mosque, and though the profits may not have been [expressly] given in charity [to the poor] on the extinction of the affluent, yet it is wakf and will be treated as wakf before their extinction." [19]

§ 5.—ADMINISTRATION OF WAKF.

489. (1) Competence ' to be mutawalli is not affected ' by

I. MUTAWALLI.

(A) Competence to be mutawalli.

[15] *Abadi* v. *Kaniz*, (1926) 54 I. A. 33, 41 (par. 2), citing Bail. II. 219 (par. 2).

[16] *Semble*, such grants do not make *wakf* property attachable by CREDITORS OF GRANTEE : but receiver may be appointed : see s. 496A.

[17] *Abdul Wahab* v. *Sughra Begum*, (1931) 54 All. 455 ; Bail. I. 565 (574) (*ll.* 9-11) (PRODUCE to such an one FOR A YEAR OR TWO YEARS & AFTER THAT TO POOR), Bail. I. 567 (576) (par. 2) (settled on myself & after me on such an one, & then upon poor) ; 570 (par. 2, last *l.*), (579, last *l.*) (everything that has been said of the words " my child " is applicable to the words " CHILD OF SUCH AN ONE "). *Abdul Cadar* v. *Tajoodin*, (1904) 6 Bom. L. R. 263, 265 (provision for settlor's brother's RIGHT TO RESIDE in loft admitted by all parties to be valid ; & so declared *per* Tyabji, J.) ; *Saiyad Jaffar El Edroos* v. *Sayad Mahomed E. E.*, (1936) 39 Bom. L. R. 277 ; *Kuneez Fatima* v. *Saheba Jan*, (1867) 8 W. R. 313 (such a grant held invalid, but is clearly valid under Wakf Act, (1913). MADAD-E-MAASH explained p. 640, *n.* 16, s. 511.

[18] Bail. I. 566 (575). This rule seems subject to rule that under dedication for public or general utility no person disqualified from benefiting on ground of being rich. " Rich " is not capable of precise definition. See s. 512(2A).

[19] Ameer Ali, I. 194 (par. 1) (277). The ( ) and [ ] are those of the learned author. Cf. *Syed Shah Muhammad Kazim* v. *Syed Abi Saghir*, (1931) 11 Pat. 288, 325 ; *Ramanadhan Chettiar* v. *Vada Levvai*, (1909) 34 Mad. 12 affd. sub. nom. *Mutu Ramanadan* v. *Vava Levvai*, (1916) 44 I. A. 21.

[1] See s. 489, *ill.* (2), (8) & *nn.* *Munnavaru Begam* v. *Mir Mahapalli*, (1918) 41 Mad. 1033, 1036, 1037-1040, 1041 f. (Abdur Rahim, J.) ; *Amiranessa B.* v. *Hatem Ali Khan*, (1933) 37 C. W. N. 697 (WOMAN QUALIFIED, unless duties of religious nature attached to office which she cannot perform in person or by deputy : burden of proving that women excluded from particular office on those who plead exclusion) ; *Syed Abdul Hamid* v. *Syed Unnissa*, (1934) 67 M. L. J. 907 ; *Biyamma* v. *Ahmed S.*, (1934) 37 Bom. L. R. 257 ; *Hosain Kasim Dada* v. *Commr. Inc.-Tax*, [1937] 2 Cal. 160 (*wakif* as *mutawalli* unsuccessfully claimed to be registered as partner).

SECTION 489.

Mutawalli during minority of incumbent.

sex [1] or religion : [2] a woman or a non-Muslim or the wakif himself may be the mutawalli.[3]

(2)[4] The appointment of a minor [5] [or person of unsound mind] as a mutawalli will not cause the dedication to fail.[6]

(3)[4] Where the office of mutawalli devolves [5] upon a minor,[6] the Court may appoint another mutawalli to act in his place during his minority.[7]

Illustrations.

(1) The wakif may appoint himself mutawalli.[8]

(2) A female is competent to be mutawalli.[9]

(3) A non-Muslim is competent to be mutawalli.

1.—Committee. i—Administration by.

(4) A body of persons constituting a COMMITTEE may be entrusted with the administration of the wakf.[10] In such cases (A) the wakif, or the court, or the person in whom the authority to appoint the members of the committee

[2] Bail. I. 591 (601) trustworthiness, puberty & understanding mentioned as essential : but nothing said about religion. Bail. II. does not seem to refer to competence for being mutawalli : but *wakf* property said to be transferred to beneficiaries (II. 220); non-Muslim may be beneficiary.

[3] I.e. being female, or non-Muslim, does not induce incompetence ; & *wakif* may declare himself *mutawalli* : *ill.* (1), (2), (3), *nn. Saadat Kamel*, v. *Att.-Gen.*, (PALESTINE) [1939] AIR (P. C.) 185, 186 par. 3, *l.* 5 (sister found more prudent than her brothers & appointed mutawalli). But where administration of *wakf* needs qualifications having reference either to sex—*ill.* (8)—or religion—*ill.* (5)—or to any other matter, e.g. s. 489, *ill.* (5), *n.* ; *Abdul Hamid* v. *Abdul Aziz*, (1934) 13 Rang. 27, (Bengali Sunni worshipper resident in Bassein)—person not possessing qualifications needed cannot, it is obvious, satisfactorily perform duties of *mutawalli*. If in respect of such *wakf* Court has to choose from rival competitors, less qualified person will not be selected ; & tenure of such person may be peculiarly liable to attack by rivals. E.g. male may be practically disqualified to be *mutawalli* of institution peculiarly for benefit of females. Cf. Ind. Trusts Act, s. 10. *Syed Ali Zamin* v. *Syed Akbar A. K.*, (1937) 64 I. A. 158, 167 ; *Tafazzul B.* v. *Majid Ullah*, (1923) 5 Lah. 59 (*wakif mutawalli*).

[4] Sub-ss. (2) & (3) cited & applied : *Kaniz Zohra* v. *Saiyad Muztaba Husain*, (1923) 2 Pat. 819, 829 ; sub-s. (2) now incorporates later decisions.

[5] Where succession not by inheritance but by appointment, minor cannot be appointed : *Kaniz Zohra* v. *Saiyed Muztaba*, (1923) 2 Pat. 819. But see s. 492 C, *n.* 3 citing Bail. I. 591 (606). Provisional arrangements may be made in proper case, so as to let in minor on attaining majority.

[6] *Nabi-un-nissa B.* v. *Liaqat Ali*, (1928) 50 All. 830 (of course minor cannot act as *mutawalli* : Court may act on s. 489(3).).

[7] (*Syed Hasan*) *Raza* v. (*Hasan*) *Ali*, (1916) 40 Mad. 941, 948 ; *Sahebzada Faridun Siko* v. *Sahebzadi Jehanara*, (1926) 31 C. W. N. 454 ; cf. Ind. Trusts Act, s. 10. See s. 489, com. *Ejaz Ahmad* v. *Khatun Begam*, (1916) 39 All. 288 (head-note omits to state that office had to all intents & purposes devolved upon minor).

[8] *Syed Ali Zamin* v. *Syed Akbar A. K.*, (1937) 64 I. A. 158, 167 ; *Tafazzul Beg* v. *Majid Ullah*, (1923) 5 Lah. 59 ; *Ghazanfar Husain* v. *Ahmadi B.*, (1929) 52 All. 369. Bail. I. 591 (601), II. 314. *Wakif* may lawfully declare himself *mutawalli* according to all, *per* Muhammad *ibn* Alfazl [Bail I. 591 (601)]. Hed. 238, col. ii. : very doubtful whether Imam Muhammad's view was to same effect.

[9] *Wahid Ali* v. *Ashruff Hossain*, (1882) 8 Cal. 732 ; *Hussain B.* v. *Hussain Sherif*, (1867) 4 Mad. H. C. R. 23 (for temporal affairs of mosque) ; *Shahar Banoo* v. *Aga Mahomed*, (1906) 34 I. A. 46 = *n.* 12 ; *Hyatee Khanum* v. *Koolsoom K.*, (1807) 1 S. D. A. 21 fully noted in *Bikani Mia* v. *Shuk Lal Poddar*, (1892) 20 Cal. 116, 149 (Ameer Ali, J.) ; *Doe d. Jaun Bebee* v. *Abdoolah Barber*, (1838) 1 Fulton, 345. See *Munnavaru* v. *Mir Mahapalli*, (1918) 41 Mad. 1033 ; *Kassim Hassan* v. *Hazra Begam*, (1920) 32 C. L. J. 151, 164.

[10] E.g. *Adv.-Gen.* v. *Abdul Kadir Jitakar*, (1894) 18 Bom. 401 : JUMA MASJID CASE.

SECTION 489.

ii—Quorum.
iii—Notice.
iv—Powers of committee in absence of special rules for quorum.

is vested, may provide (by rules or otherwise) how the members of the committee may exercise their powers. E.g. the powers may be exercisable at a meeting at which a specified number (called the QUORUM) is present, but so that (i) the meeting must be held upon NOTICE, giving every member of the committee the opportunity of being present and, (ii) that the majority of those present are in favour of the act or resolution. (B) *Quaere*, whether such a rule will be presumed to exist in every committee where the usual course of business has been in accordance with it. (C) Subject to such a rule, members of a committee may exercise the powers of the committee only at a meeting at which a majority of the whole committee is present, and the majority of those present is in favour of the act or resolution ;[11] viz. in the absence of specific rules, the quorum for a meeting of a committee consists of a majority of the whole body. The quorum must be fixed by the authority appointing the committee, and cannot be fixed by the committee itself.[11]

(5) A Shia may be the mutawalli of a wakf made by a Sunni.[12]

2.—Official trustee.

(6) The High Court may on petition appoint the OFFICIAL TRUSTEE [13] (with his consent previously obtained and cited in the declaration) to be the sole mutawalli of a wakf which is not for any religious purpose, provided that (*a*) there is no mutawalli willing to act, or capable of acting in the administration of the wakf property, who is within the local limits of the ordinary or extra-ordinary original civil jurisdiction of the High Court : or (*b*) all the mutawallis or the surviving or continuing mutawalli and all the persons beneficially interested in the wakf are desirous that the Official Trustee shall be appointed in the room of such mutawallis or mutawalli.[12]

(7) Property dedicated as wakf for a charitable purpose, may vest in the TREASURER OF CHARITABLE ENDOWMENTS [14] (in the same manner as in a mutawalli) by order of the Local Government, made on an application by the wakif. The vesting order may be on such terms, as to the application of the property, or the income thereof, as may be agreed on between the said Government and the wakif. But the duty of administering the property so dedicated or proposed to be so dedicated will not be imposed upon the said treasurer by the vesting order ; nor unless the local Government with the

[11] *Syed Hasan Raza* v. *Hasanali S.*, (1916) 40 Mad. 941 ; citing *Re Tavistock Iron Works, Lyster*, (1867) L. R. 4 Eq. 233 ; *Reg.* v. *Bailiffs &c. of Ipswich*, (1790) 2 Ld. Raym. 1232 ; *Sir R. Salisbury Cotton & Davies*, (1795) 1 Str. 53 ; *Mayor, &c. of Staple* v. *Gov. Bk. of Eng.*, (1887) 21 Q. B. D. 160, 165 ; *Hascard* v. *Somany*, (1693) 1 Freem. 504 ; *Rex* v. *Monday*, (1777) 2 Cowp. 530 ; *Smyth* v. *Darley*, (1849) 2 H. L. C. 789 ; *R.* v. *Bellringer*, (1792) 4 T. R. (Durn. & Ea.) (810); *Howbeack* v. *Teague*, (1860) 4 H. & N. 151 ; *In re Lond. & S. Counties Freehold Co.*, (1885) 31 Ch. D. 223.

[12] *Doyal Chand Mullick* v. *Keramut Ali*, (1871) 16 W. R. 116. But see *Shahar Banoo* v. *Aga Mahomed*, (1906) 34 I. A. 46, mis-spelt *Shahoo B.* 34 Cal. 118 (P. C.) (Babi) lady competent, but not proper, to be *mutawalli* of Shia endowment).

[13] Official Trustees Act, XVII. of 1864, ss. 8-13 : Off. Tr. cannot be appointed jointly with any other person.

[14] Charitable Endowment Act, VI. of 1890, s. 2 : "CHARITABLE PURPOSES includes relief of the poor, education, medical relief and the advancement of any other object of general public utility, but does not include a purpose which relates exclusively to religious teaching or worship."

SECTION 489. concurrence of the wakif, settles a SCHEME for its administration. On the scheme being settled, the Treasurer becomes the mutawalli of the wakf." [15]

(7A) A committee may be appointed under the Religious Endowments Act, XX. of 1863, ss. 3, 7, 12, 13; for the superintendence of mosques of the management of its affairs under that act.

(8) When the office of mutawalli entails the performance of RELIGIOUS or SPIRITUAL DUTIES which cannot be performed by females [16] or minors or non-Muslims, they are disqualified from acting as mutawalli or sajjadanishin.[17] But where females [18] are excluded,[19] it does not necessarily imply that the male descendants of female members of the family of the wakif, or of the last mutawalli will also be excluded.[20]

(8A) If the primary object of a grant is maintenance of the proper services at the mosque,—viz. khijmat (*sic* for khidmat = service, viz. at the mosque); imamat = preaching, being a priest; moujani (*sic* for mu'az zini = being muazzin) = calling to prayers; khitabat = reading the Koran at the masjid,—FEMALES will be excluded from holding these offices and getting the duties performed vicariously: especially where there are male members of the family qualified for the discharge of the duties.[21]

(9) A mutawalli who has been once removed from his office for neglect or misconduct in his office, may be re-appointed by the Court.[22]

3.—Rotation in office.

(10) If the duties attached to the office of a particular mutawalli, are such that he is in the position of the holder of an office or dignity, which may have been originally conferred on a single individual, but which in course of time has become vested by descent in more persons than one, "in such a case, in order to avoid confusion or an unseemly scramble, it is not unusual, and certainly not improper, for the parties interested to arrange among themselves for the due EXECUTION of the functions belonging to THE OFFICE, IN TURN, or in some settled order and sequence." [23]

[15] *Golam Hossain Shah* v. *Altaf Hossain*, (1933) 61 Cal. 80. Relig. End. Act XX., 1863, ss. 3, 4, 7, 12; Regul. XIX., 1810, ss. 7-14; *Sultan Ahmad* v. *Abdul Gani*, (1918) 46 Cal. 13, 20; *Syed Shah Md. Kazim* v. *Syed Ali Saghir*, (1931) 11 Pat. 288, 334.

[16] *Hussain B.* v. *Hussain Sherif*, (1867) 4 Mad. H. C. R. 23; *Mujavar Ibrahim Bibi* v. *Mujavar Hussain Sheriff*, (1880) 3 Mad. 95 (FEMALE disqualified from being MUJAWAR of *dargah*). But see this explained *Munnaveru B. S.* v. *Mir Mahapalli*, (1918) 41 Mad. 1033 & *n.* 12. On MUJAWARS see *Mahomed Oosman* v. *Essack Saleh Mahomed*, [1938] Bom. 189 (= s. 484, p. 608, *n.* 18; *Baijnath* v. *Mohammad Ismail*, (1922) 20 All. L. J. 697 (power to grant lease for 5 years).

[17] Cf. as to minor being *sajjadanishin* of *dargah* or shrine, *Piran* v. *Abdul Karim*, (1891) 19 Cal. 203, 219-220.

[18] Cf. *Shahar Banoo* v. *Aga Md. J. B.*, (1906) 34 I. A. 46 (= p. 615, *n.* 12).

[19] Though FEMALE always *competent*, her sex may make her incapable of performing duties, hence unqualified or less qualified than other competitors for office, see s. 489(1) & *nn.* & *ill* (8A). *Saadat Kamel* v. *Att.-Gen.*, (PALESTINE) [1939] AIR (P. C.) 185, 186 par. 3, *l.* 5 (sister preferred to brothers for *mutawallishipp*).

[20] (*Shekh*) *Karimodin* v. *Alamkhan*, (1889) 10 Bom. 119; *Mirazamalli* v. *Hidayatbi*, (1901) 3 Bom. L. R. 772; *Ismail* v. *Wahadani*, (1911) 36 Bom. 308.

[21] *Mirazamalli* v. *Hidayatbi*, (1901) 3 Bom. L. R. 772.

[22] Bail. I. 598-599 (609).

[23] Hed. 693 (col. i.), 576-578: MAHAYAT in language of law signifies PARTITION OF USUFRUCT: see s. 366 A. *Ramanathan Chetty* v. *Muruguppa C.*, (1906) 33 I. A.

SECTION 489.

Nomination of successor by mutawalli.

The mutawalli may on death-bed validly nominate an adult possessed of understanding as his successor : s. 492 A (without any judicial order).[24]

Appointment of minor mutawalli—

It was contended upon the authority of a passage in the Fatawa Alamgiri that the appointment of a minor or, mutawalli was not invalid, but remained in abeyance until he attained majority.[25] But Ameer Ali, J. explained the passage as referring not to appointment but to devolution of the office by virtue of a provision in the dedication[26] to some such effect as that the tauliat should be confined to the male descendants of the wakif or the members of a particular family. If the person on whom the office so devolves, happens to be a minor, the Kazi must appoint another to discharge the duties during the minority of the person entitled.[26]

Distinguished from devolution of tauliat upon minor.

Appointment by Court.

In England the Court is empowered "whenever it shall be expedient to appoint a new trustee or new trustees" to appoint new trustees "in substitution for or in addition to any existing trustee or trustees :" Trustees Act, 1850, s. 22. Under this power a trustee may be appointed in the place of a minor trustee appointed by will, but the order is to be made without prejudice to an application by the minor on his coming of age to be restored to the trust.[27]

Analogy of English law.

Cf. Indian Trustees Act, 1866, s. 17, Probate and Administration Act, 1881, ss. 32-34 = Indian Succession Act XXXIX. of 1925, ss. 245-247.

Competence and qualification.

Competence to be mutawalli must be distinguished from being qualified to discharge its duties satisfactorily. Usually the question is only brought before the Court, when there is some dispute or competition. In such cases, of course, the person best qualified is chosen. Though the power to appoint a deputy is specifically recognized, a person who can personally discharge the functions, has a better qualification than one who must necessarily employ a deputy. But because a person is not selected for appointment by the Court, it does not follow that he or she is incompetent to be mutawalli.[18]

139, 144 = 29 Mad. 283, affirming 27 Mad. 192, 198 (manager of Hindu temple, who by virtue of office was administrator of property attached to it). Where *wakf* for individual beneficiaries, or *jahgir* for person & his descendants, similar arrangements are not unusual. *Asita Mohan Ghosh* v. *Nirode*, (1920) 47 I. A. 140 (CAL.) (parties left to arrange half-yearly or YEARLY TURNS); *Ismail* v. *Wahadani*, (1911) 36 Bom. 308. See also *Pramatha Nath Mullick* v. *Pradyaumna Kumar M.*, (1925) 52 I. A. 245, 260 = 52 Cal. 809, 826 (worship by TURNS); *Mitta Kunth Audhicarry* v. *Neerunjun A.*, (1874) 14 Beng. L. R. 166 (Hindu parties : PARTITION OF JOINT RIGHT OF PERFORMING WORSHIP may be had as of right).

[24] See also (*Syed Hasan*) *Raza* v. (*Hasan*) *Ali*, (1916) 40 Mad. 941, 948.

[25] If *wakif* appoints minor as sole *mutawalli*, without adult, *Kazi* shall appoint some other person to officiate during minority ; & where adult & minor are joint *mutawallis*, *Kazi*, may either appoint some person to represent minor who should act with adult *mutawalli*, or may empower latter to represent minor.—*Bahr-ur-Raiq* v. 224. Ameer Ali, I. 347 (445-446) citing *Raddu'l-Muhtar* III. 596. See also *Ejaz A.* v. *Khatun B.*, (1916) 39 All. 288 : (*Syed Hasan*) *Raza* v. (*Hasan*) *Ali*, (1916) 40 Mad. 941 ; *Mahomed Ibrahim* v. *Abdul Latiff*, (1912) 37 Bom. 447, 458 = 14 Bom. L. R. 987, 1000 (during minority of last *mutawalli's* son, executors of last *mutawalli* officiated ; son succeeded on attaining majority).

[26] *Piran* v. *Abdul Karim*, (1891) 19 Cal. 203, 219 ; *Ejaz A.* v. *Khatun B.*, (1916) 39 All. 288 ; (*Syed Hasan*) *Raza* v. (*Hasan*) *Ali*, (1916) 40 Mad. 941 ; *Mahomed Ibrahim* v. *Abdul Latiff*, (1912) 37 Bom. 447, 454 (= *n.* 25) ; cf. Ameer Ali, *Mahom. Law* I. 377 (445 f) citing *Raddu'l-Muhtar*, III. 596 (see *n.* 25).

[27] *Re Shelmerdine*, (1864) 33 L. J. (N. S.) Ch. 474 ; *Re Brunt*, [1883] W. N. 220 ; *Re Tallatire*, [1885] W. N. 191. Cf. *Raikes* v. *Raikes*, (1863) 32 Beav. 403.

SECTION 489.

Management by turns. English law.

Attention is drawn to s. 489, *ill.* (10), p. 616, referring to arrangements for the management of wakf properties in rotation.

The position of infant trustees in England is far from clear,[28] and it seems that there is a similar doubt in Muhammadan law.

(B) Appointment of mutawalli and his successor.

(1) Failure to appoint or nominate mutawalli. Hanafi law. Shia law.

490.[1] When a dedication is purported to be made[1] but no mutawalli is appointed or nominated,[2]—

(1) Abu Hanifa and Imam Muhammad hold that under Hanafi law the dedication fails ; Abu Yusuf holds that it takes effect and the wakif becomes the mutawalli.[3]

(2) Under Shia law the dedication takes effect, and the beneficiaries thereunder are authorized to administer it.[4] *Quaere,* whether under Shia law where the object of the wakf is not to benefit specified individuals, but to promote works of general utility, and the wakif has not appointed any mutawalli, he himself becomes the mutawalli.

Significance of not appointing mutawalli.

Sect. 490 may be considered a re-statement from another aspect of what is implied in s. 462. The significance of the fact that no mutawalli has been appointed, is that in a great number of cases, there is then no agency, for giving effect to the alleged dedication. The question may therefore arise whether the wakif had indeed any intention to dedicate : for if he had, it is difficult to understand why he took no steps to give effect to his own intention and his own dedication. The author of the Hidaya has pointed out the connection between the question of transferring possession to the mutawalli, (see s. 462, com) and the present question.[5] When, however, the wakif has himself been giving effect to the wakf, the fact that he has not formally appointed himself or any one else mutawalli, has no such significance : hence in the absence of any appointment, the wakif is himself considered the mutawalli. Observe the connection between s. 490 and the rule of equity that a trust never fails for want of a trustee.[2]

(2) Appointment of successor to a mutawalli : Provisions by—wakif.

491. (1) The dedication may[6] designate the person by whom the appointment of the mutawalli and his successors

[28] Cf. *Inman* v. *Inman,* (1863) 15 Eq. 260.

[1] *Nabiunnissa* v. *Liaqat Ali,* (1928) 50 All. 830, 833 (*l.* 9) (rule mentioned in s. 490, com.—*wakf* will not fail for want of *mutawalli*—applied). See s. 462 (completion of *wakf*).

[2] *Ma E Khin* v. *Maung Sein,* (1924) 2 Rang. 495, 511 ; Bail. I. 591. See *n.* 1.

[3] See com. & table of differences of views : s. 457 A, com.

[4] Bail. II. 214. See com.

[5] Hed. 238 : s. 489, *ill.* (1) *n.* 8. Shia law & Imam Muhammad's exposition of Hanafi law agree on many points.

[6] Bail. I. 592 (602). These provisions may be IN WRITING, or ORAL, or INFERRED FROM long USER : s. 458 ; (*Khwaja*) *Muhammad Hamid* v. *Mian Mahmud,* (1922) 50 I. A. 92 (LAH.); *Ghulam Muhammad* v. *Abdul Rashid,* (1933) 14 Lah. 558 (succession to *sajjadanishini*); *Ali Muqtadi K.* v. *Abdul Hamid K.,* (1919) 41 Ali. 412 (*mutawallishiip* to devolve generation by generation *naslan baad naslin*); *Abdul*

may be made,[7] and provide for the period, manner and conditions of appointment.[8] The deed of appointment need not be registered.[9] SECTION 491.

(2) The provisions for the appointment of a successor to the mutawalli may be in writing or oral or may be inferred from the prevailing usage.[10] Directions oral : usage.

(3) The law does not favour the right to act as mutawalli becoming heritable : where a custom is set up that the said right devolves by primogeniture,[11] it must be proved not only that each successive mutawalli has been uniformly his predecessor's eldest son, but also that he succeeded by right of primogeniture and not by appointment.[12] Inheritance. Hereditary devolution of mutawalliship.

Hamid v. *Abdul Aziz*, (1914) 13 Rang. 27 (peculiar qualifications for becoming *mutawalli* under scheme); *Adv.-Gen.* v. *Abdul Kadir Jitakar*, (1894) 18 Bom. 401 (scheme contains rules about appointment: JUMMA MASJID CASE); (*Khajeh*) *Salimullah* v. *Abul Khair*, (1909) 37 Cal. 263 (in appointing *mutawalli* Court will not disregard DIRECTIONS OF WAKIF except for manifest benefit or endowment); cf. *Adv.-Gen.* v. *Fatima*, (1872) 9 Bom. H. C. R. 19 (when *wakif* has specified class from whom *mutawalli* to be selected, he cannot disregard his own deed); e.g. *Nisar* v. *Md. Ali Kh.*, (1932) 59 I. A. 268, 274 (OU.) (*wakif*, hereditary nawab to be first *mutawalli*: after him his successors as nawab to be *mutawallis*, three named consecutive successors, p. 275: last named to have POWERS OF NOMINATION); *Ghazanfar Husain* v. *Ahmadi Bibi*, (1929) 52 All. 378. Power to *mutawalli* of transferring by *sanad-i-wakf* or *wasiat*, *mutawalliship* to another & substituting that other in his own place as *mutawalli*, should necessity arise, would carry with it power to appoint another *mutawalli* during his life-time, or in death-illness: Ameer Ali. I. 357 (455) citing *Anfaa-ul-Wasail*. *Saadat Kamel* v. *Att.-Gen.*, (PALESTINE), [1939] AIR (P. C.) 185. See s. 511(5 A), p. 639.

[7] *Nabiunnissa* v. *Liaqat Ali*, (1928) 50 All. 830, 833; *Syed Ali Zamin* v. *Syed Muhammad Akbar*, (1928) 7 Pat. 468 (if no rules laid down in dedication power of appointment vests in *wakif* during his life-time).

[8] *Hidait-oon-Nissa* v. *Syed Afzul Hossein*, (1870) 2 N. W. 420 (unless *wakif* makes it condition in the *wakf* that he should have power to DISCHARGE MUTAWALLI, according to Imam Muhammad he cannot lawfully discharge him—but according to Abu Yusuf he may do so: former view followed); *Gulam Hussain Saib* v. *Aji Ajam Tadallah* S., (1868) 4 Mad. H. C. R. 44 (*wakif* had NO POWER TO REMOVE MUTAWALLI whom he appointed vesting in him an hereditary trust estate).

[9] *Muhammad Rustam Ali* v. *Mushtaq Husain*, (1920) 47 I. A. 224 (ALL.) (deed of appointment called *trusteenama*).

[10] (*Shah Gulam*) *Rahumtulla* v. *Mahommed Akbar*, (1875) 8 Mad. H. C. R. 63 (succession depends upon RULES ESTABLISHED by WAKIF, whether in writing or to be INFERRED FROM USAGE); cf. *Abdulla Edrus* v. *Zain*, (1888) 13 Bom. 555 (claims on ground of being eldest son, to whom by law & custom *mutawalliship* alleged to belong, disallowed: *held* claim not established); *Muhammad Hamid* v. *Mian Mahomed*, (1922) 50 I. A. 92 (LAH.); *Ismail* v. *Wahadani*, (1911) 30 Bom. 308; *Sayad Muhammad* v. *Fatteh Md.*, (1894) 22 I. A. (CAL.); *Court of Wards* v. *Ilahi B.*, (1912) 40 I. A. 18 = 40 Cal. 297.

[11] See also *Shahar Banoo* v. *Aga Md. Jaffer B.*, (1906) 34 I. A. 46 (CAL.); *Syed Ali Zamin* v. *Syed Akbar A. K.*, (1937) 64 I. A. 158, 167 (PAT.); *Sec. of St.* v. *Syed Ahmad Badsha*, (1921) 41 M. L. J. 278 (plaintiff proved that he was lawful successor by HEREDITARY right, & office not enjoyable by several heirs in common, it follows that succession must be by PRIMOGENITURE—& in absence of evidence to contrary, by LINEAL PRIMOGENITURE, i.e. by descent to eldest son & his son: when eldest son pre-deceases father or is incapable of succeeding because insane &c., grandson of last office-holder (son of eldest son) preferred to junior son.

[12] *Abdulla Edrus* v. *Zain*, (1888) 13 Bom. 555; *Fatmabi* v. *Haji Abdulla*, (1913)

SECTION 491. Sajjadanishin.

(4) Where a religious institution is in question and it is essential that the mutawalli or sajjadanishin should have qualifications which succession by descent would not always ensure, it will be presumed that the succession is not to go by descent.[13]

Religious Endowments Act : Committee powers.

(5) Where a committee is appointed under the Religious Endowments Act XX. of 1863, s. 7, the powers exercised by the wakif and the committee respectively are not determined by the general Muhammadan law : they are derived from the sovereign powers of the government.[14]

Illustration.

It may be lawfully provided that M should be mutawalli till A arrives, or so long as he (M) remains in Basrah, or till he (M) marries, or for life, and that on M's death N should be mutawalli.[15]

(3) Persons with power to appoint successor to mutawalli :

(i) Wakif.

(ii) His executor.

(iii) Court.

492.[16] In the absence of any express or implied provision in the dedication for the appointment of successive mutawallis,[17]—

(1) the wakif is entitled to make the appointment ; [15]

(2) after the death of the wakif the executor of the wakif, or the survivor of several executors, is so entitled ; [15]

(3) on the death of the said executor or surviving executor, the Court[18] may appoint the mutawalli.[19]

38 Mad. 491 ; *Atimannessa* v. *Abdul Sobhan*, (1915) 43 Cal. 467, 473 ; *Niamat* v. *Ali*, (1916) 13 All. L. J. 26 ; Macn. 343, Ch. x. §§ 5, 6 ; Prec. on Endmt. Cas. ix. & x. Cf. *Daudsha* v. *Ismalsha*, (1878) 3 Bom. 72 (last 3 *ll.* of judgment) ; *Jamal* v. *Jamal*, (1877) 1 Bom. 633 ; *Narayan S.* v. *Niranjan C.*, (1923) 51 I. A. 37 (" where everything depends on PERSONAL QUALIFICATION & exertions, a heritable tenure is out of place " : but in same judgment Lord Sumner points out (p. 52) how OFFICES MAY IN SOME CASES BECOME HERITABLE though not originally such) ; *Muhammad Hamid* v. *Mia Mahmud*, (1922) 50 I. A. 92, 103 (7 *ll.* from bottom) ; *Pir Ziadin* v. *Pir Ahsan*, [1931] AIR (SIND) 128, on appeal *vice versa* (1937) 41 C. W. N. 624 (P. C.), see p. 621, *n.* 23.

[13] *Syedun* v. *Allah Ahmed*, (1864) W. R. 327 ; cf. *Piran* v. *Abdool Karim*, (1891) 19 Cal. 203, 219 f. See also *Sunderambal* v. *Yogavana*, (1914) 38 Mad. 850, 863 ff., which applies equally to *wakfs* ; the other judgment in 38 Mad. 851 dissented from in *Raja Rajeswar Ammal* v. *Subramania Archkar*, (1915) 40 Mad. 105 ; *Annaya Tantu* v. *Ammakka Hingsu*, (1918) 41 Mad. 886, 903 ; in *Gopal Lal Sett* v. *Purna Chandra*, (1921) 49 I. A. 100 (CAL.) (property conferred on grandson charged with maintenance of worship, but no heritable shebaitship).

[14] *Golam Hossain Shah* v. *Altaf Hossain*, (1933) 61 Cal. 80.

[15] Bail. I. 592 (par. 2) (602) ; *Ramzan* v. *Zahur*, (1913) 18 Ind. Cas. 241 ; *Phalmabi* v. *Haji*, (1913) 38 Mad. 491 (3 modes of appointment : by (i) *wakif*, (ii) executor of *wakif*, (iii) Court) ; *Ghazanfar Husain* v. *Ahmadi Bibi*, (1929) 52 All. 369, 375.

[16] Sects. 492-492 H should be read together : in first edition they all together formed s. 492.

[17] *Adv.-Gen.* v. *Fatima S. B.*, (1872) 9 Bom. H. C. R. 19 ; *Ramzan M.* v. *Zahur H.*, (1913) 18 Ind. Cas. 241. Sect. 492 prevails in absence of express or implied directions : presumption under s. 492 A must not be over-looked.

[18] See as to POWERS of Distr. & Subdte. Judges : *Atimannessa* v. *Abdul Sobhan*, (1915) 43 Cal. 467, 474 ; *Ramzan* v. *Zahur*, (1913) 20 Cal. W. N. 111 = 18 I. C. 241.

SECTION 492. *Illustration.*

The plaintiff had been duly appointed and had for 30 years acted as the Mutawalli of the dargah and properties (producing Rs. 400 per year) attached to the tomb of a saint, Shaikh Muhammad Ali Hazeen. The defendant alleging that the plaintiff had abused the trust, claimed the right to displace the plaintiff on the ground that his (the defendant's) father was the executor of the saint, and had apparently placed the plaintiff in possession. The plaintiff died pending the suit. The trial Court ordered the defendant to confer the mutawalliship on either of the sons of the plaintiff, and not to dismiss him except on proof of misconduct to the satisfaction of the Court : reversing this decision, the Sadr Diwani Adalat *held*, (1) that as it was proved that the plaintiff had, on his death-bed, nominated both his sons to be mutawallis after him, they were entitled to act as such ; (2) that the defendant, as the son of the saint's executor, had no right of interference ; and must indemnify the plaintiff's sons for all loss caused by being molested by the defendant.[20]

(iv) Presumption that mutawalli authorized to nomina successor.

492A. Subject to ss. 492,[21] and 492F, it will generally be presumed that the mutawalli[22] is empowered under the dedication to appoint a successor to himself.[23] There is no such power of appointment in the congregation or devotees as such.[24] *Semble,* in the absence of appointment by competent authority,[25] the wakf property may, after the death of the last mutawalli, be administered by his executor as his legal representative. *Quaere,* whether a mutawalli, unless he is

As to Sm. Caus. Ct. ; (Presy.) Act XV. 1882, s. 19(*d*), (*g*), (*k*) ; (Prov.) Act IX., 1887, Sch. II. 4, 11, 18. *Syed Mahomed Ghouse* v. *Sayabiran Saheb,* (1934) 68 M. L. J. 684 (Court may take into account WISHES OF FOUNDER, but will make appointment in best INTEREST OF INSTITUTION) ; *Khajeh Salimullah* v. *Abul Khair,* (1909) 37 Cal. 263 (directions not to be disregarded, except for manifest benefit of endowment).

[19] Bail. I. 533 (542) ; *Phate* v. *Damodar,* (1879) 3 Bom. 84, 87, (last *l.*) (if FIT PERSON OF WAKIF'S HOUSE found he must be named) ; *Phatmabi* v. *Haji,* (1913) 38 Mad. 491 ; cf. *Atimannessa Bibi* v. *Abdul Sobhan,* (1915) 43 Cal. 467, 474 ; *Nawabzada Khajeh Atikulla* v. *Nawab Khajeh Habibulla,* (1919) 24 C. W. N. 306 (Court will not appoint *mutawalli* if *wakf* illegal) ; *Niamat* v. *Ali Raza,* (1914) 13 All. L. J. 26 (no breach of trust alleged : Civ. Pro. Code, s. 92, *held* not applicable ; observed : "Suits relating to disputes between parties as to who is entitled to be *mutawalli* on the ground of family relationship are not brought under this section"—*sed quaere*).

[20] *Moohummad Sadik* v. *Moohummud Ali,* (1798) 1 Sel. R. 17 (S. D. R.) Cal. (1827) real points decided in this curious case are numbered (1), (2).

[21] *Wakfnama* may provide that no *mutawalli* shall have power to appoint his successor : *Fatawa Kazi Khan,* III. 300.

[22] E.g. *Ghulam Muhammad* v. *Abdul Rashid,* (1933) 14 Lah. 558, 562.

[23] Need not appoint relative of *wakif* : *Amir Ali* v. (*Syed*) *Wazir,* (1905) 9 C. W. N. 876 ; cf. s. 492 C ; *Abdul Rahaman* v. *Abdul Hossain,* (1936) 4 Cal. W. N. 585, 587, (col. 2, *ll.* 8-11) ; *Pir Ahsanullah Shah* v. *Pir Ziauddin Shah,* (1937) 41 C. W. N. 624 (P. C.) (SIND) (whether successor can be nominated only on death-bed : left undetermined). See p. 619, *n.* 12.

[24] *Khajeh Salimullah* v. *Abul Khair,* (1909) 37 Cal. 263, 275, citing *Kazi Khan* IV. 216 ; *Ghulam Muhammad* v. *Abdul Rashid,* (1933) 14 Lah. 558, 567, 568 ; *Syed Shah Md. Kazim* v. *Syed Ali Saghir,* (1931) 11 Pat. 288, 309 (custom about election) ; *Ramzan Mistri* v. *Zahur Hossein,* (1913) 20 C. W. N. 111 = 18 Ind. Cas. 241 (BENEFICIARIES FAVOURING a particular candidate, how far matter deserving Court's consideration in nominating *mutawalli* : point merely alluded to).

[25] I.e. by *wakif* or his executor or Court, under s. 492.

SECTION 492A. appointed under s. 492, or by a person authorized by the dedication to appoint, is entitled to any remuneration without an order of the Court.[26]

Nomination by mutawalli of his successor.

The authorities relating to the points covered by s. 492A are not quite clear and require some attention. The general rule is first stated :—

(1) "When the superintendent has died, and (*a*) the appropriator is still alive, the appointment of another [mutawalli] belongs to him, and not to the judge ; and (*b*) if the appropriator be dead, his executor is preferred to the judge. But (*c*) if he had died without naming an executor, the appointment of an administrator is with the judge."

This gives the authority to three persons successively : the wakif, his executor and the Court ;[27] and makes no mention of the last mutawalli nominating a successor to himself. Nevertheless it is said later :

(2) "A superintendent may at death commit his office to another in the same way as an executor may commit his to another....

(3) "A superintendent while alive and in good health, cannot lawfully appoint another to act for him, unless the appointment of himself were in the nature of a general trust."[28]

Dying mutawalli must give over charge to another—

The two statements numbered (1) and (2) are not inconsistent, since (2) means that though the mutawalli has (in the absence of express direction in the wakf-nama) no right to appoint a successor to himself (just as he has no right to appoint a substitute in his life-time); yet, as he may, when necessary, in his life-time appoint a deputy,[29] similarly "at death" he may (or rather, ex necessitate rei, he must) commit the administration of the wakf to a successor. This death-bed act cannot, of course, affect the power of the proper authorities to appoint his successor,—whether such proper authority is the wakif himself, or his executor, or the Court. But in the absence of the proper authority taking any step to appoint, the death-bed appointment by the last mutawalli must take effect—the more so as such an appointment, far from fieri non debuit, was the last service that the dying mutawalli could perform towards the wakf, and was necessary in order that the wakf property may not, pending an appointment by the proper authorities, remain entirely unattended to.

subject to appointment by proper authority.

Right to appoint another.

What then does the passage (3) above mean ? In the first place the opinion of the officers of the Sadr Diwani Adalat,[30] may be referred to : they say amongst other things : "It is stated in the Bahr-ur-Raiq, the Tatarkhani, the Zahiria, the Himadia and the Fasul ul-Amadia, that if the superintendent desire on his death-bed, to bequeath the superintendence to another, it is allowable for him to do so ; but he would not be authorized to appoint a successor in his life-time and during health ; unless the consignment of the superintendence to him have been general, that is, with permission (from the appropriator or his

[26] Bail. I. 594 (par. 2) (604-605); *Khajeh Salimullah* v. *Abul Khair*, (1909) 37 Cal. 263.

[27] *Phatmabi* v. *Haji*, (1913) 38 Mad. 491.

[28] Bail. I. 593 (par. 3) (603). [29] Bail. I. 591 (*l.* 5) (601).

[30] *Moohummud Sadik* v. *Moohummud Ali*, (1798) 1 S. D. A. (CAL.) 17.

executor,—as he may have received it from either) to confer it on another ; in which case he may be authorized to appoint a successor during health." [30] This may appear tautological : that the mutawalli has power to appoint, if he is authorized to appoint, but not otherwise. But such an interpretation is hardly likely to be the correct one. It is submitted that light may be supplied to the situation by adverting to the nature and progress of the transaction which results in a wakf being created. We are thus enabled, if not to trace out, at least to get scent of a helpful surmise how it is that the power of appointing a successor to the mutawalli is attributed in the texts to three persons,—the wakif, his executor, and the Kazi—and yet, in practice, this power is in India most often exercised by a fourth person, the mutawalli himself. In canvassing the transaction it is helpful to mark the steps which may be supposed to have been taken. First, (I.) the Wakif dedicates his property by way of wakf. In doing so he deals with the property under both its aspects : (1) the corpus, which he "ties up," so as to deprive himself of the power of selling or transferring it or transmitting it by inheritance, and (2) the usufruct, which he dedicates for the benefit of man : s. 366A. Secondly, (II.) the manner in which the usufruct has to be dealt with is expected, in the main, to be laid down in the dedication. The carrying out of the scheme which the dedicator has in mind is entrusted to the mutawalli. But in such matters it is impossible to foresee and deal with every detail. Hence there are generally left over certain residual matters connected with the disposition of the usufruct. The right (or the duty as the case may be) to deal with these residual matters must on principle continue to rest with the dedicator in whom all rights over the wakf property as its owner originally vested. But (III.) part of such residual powers become vested in the State as the guardian of charities, charity being a public concern, subject to the administration of the State. To the extent to which the ruler (the Khalif) delegates his judicial function to the Kazi (as explained in s. 11 B),[31] to that extent the residual powers which had become vested in the ruler as guardian of charities, devolve upon the Kazi (Court), But (IV.) not all the residual powers relating to the usufruct come under the head of powers which vest in the State by reason of the State being the guardian of charities. The remnant of the residual powers therefore continue in the wakif. It is as part of this remnant that the wakif continues to have power to accept the resignation of his own agent, the mutawalli, if he wishes to resign, or to remove him, and, on a vacancy occurring, by his death or otherwise, to appoint another in his place as his successor.[31] (V.) This residual remnant devolves, on the death of the wakif, on his representative (executor). But a testator may appoint several executors and may entrust to each executor specific duties (provided he expresses his will to do so in due form). (VI.) The wakif may

SECTION 492A.

Analogy of executor de son tort.

Mutawalli presumed to have power to appoint his successor.

[31] Offices of *mutawalli* & *wasi* (or executor) referred to as of analogous nature : *Fatawa Kazi Khan*, III. 299, 301 : executor has the power of nominating his successor : s. 561. Executor may be appointed for specific purpose only ; but power to appoint *mutawalli* necessarily restricted to "general" executor : "special" executor's powers being limited to specified terms of authority. Cf. *Atimannessa B.* v. *Abdul Sobhan*, (1915) 43 Cal. 467, 474 ; *Niamatali* v. *Ali Raza*, 13 All. L. J. 26. On appointment of *Kazis* see s. 11 B, pp. 82 f. Bail. I. 591 f. & ss. 493 ff. on *wakif's* residual powers.

SECTION 492A. accordingly appoint an executor specifically for administering the wakf, who would in effect be the mutawalli : and in that manner the residual remnant of the wakif's powers may vest in the mutawalli as though he were (as regards the wakf property) the wakif's executor ; thus he may acquire the power (originally attributed to the executor) of nominating a successor to himself. (VII.) In India it has become usual specifically to give to each mutawalli the the power of nominating a successor. This is a simple mode of achieving the end desired ; and this mode being so obvious is apt to obscure the circuitous manner in which the result through seven imaginary steps might have presumably been arrived at,—perhaps without fore-thought. An interesting parallel to this delegation of authority from the wakif to the mutawalli is furnished by the delegation of the Khalif's judicial functions to the Kazi. The parallel extends to the detail that upon the Kazi's shoulders may or may not alight the mantle of the Khalif's powers regarding the appointment of judicial deputies in the provinces.[31] On recalling to our mental ears the terms in which the Kazi is invested with judicial functions, pp. 82 f, whether generally and absolutely, or with limitations, we seem to alight upon the meaning of the expression " the appointment were in the nature of 'a general trust.' "

Parallel delegation of Khalif's judicial powers to Kazi.

Sect. 492B : see now s. 519B.

(4) Preference to members of wakif's family.

492 C. In appointing a mutawalli the Court prefers a member of the family of the wakif to others,[1] but not necessarily the eldest member ;[2] nor is a stranger disqualified.[3] Those descended from females have been held[4] not to be regarded (*semble,* in Hanafi law[5]) as members of the family, but the matter is not free from doubt and must in any case depend upon the terms of the dedication.[6]

Sect. 492 D is now s. 489, *ill.* (6); s. 492 E is s. 519 B(iv.).

1 Bail. I. 593-594 (604); *Atimannessa* v. *Abdul Sobhan,* (1915) 43 Cal. 467, 473 ; *Phatmabai* v. *Haji M.,* (1913) 28 Mad. 491, 496 ; *re Mahomed Haji Haroon,* (1934) 59 Bom. 424 ; *Bikani Mia* v. *Shuk Lal Poddar,* (1892) 20 Cal. 116, 134 ; *Niamat Ali* v. *Ali Raza,* (1914) 13 All. L. J. 26 ; *Gopal L. S.* v. *Purna C.,* (1921) 49 I. A. 100, 107 (CAL.) (" claims of that branch of family with whom worship was established, & by whom services performed "); on other hand *Narayn Singh* v. *Niranjan,* (1923) 51 I. A. 37, 52 (" personal selection may be sole basis of his service & mere family claims valueless.") " If he should not find a fit person among the house of the appropriator & should nominate a stranger, but should subsequently find one who is qualified, he ought to transfer the appointment to him "—Bail. I. 594 (604). See s. 492, *ill.;* contrast *Sheikh Amir Ali* v. *Syed Wazir Hyder,* (1905) 9 Cal. W. N. 876.

2 (*Shah Gulam*) *Rahumtulla* v. *Mohommed Akbar,* (1875) 8 Mad. H. C. R. 63 ; *Abdulla Edrus* v. *Zain Sayed Hassan Edrus,* (1888) 13 Bom. 555. Cf. also *Asheerooddeen* v. *Droobo Moye,* (1876) 25 W. R. 55 ; *Shahar B.* v. *Aga Md.,* (1906) 34 I. A. 46 = *Shahoo B.* v. *Aga M.,* 34 Cal. 11 (P. C.).

3 Cf. (*Sheikh*) *Amir Ali* v. *Syed Wazir,* (1905) 9 C. W. N. 876 (referring to appointment by last *mutawalli*).

4 *Ahmud Hossain* v. *Mohiuddeen Ahmud,* (1871) 16 W. R. 193.

5 Shia law does not prefer AGNATES over COGNATES ; cf. s. 640 ; *Bibi Akhtari B.* v. *Diljan Ali,* [1923] AIR (P. C.) 11 = 28 C. W. N. 544.

6 Cf. (*Shekh*) *Karimodin* v. *Alamkhan,* (1885) 10 Bom. 119.

SECTION 492F.

492 F. The mutawalli may, in accordance with s. 492A, appoint a successor to succeed him at his death, but cannot validly transfer his office to another during his life-time.[7] An appointment or nomination made during the life-time of the mutawalli is revocable like other testamentary dispositions.[8]

(2) Mutawalli appointing successor to himself.

492 G. The office of mutawalli [when it is attached to the conduct of religious worship and the performance of religious duties] is not legally saleable.[9] Any custom to the contrary is opposed to public policy and void.

(3) Office not saleable when religious.

492 H. The right to succeed as mutawalli of a wakf for a public charity cannot lawfully be the subject of [private] arbitration,[10] and the Court will not file an award relating to it, unless the reference was with the consent of the Advocate-General and for the benefit of the charity.[11] But where the wakf is in effect a family settlement, or where similar circumstances make agreements as to the trusteeship unobjectionable, and parties have referred questions to arbitration, or otherwise, entered into undertakings relating to it, they will be held to their agreements or undertakings.[12]

(4) Arbitration or agreement relating to mutawallishiip.

[7] Bail. I. 494 (par. 2) (604); *Wahid Ali* v. *Ashruff*, (1882) 8 Cal. 732 ; (*Nawab Khajeh*) *Salimullah* v. *Abul Khair*, (1909) 37 Cal. 263, 274, citing *Fat. Kazi Khan* IV. 219 ; *Sultan Ahmed* v. *Abdul Gani*, (1918) 46 Cal. 13, 18 ; *Ghazanfar Husain* v. *Ahmadi B.*, (1929) 52 All. 369, 375 ; *Ali Muqtada* v. *Abdul Hamid*, (1919) 41 All. 412, 414. In *Pir Ahsanullah* v. *Pir Ziauddin*, (1937) 41 C. W. N. 624 (P. C.) (SIND) (contended that nomination of successor can only be valid if made while incumbent was in death-illness but not in good health).

[8] *Abdulla Edrus* v. *Zain S. H. E.*, (1888) 13 Bom. 555 ; *Sultan Ahmad* v. *Abdul Gani*, (1918) 46 Cal. 13.

[9] *Sarkum* v. *Rahman*, (1896) 24 Cal. 77, 90-92 ; *Muhammad Ibrahim* v. *Ahmad Said K.*, (1901) 32 All. 503 ; *Haji Ali Md.* v. *Anjuman-i-Islamia*, (1931) 12 Lah. 590 ; *Lakshmanaswami* v. *Rangamma*, (1902) 26 Mad. 31 ; *Kuppa Gurukal* v. *Dorasami*, (1887) 6 Mad. 76.

[10] *Muhammad Ibrahim E.* v. *Ahmad S. K.*, (1910) 32 All. 503 (disputes as to trusteeship of public charity cannot be settled by arbitration). In regard to public trusts, cf. Civ. Pro. Co., s. 92 (= s. 519 B, p. 651, below). Cf. *Sundarambal A.* v. *Yogavanagurukkal*, (1914) 38 Mad. 850, 865-866, distinction between PRIVATE & PUBLIC TRUSTEESHIP explained.

[11] *Att.-Gen.* v. *Hewitt*, (1804) 9 Ves. 232, referred to in *Muhammad Ibrahim* v. *Ahmad*, (1910) 32 All. 503, 516 (Court will not act under award without consent of Att.-Gen. or enquiring whether for benefit of charity : Lord Eldon directed referee not to be called arbitrator but by his name); *A.-G.* v. *Fea*, (1819) 4 Madd. 274 (Leach V. C. : no reference to arbitration without ascertaining if Att.-Gen. would consent); Russell, *Arbitr.* 9th ed., 22 ; 13th ed. (1935), p. 3.

[12] *Muhammad Hamid* v. *Mian Mahmud*, (1922) 50 I. A. 92, 106 (LAH.) (SAJJADANISHIN installed on undertaking to carry out award : held to undertaking); *Moazzam Ali* v. *Raza Ali*, (1934) 46 All. 856 (PRIVATE TRUST : *mutawallishiip* carrying with it right to take income); doubt cast on carefully considered judgment in *Muhamad Ibrahim* v. *Ahmad*, (1910) 32 All. 503 (Karamat Husain, J. laid stress on *wakf* in question being for PUBLIC CHARITY : significance of this fact, *submitted* not

SECTION 492H. Sect. 493 is now s. 519D (Court may remove mutawalli).

D. REMOVAL OF MUTAWALLI.

(1) By wakif.

494. The wakif [13] cannot lawfully remove the mutawalli unless in the dedication he has empowered himself so to do.[14]

(2) Resignation without leave.

495. The mutawalli has no authority to discharge himself from his office, unless permitted by the wakif or Court.[15]

(3) Transfer.

495A. The mutawalli has no authority during his lifetime to transfer his office to another.[16]

(4) Wakif's powers.

495B. The wakif or his executor on appointing himself as the mutawalli, or acting as such, retains the power of transferring the office to another under ss. 492, 495.[17]

E. Remuneration of mutawalli.

(1) Provision in dedication.

496. (1) The dedication [17] may validly authorize the mutawalli,[18] appointed by the wakif, and each succeeding mutawalli, to receive a specified remuneration for administering the wakf ; [19] provided (*a*) that, in the absence of anything

appreciated in 46 All. 856); cf. *Sundarambal* v. *Yogavanagurukkal*, (1914) 38 Mad. 850, 865-866; *Hakim Mirza Mohammad Jafar* v. *Mirza Md. Taqi*, (1933) 9 Luck. 170 (award gave heirs right to be *mutawallis* proportionately to right of inheritance ; suit for mere declaration without possession allowed); *Khalife M. S. A. Ganny* v. *Mohammad Ebrahim*, (1931) 9 Rang. 459 (another aspect of distinction between establishing public right & remedying individual injury, p. 463).

13 Sect. 494 refers to *wakif's* power of removal : on Court's power see s. 519D.

14 *Gulam Hussain Saib* v. *Aji Ajam Tadallah Saib*, (1860) 4 Mad. H. C. R. 44 (follows opinion of Imam Muhammad according to which *Fatawa Alamgiri* states *fatwa* to be); Bail. I. 591 (601); cf. *Bhurruck Chandra Sahoo* v. *Gulam Shurruff*, 1868) 10 W. R. 458; *Hidaitoonnissa* v. *Afzul Hossein*, (1870) 2 N. W. 420 (Shia law to same effect : no Shia authorities cited); Abu Yusuf contrariwise holds that *wakif* may remove *mutawalli* without expressly reserving power of removal, *Ghazanfar Husain* v. *Ahmadi B.*, (1929) 52 All. 568, 375; *Adv.-Gen.* v. *Fatima S. B.*, (1872) 9 Bom. H. C. R. 19 (where *wakif* has specified class from whom *mutawalli* to be selected, he cannot disregard dedication & appoint person not within class); *Abdul Nabi* v. *Mazhar Ali*, [1930] AIR (SIND) 316, 321. Bail. I. 592 (692): FATWA = not merely practice in India under Aurangzib ; it means that famous *Kazis* have been in habit of deciding in that manner. "The word *fatwa* is stronger than the word valid." —Bail. I. 518 (par. 3, last *ll.*) (527, par. 1, last *ll.*); cf. Bail. I. pp. ix. 7; s. 11A, com. *Sarkum* v. *Rahaman*, (1896) 24 Cal. 77, 93, (Court has plenary powers to remove); see s. 519E, p. 655, *n.* 2 (instances of removal by Court).

15 (*Nawab Khajeh*) *Salimullah* v. *Abul Khair*, (1909) 37 Cal. 263; cf. *Ali Muqtada K.* v. *Abdul Hamid K.*, (1919) 41 All. 412. "If the person who has been appointed *mutawalli* says : 'I have discharged myself,' then he will not be discharged, but if he tells the *wakif* or the *Kazi*, then either of them can discharge him. This is in the *Qunia*." *Fatawa Alamgiri*, *Wakf*, ch. 5. This passage omitted by Bail. I. Its proper place = Bail. I. 594, par. 3 (605, par. 1) between sent. 1 & 2. Cf. the Indian Trusts Act, s. 71.

16 Cf. ss. 492D, 499; *Rajah Vurmah Valia* v. *Ravi Vurmah Mutha* (*Kunhi Kutty*), (1877) 4 I. A. 76 = 1 Mad. 235 (transfer prohibited on principle that *delegatus non potest delegare* (p. 81/248); custom allowing sale of trusteeship bad in law (p. 85/252). This does not interfere with right to employ agents &c. : s. 499.

17 Bail. I. 594 (par. 2) (604), 597 (607-608).

18 *Syed Shah Muhammad Kazim* v. *Syed Abi Saghir*, (1931) 11 Pat. 288, 322 (SAJJADANISHIN'S ALLOWANCE).

19 E.g. *Jugatmoni* v. *Romjani*, (1884) 10 Cal. 533 (1/3 income of *wakf* villages); *Jinjira Khatun* v. *Muhammad Fakirulla*, (1921) 49 Cal. 477, 482 (1/16 net income);

to indicate otherwise, the remuneration is receivable only by the first mutawalli : the succeeding mutawallis are not, without an order of the Court, entitled thereto.[20] SECTION 496.

(2) Where no remuneration is specified for the mutawalli, the Court may, on application, fix it, and authorize the mutawalli to receive it.[21] (2) Fixed by Court.

The Official Trustee (*a*) if appointed mutawalli by the dedication, is entitled to receive in that behalf such remuneration as is specified in the dedication ;[22] (3) Official Trustee's remuneration.

(*b*) if appointed by the High Court, such commission as is fixed in the Official Trustees Act, s. 11.[23]

496 A.[24] The mutawalli's right to receive remuneration for administering the wakf does not create such an interest as to make the wakf property liable to be attached and sold in execution of a personal decree against him[25] for his private debts.[26] But the Court may appoint a receiver of the income accruing from statutorily settled estates of a jahgir and from inam fields granted partly for maintenance and partly as remuneration for services rendered as Kazi.[27] (4) Incidents of remuneration. (i) Creates no interest. (ii) Receiver.

496 B.[24] Land granted as the service emoluments appertaining to the office of Kazi,[28] to be held as watan,[29] cannot be (iii) Execution sale.

Delrus B. B. v. *Kazee Abdoor Ruhman*, (1875) 23 W. R. 453, 455 (6/28 of produce : "a very considerable sum"). Where *wakif* is *mutawalli*, s. 486(2) may conflict with s. 496(1) ; but *wakif* may lawfully take ordinary remuneration of *mutawalli* : *Abadi* v. *Kaniz Zainab*, (1926) 54 I. A. 33, 37 ; (*Mutu*) *Ramanadan Chettiar* v. *Vava Levvai Marakayar*, (1916) 44 I. A. 21, 27 = 40 Mad. 116, 122 : "The trusts too are active trusts troublesome to discharge (payments of cash doles, distribution of conjee & clothes to poor, performance of *fatiha*) & the PETTY SALARY Rs. 10 per month to each *mutawalli* given to the trustees," said Lord Atkinson, "may accordingly well be held to have been given to them AS REMUNERATION for their trouble in this respect & therefore as part of the expenditure on the charitable objects."

20 Bail. I. 594 (par. 2 (604); 597 (607-608).

21 *Mohiuddin* v. *Sayiduddin*, (1893) 20 Cal. 810.

22 Offl. Trust. Act, s. 9.

23 I.e. 1/2 per cent. on capital moneys received, & on being invested by him 3/4 per cent. on interest or dividends received by him ; 2½ per cent. on rents collected ; but High Court may allow higher commission.

24 Sects. 464, 496 A, 496 B, 497 A deal, from different aspects, with inalienability of *wakf* property : & should be read together. See also s. 478A, *n.* 9(v)-(viii).

25 See s. 464 : *Bishen Chand* v. *Nadir Hossein*, (1887) 15 I. A. 1 = 15 Cal. 329 ; cf. (*Bibee*) *Kuneez Fatima* v. (*Bibee*) *Saheba Jan*, (1867) 8 W. R. 313 ; *Futtoo Bibee* v. *Bhurrut Lall Bhukut*, (1868) 10 W. R. (C. R.) 299.

26 See s. 464, *nn.* 18, 19 (cases noted). *Nawab Bahadur Murshid* v. *Karnani Ind. Bk.*, (1931) 59 Cal. 1 (P. C.) ; *Sattappa* v. *Mahomed Sahib*, (1935) 60 Bom. 516, 541, 544, 550-551 ; following *Narayn Singh* v. *Niranjan Chakravarti*, (1923) 51 I. A. 37 ; *Rajah Nilmoni Singh* v. *Bakranath Singh*, (1882) 9 I. A. 104, 124.

27 See p. 563, *n.* 19 (s. 464).

28 *Sattappa* v. *Mahomed Sahib*, (1935) 60 Bom. 516, 539 (WATAN explained).

29 See s. 496, *ill* ; *Mohiuddin* v. *Sayiduddin*, (1893) 29 Cal. 810, 821 ff. (SAJJADA-

SECTION 496B. sold in execution of a money decree against the person holding the office, as if it were his private property.[28]

(iv) Quantum of remuneration : one tenth.

497. The remuneration of a mutawalli who has no beneficial interest in the wakf property ought not ordinarily to exceed 1|10 of the income, unless after the religious and|or charitable objects of the wakf are duly maintained, there is a sufficient surplus left, and on a consideration of the nature of the wakf the Court is of opinion that a higher remuneration would be just and proper.[29] A sajjadanishin occupies a position different from that of a mutawalli : and he may be entitled to higher rights in the income.[30]

F. MUTAWALLI AND WAKF PROPERTY : (1) Not owner but manager.

497 A.[24] The mutawalli has no ownership, right or estate in the wakf property :[31] in that respect he is not a trustee in the technical sense :[32] he holds the property as a manager for fulfilling the purpose of the wakf.[33]

NISHIN—special case) : *Syed Shah Muhammad Kazim* v. *Syed Abi Saghir*, (1931) 11 Pat. 289, 322. See *Abadi* v. *Kaniz*, (1926) 54 I. A. 33 ; *Salona B.* v. *Zubaida B.*, [1932] 30 All. L. J. 855.

30 Sacred character of office of SAJJADANISHIN : *Mohiuddin* v. *Saiyiduddin*, (1893) 20 Cal. 810, 821 ff. ; *Sec. of St.* v. *Mohiuddin*, (1900) 27 Cal. 674 (position of SAJJADANISHIN discussed : distinguished from *mutawalli*) ; *Piran* v. *Abdool Karim*, (1892) 19 Cal. 203 (do.) ; *Ishtiaq Ahmed* v. *Saiyid Massood*, (1908) 6 All. L. J. 632, *sajjadanishin* not removable by suit under s. 92 of Civ. Pro. Code & from what Abdur Rahim, J. dissents in *Sujjada Shah* v. *Shaw Habit*, (1919) 43 I. C. 677, 682 (where he held allowance of Rs. 30 per month, sufficient for the officiant, wrongly called *sajjadanishin*). See also *Vidyapurna Tirtha* v. *Vidyanidhi T.*, (1903) 27 Mad. 435, 442, 448, 455 (RELIGIOUS HEADS may be CORPORATIONS SOLE which, though dissented from in 53, Ind. Cas. 677, was approved in *Srinivasa C.* v. *Evalappa M.*, (1922) 49 I. A. 237, 251).

31 *Hosain Kasim Dada* v. *Commr. of Inc.-Tax*, [1937] 160 (partnership & income-tax) ; *Syed Ahmad* v. *Hafez Zahid*, [1934] AIR (ALL.) 732.

32 *Vidya Varuthi Tirtha* v. *Balusami Ayyar*, (1921) 48 I. A. 302, 313, 315 (per Syed Sahib Ameer Ali ; *Muhammad Rustam Ali* v. *Mushtaq Husain*, (1920) 47 I. A. 224, 232 (" the deed appointing *mutawalli* (trustee-nama) does not purport to assign property to trustees : p. 232, *l.* 5 from bottom *per* Lord Buckmaster [he controls only usufruct, see s. 366A, com.] " They are TRUSTEES IN THE GENERAL SENSE that every man is a trustee to whom is entrusted the duty of managing & controlling property that belongs to another." *Saadat Kamel* v. *Att.-Gen.*, (PALESTINE) [1939] AIR (P. C.) 185, 189 (i) word *mutawalli* not properly translated by word *trustee*, (ii) for important purposes necessary to bear in mind that *wakf* property not vested in *mutawalli*, (iii) office of *mutawalli*, though only a managership, provides continuous representation of *wakf* & all interests therein) ; *Srinivasa Chariar* v. *Evalappa Mudaliar*, (1922) 49 I. A. 237, 251 par. 2 (*Kartas* " have a much higher right with larger powers of disposal & administration, & they have a personal interest of a beneficial character") ; approving of *Vidyapurna Tirtha* v. *Vidyanidhi*, (1904) 27 Mad. 435. (*Mt.*) *Allah Rakhi* v. *Mohammad Abdur Rahim*, (1933) 61 I. A. 50 (*sajjadanishin's* suit for possession decreed against *mujawars* who were validly dismissed but who remained in possession : Ind. Limit. Act, s. 10 not applicable : *mujawars* failed to prove adverse possession within art. 144 : facts consistent with possession by leave & licence : art. 139 also not applicable).

33 *Syed Ahmad* v. *Hafiz Zahid*, [1934] AIR (ALL.) 732. Ind. Trusts Act II. of 1882, ss. 11-54 may be compared ; though *mutawalli's* position different from trustee's. The *mutawalli* really has effective control over usufruct only, not over corpus.

497B. The Indian Limitation Act IX. of 1908, art. 134 does not apply to wakfs ;[34] but see artt. 134A—134C.

SECTION 497B. (2) Limitation Act, art. 134 not applicable.

Art. 134 allows 12 years for recovering possession of trust (immovable) property, alienated by trustee for valuable consideration. As that art. does not apply to wakfs, the Limitation Act was amended (Act. I. of 1929) by the addition of artt. 134A-C which are applicable to alienation (by sale or mortgage) of immovable property comprised in Muslim religious or charitable endowments. Suits may be brought for recovery of such property, 12 years after the unauthorized alienation becomes known to the plaintiff, or (if the suit is by the manager of the endowment) from the death, resignation or removal of the previous manager, by whom it had been unauthorizedly alienated.

498. The mutawalli may do all acts reasonable and proper for the protection of the wakf property, and for the administration of the wakf.[1]

(3) General powers.

Cf. Indian Trusts Act, s. 36. To keep wakf property in repairs is expressly enjoined (s. 469(1).). But the mutawalli has no authority to make, or expend on, mere improvements, e.g. the addition of a minaret to a mosque, unless it is necessary for the call to prayers.[2] See s. 503, *ill.* Very wide discretion to the mutawalli, unlimited power of sale, undefined authority to incur expenditure for the benefit of the trust and unrestricted liberty to appropriate the residue converted the mutawalli, it was argued, into the proprietor, but the Court did not accept the argument, holding that the

1.—Repairs.
2.—Improvements.

[34] *Vidya Varuthi T.* v. *Balusami A.*, (1921) 48 I. A. 302 ; *Abdur Rahim* v. *Narayn D. A.*, (1922) 50 I. A. 84, reversing *Narayn Das* v. *Haji Abdur Rahim*, (1920) 47 Cal. 866. ART. 123 OF LIMIT. ACT, see *Maung Tun Tha* v. *Ma Thit*, (1916) 44 I. A. 42 ; *Ghulam Muhammad* v. *Ghulam Husain*, (1931) 59 I. A. 74, disapproving *Shirinbai* v. *Ratanbai*, (1918) 43 Bom. 845 ; & approving *Nurdin* v. *Bu Umrao*, (1920) 45 Bom. 519 ; & *Rustom Khan* v. *Janki*, (1928) 51 All. 101 (F. B.) ; *Hamidmiya Sarfuddin* v. *Nagindas Jivanji*, (1932) 57 Bom. 709 (artt. 134, 142, 144 : different alienees, being distinct TRESSPASSERS, cannot be said to claim through each other ; hence possession of distinct trespassers cannot be tacked to constitute ADVERSE POSSESSION for ART. 144 : ADVERSE POSSESSION OF ALIENEES against *wakf* property commences as regards mortgage or sale from date of alienation : mortgage may become binding by lapse of time, so that possession cannot be obtained without paying amount due) ; *Syed Zainuddin Hossien* v. *Mouluvi Mahamed Abdur Rahim*, (1932) 36 C. W. N. 972, 981 (art. 144 : right of residence claimed time runs from assertion of adverse title) ; *Debendranath Sadhu K.* v. *Noharmal Jalan*, (1929) 34 C. W. N. 498, 502 (LIMITATION against *mutawalli* in favour of purchaser adversely holding *wakf* property) ; (*Moulvi*) *Abdur Rashid* v. *Janki D.*, [1922] AIR (OU.) 24 ; *Venkata Subbarayudu* v. *Haji Silar S.*, (1929) 58 M. L. J. 524 ; *Maulavi Muhammad Fahim-ul Haq* v. *Jagat Ballav G.*, (1922) 2 Pat. 391 (suit by beneficiary or *mutawalli* during lifetime of alienor of *wakf* property, for declaration that alienation void, governed by ART. 120 ; 6 years) ; *Saadat Kamel* v. *Att.-Gen.* (PALESTINE) [1939] AIR (P. C.) 185, (suit for recovering wakf property held adversely : time begins to run when right of recovery can first be asserted by anyone on behalf of those interested *in praesenti* or *in futuro* : it does not run afresh if *mutawalli* changes or interest accrues to new beneficiary).

[1] *Phate Saheb Bibi* v. *Damodar Premji*, (1879) 3 Bom. 84 (e.g. bringing suit) ; *Zubaida Sultan B.* v. *Dawood Ismael Makra*, [1937] 1 Cal. 99 ; *Mahmuda B.* v. *Iffat Arah Begum*, [1937] 1 Cal. 77 (Bengal wakf Act, XIII. of 1934) ; *Husain Kasim Dada* v. *Commr. of Inc.-Tax*, [1937] 2 Cal. 160.

[2] Bail. I. 608 (par. 2) (619) ; *re Cassamally*, (1906) 30 Bom. 591.

SECTION 497B. unlimited power of sale was exercisable only for the purpose of converting the estate into money and investing.[3]

(4) Wakf Act, 1923.

498 A. Statutory provisions have now been made under which particulars of the dedication and annual audited accounts must be filed and made available for inspection by members of the public.[4]

Duties of mutawalli : under Act, 1923.

Under the Mussulman Wakf Act, XLII. of 1923 (the provisions of which apply to wakfs under which no benefit is for the time being claimable by the wakif for himself, or by any of his family or descendants)[4] every mutawalli shall within six months of the Act or of the creation of the wakf, furnish to the Court (within the local limits of whose jurisdiction the property of the wakf of which he is the mutawalli is situated): (i) a statement containing the particulars mentioned in s. 3 of the said Act; (ii) a copy of the deed or instrument creating the wakf, or if no such deed has been executed, full particulars of the origin, nature and objects of the wakf : s. 3. The Court may order further particulars : s. 4; (iii) the mutawalli shall also within three months of 31 Mar. in every year, furnish, in the prescribed form, full and true accounts for the previous year : s. 5.[5] The accounts must be audited by a person who holds a certificate under the Indian Companies Act, 1913, s. 144, or otherwise comes under s. 6 of the said Act. Any person may obtain inspection and copies of the said statement, or particulars, accounts, deed, instrument, document and/or audit report : s. 9. Failure to furnish such true and audited accounts, statements, documents, etc. within time is punishable[6] with a fine of Rs. 500, or in case of a second or subsequent offence of Rs. 2,000 : s. 10.[7] Whether the District Court has jurisdiction to

to file :—
1.—Wakfnama.

2.—Accounts.

3.—Fine for failure. Which Court may order fine ?

[3] *Shailendranath Palit* v. *Hade Kaza Mane*, (1931) 59 Cal. 586, 601, 602 ; *Zubaida Sultan B.* v. *Dawood Ismail Makra*, [1937] 1 Cal. 99 (for meeting liabilities on *wakf* property, *mutawalli* has not any more extensive powers of contracting than a trustee has in Eng. law ; money borrowed & used for repair of mosque : decree "included declaration in some form or other that plaintiff entitled to satisfy his decree out of *wakf* property in such manner as law allows.").

[4] (i) Wakf Act, 1923, s. 2(*e*); (ii) *Mahboob Bandi* v. *Mahboob Hussain K.*, [1937] AIR (OU.) 454 ; *Badrul Islam A. K.* v. (*Mt.*) *Ali Begum*, (1935) 16 Lah. 782 ("FAMILY" includes relatives depending upon *wakif* for support or residence, e.g. BROTHER, & his descendants). (iii) Bengal Wakf Act XIII. of 1934 (BENG.) extending over Bengal, elaborate Act of 93 ss. ; *Wakf al al-aulad* is defined as *wakf* in which 75 per cent. of income is payable to *wakif* or his family : ss. 6(11), 32, 34. (iv) Mussulman Wakf (Bombay Amendment) Act, XVIII. of 1935 (BOM.). (vi) Sect. 464, *expl.* & *nn.*

[5] District Judge may punish failure to furnish accounts : s. 10 ; but has no authority to order *mutawalli* to file accounts under s. 5 : *Nasrullah Khan* v. *Wajid Ali*, (1929) 52 All. 167 ; or to appoint receiver : *Fateh Ali* v. *Meherunnessa*, (1936) 40 C. W. N. 1300.

[6] *Nasrullah Khan* v. *Wajid Ali*, (1930) 52 All. 167 ; *Nasrullah* v. *Wajid Ali*, (1932) 54 All. 475 (Distr. Judge is authority who can take proceedings to enforce s. 10 by imposing fine : *per* Pullan J. ; Niamatullah, J. concurring with some hesitation) ; followed *Kali Khan* v. *Karim*, (1935) 37 Bom. L. R. 200 (Broomfield, J.) ; *Syed Abdul Hadi* v. *Abdul Latif*, [1937] Nag. 532 (Pollock, J.) ; In *Ali Mahomed* v. *Emp.*, [1928] AIR (SIND) 430 = 28 Cr. L. J. 954, held that City Magistrate, Karachi, had jurisdiction to fine ; & in *Taher Saifuddin* v. *Emp.*, (1934) 58 Bom. 302, assumed that Chief Pres. Magis. Bom. had jurisdiction to fine.

impose a fine, is not clear : but the decisions favour a reply in the affirmative. Whether the ordinary Magistrates have no authority to fine is also not clear.[6] The local government may make rules to carry into effect the purposes of the Act. In proceedings under this Act the District Judge has no jurisdiction to appoint a receiver.[8] SECTION 498A. 4.—Receiver.

In two cases it was held (it is submitted erroneously) that in proceedings under the Wakf Act, XLII. of 1923, if it is disputed, whether the properties in respect of which an application is made are wakf properties the District Judge has no jurisdiction to determine that question. But where an Act in general terms authorizes the Court to order certain things to be done, there is authority by necessary implication to make such preliminary investigations as must be made before the jurisdiction expressly given can be exercised : Cui jurisdictio data est, ea quoque concessa esse videntur sine quibus jurisdictio explicari non potuit : Dig. II. 1, 2. In particular where jurisdiction depends upon the existence or non-existence of a fact, the question whether there is jurisdiction cannot be determined without first determining whether that fact exists or does not exist. In case one party alleges that it exists and the other that it does not, the Court cannot say whether it has or has not jurisdiction without determining whether that crucial fact exists. " Allegations by the parties do not take the place of proof : least of all in regard to a question on which the Court's jurisdiction depends : otherwise the jurisdiction of the Court would be in the hands of the parties, not of the Court or the Legislature : it would be the allegation of either of the parties and not the existence of the fact on which the jurisdiction would then rest."[9] Accordingly, it has been held in other cases that the Court has jurisdiction to determine the question.[10] District Court's powers when existence of wakf denied.

499. The mutawalli may employ for hire agents or managers for the administration of the wakf, wherever he is empowered by the dedication,[11] or it is necessary, or in accord- (5) Employment of agents where (i) dedication authorizes, or (ii) necessary, or (iii) customary.

[7] *Mohammad Baqar* v. *Mohammad Qasim*, (1932) 7 Luck. 601 (F. B.) (Distr. Ct. has jurisd. to determine whether there is a *wakf* & whether it is within Act); *Nasrullah Khan* v. *Wajid Ali*, (1929) 52 All. 167 (s. 10 appears wide enough to cover inquiry when *wakf* itself disputed or applicability of Act questioned); *Nasrullah* v. *Wajid Ali*, (1932) 54 All. 475 ; *Afzal Husain* v. *Mohammad Ahsan*, [1932] 30 All. L. J. 266 (distr. Judge may determine whether there is a *wakf*); In *Wahid Hassan* v. *Abdul Rahman*, (1934) 57 All. 754, & *Syed Ali Muhammad* v. *Collector*, [1927] AIR (PAT.) 189 = 8 Pat. L. J. 233, *held* that Distr. Ct. has no such authority : *submitted* that these two decisions are erroneous); *Syed Ali Hussain* v. *Bibi Akhtari B.*, (1931) 10 Pat. 506 (existence of *wakf* admitted, but *mutawalli* merely denied that he was " trustee " & that the *wakf* was a " trust ", *held* Act applied); cf. *Mahadeo Bharthi* v. *Mahadeo Rai*, (1929) 51 All. 805.

[8] *Wahid Hasan* v. *Abdul Rahman*, (1934) 57 All. 754 ; *Syed Ali Mohammad* v. *Collr. of Bhagalpore*, [1927] AIR (PAT.) 189.

[9] *Adam Haji Omar* v. *Collr. of Poona*, (1938) XVI. Bom. L. J. 54 ; *Hurree Persad Malee* v. *Koonjo Behary Shaha*, (1862) 1 Marsh. Rep. 99, 101 (F. B.) (Peacock, C. J.).

[10] *Taher Saifuddin* v. *Emp.*, [1933] 58 Bom. 303 ; *Afzal Husain* v. *Mohammad Ahsan*, [1932] A. L. J. 265 ; *Nasrulla* v. *Wajid Ali*, *ib.* 262 ; *Ali Bakhtiyar* v. *Khond Kar Altak Hossain*, (1933) 60 Cal. 790 = *Syed Ali Bakhtour* v. *Hazi Khandker Altaf Hossain*, (1932) 37 C. W. N. 395 ; *Adam Haji Omar* v. *Collr. of Poona*, (1938) XVI. Bom. L. Journ. 54.

[11] As in *Amrutlal* v. *Kalidas*, (1887) 11 Bom. 492.

SECTION 499.

ance with the usual course of business, so to do.[12] The authority of an agent or manager so employed ceases on the death or removal of the mutawalli employing him.[13]

The instance given in the Fatawa Alamgiri is that of employing a person to sweep a masjid. As stated by Lord Watson : " Whilst trustees cannot delegate the execution of the trust,[14] they may, as was held by this House in Speight *v.* Gaunt,[15] avail themselves of the services of others wherever such employment is according to the usual course of business." [16] The first concession made in England to trustees, in the direction of delegating their powers, was, where there was necessity, legal, or moral, justifying the employment of agents. Moral necessity is from the usage of mankind. The trustee must act as prudently for the trust, as he would do for himself, and according to the usage of business referring to bankers, stewards and agents.[17]

(6) Borrowing not allowed.

500. Unless the dedication or the Court [18] authorizes the mutawalli, he cannot as mutawalli validly borrow money for any purpose whatever.[19]

Sect. 501 is now transposed as s. 520.

(7) Power to grant lease.

502. The mutawalli may grant a lease for a year of a house dedicated to the poor or other charitable object, and a lease for three years of lands ; [20] and the lease in either case is

[12] Bail. I. 608, 591, (*l.* 5); *Wahid Ali* v. *Ashruff Hossain*, (1882) 8 Cal. 732 ; *mutawalli* is not empowered to transfer his office to another during his lifetime : see s. 495 A, p. 626.

[13] *Moheeooddeen Ahmed* v. *Elahee Buksh*, (1866) 6 W. R. 277 ; cf. Ind. Contr. Act, 1872, s. 201.

[14] Cf. Ind. Trust Act 1882, s. 47.

[15] *Speight* v. *Gaunt*, (1883) 9 App. Cas. 1 ; affirming 22 Ch. D. 727.

[16] *Learoyd* v. *Whiteley*, (1887) 12 App. Cas. 727, 734.

[17] Lord Hardwicke, *Ex parte Belchier*, (1754) Amb. 219.

[18] Bail. I. 594 (par. 3) (605) (par. 1). As regards BORROWING WITH LEAVE OF COURT, see ss. 520-520B.

[19] BORROWING for purpose of *wakf* must of course be distinguished from *mutawalli* borrowing for his PRIVATE NEEDS & dishonestly pledging *wakf* property : s. 464 : *Abdoolla* v. *Rajesri Dossea*, (1846) 7 Sel. Rep. 268(O.), 320(N.), first reported case regarding LOAN ON WAKF PROPERTY : *Bikani Mia* v. *Shuk Lal Poddar*, (1892) 20 Cal. 116, 153 ; *Hamidmiya Sarfuddin* v. *Nagindas Jivanji*, (1932) 57 Bom. 709 (MORTGAGE may become binding by LIMITATION : so that possession may not be recovered without paying amount due) ; *Zubaida Sultan B.* v. *Dawood Ismail Makra*, [1937] 1 Cal. 99.

[20] *Sayad Arsad Hoosain* v. (*Sm.*) *Naresh Nandini Dey*, (1936) 40 C. W. N. 584 (lease held good during life of *mutawalli*—but *quaere*) ; contra, *Abdul Rahaman* v. *Abdul Hossain*, (1936) 40 C. W. N. 85 (*mutawalli* has no power to grant permanent lease) ; *Fakhrunnessa B.* v. *Distr. J. of* 24 *Perg.*, (1920) 24 C. W. N. 339 ; *Mahammad Mazaffar al Masavi* v. *Jabeda Khatun*, (1930) 57 I. A. 125 (LAWFUL ORIGIN PRESUMED after lapse of long time) ; *Zafar Ali* v. *Kishen Chand*, [1919] 54 P. R. 267 (No. 99) (permanent lease having been held for 50 years, suit to eject BARRED : art. 134) Cf. *Dalrymple* v. *Khoondkar Azeezul Islam*, [1858] S. D. A. 586 (see *n.* 22) referred to in *Bikani Mia* v. *Shuk Lal Poddar*, (1892) 20 Cal. 116, 153.

not determined by his death.[21] A lease granted by the mutawalli for a longer term than for one or three years respectively, is not void but voidable.[22] SECTION 502.

502A. Except as provided in the dedication, no person may occupy wakf property without paying reasonable rent, notwithstanding that the mutawalli may purport to authorize occupation without payment.[23] (8) Rent for occupying wakf property.

503. The mutawalli may erect buildings on the wakf property, or cultivate lands appertaining to the wakf, if doing so is beneficial to the objects of the wakf.[24] (9) Erection of buildings.

Illustrations.

(1) "When the qayyim (or person in charge) of wakf lands desires to populate a village in it so that the inhabitants may increase therein, that they may protect it, and that the produce of corn may increase (this being required), then he is permitted to do so. An instance of this rule is when a caravanserai is dedicated by way of wakf for faqirs, and it is necessary to have a servant for sweeping and cleaning the serai, and for opening and closing the door : now the mutawalli gives a room to some person for his RESIDENCE who, BY WAY OF HIRE, is to do this work, and devote himself to it : this is valid. This is in the Zahir." [24]

(2) "When the wakf land is adjacent to the houses in a town and people are inclined to rent the houses and the income would be greater by letting out the houses than by cultivation, or planting trees, then the qayyim may validly build houses and let them out, but the reverse is the case when the land is distant from the buildings of the town, in which case he is not entitled to build houses and let them out. This is in the Fatawa Kazi Khan." [25]

503A.[1] A person not entitled in law to act as the mutawalli of wakf property, may, by taking charge of it, and purporting II. UNAUTHORIZED ADMINISTRATION OF WAQF.

[21] Bail. I. 596 (par. 1, 2) (606, par. 2, 3); *Fatawa Kazi Khan*, III. 303 ; *Re Woozatunnissa*, (1908) 36 Cal. 21 ; cf. s. 11 A. See also s. 493, com.

[22] Bail. I. 596 (*ll.* 21-23) (606-607) :—"unless it be for the benefit of the *wakf* to sustain them. But this VARIES with the CHANGE OF PLACES & TIMES." *Dalrymple* v. *Khoondkar*, [1858] S. D. A. (CAL.) 586 (perpetual lease allowed on ground that property not all *wakf*, but "HERITABLE ESTATE BURDENED WITH certain TRUSTS," (cf. s. 464 *expl.* & *n.*), but in *Shoojat Ali* v. *Zumeerooddeen*, (1866) 5 W. R. 158, held : "trustees of an endowment cannot create a valid *mirasi* (perpetual & heritable) tenure, at a fixed rent by granting a lease of any portion of a *wakf* property." See *n.* 20.

[23] Bail. I. 597 (par. 1) (607); *Mahomed Oosman* v. *Essack Saleh*, [1938] Bom. 184 (rent may take form of services : s. 503, *ill.* (1).); *Syed Zainuddin Hossien* v. *Mouluvi Mahomed Abdur Rahim*, [1933] AIR (CAL.) 102 = 36 C. W. N. 972 (LIMITATION in respect of right to reside).

[24] *Fatawa Alamgiri*, *Wakf*, Ch. v. = Bail. I. 595 (par. 4) (605-606).

[25] Bail. I. 595 (par. 1) (605, par. 2).

[1] Sect. 503 A, (cl. 1) cited & applied : *Moidin Bibi* v. *Rathnavelu Mudali*, [1927] AIR (MAD.) 69 = 51 M. L. J. 598 (*de facto mutawalli* of *wakf* entitled to sue in ejectment) ; *Niamat Ali* v. *Ali Raza*, (1914) 37, All. 86, 90 ; *Benarsi* v. *Altaf Hussain*, (1921) 63 Ind. Cas. 171 (de facto *mutawalli* of mosque) ; *Moizuddin* v. *Mohammad Ikhlaq*, (1923) 21 All. L. J. 506 (do.).

SECTION 503A.

Mutawalli "of his own wrong."

to manage it as such,[2] become a trustee de son tort,[3] and answerable as such :[4] in some cases he may be given, (subject to conditions) some of the rights of a lawful trustee, e.g. to reimburse himself or to recover expenses properly incurred out of pocket, or to maintain a suit against a tenant for rent.[5]

Thus where possession is taken of wakf property, even though the trust has not been consciously accepted, responsibility may be incurred as a constructive trustee for the due application of the property.[6]

Where provisions in wakfnama no more applicable.

504. (1) Where owing to the altered circumstances of the wakf property, or of society, or of the position of the parties,[7] the existing conditions[8] for appointing successive mutawallis or administering the wakf, are no more applicable, persons actually administering the wakf property, by the tacit consent of the beneficiaries, if they act without dishonesty and without improper dealings with the funds of the wakf property, are not responsible for mere errors of judgment in which the beneficiaries have acquiesced ; but they are answerable for moneys actually received, and for defalcations which they would have discovered but for their default or neglect.[9]

Unauthorized administrators purchasing property.

(2) It is very doubtful whether persons so administering wakf property without being legally authorized to do so, can be justified in assuming the power of purchasing property out of the wakf funds ; and when they do so, and the property falls in value, the purchase may (*semble*) be avoided.[9]

1.—Past history.
2.—Existing conditions.
3.—Founder's wishes.

The past history of a wakf, and the way in which its management has been

[2] Or by "taking on himself to act as trustee (*per* Lord Cottenham, L. C.) *Rackham v. Siddal*, (1849) 7 M. G. 607, 521, cited in *Jugal Kishore* v. *Lakshman Das*, (1899) 23 Bom. 659. See also s. 504.

[3] *Mohammedally* v. *Akbaralli*, (1933) 36 Bom. L. R. 386, 388 (P. C.) = 38 C. W. N. 452 (appointed *mutawalli*, & trustees de son tort, contrasted : Sir L. Sanderson).

[4] *Budree Das Mukim* v. *Chooni Lal Johurry*, (1906) 33 Cal. 789, 806 ; cf. Godefroi, *Trusts*, 2nd ed., 30 ; s. 230(3) (*de facto* guardian).

[5] *Moideen Bibi Ammal* v. *Riathnavelu*, [1927] AIR (MAD.) 69 = 51 M. L. J. 598 ; *Akbar S.* v. *Soran B. Saiba*, (1913) 38 Mad. 260 ; *Debendranath Mitra* v. *Sheik Sifatulla*, (1926) 31 C. W. N. (may right to be *mutawalli* become indefeasible after 6 years ?—Ind. Limit. Act, art. 120).

[6] *Manohar Ganesh Tambekar*, v. *Lakshmiram Govindram*, (1887) 12 Bom. 247, 265 (per West, J.).

[7] *Adv.-Gen.* v. *Abdul Kadar Jiteker*, (1894) 18 Bom. 401 = JUMA MASJID CASE (*Kazi* of Bom. to be *nazir* : & office of *Kazi* of Bom. abolished).

[8] I.e. they may be either conditions laid down in original dedication or such as Court may have laid down in general jurisdiction under scheme or otherwise.

[9] *Adv.-Gen.* v. *Abdul Kadir Jitaker*, (1894) 18 Bom. 401 : see ss. 284 A, 503 A ; cf. *Abdul Khalek* v. *Poran B.*, (1876) 25 W. R. 542 ; *Mahomed Ismail Ariff* v. *Ahmed M. D.*, (1916) 43 I. A. 127 = 43 Cal. 1085, 1101.

carried on heretofore, in conjunction with other existing conditions that may have grown up since its foundation, will be borne in mind in appointing new mutawallis or settling a scheme for the management of the wakf.[10] SECTION 504.

" The mutawalli is the procurator of the donor which (sic) in this case was the sovereign, and it appears by Regulation XIX. of 1810 that it is the duty of every government to provide, that the endowments for pious and beneficial purposes be applied according to their real intention : the local agents are appointed to ascertain and report the names of trustees, managers and superintendents whether under the designation of mutawalli or any other, and all vacancies and to recommend fit persons when the nomination devolves on the Government. ... The plaintiff, therefore, upon his appointment as mutawalli became the authorized agent of the government for the performance of the acknowledged duty of the government to protect the endowment from misapplication ; or, as it is said in the opinion of the Muhammadan lawyers, ' The endower and the mutawalli are one and the same.' The endowment in this case was a perpetual endowment and the duty of the government to preserve its application to the right use was a public and perpetual duty." [11]

Duty of government to protect endowments.

III. GENERAL DISCIPLINARY JURISDICTION OF COURT.

505. The Court may order the mutawalli to give effect as far as possible to the expressed wishes of the wakif.[11] With respect to the management of public, religious or charitable trusts, e.g. mosques, the Kazi's (Civil Court's) discretion is very wide.[10] A mutawalli may (*a*) be deprived of his remuneration if he has been guilty of malversation in the discharge of his duties, (but not otherwise),[12] or (*b*) be ordered (when guilty of waste) to file, at stated intervals, complete accounts of his income, expenditure, and dealings with the wakf property,[13] or (*c*) where by availing himself of his character or position as mutawalli, he gains for himself any pecuniary

[10] *Mahomed Ismail Ariff* v. *Ahmed Moolla D.*, (1916) 43 I. A. 127 = 43 Cal. 1085, 1101, noted also s. 519 D, com. (distinction between PUBLIC & PRIVATE TRUST : see s. 519 B, p. 651, *n.* 13); (i) in *wakf* for specific individuals *Kazi* (or Civil Court) has to give effect so far as possible to expressed wishes of *wakif* ; (ii) with respect however to public religious or charitable trusts, e.g. public mosque, KAZI'S DISCRETION VERY WIDE, he may not depart from rule fixed by founder as to objects, but MANAGEMENT is governed by circumstances : complete discretion : primary duty : interests of general body of public : if RULES OF MANAGEMENT not practicable or not in best interests of institution JUDICIAL DISCRETION TO VARY them) followed *Mahomedally* v. *Akbarally*, (1933) 36 Bom. L. R. 388 (P. C.): see on scheme settled in this case : *Akbarally* v. *Mahomedally*, (1931) 57 Bom. 551.

[11] *Jewun Doss Sahoo* v. *Shah Kubeerooddeen*, (1841) 2 Moo. I. A. 390, 422, 423 (per Bosanquet, J.); cf. *Balkrishna* v. *Vinayak*, (1931) 34 Bom. L. R. 113 (duty of trustee to minister to will of author of trust).

[12] Bail. I. 598 (608-609).

[13] *Imdad H.* v. *Md. Ali K.*, (1874) 23 W. R. 150 (e.g. every 6 months); *Adv.-Gen.* v. *Yusufalli*, (1920) 24 Bom. L. R. 1060, 1090, 1102 (noted s. 10(5A), p. 64, *n.* 30) (Daudi Bohra Mullaji *not* UNACCOUNTABLE TRUSTEE); *Akbarally* v. *Mahomedally*, (1931) 57 Bom. 551.

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advantage, he may be made to account for it for the benefit of the wakf.[14]

Removing mutawalli.

On the jurisdiction of the Court to remove the mutawalli : see s. 519D.

§ 6.—INTERPRETATION OF WAKFNAMA.

GENERAL RULES OF CONSTRUCTION.

506. The wakf-nama or dedication must be construed in accordance with the intention of the wakif, and not the strict interpretation of any particular word.[15] Evidence of prevailing usage may be indicative of the directions of the wakif.[16] Sanads have been construed in many cases.[17]

Intention.
Usage.
Sanads.

(i) Reference to three generations implies perpetuity.

507. Unless a different intention appears, (1) where the wakfnama refers to one or two generations of the descendants of a specified person, as being beneficiaries under the wakf, the benefit is confined to the said generations ; but (2) where three generations or more are referred to, the benefit is for the descendants in perpetuity, so long as they exist.[18]

Illustration.

A wakf is made by a Hanafi in the first instance for the benefit of the wakif's child, (*a*) if the wakif has any child at the time of the dedication, the benefit goes only to the children in the first generation, and the grandchildren of the wakif are excluded in favour of the poor ; (*b*) if, however, the wakif has at the time of the dedication no child, all his children having predeceased him, then the child of a son (but not the child of a daughter) will benefit but should, thereafter, a child be born to the wakif that child will benefit to the exclusion of the grandchild ; (*c*) if there is no child in the first or second generation but there happens to be a third and fourth generation and others besides, the third generation and those below them participate together even though there should be many of them.[19]

[14] *Budree Das Mukim* v. *Chooni Lal J.*, (1896) 33 Cal. 787, 806 ; *Manohar* v. *Ganesh T.* v. *Lakhmiram Govindram*, (1887) 12 Bom. 247, 265 ; cf. Ind. Trusts Act, s. 88. See also *Mahomed Ismail Ariff* v. *Molla Dawood*, (1916) 43 I. A. 127 = 43 Cal. 1085, 1100, 1102 (P. C.) ; s. 493, com. *Re Biss, Biss* v. *B.*, [1903] 2 Ch. 40 ; *Babani* v. *Dulba*, (1931) 34 Bom. L. R. 357.

[15] *Asheerooddeen* alias *Kalla Miah* v. *Drobo Moyee*, (1876) 25 W. R. 557 ; *Adv.-Gen.* v. *Fatima Sultani B.*, (1872) 9 Bom. H. C. R. 19.

[16] See s. 491(1) *nn.*, s. 458(2) ; *Mahomed Ismail Ariff* v. *Molla Dawood*, (1916) 43 I. A. 127 = Cal. 1085, 1100, 1102 (USAGE called in aid for deciding how appointment of *mutawalli* made) ; see *Greedhari Doss* v. *Nundkissore Doss*, (1867) 11 Moo. I. A. 405, 428 (only law as to these mahants & their functions & duties in CUSTOM & PRACTICE, which to be proved by testimony) ; *Vidya Varuthi Thirta* v. *Balusami Ayyar*, (1921) 48 I. A. 302, 310, 317 (MAD.) (*per* Syed Saheb Ameer Ali : covering both Hindu & Muhammadan law) ; *Ahmad Ullah Khan* v. *Ahsan A. K.*, (1934) 33 All. L. J. 113 (e.g. PRIORITY of some items over others) ; *Bibi Akhtari B.* v. *Diljan Ali*, (1922) 28 C. W. N. 545 (P. C.) (PAT.) = (1925) AIR (P. C.) 11.

[17] *Sattappa* v. *Mahomed Saheb*, (1933) 60 Bom. 516, 529 ff. See s. 353A, com. *Maina* v. *Brijmohun*, (1890) 12 All. 587, 589.

[18] Bail. I. 571, (par. 1, *ll.* 2-6) (580) ; *Bikani Mia* v. *Shuk Lal Poddar*, (1892) 116, 142, 143, citing *Khazanatul-Muftiin*, (1339) ; Macn. *Prin. & Prec.*, 332, 342 ; *Fatawa Durrul Mukhtar*, (1660).

[19] Bail. I. 570 (par. 2) (581) ; s. 51(1), but see s. 5c.

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(ii) Proximity of relationship how reckoned.

508.[20] In construing a dedication for the nearest relatives of a named person, unless a different intention appears, those included below in the earlier of the groups (*a*) to (*g*), or (*a*) to (*c*), respectively, as the case may be, exclude those included in the later groups :

Hanafi law.

(1) Under Hanafi law[21]—(*a*) sons and daughters ; (*b*) parents ; (*c*) grandchildren ; (*d*) grandparents ; (*e*) great-grandchildren ; (*f*) great-grandparents, [and in the same order] ;[22] (*g*) brothers and sisters.[21]

Shia law.

(2) Under Shia law[23]—(*a*) descendants howsoever low together with the father and mother ; (*b*) grandparents, and brothers (and sisters ?)[22] together with the descendants of the brothers (and sisters ?)[22] howsoever low ; (*c*) paternal and maternal uncles (and aunts ?)[22] in the order of inheritance.

(iii) Feminine when included in masculine.

509. *Semble,* unless the contrary is indicated, the masculine gender used collectively in a dedication, includes females ; but if there are none of the male sex, the benefit reverts to the poor.[24]

Illustrations.

(1) Under a dedication by a Hanafi for the sons of a person collectively, his daughters share the income equally with the sons, so long as any sons are surviving ; but if there are no sons surviving, then the daughters take no benefit,[25] and the whole of the income is for the benefit of poor persons.[26]

(2) Under a dedication for the benefit of A's sons—(*a*) if A has 2 or more sons they take the benefit equally ;[26] (*b*) if A has only one son, he takes 1/2 of the benefit and the other 1/2 is given to the poor ; (*c*) if A has sons and daughters, they all take equally ;[27] (*d*) if A has no sons, but daughters, the whole benefit is for the poor.[27]

(3) Under a wakf for the benefit of A's brothers, if A has brothers and sisters, they all take.[27]

(iv) Terms of description when applicable.

510. Unless a different intention appears in the dedication, if the quality or description by which the beneficiaries are

[20] Sect. 508 cited & applied : *Syed Mahomed Ghouse* v. *Sayabiran Saib,* (1934) 68 M. L. J. 684, 688.

[21] Bail. I. 577 (589). See s. 5c.

[22] Not expressly stated. Bail. I. 577 (587) nor II. 217. See *Bibi Akhtari B.* v. *Diljan Ali,* [1923] AIR (P. C.) 11 = 28 Cal. W. N. 545 (PAT.)

[23] Bail. II. 217 (par. 4). See s. 5c. Shia law does not give any priority to males or agnates over females or cognates in inheritance & presumably in construction of *wakf* same course.

[24] See s. 509, *ill.;* but see s. 5c.

[25] Bail. 572 (par 2) (581-582); cf. Bail. II. 217 (par. 4).

[26] See s. 469(4) : s. 5c.

[27] Bail. I. 572 (581-582) : s. 5c.

SECTION 510. referred to or identified, (*a*) is of a permanent nature,[28] or such as cannot be acquired again after it has once been lost or ceased to be applicable,[28] then those persons alone are included who, at the time when the dedication was made, could be identified or described in the manner referred to ; but (*b*) if the quality or description may be lost or cease to be applicable, and thereafter can again be acquired or become applicable,[29] then all persons are included who can be referred to or identified in the said manner when the produce or income accrues.

Illustrations. (1) A says : my land is sadaqa (i) on my blind or one-eyed children ; or (ii) on my minor children ; or (iii) on my male children and on the children of my male children :—then those children are alone entitled who were in existence at the time of the dedication, answering to the description because s. 510(*a*) is applicable ; the quality or description in (i) and (ii) being of a permanent nature ; and (ii) being of such a kind that after it is lost it cannot again be acquired.[30]

(2) A says : my land is dedicate by way of wakf for my children (i) living in Basrah ; or (ii) professing Islam ; or (iii) who are married ; or (iv) who are poor :—then all those who at the time when the income or produce accrues, answer the said description are entitled irrespectively of their having done so or not at the time of the dedication.[31]

(v) WORDS "Child."

511. In construing a dedication[1] (unless a different intention appears),

(*a*) existing at dedication.

(*b*) of known paternity.

(*c*) not grandchildren.

(*d*) *Exceptions.*

(1) "Child of the wakif" (*a*) refers both to children in existence at the time of dedication, and after born children ;[2] (*b*) children whose paternity is not known to be in the wakif, but established in him merely by acknowledgment, are not included ;[3] (*c*) nor are grandchildren and remoter descendants ; provided that (*d*) where there is no child living at the time of the dedication, but the child of a son[4] [or other agnatic

[28] Bail. I. 569 (578); e.g. blindness, or belonging to particular sex.

[29] *Ib.* e.g. residence in a specified town. [30] Bail. I. 569 (578).

[31] Bail. I. 569 (578), 570 (579). Following instances also given—(*a*) "those who have become poor among my children," = (Imam Muhammad, *diss.*) all who are poor at time benefit accrues ; (*b*) "all who are in need of my children" = same. But see ss. 469-474, 480, 481, 485-488, also ss. 5C, 11A.

[1] See com. & s. 5C.

[2] Bail. I. 568 (*ll.* 1-4), (577). "NEAREST MALE HEIR" in *sanad* includes only male agnates : *Abdul Latif* v. *Abadi Begam*, (1934) 61 I. A. 322 (OU.); *Ashraf Bibi* v. *Muhammad Abdul Raoof*, (1927) 50 All. 404 (daughters & sisters though (Koranic) sharers, are not *nearer* than sons & brothers).

[3] Bail. I. 568 (par. 2) (577).

[4] Bail. I. 570, (par. 2) (579); 571, (par. 2) (580). See s. 507, *ill.* Child of daughter not included in "child," says *Zahir Riwayat* ; & "this is correct" : Bail. I. 571 (580-581); *Hya-on-nissa* v. *Mofukkir-ol-Islam*, (1805) 1 S. D. A. (CAL.) 106.

descendant] is living, (i) such child or descendant, but no person in a lower generation, is included ;[4] (ii) thereafter if a child is born to the wakif then such later born child is included ; (*e*) where there is no descendant in the first and second generation, all those who are in the third or any lower generation, are included together in the description of "child."[4] The same rules with the necessary modifications apply to the construction of the expression "the child" of any named or specified person. SECTION 511. (*e*) after third generation all take simultaneously.

(1A) 'Aulad' includes males as well as females (but not the descendants of females) ;[5] 'Aulad.'

(2) 'Ahfad' is of the largest and most general signification, including the descendants of females as well as males ;[6] 'Ahfad.'

(3) 'Aulad dar aulad,' or 'warisan' (sing. 'wasir')[7] does not under Hanafi law includes the sons of a daughter ; they are included under Shia law under the term 'waris' ;[8] 'Aulad' 'waris.'

(3A) 'Aulad' and 'khandan' prima facie include only legitimate offspring, though there may be some cases in which 'aulad' includes illegitimate children ;[9] 'Khandan.'

(4) 'Nasab' and its inflections refer only to agnatic descendants ;[10] 'Nasab.'

(5) 'Nasl' and 'zariat' include and refer to all descendants, male or female, near or remote,[11] and whether born at the time of the dedication or thereafter ;[12] 'Nasl,' 'zariat.'

(5A) 'Naslan baad naslin' and 'batnan baad batnin' (subject to surrounding circumstances and context) ordinarily confer absolute interests ;[13] 'Nasl' : 'batn' : 'baad.'

Every thing said of the words "my child," applicable to "child of such an one." (Bail. I. 570 (579)) : see s. 467, *n.* 17, p. 612.

5 Bail. I. 568 (par. 2) (577).

6 (*Shekh*) *Karimodin* v. (*Nawab*) *Mir Sayad Alam Khan,* (1889) 10 Bom. 119.

7 *Abdul Ganne Kasam* v. *Hussen Miya Rahimtulla,* (1872) 10 Bom. H. C. R. 7.

8 *Bibi Akhtari B.* v. *Diljan Ali,* [1925] AIR (P. C.) 11 (PAT.).

9 *Bhaiya Sher B.* v. *Bhaiya Ganga Buksh S.,* (1913) 41 I. A. 1 (OU.).

10 Bail. II. 221.

11 Bail. I. 572 (par. 4) (582 par. 3); cf. Bail. I. 601 (612); II. 217 (par. 4).

12 Bail. I. 573 (582).

13 Final inflections often omitted so as to shorten into : *nasl baad nasl, batn baad batn. Chaudhry Ahmad Azim* v. *Chaudhry Safi Jan,* (1926) 2 Luck. 335, 337 ; *Syed Mahomed Ghouse* v. *Sayabiran Saib,* (1934) 68 M. L. J. 684 ; *Saadat Kamel* v. *Att.-Gen.* (PAL.) [1939] A. C. 508, [1939] AIR (P. C.) 185, 189 (*butnun baad butn* = "from generation to generation" : this phrase has intention & effect of preventing nearer & more remote descendants from being treated alike : the nearer & more remote are alike, unless the appropriator says in making the *wakf* "the nearer is nearer," or says

SECTION 511. 'Qarabat.'

(6) 'Qarabat,' (Abu Yusuf and Imam Muhammad hold) includes every one related to a person through a common ancestor up to the furthest back in Islam, either on the father's or mother's side, whether within the prohibited degrees or not : and the near and remote are alike in this respect whether the word be in the singular or the plural.[14] The context may show that the expression qarabat is not intended to be restricted to relations by blood but to include [all blood relations, and [11]] relations by affinity.[15]

Yatim.

(7) 'Yatim' (orphan) means an infant child who has not attained puberty,[16] and has no father living, though the mother and |or grandfather may be alive.[16]

Illustrations.

(1) If the dedication provides : "This my land is settled on my children," then so long as there are any children of the wakif, they, or he, or she, are/is entitled to the entire benefit ; after all the children are dead, the children of his sons are entitled ; after the grandchildren are exhausted, those in the third

" on my child & then after him or them on the child of my child," or says " generation after generation " (*butnun baad| butn*), when a beginning must be made with them with whom the appropriator has begun." Bail. I. 571 (580).).

[14] Bail. I. 576-577 (586-587). *Niamat Ali* v. *Ashiq Ali*, [1922] AIR (OU.) 96 (*qarib* in *wajibu'larz* interpreted in widest sense, as meaning near in degree, not restricted to mean near in degree through male line) ; Abu Hanifa interprets *qarabat* differently when used in singular. Some other details also given : but see s. 5c.

[15] *Adv.-Gen.* v. *Fatima Sultani B.*, (1872) 9 Bom. H. C. R. 19 : *akriba* (scil. *aqriba*), derivative from same stem word as *qarabat* does not include widow. It was apparently assumed that all relations by blood were included in term : hence| words in [ ] above.

[16] Ameer Ali, I. 285 (par. 5)) (376). WORDS EXPLAINED IN *Syed Shah Muhammad Kazim* v. *Syed Ali Saghir*, (1931) 11 Pat. 288-365 ; *Mahomed Akhtar* v. *Ramzan Khan*, (1907) 34 Cal. 587 ; *Sabitri Thakurani* v. *Savi*, (1921) 25 C. W. N. 557 (P. C.) ; *Muhammad Raza* v. *Yadgar Hussain*, (1924) 51 I. A. 192 ; *Haji Ali Muhammad* v. *Anjuman-i-Islamia*, (1931) 12 Lah. 590 ; *Saiyad Maher Huscin* v. *Haji Alimahomed*, (1933) 36 Bom. L. R. 526 ; *Syed Ahmad* v. *Hafiz Zahid*, [1934] AIR (ALL.) 732 : *Abad* (= perpetual) 11 Pat. 324 ; *ba-farzandan* (= generation after generation) 11 Pat. 324 ; *bafazl Maula Karim* (= by grace of the Master, the Benefactor) 11 Pat. 315 ; *chabutra*, [1934] AIR (ALL.) 732 ; *chela* = disciple, 12 Lah. 595 ; *chellagah* (= place where saint used to retire in seclusion) 12 Lah. 595 ; *darwesh* (= religious ascetic) 12 Lah. 595 ; *ghaffar* (= forgiver) 11 Pat. 315 ; *hoowal qadir* (= He is the powerful) 11 Pat. 316 ; *ibadatkhana*, 36 Bom. L. R. 534 ; *ism-e-zat* (= name of the person of God) 11 Pat. 315 ; *Khadim* (= servant ; peculiar relation between spiritual teacher & disciple) 12 Lah. 590, 594 ; *madad-e-maash*, 11 Pat. 321 ; 34 Cal. 587 ; 25 C. W. N. 557 (P. C.) ; 51 I. A. 192 (= grant of means of subsistence in general ; also assignment of revenue for support of learned or religious Muslims or for benevolent institutions by government (Wilson, *Gloss.*) *Madad* = help ; *maash*, place or means of living) ; *maktah*, [1934] AIR (ALL.) 732 ; *malik* (= proprietor) 11 Pat. 327 ; *Maula Karim* (= Master the Benefactor) 11 Pat. 315 ; *milk* (= property, ownership of the substance of the thing) 11 Pat. 341 ; *Mujawar* (= servant of the shrine) 61 I. A. 53 ; *mokhtar, mukhtar* (= one having power) 11 Pat. 327 ; *mukhtar-kar* (= manager) 11 Pat. 330-1 ; *naql* (= copy) 11 Pat. 315 ; *naubat* (= turn) 11 Pat. 320 ; *naubat nawaz* (= drum beater) 11 Pat. 320, 323 ; *nawaz* (= one who plays on a musical instrument) 11 Pat. 320 ; *sadabarat* (= daily alms) 11 Pat. 328 ; *sahan dargah*, [1934] AIR (ALL.) 732 ; *silsila* (= (spiritual)' line) 11 Pat. 319.

and remoter generations all take, the nearer and the more remote sharing alike.[17] SECTION 511.

(2) Under a dedication providing, "I have settled it on my children," if the wakif has only one child surviving at the time when the produce accrues, then 1/2 of it will be for the child and 1/2 for the poor. (If it were "for my child" the surviving child would have taken the whole).[18]

(3) Under a dedication providing, "Sadaqa on my two children, S and *D*, and when they fail, then upon the children of both, for ever so long as there are descendants," then if S dies, leaving two children SS and S*D*, (who are grandchildren of the wakif),—then *D* takes 1/2 of the produce, and the other 1/2 goes to the poor, and the children of S the deceased child (viz. SS and S*D*) do not get anything so long as *D* survives. After *D*'s death, the whole of the produce is to be expended upon (*a*) SS, (*b*) S*D*, (*c*) their children, (*d*) the children of *D* and (*e*) the children of *D*'s children.[19]

(4) A dedication "For A's child, and on A's 'nasl,'" is valid : all A's descendants, will take under it, whether male or female, near or remote, agnates or cognates, and born at the time of the dedication or thereafter.[20]

(5) Under a dedication to A's "children in being, and the children of their children,"—A's children and great-grandchildren will take, but not his grandchildren.[20]

Sects. 511-513 must be applied with caution to deeds of our times, which are not expressed in the language and phraseology contemplated by the ancient texts : see s. 5c. But, with caution, they may be of application also in the case of ancient grants, or inams by the Moghul Emperors (the construction of which is occasionally the subject of litigation : s. 353 A) or *semble* in the interpretation of rules or provisions, relating to succession to the office of mutawalli.

512. Unless a different intention appears,[21]—

(1) The objects or beneficiaries referred to in a dedication, benefit equally and concurrently (or simultaneously).[22] (vi) DISTRIBUTION AMONGST BENEFICIARIES :

[17] Bail. I. 571, (par. 2) (581). [18] Bail. I. 571 (580-581).

[19] Bail. I. 571-572 (580-582). Note in *ill.* (3): I. as *wakfnama* mentions two beneficiaries by name, they are each to have 1/2 of produce & no right of survivorship : s. 512(2); II. children of both S & *D* take simultaneously—only on failure of both,—so that between death of S & of *D*, children of S do not take anything ; III. share of S while *D* survives him given to poor & does not accrue to *D*.

[20] Bail. I. 573 (582-583). See, however, s. 5c.

[21] As in *Ahmad Ullah* v. *Ahsan Ali*, [1935] 33 All. L. J. 113 (items classified into groups with priorities).

[22] Bail. I. 570-573 (579-583); *Minhaj*, 231 (Bk. 23, s. 2); (*Muthkana Ana*) *Ramanadham* v. *Vada Levvai*, (1909) 34 Mad. 12, 17 (last 7 lines), [affmd. (1917) 44 I. A. 21 = 40 Mad. 116]; s 459, *ill.* (1)(*c*); s. 512, com.; Bail. I. 574 (*ll.* 3-4 from bottom) (584); 572 (*ll.* 13, 14, 24-27) (581 582); 573 (*ll.* 5-7) (582-583). See also s. 470. Rule of EQUAL DIVISION prevails also in England, on ground that EQUALITY IS EQUITY ; e.g. where trusts were (*a*) in favour of A's relations, & (*b*) for such charitable uses & purposes as trustees should think most proper & convenient, Sir J. Jekyll, M. R., directed that (*a*) 1/2 should go to A's relations ; (*b*) 1/2 to charitable uses ; (*c*) trust in favour of A's relations purporting to be for such of them as were most deserving, & in such manner as trustees should think fit, all were directed to

SECTION 512.

equally : concurrently.

(2) Beneficiaries consisting of classes of persons individually identified, are entitled equally amongst themselves, and the share of one who dies, goes to the poor, and the remainder to the survivors.[23]

Share of one of class accrues to rest.

(2A) Where the beneficiaries consist of a class of persons some of whom may be poor and others rich, the benefit must *semble,* be applied for the poor alone out of the said class.[24]

Benefit taken per capita males and females alike.

(3) The benefit of a wakf for a person's "sons and his children, and the children of his children for ever so long as there are descendants,"[25] is taken per capita, males and females being on the same footing, and the children of daughters being included.[26]

Share of deceased when lapses to poor.

(4) Under a dedication for the children of a named person, and in default of them, for the poor, if some of the children die, the survivors take the entire benefit ; provided that where the children are individually identified in the dedication, the share of each child lapses on his death in favour of the poor.[27]

(5) Where under the dedication the beneficiaries take specified shares consisting of fractions of the total income of the wakf property—

Abatement ('aul').

(*a*) if the said fractions added together amount to more than unity, the share of each beneficiary abates proportionately ;[28]

"Return" of residue.

(*b*) the residue (if any) left after giving to the beneficiaries their specified shares, is divided amongst all of them in equal shares[29] [*semble,* this is subject to s. 471, and to there being the indication of an intention to give the whole income to the said beneficiaries.[30]]

come in without distinction : *Doyley* v. *Att.-Gen.*, (1735) 2 Eq. Ca. Ab. 195 = 4 Vin. Ab., 485 pl. 16 ; cf. *Re Douglas, Obert* v. *Barrow,* (1887) 35 Ch. D. 473, 485 ("Take a gift to A., B., C., .. " *ll.* 22 ff.). See also Trans. Prop. Act, s. 45.

[23] Bail. I. 599 (par. 2) (599-600), 600 (par. 2) (610-611). Sect. 512(2) & (3) are particular instances of the general rule in s. 512(1).

[24] Bail. I. 566 (575); see s. 488. [25] See s. 480(2).

[26] Bail. I. 572 (584) (par. 3) (581-582); II. 217 (par. 4).

[27] Bail. I. 574 (par. 2 (584), cf. Bail. I. 600 (par. 2) (600-601); s. 517, I have retained "poor" as reversioners : though any other object may take their place as ultimate charity : see s. 469, com.

[28] Bail I. 599 (609-610) as by *increase* (= *aul*) in succession, referring to increase of common denominator ; cf. ss. 605(17), 610.

[29] Bail. I. 599 (*ll.* 30-33) (610); 600 (*ll.* 8-11) (610). Compare *return* taken by *Koranic* sharers in inheritance : s. 625.

[30] This is not expressly stated.

(6) If the income from the wakf property decreases, all the expenses provided for in the dedication abate proportionately, unless there is something to indicate a different intention.[21] SECTION 512. Proportionate abatement.

Illustrations.

(1) Where the beneficiaries under a wakf are children of a named person, both males and females take in equal shares.[31]

(2) Under a dedication for the benefit of X's "children," if only one child survives then 1/2 of the benefit will be for the said child, and the other 1/2 will be given to the poor.[32]

(3) Under a dedication for Abdulla and Zaid, they benefit equally; after the death of one of them, half of the benefit, and when both die, the whole of it, goes to the poor.[33]

(4) Under a wakf for the child of Abdulla, without mention of number, so long as any child of Abdulla lives, he takes the whole income.[34]

(5) The wakf-nama provides,

(*a*) that 1/2 of the income should be given to A, and 2/3 to B; then A takes 3/7 and B 4/7;[35]

(*b*) that 1/2 should be given to A, and 1/3 to B; then the 1/6 residue should be divided equally between them;[22]

(*c*) that it should be given to A and B, and that 100 dirhams or 1/3 should be given to A; then B takes the residue after giving 100 dirhams or 1/3 to A.[35]

513. Unless a different intention appears (1) the interest of a beneficiary under a wakf lapses on his death, and accrues to the poor [or the other ultimate charitable object of the wakf];[1] (2) under a dedication providing expressly or impliedly that the descendants shall succeed to the interests of their ancestors, the descendants succeed per stripes and not per capita,[2] males and females taking equal shares; but (3) *semble,* if it is provided that certain interests shall devolve upon relatives other than the descendants of the prior beneficiaries, then ss. 508-512 apply with the necessary modifications. (vii) DEVOLUTION OF RIGHTS. Distribution per stripes.

Illustrations.

(1) W dedicates in favour of "B, and his offspring, GENERATION AFTER

31 Bail. I. 570 (par. 2) (579); II. 217 (par. 4) 220 (*third appendage*).

32 Bail. I. 569-570 (578-579); cf. ss. 469-474.

33 Bail. I. 599 (609-610).

34 Bail. I. 599 (par. 2) (609-610). But see s. 5c.

35 Bail. I. 599 (*ll.* 30-33) (610); 600 (*ll.* 8-11) (610).

1 See ss. 511, 511A, *ill.* & *nn.*

2 *Saadat Kamel* v. *Att.-Gen.*, (PALESTINE), [1939] AIR (P. C.) 185, 189. Macn. 341, case 8, Q. 2: Ameer Ali, I. 270-271 (361) citing *Raddul Muhtar*, III. 672, *Majmaa-ul-Anhar*, Part. II. 641.

3 Macn. 342; Bail. I. 570 (579).

SECTION 513. GENERATION ;" (*a*) B has a son, and a daughter. They will, after the death of B, benefit equally ; (*b*) on the death of B's son, his children, if any, will take 1/2 of the benefit in equal shares ; (*c*) then if the son of B's son dies (whether he predeceases B's son, or survives him), the children of B's son's son will take the share to which B's son's son was entitled ; (*d*) if the descendants of B's son or daughter become extinct, then his or her original share lapses to the descendants of the other (as the description " offspring of B " is general and not specific).[4]

(2) A dedication provides for the wakif's " lineal descendants." He has 10 lineal descendants at the time of the dedication. So long as these live, they will each be entitled to an equal share. But if 4 of them die childless, and 2 (viz. A and B) die, leaving children, then the children of A and B will respectively take an equal share with the 4 surviving lineal descendants, i.e., the said 4 will each take 1/6 of the benefit, and the children of A 1/6, and the children of B 1/6, i.e. all the 6 lines will benefit equally per stripes.[5]

§ 7.—SPECIAL RULES RELATING TO MASJIDS.

I. WAKF FOR MOSQUE COMPLETED BY (Hanafi law). (i) division, (ii) providing way.

514.[6] (1) Under Hanafi law erecting or specifying a building for dedication as a masjid,[7] does not complete and effectuate the dedication of the land and building, nor cause the private ownership therein to cease until the owner divides them off from the rest of his property, provides a way to go to the masjid, and either permits public prayers to be said therein, or delivers possession of it to a mutawalli, or to the judge, or his deputy.[8]

[4] Macn. 341, case 8, Q. 2.

[5] See *n.* 2. Macn. 341, case 8, Q. 2. It makes no difference whether or not the descendants belong to same generation : not even whether some of the 10 are children of rest. Description—" his lineal descendants," includes the 10 persons alive at time : " descendants " includes sons as well as grandsons : s. 510 ; these 10 persons take equally : s. 511(1); as the descendants are not individually identified, shares of deceased beneficiaries do not lapse, but accrue to survivors of the 10 descendants. This conclusion based (i) on fact that the *wakf* is in favour of his " descendants," which indicates (ii) that provision is not limited to A, B, & others, individually : s. 512(1), but that (iii) it is to devolve on descendants of A, B, & the others ; hence on death of any of the 10, benefit neither lapses to ultimate object of *wakf*, nor goes to survivors of the 10, but (iv) devolves on heirs of deceased beneficiary : see s. 511, *ill.* (3), *n.*

[6] Sect. 514 cited & applied : *Saiyed Maher Husein* v. *Haji Ali Mahomed*, (1933) 36 Bom. L. R. 526, 536.

[7] Mosques & the tombs of Muslims are, of course, governed by Muhammadan law : *Adv.-Gen.* v. *Yusufalli*, (1921) 24 Bom. L. R. 1060, 1077 ; *Akbarally* v. *Mohamedally*, (1932) 57 Bom. 551.

[8] Hed. 239, Bail. I. 604, 605 (par. 2, 3) (615, 616); *Yakoob Ali* v. *Luchmun Doss*, (1874) 6 N. W. 80 (two conditions essentially requisite : (*a*) site must be publicly appropriated, (*b*) public prayer said); *Adam Sheik* v. *Isha Sheik*, (1894) 1 C. W. N. 76 (mosque becomes consecrated by delivery to *mutawalli*, or declaration, or on performance of prayers) ; *Saiyad Maher Husein* v. *Haji Alimahomed*, (1933) 36 Bom. L. R. 526, 534 (appointment of *muezzin* or *mouluvi* &c. not necessary) ; *Akbarally* v. *Mahomedally*, (1931) 57 Bom. 551, 567 (do.); *Debendranath Sadhu Khan* v. *Nohar mal Jalan*, (1929) 34 C. W. N. 498 ; *Miru* v. *Ramgopal*, [1935] A. L. J. 1269 (*Katcha* structure as mosque, cf. *n.* 12 ; 57 Bom. 551, 567).

SECTION 514. (Shia law.)

(2) Under Shia law the dedication of a masjid is completed and effectuated by the wakif making a formal dedication, and permitting prayers to be said therein.[9]

Illustrations.

(1) W purports to build a masjid within his house, or boundaries, and permits the public to enter there and say their prayers. Then it becomes a masjid according to the opinion of all, provided that he gives the public a right of way. But according to Abu Hanifa, not otherwise. According to the two disciples [10] and the Shia law, dedication is complete even without the right of way (provided that under Shia law, a formal dedication is made).[11]

(2) W, a Hanafi, purports to build a masjid, and there is a basement underneath it, or a dwelling place on the floor above. Then (though there is an entrance to it from the highway) it does not validly become a masjid. But if the basement were dedicated to the use of the masjid, it would be valid, as in the case of the masjid at Jerusalem : the reason being that the masjid in the first instance is not divided off. That objection would not apply under Shia law, provided that a formal dedication were made.[11]

(3) A man has an open space of building ground, and gives permission to a body of persons to say prayers there publicly ; and the permission is without any condition, and for ever, without restriction of a time limit, then the masjid is consecrated, and the property cannot form part of his estate on his death.[12]

Requisites for dedicating mosque.

Under Hanafi law "separation is necessary, [for completing the wakf of a masjid] because without that the masjid is not made special to Almighty God ; and prayer is necessary, because delivery is requisite according to Abu Hanifa and Muhammad." [8] On the other hand, under Shia law : "If one should appropriate" (i.e. dedicate) "a masjid or place of worship, it is valid, though only one person should pray in it. . . . ; but without the formal words of wakf being pronounced," it would not "pass out of the property of the original owner." [13]

Acts of ownership as evidence of possession :

Delivery of possession may be evidenced by the fact that the subject of the wakf is put to the use of its objects ; just as in the case of a gift, delivery of possession is proved by acts of ownership exercised on the subject by the donee : s. 404. It has also been pointed out in the definition of possession (s. 382A, com.), that possession represents the relation between a person and a thing, the particular aspect of the relation to be considered having reference to the ability to exercise exclusive control over the thing. Hence delivery of possession must in each case depend upon the nature of the thing. For

[9] Bail. II. 220 (par. 1) see com.

[10] *Fatawa Alamgiri, Wakf,* ch. xi. in it. Bail. I. 604 (615); Hed. 239 (col. ii).

[11] Bail. II. 220 (par. 1).

[12] *Fatawa Alamgiri, Wakf,* ch. xi.; Bail. I. 605 (par. 4) (616) ; II. 220 (par. 1). *Akbarally* v. *Mahomedally,* (1931) 57 Bom. 551, 567 (*masjid* is locative of *sijda*. *sijda* = adoration, inclination (in prayer) or prostration, forehead touching ground ; *masjid* = place for making *sijda* or place where prostration in prayer may be made : no structure or building necessarily connoted in expression *masjid*).

[13] Bail. II. 219-220.

SECTION 514. offering prayers.

example, delivery in the case of a cemetery, is the burial of a person, and of a masjid, that people should pray there in jamaat. In the case of a mosque where there is no express dedication it is necessary that prayers should have been offered with the azan or iqamat.[14]

II. WAKIF MAY NOT PARTICIPATE IN BENEFIT WITH MOSQUE.

515.[15] The wakif cannot validly reserve any benefit to himself under a dedication for a mosque. A wakf with any such reservation is void.[16]

This is in accordance with all the schools of law. For Abu Yusuf's exposition of the Hanafi law alone permits the wakif to reserve any benefit to himself in a wakf of any kind whatsoever. But even according to Abu Yusuf, where a mosque is the object of the wakf the wakif cannot be a beneficiary.

III. POWER OF REVOCATION IN DEDICATION OF MOSQUE INVALID.

515A. A wakf for a masjid on the condition that the wakif shall have an option to revoke the dedication is valid and operative, but the option is void.[17]

IV. CAN MOSQUE BE RESERVED FOR SECT OR LOCALITY ?

516. Where a masjid is consecrated, and it is purported to be reserved for the people of a particular locality,[18] the Fatawa Alamgiri pronounces the reservation to be void under Hanafi law ; and that persons not belonging to that locality [18] are entitled to worship in it.[19] Decisions have been given by the Courts [20] that a masjid cannot be dedicated with an effective reservation for a particular sect or class of people.[20] Under Shafii law a masjid may be dedicated with a reservation that it shall be specially destined to a particular rite.[21]

[14] *Raddul Muhtar* III. 572 ; *Fatawa Kazi Khan*, 296, Ameer Ali, I. 305 (395). See ss. 381A, 404.

[15] Sect. 515 cited & applied : *Muhammad Shafi* v. *Muhammad Abdul Aziz*, (1926) 49 All. 391, 393, 395.

[16] Bail. I. 606 (*l.* 10) (617). It is not quite clear whether reservation alone void, or entire dedication. The translator does not seem to be responsible for ambiguity : *Tafazzal B.* v. *Majid Ullah*, (1923) 5 Lah. 59 (*wakf* for support & maintenance of mosque : *wakif mutawalli* : monthly payment of Rs. 2 to daughter : valid).

[17] Bail. I. 557 (*ll.* 5-9) (565); see s. 466.

[18] Note (1) that *Fatawa Alamgiri* is Hanafi text binding only Hanafis ; (2) the reservation mentioned has regard to peoples of particular localities, not of particular schools. But in *Maula Bakhsh* v. *Amiruddin*, (1919) 1 Lah. 317 (mosque dedicated for use of members of *Ahl-i-quran* held to be open to all Muslims); *Jivan Khan* v. *Habib*, (1933) 14 Lah. 518 (*n.* 28, (vi), (xi).).

[19] Bail. I. 606 (par. 1) (617).

[20] See cases ss. 520, *nn.*, 521, *n.* ; cf. *Kuttayan* v. *Mamanna Ravuthan*, (1912) 35 Mad. 681.

[21] *Minhaj-at-Talibin* II. 186 ; in Mr. Howard's transl. of Van den Berg's version, Bk. 23, p. 231 : "As to other conditions"—viz. other than such as makes the *wakf* depend upon a condition, e.g. 'I make *wakf* provided Zaid comes,' &c. "they should be faithfully executed, as that the property immobilized [dedicated] may not be leased, or that a mosque should be specially destined to a particular rite, such as that of Shafii. In the last case the members of the school mentioned alone have a

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Fazl Karim v. Maula Buksh 18 I. A. 59.

The Privy Council [22] have laid down that (1) the followers of each of the four Sunni schools may properly worship with each other ; (2) no text was produced to show that a follower of Abu Hanifa could do wrong in following a practice recommended by any other of the four Imams [23] (3) if the Imam (leader at prayer) introduces the loud-toned amin and the rafaidain [24] it (*a*) does not disqualify him from officiating in a mosque where these ceremonies were not previously used, nor (*b*), does it justify a section of the worshippers in setting up another leader at prayer at the same time when the prayer is being conducted by the duly authorized Imam ; (4) there is no rule of law that when public worship has been performed in a certain way for twenty years, there cannot be any variation, however slight, from that way : the question in each case of dispute must be as to the magnitude and importance of the alleged departure ; [25] (5) the Court ought not to declare that the imam or mutawalli of the masjid has authority to eject the dissentients if and when they interfere : the plaintiffs must rely on the prohibitory order which can be enforced according to law if the occasion arises.[26] (6) Edge, C. J., observed that a mosque [27] cannot be consecrated exclusively for the use of any particular sect or denomination of Sunni Muslims, that a mosque must be a mosque for all, it must be a building dedicated to God and not a building dedicated to God with a reservation that it should be used only by particular persons holding particular views of the ritual, where all Muslims are entitled to go and perform their devotions as of right, according to their conscience.[28] Mahmood, J. made similar observations.[28] These observations were referred to by the

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right of enjoyment, to exclusion of all other believers ; & this rule applies also to the foundation of a school or a hostelry," see s. 481 A : *Saklat* v. *Bella*, (1925) 53 I. A. 42.

22 *Fazl Karim* v. *Maula Buksh*, (1891) 18 I. A. 59 = 18 Cal. 448 reversing H. C.

23 *Ib.* ; cf. *Muhammad Ibrahim* v. *Gulam Ahmed*, (1864) 1 Bom. H. C. R. 236.

24 *Rafaidain* = raising arms when saying *Allah Akbar* in prayers.

25 *Semble*, this refers to authorized prayers. *Quaere*, if it affects principle of s. 516.

26 *Fazl Karim* v. *Maula Buksh*, (1891) 18 I. A. 59 (CAL.); *Akbarally* v. *Mahomedally*, (1931) 57 Bom. 551 (clause authorizing exclusion struck off from draft scheme); see also *Mohammedally* v. *Akberally*, (1933) 36 Bom. L. R. 386 (P. C.).

27 *Jangu* v. *Ahmadullah*, (1889) 13 All. 419 (F. B.) (finding that there was PUBLIC Muhammadan mosque : once distinction between PUBLIC & PRIVATE MOSQUES recognized & mosques of both kinds permitted, argument runs in circle).

28 (i) *Ata Ullah* v. *Azimullah*, (1889) 12 All. 494, 500, 505. With the ideal that mosques ought not to be dedicated with reservation for particular sect, great majority of thinking Muslims most cordially sympathize,—all those that deplore "the two & seventy jarring sects,"—& who as a protest frequently profess to belong to no one sect or school. [But so long as sects or schools exist & each has its own legal sytsem & so long as private & exclusive property in individuals or bodies is recognized, can such reservations if laid down in dedications be ignored by Courts ? If mosque is attached to school or hostel, ought not Court to accord protection (if any is needed) to those for whose use—without any narrow-minded sectarianism or bigotry or offensive exclusiveness—the mosque is even impliedly reserved ? & ought not general feeling in minds of all right-thinking persons against excluding any one who seeks in good faith to avail himself of mosque without injury to others (see s. 481A) be left to assert & to prevent narrow exclusiveness ? (ii) *Akbarally* v. *Mohammedally*, (1931) 57 Bom. 577, 566] ; (iii) *Fazl Karim* v. *Maula Buksh*, (1891) 18 I. A. 58 = 18 Cal. 448 (P. C. refer to Edge, C. J.'s observations as a ruling); (iv) cf. *Kuttayan* v. *Mamanna Ravuthan*, (1912) 35 Mad. 681 ; (v) *Jivan Khan* v. *Habib*, (1913) 14 Lah. 518 (mosque does not belong to any particular sect : for once it is built & consecrated, any RESERVATION for people of PARTICULAR

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Mosques under control of particular jamaats.

Jamaats : constitution : usage.

Privy Council, but the question involved was not decided. There are, however, religious communities—jamaats[29] is the term applied to them—possessing property, and places of worship. The Courts have to some extent recognized mosques for the exclusive use or at any rate in the exclusive management of particular jamaats.[30] It would undoubtedly be foreign to the ideas of any devout person to exclude another Muslim from entering and offering up his prayers in any place of worship. Unless when a "mood has been roused which spurns the check of salutary bands," and when the dictates of ordinary courtesy and the brotherhood of Islam are entirely forgotten, it is difficult to conceive of a situation in which a Muslim desiring in good faith to offer his prayers in any mosque according to his own rites, should receive any other treatment but a welcome invitation to do so. Moreover the Privy Council, as stated above, have pronounced against giving authority of ejecting dissentients.[30] They have expressed themselves upon the undesirability of introducing purposeless distinctions, s. 11(2). They have encouraged trustees not to exclude from the benefit of their trusts those who have no legal right to share it, if they can share to it without detriment to persons who are the direct objects of the trust : s. 481A. Yet as a matter of practice no one, who is not a member of a particular jamaat ever enters the mosque belonging to it, without being invited to do so or obtaining leave, and without conforming, within the precincts of the mosque, to the amenities observed by the members of the jamaat in possession of the mosque. These places of

LOCALITY or SECT VOID, & persons not belonging to that locality or sect entitled to worship in it whether or not any particular sect had contributed towards site or building & had been saying their prayers in it); (vi) *Syed Ahmad* v. *Hafiz Zahed*, [1934] AIR (ALL.) 232 (mosque OPEN TO ALL Muslims); (vii) (*Mt.*) *Iqbal B.* v. (*Mt.*) *Syed B.*, [1933] Lah. 80 = 34 P. L. A. 24 (all MOSQUES OPEN to members of ALL SECTS of Islam : no such thing as Sunni or Shia mosque, though majority of worshippers at any particular mosque may belong to one or other sect, either generally or at various times); (viii) *Amir Husain Shah* v. *Hafiz Ghulam Rasul*, [1936] AIR (PESH.) 65 (every Muslim may pray behind regular Imam in any mosque, but every sect not entitled to particular calls being made): following (ix) *Sifat Ali K.* v. *Syed Ali M.*, [1933] 31 All. L. J. 513 (members of Ahmadya community may enter Sunni mosque & pray with regular congregation behind recognized Imam, but not entitled to pray in separate congregation behind Imam of their own); (x) *Hakim Khalil Ahmad* v. *Malik Israf*, (1916) 2 Pat. L. J. 108; (xi) *Maula Bakhsh* v. *Amiruddin*, (1919) 1 Lah. 317 (RESERVATION for sect of dedicator, *ahl-i-quran*, held VOID : mosque held to be for use of Muslims generally): [but with great respect & with all desire to support the decision which seeks to unify Muslims in regard to mosques, unless law to which founder (*wakif*) was subject prevented him from making such reservation, how could the dedication be governed by "general Muhammadan law?" No reference made in decision to law of *wakif*. Can fact that Hanafi law makes particular provisions void, affect followers of another system of law which contains no such restrictions?] It is hoped that this volume of judicial opinion, supported as it is by sympathy of thinking Muslims, & by ss. 11(2), 481 A, will be able to withstand the difficulties mentioned in [ ] which have been reluctantly referred to above in performance of a text writer's duty.

[29] JAMAAT, cf. e.g. *Haji Abdul Razak Haji Mahomed* v. *Haji Adam Haji K. Usman Noorani*, (1935) 37 Bom. L. R. 603; *Fakir Mahomed Nanji* v. *Agha Khan*, [1930] AIR (SIND) 204; *Adam Haji Omar* v. *Collr. of Poona*, ref. Civ. Rev. App. 1929 of 1932 (1938) XVI. Bom. L. Journ. 54 JAMAAT PROPERTY : CONSTITUTION & USAGES OF JAMAAT).

[30] *Akbarally* v. *Mahomedally*, (1931) 57 Bom. 551; cf. *Mohammedally* v. *Akberalli*, (1933) 36 Bom. L. R. 386 (P. C.); *Adv.-Gen.* v. *Yusufalli*, (1920) 24 Bom. L. R. 1060, 1109.

worship are always referred to as masjids, but they are kept under the control of persons who obey the orders of the heads of their own community. It surely cannot make any difference whether such a mosque is called a private mosque or ibadatkhana, or by some new designation and distinguished from a public mosque.[31] The issue would therefore arise if the persons in charge of such a mosque, were proceeded against in a court of law for a breach of trust on the ground that the doors of the mosque were locked up, and not opened except to members of the jamaat. They would be guilty of a breach of trust if the real object of the wakf were to benefit not their own jamaat but all Muslims. That question is very different from whether persons habitually attending a particular mosque can be prevented by the others from praying in their own way,—which was dealt with in Fazl Karim's [22] case. The question is also different whether a devout Muslim of another school in good faith wishing to enter the mosque and pray there, can be prevented from doing so : s. 521. There are of course mosques the origin of which is lost in antiquity. The foundation of such mosques cannot be assumed to be subject to any denominational restrictions : to them the principle in s. 516 can be unreservedly applied. SECTION 516.

Again, the questions are different whether a Muslim of another community wishing to enter a mosque in good faith, can be prevented from doing so, and, whether reservations relating to the persons entitled to use a mosque—at least primarily and in preference to others—can be given less effect than that indicated in s. 481 A. The result of the decisions, may be thus summarized : the Courts do not favour (in the absence of special circumstances) sectarian mosques, or reservations in dedications excluding other Muslims from the right to pray in any mosque, and, it is presumed that any Muslim has the right in good faith to enter any mosque and offer up prayers according to his own religious tenets, so long as he has no intention to cause, and does not in fact cause, disturbance to others. Result summarized.

517. The site of a masjid never reverts to its original owner, or his heirs. If a masjid falls to decay, and is no longer used for prayers, its old materials cannot be lawfully used for building or repairing another masjid.[32] The mutawalli is not bound to allow any use of the wakf property, however laudable, which is not an object of the wakf.[33] V. MOSQUE PROPERTY NEVER APPLIED TO OTHER OBJECTS. Passes out of private property.

[31] *Muhammad Esuf S.* v. *Maulvi Abdul S.*, (1918) 42 Mad. 161, 164, 169.

[32] Hed. 210 ; Bail. I. 606 (par. 2) (617) Abu Yusuf's opinion followed against Imam Muhammad's. The latter held that land & old materials of MASJID in ruins revert to *wakif* or his heirs. Bail. II. 221 (*fourth*). *Kuttayan* v. *Mamanna Ravuthan*, (1912) 38 Mad. 681. Cf. "If it was a public chapel, it must have been consecrated & by that solemn rite dedicated, to the service of God & separated from all unhallowed uses, & could not be unconsecrated but by Parliament : " *Ex parte Greenhouse*, (1815) 1 Maddock, 92, 108, *per* Sir Thomas Plumer, V. C., reversed in House of Lords on a point of procedure, *sub nom*, *Corporation of Ludlow* v. *Greenhouse*, (1827) 1 Bligh, 17.

[33] *Syed Ahmad* v. *Hafiz Zahid*, [1933] AIR (ALL.) 732 ; cf. *Saklat* v. *Bella*, (1925) 53 I. A. 42 : s. 481 A, p. 605.

SECTION 518. Provision for poor not necessary.

518. The dedication of a masjid (which is itself a perpetuity : s. 517) need not contain any ultimate provision for the poor.[1]

VI. ENDOWMENT OF EXISTING MOSQUE. Provisions for poor.

519. Property may be dedicated for supplying an existing masjid[2] with its necessary expenses, with provisions that in case the said masjid is not in need of the said expenses, then the income of the wakf property shall be expended on the poor,[3] or with provisions for benefiting objects that must in time cease, and the lapse of which will leave the whole benefit available for the masjid.[4]

Illustrations.

(1) A dedication may be in the following form : "I dedicate this my land" (specifying its boundaries) "with its rights and advantage, as a perpetual wakf during my life and after my death, on this condition, that it may be cultivated, and its produce be applied[5] for the expenses or repairs of the buildings, and for the salaries of the attendants, and general maintenance, and that the surplus may be expended on the building, of such and such a masjid, and for the supply of its oil, and all similar purposes, for the benefit and advantage of the masjid, with liberty to the mutawalli to expend thereout in accordance with his discretion, and when the said masjid is not in need of these expenses, then the said produce should be applied to the poor." [1]

(2) A sanad making a gift of the income of certain villages providing that 1/3 is for the defrayal of expenses of the servant of a mosque, and farsh and light, etc., 1/3 for the expenses of a madrassa, and the remaining 1/3 for the allowance of the mutawalli, complies with the four essential conditions necessary to create a valid wakf.[6]

§ 8.—LEGAL PROCEEDINGS RELATING TO WAKFS.

I. CHARITABLE AND RELIGIOUS TRUSTS ACT,

519 A. The Charitable and Religious Trusts Act XIV. of 1920 provides for (1) persons having an interest in trusts

[1] Bail. I. 607 (618). *Fatwa Alamgiri, Wakf*, Ch. XI. *fasl* ii. *init.*; Bail. I. 607 (par. 1) (618) does not bring out that object of *wakf* in s. 519, *ill.* is to benefit another *masjid* not forming part of same *wakf*; & that object of *wakf* may be to provide on, &c., for existing *masjid*, with reversion in favour of poor.

[2] *Muhammad Ismail* v. *Muhammad Ishaq*, (1921) 43 All. 508 (property devised for sale, proceeds to be utilized for mosque).

[3] Bail. I. 607 (618); see s. 518, *ill.*, s. 480, *ill.* (6); cf. *Assoobai* v. *Noorbai*, (1905) 8 Bom. L. R. 245, 246.

[4] *Muzhurool Huq* v. *Pohraj Dutarey Mohaputtur*, (1870) 13 W. R. 255 (for expenses of mosque, alms to mendicants, & surplus for expenses of marriages, burials & circumcision of members of family of *mutawalli*).

[5] *Debendra Nath S.* v. *Noharmal*, (1929) 34 C. W. N. 498 (omission to provide for residue of profits after meeting expenses of mosque, does not derogate from dedication being absolute).

[6] *Jugatmoni Chowdrani* v. *Ramjani Bibee*, (1884) 10 Cal. 533 (4 essentials (i) ultimate objects not liable to extinction; (ii) appropriation at once complete; (iii) no stipulation for sale of property & expenditure on *wakif's* necessities; (iv) perpetuity).

SECTION 519A.

for a public[7] purpose of a charitable or religious nature[8] obtaining (*a*) particulars as to the nature and objects of the trust, and of the value, condition, management and application information of the subject matter of the trust and the income belonging thereto, (*b*) an order directing that accounts of the trust shall be examined and audited (s. 3),[9] (2) for trustees obtaining the directions, opinion, advice or direction of the Court on questions affecting the management or administration of the trust property (s. 7),[9] (3) for security for costs of the plaintiff in a suit costs. under the Civil Procedure Code, 1908, s. 92, or Religious Endowments Act, XX. of 1863, s. 14 (s. 10).[9]

II. CIVIL PROCEDURE CODE, s. 92.

519 B.[10] Where[11] in respect of a wakf[12] for public purposes[13] of a charitable or religious nature, any breach of

[7] On PUBLIC & PRIVATE TRUSTS see s. 519 B, *n.* (= Civ. Pro. Code, s. 92); *Muhammad Yar* v. *Khalil-ul Rahman*, (1936) 17 Lah. 768 (e.g. mosque built with public subscriptions).

[8] Question whether trust exists may be raised before Distr. Judge : s. 5 : *Mahadeo Bharati* v. *Mahadeo Rai*, (1929) 51 All. 805 (Niamatulla, J., Distr. Judge's decision not conclusive as to existence of *wakf*, even though aggrieved party does not undertake to bring suit for declaration within 3 months; Mukerji, J. *contra*); *Haidaralli* v. *Saiyad Gulam Mohiuddin*, (1934) 58 Bom. 623 (N. J. Wadia, J. agrees with Niamatulla, J.); *Adam Haji Omar* v. *Collr. of Poona*, (1938) XVI. Bom. L. Journ. 54.

[9] Figures in ( ) refer to ss. of Act XIV. of 1920.

[10] Sect. 519 B (= s. 475 of last ed.) represents main features of Civil Procedure Code, 1908, s. 92. (Act XIV. of 1882, s. 539). Cf. ss. 11 B, 492 B, 501 A, 505.

[11] Sect. 519 B = Civ. Pro. Code, 1908, s. 92, but (*a*) particulars of FORM OF SUIT, & (*b*) RELIEFS put in *nn.* (i) *Mahomed Ismail A.* v. *Ahmad Mulla D.*, (1914) 43 I. A. 127 = 43 Cal. 1043, 1001. Civ. Pro. Code, 1908, s. 92, commences thus : "In the case of any alleged breach of any express or constructive trust [*wakf*] created for public purposes of a charitable or religious nature, or when the direction of the Court is necessary for the administration of such a trust [*wakf*] "..... (ii) *D. I. Attia* v. *M. I. Madha*, (1936) 14 Rang. 575, 583 (REAL INTENTION & MEANING OF S. 92 : ADMINISTRATION distinguished from SETTING ASIDE trust : how far PUBLIC PURPOSES OF CHARITABLE NATURE to be construed by reference to "CHARITY" as understood IN ENG. LAW : effect of s. 92); *Ashraf Ali* v. *Mohammad Nurojjoma*, (1918) 23 C. W. N. 115; (iii) *Fakhrunnissa* v. *Distr. J.*, (1920) 47 Cal. 592; (iv) *Makhlachor Rahman* v. *Faizur Rahman Chaudhury*, (1916) 35 Ind. Cas. 880 (s. 92 & Relig. End. Act XX. of 1863, s. 18 compared); (v) *Syed Diljan Ali* v. *Bibi Akhtari B.*, (1925) 4 Pat. 741 (s. 92 & s. 14 of Rel. End. Act), on appeal [1925] AIR (P. C.) 11.

[12] E.g. *Saiyad Ali* v. *Ali Jan*, (1912) 11 All. L. J. 25 (*wakf* for expenses of mosques & *imambara*); *Muhammad Baksh* v. (*Mt.*) *Piari*, (1921) 19 All. L. J. 236 (if no valid *wakf*, Court will not entertain suit); *Nawabzada Khajeh Atikulla* v. *Nawab Khajeh Habibulla*, (1919) 24 C. W. N. 306; *Saiyed Maher Husein* v. *Haji Alimahomed Jalaludin*, (1933) 36 Bom. L. R. 526 (if trust disputed, Court will determine nature of the institution); *Adam Haji Omar* v. *Collr. of Poona*, (1938) XVI. Bom. L. Journ. 54; *Jafar J. Khan* v. *Daudshah*, (1910) 13 Bom. L. R. 49; *Niamatunnissa* v. *Hafizul Rahman*, (1933) 8 Luck. 482 (Spec. Rel. Act, s. 42); *D. I. Attia* v. *M. I. Madha*, (1936) 14 Rang. 575 (= *n.* 11).

[13] PRIVATE & PUBLIC WAKFS (OR TRUSTS) : DISTINCTION : see s. 504, com. *n.* (i) *Mahomed Ismail Ariff* v. *Ahmed Moolla Dawood*, (1916) 43 I. A. 127, 143 (RANG.); (ii) *Mohammedally* v. *Akberalli*, (1933) 36 Bom. L. R. 386 (P. C.) (wide distinction, between PUBLIC & PRIVATE TRUSTS : see s. 504 & 43 I. A. 127, public trusts Court's primary duty to consider public interests); (iii) *Muhammad Ibrahim K.* v. *Ahmed*

SECTION 519B. Breach of trust, or direction of Court. Parties.

trust[14] is alleged, or the direction of the Court[15] is deemed necessary in its administration, a suit[16] for[17] (i) removing or appointing a mutawalli,[18] or (ii) accounts[19] or enquiries, or (iii) declaring what proportion of the benefit shall be allowed to any particular object, or (iv) sale[20] or mortgage or exchange of the wakf property,[21] or (v) settling a scheme,[22]

Said K., (1910) 32 All. 503, 511 (it is private, if for specific individuals); (iv) *Saiyad Shabbir H.* v. *Shaikh Ashiq H.*, (1929) 14 Luck. 429, (F. B.) (trusts where (*a*) specified persons or class of persons immediate beneficiaries, distinguished from (*b*) public trusts); (v) *Muhammad Shafiq Ahmed* v. *Muhammad Mujtaba*, (1929) 51 All. 30, 34; (vi) *D. I. Attia* v. *M. I. Madha*, (1936) 14 Rang. 575, 590, 592 (= *n.* 11); (vii) *Syed Shah Md. K.* v. *Syed Abi Saghir*, (1931) 11 Pat. 288, 344-346 (public = section of public); (viii) *Delroos Banoo B.* v. *Nawab Syud Ashgur A. K.* (1875) 15 Beng. L. R. 167, 184 = 23 W. R. 453 upheld *Ashgar Ali* v. *Delroos B. B.*, (1877) 3 Cal. 324 (P. C.) (IMAMBARA); (ix) *Mohammad Yusuf* v. *Mohd. Shafi*, [1935] 33 All. L. J. 40 (private IMAMBARA : s. 92 not applicable, though public invited to it); (x) *Muhammad Esuf Sahib* v. *Moulvi Abdul Sathur*, (1918) 42 Mad. 161, 168; (xi) (*Nawab Mirza*) *Mohammad Sadiq* v. *Nawab Kazim A. K.*, (1934) 9 Luck. 507, 516 (partly public, partly private : *raddi mazalim* fund); (xii) *Ali Bakhtiyar* v. *Khondkar A. H.*, (1933) 60 Cal. 790 = 37 C. W. N. 395 (mixed *wakf*, partly for family, partly public, comes within WAKF ACT, 1923, s. 2(*e*) : *wakf al-al-aulad*, i.e. family WAKF, not generally speaking a public trust : see Wakf Act, XLII. of 1923, s. 2(*e*), Bengal Wakf Act, XIII. of 1934, ss. 6(11), 34); (xiii) *Muhammad Shafiq Ahmad* v. *Md. Mujtaba*, (1926) 51 All. 30, 34; (xiv) *Muhammad Baksh* v. (*Mt.*) *Piari*, (1921) 19 All. L. J. 231 (*public* CEMETARY, public trust).

[14] (i) *F. A. Shihan* v. *Abdul A. A.*, (1930) 58 Cal. 474 (suit vs. *mutawalli* who denied *wakf* treating property as his own, not governed by s. 92); (ii) *Maulavi Muhammad Fahim-ul-H.* v. *Jagat Ballav*, (1922) 2 Pat. 391 (suit vs. trespassers not trustees : s. 92 does not apply); (iii) *Muhammad Baksh* v. (*Mt.*) *Piari*, (1921) 19 All. L. J. 236; (iv) *Hakim Mirza Md. J.* v. *M. Md. Taqi K.*, (1933) 9 Luck. 170 (applicability of Spec. Rel. Act, s. 42, see 58 Cal. 474); (iv) *Balkrishna* v. *Vinayek*, (1931) 34 Bom. L. R. 113 (executor must minister to will of testator).

[15] Meaning of DIRECTION explained : *Budree Das M.* v. *Chooni Lal Joherry*, (1916) 33 Cal. 789 (scope of old s. 92, now altered, discussed); *Abdul Alim Abed* v. *Abi Jan B.*, (1928) 55 Cal. 1284 ("DIRECTION" viz. in nature of framing scheme or otherwise for administration of trust); *Muhammad Ibrahim K.* v. *Ahmad Said K.*, (1910) 32 All. 503, 514, 515 (Hanafi law compared with s. 92).

[16] *Nawab Mirza Md. Sadiq A. K.* v. *Nawab Kazim A. K.*, (1934) 9 Luck. 507 (two applications : under Indian Trusts Act s. 34 by claimant for trusteeship & under s. 74, by beneficiaries : application under Ind. Trusts Act, ss. 34, 74 not proper when question of detail difficulty & importance, proper remedy suit under s. 92(1) of Civ. Pro. Code).

[17] Reliefs mentioned in Civ. Pro. Code, s. 92 : see s. 519 B, com., pp. 653 f.

[18] Civ. P. C., s. 93(*a*), (*b*) : *Abdul Alim Abed* v. *Abi Jan*, (1928) 55 Cal. 1284 (if no *mutawalli*, s. 92 not applicable, Distr. Judge may APPOINT on application); (*a*) compare Relig. Endt. Act, 1863, s. 14 : *Mahomed Akhtar* v. *Ramjan K.*, (1907) 34 Cal. 587; (*b*) *Debendra Nath Mitra M.* v. *Sheik Safatulla*, (1926) 31 C. W. N. 184 (suit vs. *mutawalli* disputing his title to act as such, must be brought within 6 years : LIMIT. ACT, Art. 120. Civ. Pr. C., s. 93(*c*) : suit for vesting property in trustee : property (*ayn*) never vests in *mutawalli*, he has only right to take recurring produce as manager for distribution amongst beneficiaries; *Vidya Varuthi Thirtha* v. *Balusamy Aiyar*, (1927) 48 I. A. 302 (s 497 A, i.e. he controls or manages only usufruct : s. 366 A, p. 381); *Saadat Kamel* v. *Att.-Gen* (PAL.), [1939] A. C. 508, [1939] AIR (P. C.) 185, 188; *Fahim-ul Huq* v. *Jagat Ballav*, (1922) 2 Pat. 391 (consequential relief of delivery of property to *mutawalli*).

[19] ACCOUNTS : cf. *Commr. of Wakfs* v. *Umme Salima*, (1936) 41 C. W. N. 382.

[20] Civ. Pr. Code, s. 93(*f*). See s. 520, below.

[21] Persons other than *mutawalli* desirous of obtaining decree for sale, mortgage, or exchange of *wakf* property, must proceed under s. 119 B : *Fakhrunnessa B.* v *Distr. J. 24 Parganas*, (1920) 47 Cal. 592; (*Prince Syed*) *Fateh Ali Mirza* v. *Sahebzadi*

must[23] (save as provided by the Religious Endowment Act XX. of 1863)[24] be instituted in conformity with the Civil Procedure Code V. of 1908, s. 92(1), which is referred to in the comment. SECTION 519B.

The suits referred to in the Civil Procedure Code, 1908, s. 92(1)[25] (Act XIV. of 1882, s. 539)[25] are to obtain a decree— Civil Procedure Code, s. 92.

(*a*) REMOVING any trustee [mutawalli] ;

(*b*) APPOINTING a new trustee [mutawalli]; Mutawalli.

(*c*) VESTING any property in a trustee, [mutawalli];

(*d*) directing ACCOUNTS and ENQUIRIES ;

(*e*) DECLARING what proportion of the trust property, or of the interest therein shall be allocated to any particular object of the trust ; Allocation of benefit.

(*f*) authorizing the whole, or any part of the trust property to be SOLD, MORTGAGED OR EXCHANGED ; Sale mortgage or exchange

(*g*) settling a SCHEME, or Scheme.

(*h*) granting such further or other relief as the nature of the case may require.

Meherunnessa B., (1936) 40 C. W. N. 1300 (Distr. Judge under Wakf Act, XLII. of 1923 has no power to appoint receiver).

[22] SCHEME with rules for appointment of successive *mutawallis* : *Mahomed Ismail Ariff* v. *Ahmed Moolla Dawood*, (1936) 43 I. A. 127 (RANG.) (very WIDE DISCRETION of Kazi as to public, religious or charitable trusts : as regards rules of management Kazi's primary duty to consider interests of public : he may vary such rules if not practicable or not in interest of institution : he need not defer to wishes of founder, if rules not conformable to changed conditions & circumstances) followed *Mohammedally* v. *Akberalli*, [1931] AIR (P. C.) 53 (BOM.). See scheme settled in this case : *Akbarally* v. *Mahomedally*, (1931) 57 Bom. 551. As in JUMA MASJID CASE, Bom. = *Adv.-Gen.* v. *Abdul Kadir Jitakar*, (1894) 18 Bom. 401. Similar rules prevail for many big mosques : e.g. Jami Masjid, Delhi. SCHEME may also be settled by local government under CHARITABLE ENDOWTS. ACT, VI. of 1890, s. 5.

[23] Under the Civ. Pro. Code of 1882, s. 539 (= s. 92 of Code of 1908); *Budree Das Mukim* v. *Chooni Lal Johurry*, (1906) 33 Cal. 789 had held s. 539 not mandatory & that founder could sue trustee for due performance & removal of trustees without invoking aid of s. 539 ; *Syed Diljan* v. *Bibi Akhtari B.*, (1925) 4 Pat. 741, 750 (s. 93, cl. (2) since then amended : now s. 93 is mandatory).

[24] Under RELIG. ENDMTS. ACT, XX. of 1863, PERSON INTERESTED in mosque MAY, without joining as plaintiff other person interested therein SUE TRUSTEE, manager, or superintendent or member of committee, for misfeasance, breach of trust or neglect of duty, committed in respect of the trusts ; & Court may direct specific performance of any act & decree damages & costs & removal of trustee, &c. : such suit not entertained without preliminary enquiry under Relig. End. Act, s. 18 : interest required to sue need not be pecuniary : right to attend mosque or get part of benefit of alms is enough interest. Cf. Beng. Code, Regl. XX. 1810 ; Madr. Code, Reg. VII. 1817.

[25] FORM OF SUIT UNDER CIV. PRO. CODE, s. 92 : (*a*) Suit must be instituted by (i) Adv.-Gen. or (ii) two or more persons having interest in trust [*wakf*] & having obtained consent in writing of Adv.-Gen. ; (*b*) it may be contentious or not ; (*c*) it must be instituted in principal Civ. Ct. of orig. jur. or in any other Court empowered in that behalf by Local Govt. within local limits of whose jurisdiction whole or any part of subject of trust [*wakf*] situate. But SUIT FOR DECLARATION THAT PROPERTY BELONGS TO WAKF may be maintained by Muslims interested in *wakf* without conforming with s. 92 as above stated. *Abdur Rahim* v. *Barkat Ali*, (1927) 55 I. A. 96 (CAL.) ; *Maulavi Md. Fahim-ul Huq* v. *Jagat Ballav Ghosh*, (1922) 2 Pat. 301. As to INTEREST in *wakf* property : in case of temple or mosque persons entitled to attend these for purposes of worship are beneficiaries & as such possess sufficient interest to support a suit under s. 92 of Civ. Pro. Code *Narinjan Singh* v. *Kirpal S.*, (1924) 5 Lah. 455, 459 dissenting opinion of Abdur Rahim J. in *T. R. Ramachandra* v. *Parameswaran*, (1918) 42 Mad. 360 ; *Sajidar Raja C. G.* v. *Gour Mohun D. B.*, (1897) 24 Cal. 418 ; *Mahikar Ganesh Tambikar* v. *Lakmiram Govindram*, (1888)

SECTION 519B. Save as provided by the Religious Endowment Act, XX. of 1863, [= s. 520 of this work,] no suit claiming any of the reliefs specified above can be instituted in respect of any such trusts [wakfs] as is therein referred to, except in conformity with provisions of the said sub-section, viz. (i) the Advocate-General, or (ii) two or more persons having an interest in the wakf and having obtained the consent in writing of the Advocate-General[26] may institute a suit whether contentious or not. (iii) The suit must be in the principal Civil Court of original jurisdiction or any other Court empowered in that behalf by the local government, within the local limits of whose jurisdiction the whole or any part of the subject of wakf is situate.

SCHEME by Court. "Usually, when a scheme is spoken of in connection with a charity, what is meant is, not the instrument of foundation, but a document sanctioned by some properly constituted authority containing directions for the administration of the charity. Previously to the passing of the [Charitable Trusts] Act of 1853, such schemes were [in England] made by the Court of Chancery only. They were made mainly in three classes of cases: (1) Where the directions contained in the instrument of foundation were ambiguous, imperfect or otherwise insufficient; (2) where the directions though originally precise and complete, had become under altered circumstances unsuitable to carry out the general intention of the founder, and (3) where a scheme sanctioned by the Court itself had in the like manner become unsuitable for that purpose. The Charitable Trusts Act of 1853 authorized the making of schemes by other authorities than the Court of Chancery, as by bankruptcy and country courts: see the Act of 1853, ss. 32, 36."[27]

III. Suit to set aside alienation. 519 C.[28] Any person interested in the objects of a wakf[29] (but not one who has no interest therein)[30] may institute a suit to have a wrongful alienation of the wakf property set aside and the objects of the wakf given effect to,[29] or for a declaration that certain property belongs to the wakf.[31]

12 Bom. 247 (in which majority held that interest must be substantial & not REMOTE & FICTITIOUS or purely illusory INTEREST); *Debendra Nath Mitra* v. *Sheik Safatulla*, (1926) 31 C. W. N. 184; *Nawab Mirza Md. Sadiq A. K.* v. *Nawab Kayim A. K.*, (1934) 9 Luck. 507 (= *n.* 16).

[26] *(Mt.) Ali Begam* v. *Badrul Islam Ali K.*, (1938) 65 I. A. 198 (consent of Adv.-Gen./Collr. under Civ. Pro. Code, s. 92/93 to suit by 3 persons as plaintiffs: suit must conform to consent, & cannot validly be instituted by two only; such consent, however, only condition to valid institution of suit, & has no reference to other stage: if two of original plaintiffs die pending suit, it does not become defective).

[27] *In re Mason's Orphanage & Lond. & N. W. Ry. Co.*, [1896] 1 Ch, 57.

[28] Sect. 519C = s. 465 of last ed.

[29] *(Kazi) Hassan* v. *Sagun*, (1899) 24 Bom. 170 (giving effect to *wakf* = requiring income of property to be dealt with in accordance with *wakf*, otherwise treating it as *wakf* property); *Niamat-unnissa* v. *Hafizul Rahman*, (1933) 8 Luck. 482, 486; *Zafaryab Ali* v. *Bakhtawar*, (1883) 5 All. 497.

[30] *Abdur Rahim* v. *Barkatali*, (1927) 55 I. A. 96 (CAL.); *Maulavi Md. Fahim-ul Huq* v. *Jagat Ballav Ghosh*, (1922) 2 Pat. 391; *Debendra Nath Mitra Majumdar* v. *Sheik Sifatulla*, (1926) 31 C. W. N. 184.

[31] *Bhurruck Chandra Sahoo* v. *Golam Shurruff*, (1868) 10 W. R. 458.

519D. (1) In some circumstances one or more beneficiaries may be empowered to bring suits, e.g. against tenants or others directly to recover moneys as income of the wakf payable to them, or to put in suit against the mutawalli or other persons interested in the wakf their own immediate claims to benefit thereunder.[32]

SECTION 519D. IV. Only in special circumstances a beneficiary and not mutawalli proper plaintiff.

(2) A suit to recover for the wakf, property held adversely to it, asserts the right of the wakf itself, on behalf of and including all interests therein, whether present or future, absolute or contingent. Only in special circumstances would such a suit be brought by a beneficiary. The mutawalli is ordinarily the proper plaintiff for it : it is his function to make such a claim : for, although the right asserted in such a suit is not the right of a mere manager, such as is the mutawalli, yet his office, though only a managership, provides continuous representation of the wakf and of all interests therein.[32]

(3) Limitation for such a suit as is referred to in s. 519D(2) would therefore, *semble,* run continuously, and when time has begun to run against the mutawalli, it would not stop running, nor would a fresh cause of action arise on a new mutawalli succeeding.[32]

Limitation runs continuously against successive mutawallis.

519E.[1] The Court may remove a mutawalli who is unfit for the office,[2] and appoint another in his place,[3] notwith-

V. REMOVAL BY COURT OF UNFIT MUTAWALLI.

[32] *Saadat Kamel* v. *Att.-Gen.* (PALESTINE), [1939] A. C. 508, 523, 525, [1939] AIR (P. C.) 185, 188 (col. ii.,), 189 (col. ii), (claim held barred : see p. 629, *n.* 34).

[1] Sect. 519E = s. 493 of last ed.

[2] INSTANCES OF UNFITNESS & : REMOVAL (i) *Sarkum* v. *Rahaman,* (1896) 24 Cal. 77, 93 (NEGLECT TO REPAIR *wakf* property though there is surplus income); (ii) *Joygunnessa* v. *Majilullah Mamed Promanik,* (1923) 28 C. W. N. 781 (gross MISMANAGEMENT not mere errors of judgment : Court will not hesitate to remove trustee who has purchased trust property or concurred in breach of trust); (iii) *ex p. Reynolds* (1800) 5 Ves. 707 (purchase by assignee of bankrupt set aside : assignees removed for misconduct in purchasing or allowing co-assignee to purchaser); (iv) *Letterstedt* v. *Broers,* (1884) 9 App. Cas. 371, 386 (trustees removable, though no breach of trust : "trustees exist for benefit of those to whom creator of trust" has given trust estate : trustees always advised by their own advisers to resign when their continuance detrimental to trust : & they do resign ; hence little to be found in books on the subject *per* Lord Blackburn ; *Moore* v. *M'Glynn,* [1894] 1 Ir. Rep. 74 (trustee removed without breach of trust : because he set up similar line of business for himself); (v) *Srinath* v. *Radha Nath,* (1883) 12 C. L. R. 370 (WRONGFULLY ALIENATED trust property); (vi) *Doyalchand Mullick* v. *Keramat Ali,* (1871) 16 W. R. 116 (mere stoppage of religious service does not start limitation : valid *wakf* not affected by alleged revocation, by bad conduct of those responsible for carrying out *wakif's* behests, nor alienable : Shia may be *mutawalli* of *wakf* made by Sunni : see *n.* 11); (vii) *James Powell,* (1872) 6 All. H. C. R. 54 (wantan WASTE & neglect of duty); (viii) *Ganapati Ayyan* v. *Savithri Ammal,* (1897) 21 Mad. 10; (ix) *Mayor of Coventry* v. *Att.-Gen.* (1720) 7 Browns P. C. 235; (x) *Buckeridge* v. *Glasse,* (1840) Cr. & Ph. 126 = 10 L. J. (CH.) 134; (xi) *Raja of Kalahasti* v. *Ganapati,* [1918] M. W. N. 555 (total LACK OF CAPACITY to manage shown);

SECTION 519E. standing that the wakif has appointed himself as the mutawalli,[4] and/or has purported to make the mutawalli incapable of being removed.[5]

Wakif's wishes.

The "extreme position" that the Court [6] has no discretion but to give effect to the rule laid down by the founder in all matters relating to the appointment and succession of trustees or mutawallis is based on a misconception.[6]

Public and private trusts distinguished.

There is "a wide distinction between public and private trusts. Generally speaking, in the case of a wakf or trust created for specific individuals, the Kazi, (in India, the Civil Court) has to give effect so far as possible to the wishes of the founder. With respect, however, to public, religious or charitable trusts, as mosque, the Kazi's discretion is very wide. He may not depart from the intention of the founder or from any rule fixed by him as to the objects of the benefaction; but as regards MANAGEMENT, which

Public trusts: (1) objects must be preserved; but

(xii) *Nataraja Thambiran* v. *Kallasami Pillai*, (1920) 48 I. A. 1, 11, 12 (head of *mutt* had right to appoint successor: appointment made not in interests of *mutt* but under compromise saving him from threatened prosecution for forgery of will, *held* invalid); (xiii) *Fazla* v. *Zainuab Din*, (1931) 13 Lah. 162 (DENIAL OF WAKF character of property & setting up an adverse claim); (xiv) *Hussain B.* v. *Sayed Nur Hussain Shah*, [1928] AIR (P. C.) 106 = 30 Bom. L. R. 849 (LAH.) (INCOME spent FOR PERSONAL USE, property not conserved: misappropriation; mosque not maintained: title set up; mistaken impression that property was trustee's own would be unique case requiring very careful proof); (xv) *Raja Piarey M.* v. *Manohar M.*, (1921) 48 I. A. 258; (xvi) *Srinivasa C.* v. *Evalappa M.*, (1922) 49 I. A. 237; (xvii) *Vaidanatha* v. *Swaminatha*, [1923] 51 I. A. 282 followed, (xviii) *Mahomedally* v. *Akbarally*, [1934] AIR (P. C.) 53 (BOM.) (INSOLVENCY & mismanagement); (xix) *Golam Hossain S.* v. *Altaf Hossain*, (1933) 61 Cal. 80 (dismissal by Committee, Relig. End. Act, XX. 1863: onus of showing committee's bad faith on dismissed *mutawalli*); (xx) *Syed Shah Md. Kazim* v. *Syed Abi Saghir*, (1931) 11 Pat. 288, 346-8 (removal of SAJJADANISHIN, MISMANAGEMENT OR INCAPACITY ordinarily not enough: but LOW MORALITY, DISHONESTY with accounts, claiming property as private); (xxi) *Sujjada Shah* v. *Shaw Habit*, (1919) 53 I. C. 677 (SAJJADANISHIN may be removed for GROSS MISCONDUCT); (xxii) *Muhammad Esuf Saheb* v. (*Moulvi*) *Abdur Sathur S.*, (1918) 42 Mad. 161 (INAM grantees removed for non-performance of duties & misappropriation); (xxiii) *Sherumal Chainrai* v. *H. Greenfield*, [1930] AIR (SIND) 316, 322; (xxiv) *Mahomed Oosman* v. *Essack Saleh*, [1938] Bom. 184); (xxv) *Rahim Baksh Molla* v. *Haji Amed*, (1912) 16 Ind. Cas. 9 (blind man aged 80 not removed: but his son who was of loose character required not to interfere with mosque: charges against *mutawalli* considered: Brett, Sharfuddin, JJ.); (xxvi) *Chintaman B. D.* v. *Dhondo G. D.*, (1888) 15 Bom. 612 (MISAPPROPRIATION: manager of *devasthan* removed though he was descendant of founder & it was believed that descendants of founder to 7th generation were incarnations of Ganapati; & dedication recognized seven generations of successive trustees).

[3] Bail. I. 592 (par. 1) (602); 598 (par. 2) (608-609); Hed. 329 (col. i. par. 1); Macn. 70, Endt., case 8; *Hidaitoon-nissa* v. *Afzul H.*, (1870) 2 N. W. 420 (Shia); cf. *Gulam H. Saib* v. *Ali Ajam T. S.* and *vice versa*, (1868) 4 Mad. H. C. R. 44; *Bhurruck C. S.* v. *Golam S.*, (1868) 10 W. R. 458. See also *Fatawa Kazi Khan*, III. 299; *Bahru'r Raiq* v. 245, 253. *Jewun Doss* v. *Shah Kubeer*, (1840) 2 Moo. I. A. 390, 423: "DUTY OF THE GOVERNMENT to PRESERVE its application, viz. of ENDOWMENT to the right use was a public & perpetual duty": s. 504, com.

[4] *Joygunnessa B.* v. *Majlullah Mamed P.*, (1923) 28 C. W. N. 281.

[5] See s. 519B as to form of suit.

[6] *Mahomed Ismail Ariff* v. *Ahmed M. D.*, (1916) 43 I. A. 127 = 43 Cal. 1085; (cf. *Peary* v. *Monohar*, (1921) 49 I. A. 258 (CAL.) (properties dedicated by will for pious purposes will be provided for order of succession to office of shebait among testator's own descendants, *per* Lord Buckmaster (condensed): "GROUNDS FOR REMOVING *shebait* from office may not be identical with those upon which trustees

must be governed by circumstances, he has complete discretion. He may defer to the wishes of the founder so far as they are conformable to changed conditions and circumstances, but his primary duty is to consider the interest of the general body of the public for whose....benefit the trust is created. He may in his judicial discretion vary any RULE OF MANAGEMENT which he may find either not practicable or not in the best interest of the institution."

SECTION 519D. (2) wide discretion in Court.

Thus "were the wakif (the founder) to make a condition that the King or Kazi should not interfere in the management of the wakf, still the Kazi will have his superintendence over it, for his supervision is above everything....."

Court's supervision cannot be ousted.

In appointing new trustees and settling a scheme,[7] (s. 519 B) the Court is entitled to take into consideration (1) the wishes of the founder, so far as ascertained, (2) the past history of the institution, (3) the way in which the management has been carried on heretofore, (4) other existing conditions that may have grown up since its foundation. "It has also the power of giving any directions and laying down any rules which might facilitate the work of management, and, if necessary, the appointment of trustees in the future."[6]

Wakif's wishes: history of past management.

VI. Proceedings by mutawalli for—

(A) Sanction of sale or mortgage.

520.[7] (1) Unless[8] the dedication[9] or the Court[10] authorizes the mutawalli to sell[11] or mortgage[12] the wakf property,

removed in 'this' country. Close intermingling of duties & personal interest which together make up office of *shebait* may well prevent closeness of analogy, but as part of office, indisputable that there are duties which must be performed, & that the estate does need to be safeguarded & kept in proper custody: in exercise of his duties if trustee has put himself in POSITION IN WHICH Court thinks that OBLIGATIONS of his OFFICE can no longer be FAITHFULLY DISCHARGED: SUFFICIENT GROUND FOR REMOVAL. ...Trustee may indeed acquire from beneficiaries who are *sui juris*, estate, but only if he has made FULLEST DISCLOSURE to them of all relevant & material facts within his knowledge, affecting, or that might affect, value & condition of estate, & parties are at arm's length,—*cestui que trust* knowing that he is dealing with trustee... No doubt word 'trustee' covers very large number of relationships involving different obligations: 'TRUST' therefore may be used to apply only to one class of such duties: & it follows that rules & decisions which depend upon special conditions attached to particular class, would not of necessity apply to another, when these conditions did not exist... Even if attorney or agent can show that he is entitled TO PURCHASE, yet if instead of OPENLY purchasing, he purchases in name of trustee or agent without DISCLOSING THE FACT,—no such purchase as that can stand for single moment": rule laid down by Lord St. Leonards in *Lewis* v. *Hillman*, (1852) 2 H. L. C. 607: see also *Nugent* v. *Nugent*, [1907] 2 Ch. 292; *Chintaman B. D.* v. *Dhondo G. D.*, (1888) 15 Bom. 612 (= *n.* 2 (XXVI).). Cf. *Saadat Kamel* v. *Adv. Gen.* (PALESTINE), [1939] AIR (P. C) 185, 188.

[7] Sect. 520 (then numbered 501) cited & applied. *Muhammad Yusuf* v. *Muhammad Sadik*, (1933) 14 Lah. 431, 435 (power to sell dedicated property & apply proceeds to objects of *wakf*). See s. 500, p. 632.

[8] See s. 519 B (iv), p. 652.

[9] *Golam Ali* v. (*Mt.*) *Sowlatoonnissa*, [1864] W. R. 241 (when advisable for benefit of *wakf*, mutawalli may sell part in order to purchase other property: s. 500).

[10] Bail. I. 587 (597); s. 500; *Shailendranath Palit* v. *Hade Kaza M.*, (1931) 59 Cal. 586; *Shama Churn Roy* v. *Abdul Kabeer*, (1898) 3 C. W. N. 158. "In the ordinances of Abu Saood, there is an order issued by the *Sadr-ush-Sharaya* of the time, in the year 951 Hegira, declaring that no SALE OR EXCHANGE of *wakf* property should take place without an order of the Sultan (or his representative, the Judge)": Ameer Ali, *Mah. L.* I. 342 (430).

[11] Bail. I. 594 (par. 3) (605); *Shama Churn Roy* v. *Abdul Kabeer*, (1898) 3 C. W. N. 158 (SALE not merely voidable, but VOID: but this view over-ruled: see

SECTION 520.

he has no authority to do so ; and where he does so he is guilty of a breach of trust,[13] for which he may be removed.[11]

(B) Court may authorize or validate alienation.—

(2) The Court may, if wakf land becomes unfit for the objects of the wakf,[10] order its sale ; or in a proper case, for urgent necessity, empower or retrospectively approve and validate a sale, or mortgage, or a long or perpetual lease ; [14] or, for securing quiet possession to apparent lawful holders for a long time, it may presume a lost and unrecorded permission of the Kazi for such a lease.[15] It is not clear whether under Shia law on dissensions arising amongst the beneficiaries, the wakf property may be sold.[16]

(C) Sale when dissensions.

(D) Court may authorize borrowing.

(3) The Court may authorize the mutawalli to borrow money for purchasing seeds (for the cultivation of wakf lands), but it is doubtful whether the mutawalli may borrow money for the said purpose without being authorized by the Court.[17]

(E) Sale for improvements not authorized.

(4) The mutawalli is not authorized to sell a part of the wakf land in order to improve the rest, notwithstanding that the part sought to be sold cannot be put to any profitable use ; [18] but such part of the wakf property as is in ruins or is injurious to the wakf property as a whole,[19] may be removed.

n. 14); *Doyal Chand Mullick* v. *Keramut Ali*, (1871) 16 W. R. 116 (*mutawalli* removed for UNLAWFUL ALIENATION : see *n.* 2(vi).). Cf. *Bhurruck Chundra Sahoo* v. *Golam Shuruf*, (1868) 10 W. R. 458, (plaintiff having no beneficial interest in *wakf*, could not sue to recover property alleged to be improperly sold by *mutawalli* ; he might have asked for his removal) ; *Jewun Doss Sahoo* v. *Shah Kubeeroodeen*, (1840) 2 Moo. I. A. 390, 421, (par. 3), 423 (par. 2). See *Mathuradas* v. *Raimal*, (1935) 37 Bom. L. R. 642, 663 (FOLLOWING TRUST PROPERTY).

12 (*Moulvie*) *Abdoolah* v. (*Mt.*) *Rajesri Dossea*, (1846) 7 S. D. A. (CAL.) 268.

13 Bail. I. 597 (607) ; *Shailendranath Palit* v. *Hade Kaza Mane* (to introduce doctrine of PROTECTION OF BONA FIDE LENDER would be to impose legal limitations on *mutawalli's* powers,— but see other cases cited here & s. 500).

14 *Nimai Chand* v. *Golam Hossein*, (1909) 37 Cal. 179 ; *Afzal Husain* v. *Chedi Lal*, (1934) 57 All. 727, 732 ; *Shailendranath Palit* v. *Hade Kaza Mane*, (1931) 59 Cal. 586, 611.

15 *Mahammad Mazaffar-al-Masavi* v. *Bibi Jabeda K.*, (1930) 57 I. A. 125 (lands belonging to ancient *wakf* held by tenants for over 70 years at unchanged rent, & as heritable property : tenure described as *istimrari muqarrari* in receipts by *mutawalli*, though *sanad* of 1722 prohibited grant of permanent tenancies : lawful origin of tenure presumed : such presumption arising from law) ; *Chockalingam Pillai* v. *Manandi Chettiar*, (1896) 19 Mad. 483 ; *Murugesam Pillai* v. *Mani Kavasaka*, (1917) 44 I. A. 98 (MAD.).

16 Bail. II. 221 ; *Daaimu'l-Islam* : see com. ; *mutawalli* would be wise not to use his powers such as they are : s. 500.

17 Bail. I. 597 (607-608) ; see however, *nn.* 14, 15.

18 Bail. I. 695 (par. 2) (607-606) ; cf. *ib.* 608 (par. 2) (619) : *minaret* may be erected only if necessary for mosque.

19 "Trees in vineyard cannot lawfully be sold, when fruit of vines not injured by shade : & though fruit should be injured by shade, trees cannot be sold, if their

(5) Where the mutawalli is authorized to sell, it is not necessary for the purchaser to look further than to the power of sale under the dedication or the order of the Court, nor to see whether the discretion, if any is left to the mutawalli, is wisely exercised by him.[20] The alienee will not be affected by a fraud to which he was no party.[20]

SECTION 520. Purchaser's duty.

(6) The subject of a wakf may, like other trust property, be followed in the hands of a third person under the Indian Trusts Act, 1882, s. 63.

Following wakf property.

"(1) If the mansion belonging to a wakf should fall into ruins," states the *Sharaiu'l Islam*, "the space would not cease to be wakf, nor would its sale be lawful. (2) But if dissensions should arise among the persons for whom it was appropriated, insomuch as to give room for apprehension that it will be destroyed, its sale would be lawful. (3) But even though there should be no such differences, nor room for such apprehensions, but the sale would be more for the advantage of the parties interested, (i) some are of opinion that the sale would be lawful, but (ii) it would rather seem that it ought to be forbidden. And if palm trees are rooted out of appropriated ground, (i) the same persons would say that it may be sold on the plea that no benefit can be otherwise derived from it, (ii) but others are of opinion that it cannot lawfully be sold in such circumstances from the possibility of turning it to some use, by letting it on hire ; and this opinion seems the more reasonable." [21]

Sale : circumstances justifying.

The passage may bear on the application of the cy pres doctrine.[22]

Cy pres.

520 A.[23] The Court may if necessary authorize a lease[24] to be made for any term, notwithstanding that the declaration of wakf expressly provides that no lease shall be made for a longer term than a specified period.[25]

(F) Long lease : Court may authorize.

fruit more profitable than that of vines ; but if it be less profitable, trees may be cut down & sold," : Bail. I. 595 (606).

[20] *Golam Ali* v. *Sowlatoonnissa Bibee*, [1864] W. R. 241 ; *Shailendranath Palit* v. *Hade Kaza Mane*, (1931) 59 Cal. 586, 598, 612 (purchaser not bound to go beyond immediate cause for loan, viz. pressure & impending danger : p. 599 ; *Gangapershad Sahu* v. *Maharam B.*, (1885) 12 I. A. 47, 49-50 (if Court authorizes loan, lender entitled to trust to Court's order & not bound to enquire as to expediency or necessity : but otherwise, if fraud or underhand dealing brought home to lender).

[21] Bail. II. 221 (*fifth*) ; *Sharaiu'l Islam* 239, case 8.

[22] *Salebhai* v. *Bai Safiabu*, (1911) 36 Bom. 111 = 13 Bom. L. R. 1025 ; Abdur Rahim, *Muham. Jurispr.* 305.

[23] Sect. 520A = s. 502, proviso (2) of last ed.

[24] Or retrospectively approve and validate or presume a lost or unrecorded permission : see s. 520.

[25] Bail. I. 596 (par. 2) (607 par. 1) ; *Fat. Kazi Kh.* III. 303 ; *Re Woozatunnissa*, (1908) 36 Cal. 21 ; cf. s. 11A ; see also ss. 403, com., 502 *n. Nimai Chandaddya* v. *Golam Hossein*, (1909) 37 Cal. 179 ; *Afzal Husain* v. *Chhidi Lal*, (1934) 57 All. 727, 732 ; *Shailendranath Palit* v. *Hade Kaza Mane*, (1931) 59 Cal. 586, 611 ; *Sayed Arsad Hossain* v. (*Sm.*) *Naresh Nandini*, (1936) 40 C. W. N. 584 (permanent lease valid against *mutawalli* during his life : he cannot eject transferee from lessee).

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(G) Procedure for obtaining leave of Court.

520B.[26] The mutawalli may obtain the sanction of the Court for the sale or mortgage of wakf property, by an application under the Indian Trustees Act, XXVII. of 1866.[27]

VII. CRIMINAL PROCEEDINGS.

Disturbance in mosque.

521. Any person making any demonstration[28] oral or otherwise in any mosque, or saying his prayers in accordance with the ritual of his sect not in good faith,[29] but with the intention of maliciously disturbing others in their devotions, is guilty of committing a criminal offence.[30]

Illustrations.

(1) Members of the Muhammadi or Wahabi sect are Muslims, and are therefore entitled to perform their devotions in a mosque, though they may differ from the majority of the Sunni Muslims on particular point.[30]

(2) A Shafiite, may, notwithstanding that he may by doing so cause annoyance. pronounce the word amin loud in saying his prayers in a mosque, in which the majority of worshippers are Hanafis, who pronounce it in a low tone, provided that he does it bona fide, in accordance with his own rituals, and not for the purpose of disturbing the others.[31]

[26] Sect. 520B = s. 501A of last edition.

[27] *Kahandas Narandas*, (1885) 5 Bom. 154, 173 (*per* West, J.) (English law & Trustees Act, 1866, applicable in all cases in which peculiarly equitable doctrines have obtained recognition as means of ameliorating native laws: High Court has summary powers, confirmed by Trustees Act, in case of Hindu trusts); *Re Woozatunnessa, Bibi*, (1908) 36 Cal. 21; *In re Nilmoney Dey Sarkar*, (1904) 32 Cal. 143; *Fakhrunnessa B.* v. *Distr. J. of 24 Parganas*, (1920) 47 Cal. 592; *Habibar Rahman* v. *Saidanessa B.*, (1923) 51 Cal. 331 (sanction may be obtained by application to Distr. J.); *Askari Husain* v. *Chunni Lal*, [1930] 28 All. L. J. 205. CONTRA.—He must proceed by way of SUIT, on ORIGINATING SUMMONS: *Halima Khatun*, (1910) 37 Cal. 870 (*per* Pugh, J.: powers & authorities given by Act shall & may be exercised only in cases to which English law applicable: cf. Trustees Act, 1866, s. 30). Cf. *Burhan Mirdha* v. (*Mt.*) *Khodeja B.*, (1936) 41 C. W. N. 314 (F.B.) (suit for dissolution of Muslim marriage to be brought in Munsif's Court valued at Rs. 15); *F. A. Shihan* v. *Abdul Alin Abed*, (1930) 58 Cal. 474. SHARIAT ACT XXVI. of 1937, s. 5 (which came into operation on 7 Oct. 1937) provided that "the District Judge may on petition made by a Muslim married woman dissolve a marriage on any ground recognized by Muslim personal law." But that section was repealed by DISSOLUTION OF MUSLIM MARRIAGES ACT VIII. of 1939, s. 6 (which came into operation on 17 Mar. 1939) set out, p. 252.

[28] E.g. by bawling out word *amin* in noisy & disorderly fashion, causing disturbance; Straight, J. in *Ataullah* v. *Azimullah*, (1889) 12 All. 494 (F.B.), explaining *Q.-E.* v. *Ramzan*, (1885) 7 All. 461.

[29] *Janki Prasad* v. *Karamat Husain*, (1931) 53 All. 836 (right to worship according to own rites without causing nuisance: Ind. Pen. Code, s. 268); *Ataullah* v. *Azimullah*, (1889) 12 All. 494, 504, 505.

[30] *Ataullah* v. *Azimullah*, (1889) 12 All. 494 (F.B.), 504 (*per* Mahmood, J.); *Jangu* v. *Ahmadullah*, (1889) 13 All. 419 (F.B.); see also *Abdus Subhan* v. *Korban Ali*, (1908) 33 Cal. 294; *Fazl Karim* v. *Maula Buksh*, (1891) 18 I. A. 59 = 18 Cal. 448; *Adam Sheik* v. *Isha S.*, (1894) 1 C. W. N. 76; *Jawahir* v. *Akbar Hussain*, (1884) 7 All. 178; *Dasondhay* v. *Muhammad Abu Nasar*, (1911) 33 All. 660; *Ram Chandra* v. *Ali Muhammad*, (1913) 35 All. 197; *Jawand Singh* v. *Muhammad Din*, (1919) 1 Lah. 140 (conches blown to stop Muslims from calling out *azan* from mosque: injunction against such blowing issued).

[31] Bail. I. 606 (617); *Fazl Karim* v. *Maula Buksh*, (1891) 18 I. A. 59, 68 (*l.* 25), 72 = 18 Cal. 448, 458(*l.* 16), 462 (there is NO CODE OF RITUAL [in Islam]: 20 years' practice does not render ritual rigid & imperative. Court will not authorize plaintiffs to turn out defendants if they interfere. Court's order must be obtained & enforced in each case that arises. *Ataullah* v. *Azimullah*, (1889) 12 All. 494.

RELIGIOUS PROCESSIONS along streets.

521A. (1) There is a right in India to conduct religious processions along streets, practising on the route appropriate religious observances,[32] without being compelled to intermit worship at particular points by people of a different sect whose place of worship is upon the route ; provided that such processions do not interfere with the ordinary uses of such street by the public,[33] that they are conducted subject to such directions as the local authorities or Magistrates may lawfully give to regulate the traffic,[33] and to prevent obstruction of the thoroughfare, and breaches of the peace :[33] such directions may compel the intermission of worship at particular points.[34]

Saving use by public.

Directions.

Intermission of worship.

(2) No sect has an exclusive use of the highway for its worship.[34]

(3) A civil suit lies against those who would prevent a procession with its observances.[34]

Public use of highway.

Profitable ceremonies.

Processions, ceremonies and observances are frequently contrived so as to bring profit to those who organize them.[35]

[32] *Venkatesh Appashet* v. *Abdul Kadir*, (1918) 42 Bom. 438 seems (*submitted*) to be wrongly decided.

[33] *Manzur Hasan* v. *Muhammad Zaman*, (1924) 52 I. A. 61 (ALL.); *Parthasaradi* v. *Chima Krishna*, (1882) 5 Mad. 304 ; *Muthiali Chetty* v. *Bapun Saib*, (1880) 2 Mad. 140 ; *Sudan Chetti* v. *Queen*, (1883) 6 Mad. 203 (F. B.) ; *Mahomed Abdul Hafiz* v. *Latif Hasan*, (1897) 24 Cal. 524 ; *Baslingappa* v. *Dharmappa*, (1910) 34 Bom. 571 ; *Muhammad Jalil K.* v. *Ramnath Katna*, (1930) 53 All. 485 (music & nuisance); *Janki Prasad* v. *Karamat Husain*, (1931) 53 All. 836 (= *n.* 29); *Subhan* v. *Baburam*, (1929) 52 All. 329 (agreement about DULDUL PROCESSION : app. to P. C.); *Ram Singh* v. *Subhan Mochi*, (1929) 27 All. L. J. 1083 (DULDUL PROCESSION : Ind. Contr. Act, s. 187); *Hussain Khan* v. *Krishnan Servai*, (1929) 53 Mad. 761 (compromise of competing rights : if new body of worshippers invades already occupied locality, LONG CONTINUED CUSTOMARY WORSHIP in invaded locality will not be curtailed).

[34] Bail. I. 606 (617); *Fazl Karim* v. *Maula Buksh*, (1891) 18 I. A. 59 = 18 Cal. 448 ; *Ataullah* v. *Azimullah*, (1889) 12 All. 494.

[35] See s. 478 A. p. 581 & cases there cited : also James Morice, *Haji Baba of Isfahan*, Ch. 9, 10 & *passim*.

CHAPTER XI.

PRE-EMPTION.

§ 1.—TERMS : OPERATION OF PRE-EMPTION.

I. Terms defined.

522. (1) "Pre-emptor[1] means a person[2] having or claiming the right to get any property transferred to himself,[3] on his paying the consideration for which the owner[4] of the said property has, or is alleged to have sold or bartered or has purported, or agreed, to sell[5] or barter[6] it to another. The said right or claim is called the "right (or claim) to pre-empt."[7] The said property is referred to as the "subject of pre-emption"[7] or "the pre-empted property," or "the land pre-empted."[7]

Pre-emptor : pre-emption.

Subject of,—

(2) In this chapter unless it otherwise appears,

land, seller, vendor, or buyer.

(*a*) The subject of pre-emption is called "the property" or "the land"; its original owner[8] "the seller or vendor";[9]

[1] The pre-emptor may be a co-sharer (= *sharik*) (s. 541 A), or participator in appendages (= *khalit*) (s. 541 B) or neighbour (= *jar*) (s. 541 C); see definitions in ss. 541 A-C, pp. 707 f. & in Punjab Pre-emption & Oudh Laws Acts : pp. 726 ff., s. 557.

[2] Masculine includes feminine & singular includes plural, & *vice versa.*

[3] PRE-EMPTION = right not of repurchase from seller or buyer : but of substitution : entitling pre-emptor to stand in shoes of buyer. Agra Pre-emp. Act (Local) XI. of 1922, s. 4 : decree for pre-emption is not a re-sale : pre-emptor not representative of & does not for purposes of Limitation Act IX. of 1908, s. 19, derive title through buyer : *Shankar Lal* v. *Hashmi Begam*, (1932) 54 All. 1023. WANT OF MUTUALITY : see p. 665, *n.* 5, s. 523.

[4] JOINT OWNERS OR SELLERS : Hed. 564 ; Bail. I. 492 (498) ; *Muhammad Askari* v. *Rahmatullah*, [1927] 25 All. L. J. 473, 478.

[5] Not *hiba bil iwaz* for *mahr* : *Bashir Ahmad* v. (*Mt.*) *Zubaida Kh.*, (1925) 1 Luck. 83 : *Sheikh Mohammad Jamil* v. *Khub Lal Raut*, (1920) 5 Pat. L. J. 740 (pre-emption applies only to SALE OF PROPRIETARY INTEREST & therefore not to sale of *muqarrari* interest) : see ss. 526-526 B, *nn.*, pp. 678-681.

[6] Texts refer both to SALE & EXCHANGE, but for brevity only sale is referred to throughout, & that expression must be taken to include exchange or barter.

[7] Bail. I. 471 (475). Pre-emption = *shufa* in Arabic ; pre-emptor = *shafi*, Mahmood, J., suggested "servient tenement" = subject of pre-emption : *Jai Ram* v. *Mahabir Rai*, (1885) 7 All. 720, 728 ; see *Jadu Lal Sahu* v. *Maharani Janki Koer*, (1912) 39 I. A. 101 = 39 Cal. 915.

[8] I.e. owner who has agreed or purported to sell property.

[9] Where there are JOINT PURCHASERS there are supposed to be as many sales : *Muhammad Askari* v. *Rahmatullah*, [1927] 25 All. L. J. 473, 477 ; citing *Durrul Mukhtar*, (B. M. Dayal) 399 (Luck. 1913, 1916) ; *Aliman B.* v. *Ali Husain*, (1923) 45 All. 449 (where more purchasers than one, demand must be made in presence of all).

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the person to whom it was originally intended to be transferred by sale or barter "the buyer, purchaser or vendee";[10] the agreement for its transfer "the sale," or the "ground for pre-emption"; its consideration (in money or property), the "purchase money" or "the price"; and the right of pre-emption is said to be "claimable on" or to "arise from" or to be "based on" the sale or the ground of pre-emption.

Sale.

Price.

Right of pre-emption arising.

(*b*) Two or more persons simultaneously entitled to pre-empt the same property, are said to be on the same footing in respect of the priority of their claims to pre-empt, or "equal in degree in respect of pre-emption"[11] or "joint pre-emptors."[11]

Pre-emptors equal-in-degree; joint-pre-emptor

(*c*) Where the right of one person to pre-empt arises only in the absence, or on the disqualification, of another, or on that other waiving or forfeiting his claim to pre-empt, the latter is (subject to his disqualification or waiver or forfeiture) said to have "priority in the right to pre-empt" over the former,[12] or to be "the prior pre-emptor."

Priority in the right.

(*d*) A person whose personal law includes the law of pre-emption, is said to be "governed by" or "subject to the law of pre-emption."[13]

Persons governed by.

(*e*) The talab-i-muathibat, talab-i-ishhad, and talab-i-tamlik, as explained in ss. 528-528 C, are respectively called the "assertion,"[14] "demand," and "enforcement" of the claim to pre-empt,[15] or the first, second, and third claims; the first two of these are referred to as the "preliminary ceremonies;" and the pre-emptor is said respectively to assert, demand, and enforce, his claim.

Talab-i muathibat (or assertion).

Talab-i-ishhad (or demand).

Talab-i-tamlik (or enforcement)

(*f*) The wajibu'l-arz is the record of the information

Wajib-ul-'arz or record of tenures, &c.

[10] *Original* sometimes added out of greater caution, to distinguish buyer or vendee from pre-emptor: since the pre-emptor becomes the final buyer.

[11] *Syeeduddin* v. *Latifunnissa*, [1921] 19 All. L. J. 909 (degrees of nearness between same class of pre-emptors not recognized). Cf. s. 545, pp. 714 f.

[12] Civ. Pro. Code, 1908, O. xxv., r. 14(2)(*b*) speaks of SUPERIOR & INFERIOR PRE-EMPTORS.

[13] PERSONS GOVERNED IN INDIA BY LAW OF PRE-EMPTION are: (*a*) all Muslims (except residents of places where Courts refuse to enforce law of pre-emption on ground that it is against public policy, or that it has fallen into desuetude); (*b*) those who have adopted it by custom; or (*c*) by contract: *Hamedmiya* v. *Benjamin*, (1928) 53 Bom. 525, 539 f.

[14] "The first formality technically called the *immediate demand*": *Jadu Lal Sahu* v. *Maharani Janki Koer*, (1912) 39 I. A. 101 = 39 Cal. 915.

[15] Where necessary, Arabic equivalents are given, or they are referred to by number, e.g. first assertion: second demand.

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Custom and wajib-ul-'arz altering Muhammadan law.

(3) The rules stated in this chapter represent the general Muhammadan law. The said rules may be altered by custom.

(4) Rights of pre-emption claimed under a wajibu'l-arz, are governed, in the first instance, by its construction.

1.—Basis of right to pre-emption.

"The right of pre-emption is founded on contract and neighbourhood, confirmed by talab or demand, and ishhad, or invocation; and is perfected by taking possession." [17]

2.—Procedure.

The exposition of the procedure on a suit for pre-emption before the Kazi [18] represents in a compendious form a statement of all the matters and constituents establishing the claim.

3.—Definitions of pre-emption.

a.— "Shafa or pre-emption is defined in the Sharaiu'l-Islam as "the legal title of one partner in joint property to the share of another partner in consequence of its transfer of sale;" [19] by Mahmood, J., as "a right which the owner of certain immovable property possesses as such for the quiet enjoyment of

c.— immovable property, to obtain in substitution for the buyer, proprietory possession of certain other immovable property not his own, on such terms as those on which such latter immovable property is sold to another person." [20]

The Punjab Pre-emption Act, 1913, and Oudh Laws Act, 1876 define it as

b.— the right of persons mentioned or referred to, to acquire, in the cases

[16] *Chowdhree Brij Lal* v. *Raja Goor Sahai*, (1867) Agra (F. B.) (N. W. P., F. B. RUL. July-Dec. 1867), 95 (ORIGIN & EFFECT OF WAJIBU'L-ARZ explained in great detail); *Sadhu Sahu* v. *Raja Ram*, (1893) 16 All. 40 (F. B.); *Returaji Dubani* v. *Pahlwan Bhagat*, (1910) 33 All. 196, 204, 206 (F. B.); (*Mt.*) *Lali* v. *Murlidhar*, (1906) 33 I. A. 97 = 28 All. 488, 492; *Murtuza Hussain* v. *Mohammad Yassin*, (1916) 43 I. A. 269, 283 (OU.). WAJIBU'L-ARZ, lit. = fit for, or worthy of, representation; petition, written statement or representation, written agreement: in N. W. Prov. is considered to be most important of documents relating to village administration, describing (i) established mode of paying Gov. revenue, (ii) actual shares or holdings, (iii) whether held in severalty or in common, & how separation or re-allotment takes place, (iv) powers & privileges of *lambardars* & how elected, (v) what extra items of collection recognized, (vi) rules regarding fruit & timber trees on estate, & (vii) how irrigation maintained, (viii) appropriation of waste lands, (ix) village servants & fees, & pay of the village watchmen: it should be, in fact, complete view of organization of village & to be attested by (1) signatures of all *lambardars*, & (2) as many of shareholders as choose to sign, & (3) by signatures of *patwari* & *kanungo*, (4) it should be read aloud in open court in hearing of subscribing parties, & settlement officer, (5) & be approved & signed also by him. Term seems superseded of late years by *khewat*.—Wilson, *Glossary*, (1855). On evidentiary value of *wajibu'l-arz* see *Fazl Hussain* v. *Muhammad Sharif*, (1914) 36 All. 471. It may be rebutted: *Digambar* v. *Ahmad*, (1914) 42 I. A. 101 (ALL.).

[17] Bail. I. 481 (487), cf. Bail. I. 485-487 (491-493).

[18] Bail. I. 485-487 (491-493), Bk. VII. ch. 3.

[19] Bail. II. 175: under Hanafi law a partner not only in the property, but also in its rights, & also a neighbour, have a legal claim to pre-emption, *ibid. n.* 1, citing Bail. I. 476 (481).

[20] *Gobind Dayal* v. *Inayatullah*, (1885) 7 All. 775, 799.

specified, certain classes of immovable property in preference to all other persons. The term has been more briefly defined as the right of purchasing property before, or in preference to, other persons.[21] SECTION 522. *d.*—

Imam Shafii held pre-emption to be "repugnant to analogy, as it involves the taking possession of another's property contrary to his inclination; whence it must be confined solely to those to whom it is particularly granted by the law."[22] It is justified, however, on the grounds that: (*a*) so far as a joint owner is concerned, it is injurious to him to have a stranger as participator in the property to which he must be attached through associations, but which he may perhaps abandon: and that it would be a greater hardship on him than on the stranger: the more so as the stranger is compensated; (*b*) inconveniences attend the division of property;[22] (*c*) the Sharaiu'l-Islam refers to division occasioning loss or damage as a cause why the right is given;[23] and (*d*) the Hidaya, to pre-emption "being a disseising another of his property merely in order to prevent apprehended inconveniences"; and (*e*) that "the grand principle of shafa is the conjunction of property and its object...to prevent the vexation arising from a bad neighbour."[24] 4.—Shafii's view. 5.—Pre-emption justified.

The nature of the right makes it clear that its existence is no defence to a suit for possession by the purchaser of the interest of another co-sharer.[25]

The question has been raised, but not decided, whether the right of pre-emption creates an interest in the land.[26]

II. OPERATION OF PRE-EMPTION.. (A) LAW OF SUNNIS AND SHIAS.

523. (1) The Sunni or Shia law of pre-emption respectively governs persons belonging to the said schools.[1]

(2) Pre-emption may be based on custom[2] or may arise out of the wajibu'l-arz[3] or other contract, or under a legislative enactment;[4] and in such cases, subject to ss. 523 C-D, the terms of the custom or contract or enactment (as the case may be) are strictly[5] enforced.[6] Custom: contract.

21 Sweet, *Law Dict.* cited, *Encyc. Laws of Eng.* s. v. pre-emption.

22 Hed. 548. Shafii therefore does not admit it in favour of neighbours.

23 Bail. II. 176 (par. 3).

24 Hed. 550 (col. i., par. 4); 558 (col. ii., par. 1, 2).

25 *Ajudhia Baksh Singh* v. *Arab Ali Khan*, (1885) 7 All. 892 (decree passed in suit to which minor not party: minor sues execution purchaser & claims possession of his (minor's) share in estate: *held* execution purchaser cannot as defence plead right of pre-emption: pre-emption must be sued for in separate suit).

26 *Sitaram Bhaurau* v. *Sayed Sirajul K.*, (1917) 41 Bom. 636, 650(= p. 679, *n.* 4); cf. Trans. of Prop. Act, s. 54 (last clause), s. 40.

1 Cf. *Qurban Husain* v. *Chote*, (1899) 22 All. 102.

2 As to proof of CUSTOM see s. 10 A, pp. 71 ff.

3 Agreement creating right of pre-emption is not compulsorily REGISTRABLE: *Tribhuvan* v. *Bai Khushal*, (1923) 25 Bom. L. R. 79.

4 *Birendra Bikram S.* v. *Brij Mohan Panday*, (1934) 61 I. A. 235 (OU.). E.g. AGRA PRE-EMPTION (Local) ACT XI. of 1922: *Abdul Khan* v. *Shakira B.*, (1927) 50 All. 348; *Ashraf B.* v. *Muhammad Abdul Raoof*, (1927) 50 All. 404; *Zainab B.* v. *Umar Hayat Khan*, (1936) 58 All. 873; *Shankar Lal* v. *Hashmi B.*, (1932) 54 All. 1023 (s. 4 & Limit. Act, s. 19); *Amjad Ali K.* v. *Saddat B.*, (1931) 53 All. 525. See also PUNJAB PRE-EMPTION & OUDH LAWS ACT, 1913, 1876: s. 557 below, pp. 726 ff.

5 (i) *Chesterman* v. *Mann*, (1851) 9 Ha. 206 (where plaintiff calls for perform-

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(3) A suit for pre-emption the parties to which are not governed by the same law, is subject to s. 524.

History of pre-emption.

From the history of pre-emption in India (alluded to by the Privy Council)[7] it appears that pre-emption in village communities had its origin in the Muhammadan law. It was apparently unknown in India before the time of the Mughal rulers. In some cases customs of pre-emption grew up among village communities. The Calcutta High Court has held that the preliminary forms of Muhammadan law must always be adhered to.[8]

Origin from Muslim law.

Pre-emption by custom.

523 A. The custom of pre-emption is recognized and enforced in several places.[9] It is enforceable in certain

ance of COVENANT IN WHICH THERE IS NO MUTUALITY,—defendant having no means of enforcing that covenant against plaintiff,—Court very cautiously exercises EQUITABLE DISCRETION to enforce specific performance : if terms of covenant, e.g. about payment, not followed strictly by plaintiff, discretion not exercised : even if defendant has asked for payment of improper amount, plaintiff's duty is to come to Court for having proper amount fixed, not to sit still till time for payment elapses); (ii) *Topham* v. *Duke of Portland*, (1869) L. R., 5 Ch. App. 40, 55 (power must be strictly exercised within limits prescribed); *Lord Ranelagh* v. *Melton*, (1864) 2 Dr. & Sm. 218 = 34 L. J. (CH.) 353 (lessee had right of purchase on payment at expiration of 3 months from notice : payment not made on day when 3 months expired : right of purchase forfeited); (iii) *Weston* v. *Collins*, (1865) 34 L. J. (CH.) 353 (do.); (iv) *Brooke* v. *Garrod*, (1857) 2 De G. & J. 62 (time fixed for payment for pre-empting : not extended by Court : though pre-emptor asked for abstract of title & there was delay in furnishing it); (v) but see *Ward* v. *Wolverhampton Waterworks Co.*, (1871) L. R. 13 Eq. 243 (RIGHT MAY BE OF REPURCHASE, similar to mortgagor's right of redemption, exercisable at any time ; p. 247 arg ; or like power of appointment which NOT NECESSARILY DESTROYED BY previous INEFFECTUAL & ILLOGICAL ATTEMPT to exercise it); (vi) cf. Act x. of 1877, s. 310 ; Act XXI. of 1860, s. 14, for rights of pre-emption in Court sales ; (vii) *Ilahi Jan* v. *Mohammad Ishaq K.*, [1919] 17 All. L. J. 687 (where right based on contract & contract comes to end, pre-emptor may fall back on Muslim law : but decision went against claim for want of proof).

[6] Cases depending on *wajibu'l-arz* very common. Other contracts : *Rajaram* v. *Krishnasami*, (1892) 16 Mad. 301 ; *Haris Paik* v. *Jahuruddi Gazi*, (1897) 2 Cal. W. N. 575. In contracts, pre-emption frequently called *option* to purchase.

[7] *Digambar Singh* v. *Ahmad S. K.*, (1914) 42 I. A. 10 (ALL.).

[8] *Fakir Rawot* v. *Sheikh Imambaksh*, (1863) W. R. (F. B.) 143 = Beng. L. R. SUPP. VOL. 35, generally approved by P. C. in *Jadu* v. *Maharani Janki*, (1912) 39 I. A. 101 = 39 Cal. 915 ; different view of HISTORY OF LAW had been taken in (*Chowdhree*) *Brij Lall* v. (*Raja*) *Goor Sahai*, (1867) N. W. P. (F. B. RUL.) July-Dec. 1867, p. 95.

[9] In this *n.*, " PR." = " custom of pre-emption prevails in place or amongst class of people referred to." " not-PR." = " it does not so prevail." (i) *Gordhandas* v. *Prankor*, (1869) 6 Bom. H. C. R. (A. C.) 263 ; *Motilal* v. *Harilal*, (1920) 22 Bom. L. R. 806, AHMEDABAD Hindus PR. : *Sitaram* v. *Jiaul Hasan*, (1921) 48 I. A. 475 (upholding 41 Bom. 636). (ii) Bene Israelite buyer from Muslim seller in AHMEDABAD not-PR.: *Hamedmiya* v. *Benjamin*, (1928) 53 Bom. 525. (iii) BEHAR not-PR. : *Jadu* v. *Manarani Janki*, (1912) 39 I. A. 101 (CAL.) affirming *Jadu* v. *Janki*, (1908) 35 Cal. 575 ; *Joy Koer* v. *Suroop*, [1864] W. R. 259 ; *Kasi C. ib.* 189 ; *Fakir Rawot* v. *Sheikh Emambaksh*, Beng. L. R. (SUP. VOL.) 35 = W. R. (SP. NO.) 143 (F. B. ; *Ramdular* v. *Jhumack*, (1872) 8 Beng. L. R. 455 = 7 W. R. 265 ; *Sheojuttun* v. *Anwar*, (1870) 13 W. R. 189. Whether NATIVE OF BEHAR OR DOMICILED there. (iv) BENARES : PR. as to houses ; but that custom not extended to sale of *land*, in absence of strict proof : *Ram Chand Khanna* v. *Goswami Ram Puri*, (1923) 45 All. 401. (v) NATIVE OF LOWER BENGAL seeking his fortune in BEHAR not necessarily PR. : *Byjnath* v. *Kopilmon* (1875) 24 W. R. 59 ; nor person who is co-sharer in property in BEHAR but not domiciled there : *Parsashth* v. *Dhanai*, (1905) 32 Cal. 988 ; *Saiyad Fazal Karim* v. *(Mt.) Bibi Fatmatul Kubra*, (1922) 1 Pat. 774. (VI) CHRISTIAN IN BHAGALPORE : *Moheshee Lal* v. *Christian*, (1866) 6 W. R. 250 not-PR. BROACH see GUJARAT. (vii) in BULSAR : PR. under Hanafi law : *Vithaldas Kahandas* v. *Jametram*, (1920) 44 Bom. 887. (VIII) BURMA PR. *Syed Ebrahim* v. *P. M. Syed Khan*, (1925) 4

localities irrespective of the religion of the parties concerned.[10] SECTION 523A.

Based on Muhammadan law.

The law of pre-emption, as recognized in India, is based on Muhammadan law ; and even where it derives its authority from the customs and usages of the people, "it is presumed to be founded on, and co-extensive with, the Muhammadan law on that subject, unless the contrary is shown."[11]

Codification of the law of pre-emption.

The law of pre-emption has been to a great extent, codified in the Punjab Laws Act, IV. of 1872, ss. 9-20, now Punjab Pre-emption Act I. of 1913 (Punjab Act), the Oudh Laws Act, XVIII. of 1876, ss. 6-15 : see s. 557, pp. 726 ff. See also Act XXII. of 1861, s. 14, (pre-emption allowed to a co-sharer of 'puttee-dari' estate sold in execution of a decree);[12] Act X. of 1877, s. 310, XXI. of 1860, s. 14, (rights of pre-emption on contract sales).

Court sales : pre-emption.

Grounds for enforcing it : 1. As "religious usage or institution."

The Acts laying down the law in accordance with which decisions have to be given by the Courts, do not expressly refer to the law of pre-emption. See the table of enactments in Chapter II., p. 28/29.

Mahmood, J., held[13] that, the law of pre emption, being based on the traditions of the Prophet's sayings and actions, must be deemed a part of "religious usages or institutions,"[14] and as such necessarily enforceable. But

Rang. 13. (ix) HINDUS IN CHITTAGONG not-PR. ; H.C. held custom not proved. See *Inder N. C.* v. (*Mahomed*) *Naziroodeen*, (1864) 1 W. R. 234, s. c. on review, *vice versa*, (1866) 5 W. R. 237 : 3 decisions of subordinate Courts holding PR. (x) *Kalidas* v. *Partap*, (1916) 18 Bom. L. R. 693, Hindus in GODHRA PR. (xi) *Reva* v. *Dhulabdas*, (1902) 4 Bom. L. R. 811, assumed Hindus of GUJARAT PR. but that decision & *Gordhandas's Case*, 6 Bom. H. C. R. 263, explained & held in *Dahyabhai* v. *Chunilal*, (1913) 38 Bom. 183, as insufficient to show that whole of Gujarat PR. beyond territorial jurisdiction of Sadr Courts of SURAT & BROACH. Ultimate decision in *Dahyabhai's* case proceeded on omission of parties to go through preliminary ceremonies. (xii) Dist. KHANDESH not-PR. : *Mahomed Beg* v. *Narayan*, (1915) 40 Bom. 358. (xiii) MADRAS not-PR. : *Ibrahim* v. *Muni*, (1870) 6 Mad. H. C. R. 26 (see s. 5) ; *Krishna* v. *Kesavan*, (1897) 20 Mad. 305, MADRAS in general not-PR. ; see s. 523. com., s. 5 ; *Kadakamvali* v. *Mokkath*, (1897) 30 Mad. 388. (xiv) *Zamir* v. *Daulat Ram*, (1882) 5 All. 110 : MUZAFFARNAGAR in *Muhalla* Abupura PR. (xv) HINDUS IN PURNEAH not-PR. : *Kantee* v. *Walee*, (1869) 11 W. R. 251 not-PR. (xvi) *Jagjivan Haribhai* v. *Kalidas Mulji*, (1920) 45 Bom. 605. Hindus of SURAT PR. as to houses : as to agricultural lands, doubtful. (xvii) SYLHET : *Jameelah* v. *Pagul*, (1864) 1 W. R. 251, PR. ; see also *Abdul Jaleel* (*Jabel*) v. *Khalat C.*, (1868) 1 Beng. L. R. (A. C.) 105 = 10 W. R. 165 ; *Syed Abdool* v. *Kalle*, (1866) 6 W. R. Mis. 32 ; *Gireeshchandra* v. *Rabeendranath*, (1930) 61 Cal. 694 (custom in SYLHET so long PR. & has received such judicial recognition, as to put it in category of rule of law ; no more necessary to prove prevalence of Pre-em. by evidence). (xvii) TIPPERAH : *Dewan* v. *Azhurooddeen*, (1866) 5 W. R. 270 (issue whether PR. allowed by custom as against Hindu purchaser in TIPPERAH).

[10] In other cases CUSTOM, where alleged, must be proved (s. 10, pp. 65 ff.) ; one or two solitary instances not = proof : see s. 10 A, pp. 71 ff : *Benarsee* v. *Phool*, (1866) 1 Agra 243 ; *Sheraj Ali* v. *Ramjan B.*, (1867) 8 W. R. 204 ; *Hubeebul Hossain* v. *Lolla Daoki*, [1867] Suth. W. R. 74 ; *Muhammad Mahbubali* v. *Raghubar*, (1915) 13 All. L. J., 951. Whether custom exists is QUESTION OF FACT : *Barumal* v. *Tonsukh*, *ib.* 717 ; & evidence of *wajibu'l-arz* may be rebutted : *Digambar* v. *Ahmad*, (1914) 42 I. A. 101 (ALL.).

[11] *Fakir* v. *Shaikh Emambuksh*, (1863) W. R. 143 ; *Gordhan* v. *Prankor*, (1869) 6 Bom. H. C. R. 263 ; *Rewa* v. *Dulbhdas*, (1902) 4 Bom. L. R. 811 ; cf. *Gobind* v. *Inayatullah*, (1885) 7 All. 775.

[12] Cf. *Shib* v. *Thika*, (1875) 7 N. W. 97.

[13] *Gobind* v. *Inayatullah*, (1885) 7 All. 775 ; cf. *Vahazullah* v. *Boyapati*, (1906) 30 Mad. 519, 521 ; *Abdul* v. *Aziz-ul-Huq*, (1911) 39 Cal. 259 ; *Amir* v. *Saman*, (1910) 7 All. L. J. 956 ; *Imam Din* v. *Hasan*, (1905) 41 Punj. Rec. 309 (No. 85).

[14] Table of Acts (see pp. 28, 29) mentioned "religious usages or institutions" amongst matters to be decided in accordance with Muhammadan law.

SECTION 523A. Petheram, C. J., and Oldfield, J., dissented, and held that the Courts are not bound to administer the Muhammadan law in claims of pre-emption, but do so on grounds of equity.[15] The Madras High Court has taken a directly contradictory view. Holloway, J., said that the law of pre-emption was "manifestly opposed" to equity and good conscience,—a conclusion based on a comparison of the Muhammadan law with the Roman and German law on the same point. Roman law differs from the two other systems: under it, the right arises out of contract, and gives only a personal action against the vendor. In Germany almost all trace of the law of pre-emption has disappeared. The Muhammadan lawyers felt the necessity of "an antidote to its beneful influences," and "found it in subtle devices for its defeat," and "short periods of prescription for its exercise."[16]

2. Justice, equity and good conscience.

Recent Bombay decisions.

Batchelor, J., concurred with the view that pre-emption is opposed to justice, equity and good conscience; and that the rules of pre-emption place a clog or fetter upon that freedom of sale, for which the Transfer of Property Act and the Indian Contract Act, provide.[17] Shah, J., while agreeing that pre-emption was opposed to justice, equity and good conscience, hesitated to accept the view that pre-emption was opposed to the statutory law of transfer and contract in British India: for two reasons: (i) pre-emption according to Muhammadan law has been enforced in other parts of India and even in parts of the Bombay Presidency; and (ii) Chapter III. of the Transfer of Property Act which relates to sales of immovable property, does not purport to deal with the right of the vendor to sell, but only provides the mode of effecting sales, and contains provisions as to the rights and obligations of the seller and buyer in the absence of a contract to the contrary.[18] Both judges, however, agreed on (iii) the third ground for decision, viz. that it had not been proved that the custom of pre-emption was recognized in the District of Khandesh.[18]

3. Custom.
4. Contract.

Pre-emption may, be adopted by the customs[19] of the people and enforced on that ground or arise out of contract.[20]

(B) PRESUMPTIONS.
(1) Muslims alone governed by it.

523 B.[21] In the absence of proof to the contrary it will be

[15] *Gobind Dayal* v. *Inayatullah*, (1885) 7 All. 775, 815.

[16] *Ibrahim Saib* v. *Muni Mir Udin*, (1870) 6 Mad. H.C.R. 26 (per Holloway, J., Innes, J., concurring).

[17] *Mahomed Beg. A.* v. *Narayan Meghaji*, (1915) 40 Bom. 358; cf. *Sitaram* v. *Bhaurau Sayad Sirajul K.*, (1917) 41 Bom. 636, 649, 650 affirmed (1921) 48 I. A. 475 = 45 Bom. 1056.

[18] *Mahomed Beg. A.* v. *Narayan Meghaji*, (1915) 40 Bom. 364, 365, 368.

[19] *Gordhandas* v. *Prankor*, (1869) 6 Bom. H.C.R. 263.

[20] E.g. in *Rajaram* v. *Krishnasami*, (1892) 16 Mad. 301; *Sitaram B.* v. *Sayad Sirajul K.*, (1917) 41 Bom. 636 affirmed *Sitaram* v. *Jiaul Hasan*, (1921) 48 I. A. 475 = 45 Bom. 1056: s. 310 Act XXI. of 1860, s. 14, for rights of pre-emption on court SALES. For Shafii law see *Minhaj*, 205 (Bk. 18, s. 1). *Wajid Ali* v. *Shaban*, (1909) 31 All. 623 (pre-emption under (i) Muhammadan law, (ii) contract, & (iii) custom distinguished).

[21] Sect. 523B cited & applied: *Syed Ebrahim* v. *P. M. Syed Khan*, (1925) 4 Rang. 13.

presumed that Muslims are subject to the law of pre-emption, and that non-Muslims are not subject to it.[22] SECTION 523B.

523 C. In the absence of proof to the contrary it will be presumed that where the law of pre-emption is adopted by custom [or contract[23]] it is the Muhammadan law[24] in accordance with the Hanafi[25] exposition thereof.[26] (2) Pre-emption and Hanafi law.

Peacock, C. J. observed that where "a right or custom of pre-emption" "exists, it must be presumed to be founded on, and co-extensive with, the Muhammadan law upon that subject, unless the contrary be shown ; the Court may, as between Hindus, administer a modification of that law as to the circumstances under which the right may be claimed, when it is shown that the custom in that respect does not go the whole length of the Muhammadan law of pre-emption. But the assertion of the right must always be preceded by an observance of the preliminary forms prescribed in the Muhammadan law, which forms appear to have been invariably observed and insisted on, through the whole of the cases from the earliest times of which we have record.[27] In this requirement we see no evil, inasmuch as a right of pre-emption undoubtedly tends to restrict the free sale and purchase of property, and it is desirable, therefore, to encompass it with certain rules and limits, lest the right should be exercised vexatiously."[28] Mahmood, J., also expressed a strong view to the *Presumptions.* 1.—Calcutta view : co-extensive with Muhammadan law. Preliminary forms. 2.—Mahmood, J. : pre-emption originates from Muhammadan law.

[22] *Fakir Rawot* v. *Imam Baksh*, (1863) Beng. L. R. (SUPP. VOL.) 35 = 35 W. R., Sp. No. 143 (F. B.); cf. *Jadu Lal Sahu* v. *Maharani Janki Koer*, (1912) 39 I. A. 101 = 39 Cal. 915 ; *Syed Ebrahim* v. *P. M. Syed Khan*, (1925) 4 Rang. 13 (pre-emption prevails in BURMA under Burma Laws Act, XIII. of 1898, s. 13); *Ajimtulla Saha* v. *Jadavnath Chakrabutty*, (1925) 30 C. W. N. 292 (purchaser Hindu : pre-emp. not applicable); *Furman Khan* v. *Bhurut Chunder*, (1869) 13 W. R. (F. B.) 21 ; *Ramchand Khanna* v. *Goswami Ram Puri*, (1923) 45 All. 501 (not to be extended amongst Hindus beyond limits established by custom).

[23] See *Muhammed Usman* v. *Muhammad Abdul Ghafur*, (1912) 34 All. 1 (when it arises under CONTRACT, the contract can affect general law only during subsistence of the contract : general law revives when the contract is no more applicable ; *Ilahi Jan* v. *Mohammad Ishaq K.*, [1919] 17 All. L. J. 686 (right claimed on contract which came to end on settlement : plaintiff allowed to fall back on Muslim law); *Jagmohan Prasad* v. *Brijendra Bahadur Sing*, (1924) 46 All. 627 ; *Sitaram Bhaurao* v. *Sayed Siraj-ul-Khan*, (1917) 41 Bom. 636, 652, (contract for pre-emption : parties having agreed what law to apply). See *n.* 26.

[24] *Jadu Lal Sahu* v. *Janki Koer*, (1912) 39 I. A. 104, 107 (CAL.); *Jagmohan Prasad* v. *Brijendranath B. S.*, 46 All. 627 (entry in WAJIBU'L-ARZ under Beng. Regul. VII. of 1822, PRESUMED to record custom or local usage : if not specified, right to be enforced in accordance with MUHAMMADAN LAW).

[25] *Akbarally* v. *Mahomedally*, (1931) 57 Bom. 55.

[26] *Chakauri Devi* v. *Sundari Devi*, (1905) 28 All. 590 (in absence of allegation & proof as to any custom different from or not CO-EXTENSIVE with MUHAMMADAN LAW of pre-emption, that law applicable to Hindus); *Ganeshi Lall* v. *Luchman Dass*, (1873) 5 N. W. 31 ; cf. *Arjun Singh* v. *Sarfaraz Singh*, (1888) 10 All. 182 ; *Ram Prasad* v. *Abdul Karim*, (1887) 9 All. 513 ; *Jog Deb Singh* v. *Mohammad Afzal*, (1905) 32 Cal. 982 ; *Jadu Lal* v. *Janki Koer*, (1912) 14 All. 436, 442, (P. C.). See also *Jai Ram* v. *Muhabir Rai*, (1885) 7 All. 720, 728 (cf. s. 547, com.); *Jasoda Nand* v. *Kandhaiya Lall*, (1891) 13 All. 373 ; *Rustom Ali Khan* v. *Abbasi Begum*, (1891) 13 All. 407 ; *Jag Deo Singh* v. *Kazi Sayed Mohammed Afzal*, (1905) 9 Cal. W. N. 826 ; *Zamir Ahmad* v. *Abdul Razzak*, (1915) 13 All. L. J. 704.

[27] So far quoted with approval : *Jadu Lal* v. *Janki Koer*, (1912) 39 I. A. 101.

[28] *Fakir Rawot* v. *Sheikh Emam Bukhsh*, (1863) W. R. (SP. NO.) 143 = Beng.

SECTION 523C.
3.—Earlier Allahabad view.

same effect, and that there was no foundation for it in Hindu law : [29] " the administration of law by the kazis during the Muhammadan period gave wide currency to haq-i-shufa and its advantage became so apparent to the Hindus, that they attempted to naturalize it ... by an interpolation in he Tanra in question," i.e. in the Maha Nirvana.[30]

(3) Wajibu'l-arz : presumption as to custom.

523 D. A pre-emption clause in a wajibu'l-arz will be presumed to record a pre-existing custom, unless its language or other evidence indicates a new contract.[31]

(4) Law of pre-emption personal not territorial.

523 E.[32] The law of pre-emption is personal.[33] It is not territorial, nor an incident of property. A person who is not a native of or domiciled within a locality where pre-emption is enforced by law, or custom, but who owns land within the said locality,[34] will not necessarily be subject to the law of pre-emption.

(c) Under Acts.

523 F. Pre-emption may be claimed under several Acts of the Legislature.[1]

L. R. (SUPP. VOL.) p. 35. Noted as significant fact that every term employed in connection with, & the name of the right itself, *shufa*, borrowed from Arabic : pleader, himself a Hindu, could not refer to any term of Hindu origin connected with subject : no separate Hindu custom ever pleaded : nor applicability of Muhammadan law ever disputed by defendant until point orally taken up at hearing.

[29] *Gobind Dayal* v. *Inayatullah*, (1885) 7 All. 775 (F. B.); *Deokinandan* v. *Sri Ram*, (1889) 12 All. 234, 269 (F. B.); *Deonadan Prashad S.* v. *Ramdhari C.*, (1916) 44 I. A. 80 = 44 Cal. 675, 686 (P. C.). Cf. *Ram Pershad* v. *Abdul Karim*, (1887) 9 All. 513 (where *wajibu'l-arz* gave right of *shufa* according to usage of country); *Jadu Lal* v. *Janki Koer*, (1912) 39 I. A. 101 = 39 Cal. 915 (where this view seems to be adopted by P. C., *per* Syed Sahib Ameer Ali).

[30] *Chowdhree Brij Lall*, (1867) N. W. P. (F. B. R.) 65 (the view was expressed that it is not to be assumed that pre-emptor must necessarily prove compliance with the conditions essential under Muhammadan law). Cf. s. 556, com., p. 725.

[31] *Bhim Sen* v. *Motiram*, (1910) 33 All. 85 (F. B.), following *Majidan Bibi* v. *Sheigh Hayatan*, (1897) All. W. N. 3 (F. B.). ON CUSTOM : *Hazari Lal* v. *Durga Prasad*, (1909) 22 All. 187. ON CONTRACT : *Kanchan Singh* v. *Mani Ram*, (1910) *ib.* 201 ; *Tasadduq Hussain Khan* v. *Ali Khan*, (1908) All. W. N. 121 = 5 A. L. J. 470 ; *Pran Sukh* v. *Saliq Ram*, (1910) 32 All. 261. Cf. *Ganga Singh* v. *Chedi Lal*, (1911) 33 All. 605.

[32] Sect. 523 E cited & applied : *Syed Ebrahim* v. *P. M. Syed Khan*, (1925) 4 Rang. 13.

[33] See Punjab Pre-emption & Oudh Laws Acts : (s. 557 below, pp. 726 ff.) pre-emption applied to Muslims, mainly on ground of justice & equity. Cf. s. 5, above, p. 38.

[34] *Byjnath Pershad* v. *Kopilmon Singh*, (1875) 24 W. R. 95 (Hindu resident of Calcutta registered as pleader at Arrah in Behar, owns & sells land there : no pre-emption) ; *Parsashth Nath Tewari* v. *Dhanai Ojha*, (1905) 32 Cal. 988 ; *Hamedmiya* v. *Benjamin*, (1928) 53 Bom. 525 ; *Saiyed Fazal Karim* v. (*Mt.*) *Bibi Fatmatul Kubra*, (1922) 1 Pat. 774.

[1] E.g. PUNJAB PRE-EMPT. & OUDH LAWS ACTS ; (s. 557 below, p. 726), AGRA PRE-EMP. ACT (Local) XI. of 1922 ; *Abdul Khan* v. *Shakira B.*, (1927) 50 All. 348 (Agra Pr. Act, s. 16); *Ashraf B.* v. *Muhammad Abdul Raoof*, *ib.* 404 (s. 12(3).) : competition between sister & uncle) ; *Amjad Ali K.* v. *Saadat Begam*, (1931) 53 All. 524 (s. 1(3), prov. (3) ; s. 16) ; *Shankar Lal* v. *Hashmi Begam*, (1932) 54 All. 1023 (Limit. Act, s. 19 ; Agra Pre-emp. Act, s. 4(9).) ; *Zainab Bibi* v. *Umar Hayat K.*, (1936) 58 All. 873 (Agra Pr. Act, ss. 3 (prov.), 4(3), 16). Under BERAR LAND REVEN. CODE, 1928 :

SECTION 524. (D) CONFLICT OF LAWS : DIFFERENT RELIGIONS.

524. (1) *Quaere,* whether pre-emption cannot be lawfully claimed if the law by which the pre-emptor is governed, does not, in the particular circumstances allow it.[2]

(2) If the seller is not governed by the law of pre-emption, pre-emption cannot be lawfully claimed.[3]

Personal law of—

(3) The Allahabad [4] and Patna [5] High Courts hold that the personal law of the purchaser does not affect the question whether pre-emption may be claimed ; the Calcutta High Court has held that pre-emption can not be claimed unless the purchaser as well as the pre-emptor and the seller are all governed by the law of pre-emption.[6]

1. pre-emptor,
2. seller,
3. purchaser.

Seller and pre-emptor must both be governed by law of pre-emption.

Explanation.—(1) Pre-emption cannot be claimed unless the pre-emptor and the seller are Muslims or are, by custom or contract or by operation of a legislative enactment, subject to pre-emption. (2) *Quaere,* whether where the pre-emptor and the seller are subject to different personal laws of pre-emption, the claim to pre-emption is enforceable only [7] in cases

Namdeo v. *Keshao,* (1937) Nag. 469 (legitimate to look for assistance to Muhammadan law where Act silent).

[2] See s. 524, *ill.* (1). The three subsections of s. 524 deal with question how far enforceability of pre-emption is governed by personal law respectively of (1) pre-emptor, (2) seller, (3) purchaser.

[3] "The right of pre-emption arises from rule of law by which the owner of land is bound, & it exists no longer if there ceases to be an owner who is bound, by the law either as Muhammadan or by custom" : *Poornoo Singh* v. *Hurry Churn Surmath,* (1872) 10 Beng. L. R. 117 = 18 W. R. 440, followed in *Byjnath Pershad* v. *Kopilmoni Singh,* (1875) 24 W. R. 95 ; *Dwarka Das* v. *Hussain Baksh,* (1878) 1 All. 564 ; see also *Pir Khan* v. *Faiyaz Hussain,* (1914) 36 All. 488 ; CONTRA : *Chundo* v. *Alimoodeen,* (1873) 6 N. W. 28 etc. ; see s. 524, *ill.* (1), com., *Saiyad Fazal Karim* v. (*Mt.*) *Bibi Fatmatul Kubra,* (1922) 1 Pat. 774 (where pre-emption applies by custom among non-Muslims in particular area, it does not become part of personal law of such persons : therefore non-Muslim, subject to pre-emption in one locality, not necessarily subject to custom in another locality, where he owns property).

[4] *Moti Chand* v. *Mahomed Hossein Khan,* (1875) 7 N. W. 147 ; *Chundo* v. (*Hakeem*) *Alimoodeen,* [1874] Agra F. B. 305, 6 N. W. 28, had held : right of pre-empt. (i) not enforceable where *buyer* Hindu & therefore not governed by law of pre-emption, & that (ii) it would be enforced though *seller* was Hindu. This view followed from reasoning that only buyer & pre-emptor concerned in pre-emption : seller "being not in the least degree interested in the matter & need not be considered." *per* Pearson, J. But this is no more law : *Gobind Dayal* v. *Inayatullah,* (1885) 7 All. 775 (F. B.) ; *Dwarka Das* v. *Husain Baksh,* (1878) 1 All. 564 (F. B.) (Stuart, C. J., & Pearson, J., dissenting).

[5] *Achutananda Pasait* v. *Biki Bibi,* (1922) 1 Pat. 578 (pre-emptor Muslim : Hindu buyer : pre-emption allowed).

[6] *Kudratulla* v. *Mahini Mohan,* (1870) 13 W. R. (F. B.) 21 = 4 Beng. L. R. (F. B.) 144. But in *Jog Debi Singh* v. *Mahomed Afzal,* (1905) 32 Cal. 982 (seller SUNNI ; buyer Hindu ; pre-emptor SHIA : but point seems not taken, that the right not enforceable, unless buyer is MUSLIM or otherwise bound by law of pre-emption. Merely argued that (*a*) pre-emptor's law (i.e. SHIA, not SUNNI law) prevailed ; (*b*) preliminary ceremonies not duly performed. *Jog Debi Singh's* case not followed in *Pir Khan* v. *Faiyaz Hussain,* (1914) 36 All. 488.

[7] This seems to follow from *ill.* (1) as far as Allahabad H C. concerned. Cf. *per* Mahmood, J. *Gobind Dayal* v. *Inayatullah,* (1885) 7 All. 775 : "The rights and

SECTION 524. where it is reciprocally enforceable, i.e. where it would have been enforceable also under the personal law of the pre-emptor, had he been the seller.[7]

Illustrations.

(1) *As to the personal law of the pre-emptor* : A Shia cannot enforce pre-emption on the ground of vicinage even though both the vendor and vendee are Hanafis.[8]

(2) *As to the personal law of the seller* : S, a Hindu (who is not subject to the law of pre-emption : see s. 523-B) sells land ; pre-emption under Muslim law is not enforceable.[9]

(3) *As to the personal law of the buyer* : S and P are Muslim neighbours, and S sells his share to B, who is not a Muslim : *held*, (*a*) in Calcutta and (*b*) in Bombay[10] that pre-emption cannot be claimed, (*c*) held in Allahabad that P may enforce pre-emption against B.[11]

(4) The plaintiff, a Hanafi, claimed pre-emption alleging that he was a khalit ; the purchaser, a Shia woman, defended the suit on the ground that she was also a khalit. The plaintiff contended that while under the Shia law (by which the defendant was governed) khalits had no right of pre-emption, under the Hanafi law (by which he himself was governed) Khalits had the right. *Held*, that if a Hanafi claims pre-emption on the ground that he is a khalit, he cannot oust a vendee who is in the same position, whether that vendee is a Shia, Sunni or Hindu. Consequently the suit was dismissed.[12]

Conflict of laws.

1.—Does religion of (i) pre-emptor or (ii) buyer affect rights ?

Under Shia law pre-emption is not claimable by a non-Muslim where the purchaser is a Muslim.[13] " The shafi is every partner of a share in joint and undivided property, who is able to pay the price at which it has been sold. It is, however, a condition that he be a Muslim, when the purchaser is of that religion." [14] Under Hanafi law the religion of the pre-emptor does not affect his rights.[15] The question,[16] turns on whether (i) the right of pre-emption

Nature of right : (i) defect of title, or

obligations created by that (viz. Muhammadan) law, as indeed by every other system with which I am acquainted, must necessarily be reciprocal." But in *Jog Debi* v. *Mahomed*, (1905) 32 Cal. 982, seller was Shia, pre-emptor Sunni : Sunni law applied. See com. *Hamedmiya* v. *Benjamin*, (1928) 53 Bom. 525 (pre-emptor & seller MUSLIM : buyer BENE ISRAELITE : claim to pre-empt not allowed).

[8] *Qurban Husain* v. *Chote*, (1890) 22 All. 102.

[9] *Dwarka Dass* v. *Husain Baksh*, (1878) 1 All. 564 (F. B.), (Stuart, C. J. & Pearson, J., dissenting).

[10] (*Sheikh*) *Kudratulla* v. *Mahini Mohan Shaha*, (1869) 4 Beng. L. R. (F. B.) 134 = 13 W. R. (F. B.) (by Peacock, C. J., Kemp & Mitter, JJ.) (Norman & Macpherson, JJ., dissenting) ; *Hamedmiya* v. *Benjamin*, (1928) 53 Bom. 525, cf. also *Hira* v. *Kallu*, (1885) 7 All. 916.

[11] *Gobind Dayal* v. *Inayatullah*, (1885) 7 All. 775 (F. B.) ; followed *Achutananda Pasait* v. *Biki Bibi*, (1922) 1 Pat. 578.

[12] *Rokaiya Begam* v. *Ahmadi Khanam*, (1912) 9 All. L. J. 769.

[13] Bail. II. 179 (par. 1), 180 (par. 3).

[14] Bail. II. 179 (par. 1).

[15] Bail. I. 473 (479) ; (par. 2) ; Hed. 556 (col. i. par. 2), 557 (col. ii. par. 4).

[16] *Gobind Dayal* v. *Inayatullah*, (1885) 7 All. 775 (F. B.) (VIEW (i) *per* Mahmood, J., adopted by his colleagues Petheram, C. J., Oldfield, Broadhurst, & Duthoit, JJ.) = as put (but rejected) by Mitter, J., " A legal disability on his part to sell his property to a stranger without giving an opportunity to his co-parceners & neighbours to purchase in the first instance " : (*Sheikh*) *Kudratulla* v. *Mahini Mohan*, (1869)

depends upon a defect of title on the part of Muhammadan co-parcener to sell, except subject to the right of pre-emption,[17] or whether (ii) it is mere right of repurchase, not from the vendor, but from the vendee. As to this last suggestion, Mahmood, J., says that it can only be a "right of substitution entitling the pre-emptor by reason of a legal incident to which the sale itself was subject ... the right being necessarily antecedent to the injury. My conceptions of jurisprudence prevent me from conceiving any kind of right of which both the *inception* and the *infringement* depend upon one and the same incident." The right of pre-emption cannot in his opinion be defeated in India by the devices (characterized by Mitter, J., as "tricks and artifices") to which the Muslim texts refer. "There is nothing whatever," opined Mitter, J.,[16] "in the Muhammadan law which imposes upon anyone the obligation of making the first offer to his neighbour." But Mahmood, J.,[16] cites texts[17] that "it is not lawful for anyone to sell till he has informed his co-parcener who may take or leave it as he wishes; and if he has sold without such information, the co-parcener has a preferential right to the share."[17] Cf. p. 727(5).

SECTION 524. (ii) right of repurchase.

Obligation to make first offer to neighbours.

Where a Hanafi claimant to pre-emption sues a Shia seller and a Hindu purchaser, the governing system of law has been held to be the Hanafi, as that system is in force in India territorially or by custom, and the Shia law to be applicable only where the claimant and vendor are both Shias[18]—*sed quaere*, whether any such broad rule can be laid down.[19]

2.—Shia vendor: Hindu purchaser: Hanafi pre-emptor.

524 A. In construing a contract containing the terms of pre-emption, the Court will give effect to the intention of the parties as expressed therein without alteration or addition.[20]

III. INTERPRETATION: WAJIBU'L-ARZ.

"You are to look at the intention of the parties in determining what system of law was to be taken as applying and what was to be taken to be the date of the sales with reference to which the ceremonies were performed."[21]

Construction of contract.

The terms of a contract for pre-emption are strictly construed by the Courts, both in England and in India, (s. 423(2).) as pre-emption is not favoured by the law: s. 556. See s. 545, p. 714, *n.* 13.

524 B. Certain words and expressions have been judicially interpreted with reference to the particular contract, context and circumstances[22]—

Words interpreted by Courts.

4 Beng. L. R. (F. B.) 134, 139, 140 = 13 W. R. (F. B.) 21; Peacock, C. J., Kemp & Mitter, JJ. (Norman & Macpherson, JJ., *diss.*) take VIEW (ii), viz. that it is repurchase: VIEW (ii) also adopted in *Hamedmiya* v. *Benjamin*, (1928) 53 Bom. 525, 533.

[17] *Ain Sharh-Kanz*, II. 237; *Muslim*, VI. 32, *Nawawi Sharh Muslim*, II. 52.

[18] *Jug Deo Singh* v. *Kazi Sayed Mahomed Afzal*, (1905) 9 Cal. W. N. 826.

[19] See ss. 6A, 8. Cf. *Akbarally* v. *Mahomedally*, (1932) 57 Bom. 551.

[20] *Chowdhry Brij Lall* v. *Goor Sahai*, (1867) Agra F. B. 128. For *ill.* see *Ruttun Singh* v. *Umrao Singh*, (1872) 4 N. W. 13; *Dowlut* v. *Netram*, (1871) 3 N. W. 42.

[21] *Sitaram* v. *Jiaul Hasan*, (1921) 48 I. A. 475, 481 (BOM.). See *Spurrier* v. *La Cloche*, [1902] A. C. 446 (parties residing in different countries where DIFFERENT SYSTEMS OF LAW prevail: their INTENTION true criterion to determine by what law interpretation & effect of contract to be governed). *Hamlyn* v. *Talisker*, [1894] A. C. 202.

[22] They would not (*submitted*) necessarily be interpreted always in same sense:

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'Bhai band.' (1) 'bhai band' as the brotherhood of the village, and not merely relations by blood ;[23]

'Ek-jaddi.' (2) 'ek-jaddi' as descendants from a common ancestor, through the male line ;[24]

'Haq qiyat.' (3) 'haqqiyat' as rights and interests in the legal sense of the phrase ;[25]

'Hissadar.' (4) 'hissadar' (after the village had been perfectly partitioned into three mahals, without a new wajibu'l-arz), as the owner of a share in the same mahal as the seller ;[26]

'Hisadaran shikmi.' (5) 'hissadaran shikmi' (in clauses dealing with classes of persons entitled to pre-empt in preference to strangers) as not necessarily implying any idea of subordination but as signifying co-sharers in the particular 'khattu' of the 'patti' in which the land sold was situated ;[27]

'Intiqal.' (6) 'intiqal' as signifying not only an absolute transfer, but having the broadest meaning in connection with alienation, conveyance, assignment, or transfer of rights in immovable property,[28] and applying also to conditional sales and usufructuary mortgages ;[29]

'Karibi.' (7) 'karibi' (qaribi) as ambiguous, and inadequate to express the relations between share-holders 'near' to the seller :

(*a*) 'karibi,' read in connection with 'bhai' which word preceded it in the wajibu'l-arz under construction, as not confined to cousins, but as meaning 'bhai band' or 'bhailog' so as to include all near relatives both male and female ;[30]

'Bhai band.'

'Karibi wakhandani.' (*b*) 'karibi wa khandani' as not including a person related to the seller through the female line only, and twelve degrees removed from him ;[31]

decisions do not condemn these unoffending words to "prisons ordained in utter darkness : far removed from the light of heaven" (*Par. L.* I. 70)– & of the context.

23 *Hira Lal* v. *Ramjas*, (1883) 6 All. 57.

24 *Chatai Singh* v. *Kalyan Singh*, (1900) 23 All. 32. Cf. *Ashraf B.* v. *Muhammad Abdul Raoof*, (1927) 50 All. 404 (under AGRA PRE-EMP. ACT (Local) XI. of 1922, s. 12(3), on COMMON ANCESTOR); *Padam Singh* v. *Umrao S.*, [1923] 21 All. L. J. 527 (*bhai haqiqi ekjaddi*).

25 *Sheoratan Kuar* v. *Mahipal K.*, (1884) 7 All. 258.

26 *Dalganjan S.* v. *Kalka S.*, (1899) 22 All. 1 ; cf. *Sheobalak S.* v. *Lachmidar*, (1901) 23 All. 427.

27 *Abdul Shakur* v. *Mendai*, (1901) 23 All. 260.

28 *Sheoratan Kuar* v. *Mahipal Kuar*, (1884) 7 All. 258 ; *Jagdam Sahai* v. *Mahabir Prasad*, (1905) 28 All. 60.

29 *Chuttur Mull* v. *Chuttur Kishore Lall*, (1868) 8 Agra 396.

30 *Khuman S.* v. *Hardai*, (1888) 11 All. 41.

31 *Durga Prasad P.* v. *Fateh B. S.*, (1914) 36 All. 451.

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(8) 'pattidar' as not including a 'chakdar' holding a share in the same 'chak' as the seller ;" [32] 'pattidar.' 'Chakdar.'

(9) 'qimat' in the sense given it by Muhammadan law, as including (*a*) not only money but (*b*) other kinds of property capable of being valued at a definite sum of money, and (*c*) covering the consideration of sale as well as exchange as defined in the Transfer of Property Act, ss. 54, 118 ; [33] and (*d*) also wide enough to include the consideration given for a usufructuary mortgage with possession ; [34] 'Qimat.'

(10) 'rahn' as a generic word indicating all that is included in the English word mortgage, not limited to usufructuary mortgages : including simple mortgages ; [35] 'Rahn.'

(11) "sale, etc." as including a usufructuary lease for a term of eight years ; [36] "Sale, etc."

(12) 'shikmi showkayan' in the particular context as implying priority in favour of sharers in the thoke over those who were merely sharers in the village.[37] 'Shikmi showkayan.'

524 C. The question frequently arises whether, under the particular wajibu'l-arz, the right of pre-emption has been confined to cases where the sale is to a stranger, or is extended to cases where, had the sale been to a stranger, the purchaser would himself have been entitled to pre-empt.[38] Sale to one who might himself have pre-empted.

§ 2.—PRE-EMPTION : HOW IT ARISES : HOW ENFORCED.

525.[1] The right of pre-emption arises under Muhammadan law only on an exchange of property for property ;[2] I. SALE OR GROUND OF PRE-EMPTION. Only transfer for consideration.

32 *Balwant S.* v. *Subhan A.*, (1887) 10 All. 107.

33 *Niamat Ali* v. *Asmat B.*, (1885) 7 All. 626.

34 *Hulas Rai* v. *Ram Prasad*, (1906) 28 All. 454.

35 *Sheoratan Kuar* v. *Mahipal K.*, (1884) 7 All. 258. Cf. extract from *Sharaiu'i-Islam* in s. 370, com.

36 *Ahmed Ali K.* v. *Ahmed Ali*, (1866) 1 Agra 101.

37 *Jey Mull* v. *Kesree*, Agra F. B. 171, ed. 1874, 128.

38 *Janki* v. *Ram Partab S.*, (1905) 28 All. 286 ; *Sardar S.* v. *Ijaz Husain K.*, (1906) 28 All. 614 ; *Jai Dat* v. *Ram Badal*, (1905) 28 All. 168 ; *Sukhdeo S.* v. *Bahadur S.*, (1904) 26 All. 544 ; *Khatun B.* v. *Sayida B.*, (1905) 27 All. 457 ; *Amjad Ali* v. *Mushtaq Ahmad*, (1895) 17 All. 454, upheld (1897) 19 All. 311 ; *Mathura Prasad* v. *Hardeo Bakhsh S.*, [1920] 18 All. L. J. 518. For general law see s. 527.

1 Sects. 525 & 526 are complementary.

2 I.e. either sale or barter, s. 552(1), p. 662, *n.* 6. Cf. *Sewa* v. *Risal*, (1866) 1 Agra 144 ; *Niamat* v. *Asmat*, (1885) 7 All. 626 (plot exchanged) ; *Lachmi* v. *Manog*, [1889] 5 All. W. N. 47 (suit compromised). PROPERTY CONFISCATED BY GOVT., then sold : (i) (1869) *Sheodut* v. *Ramadpree*, 1 N. W., Part II., p. 35 (ed. 1873), p. 93 ; (ii) *Mahomed Villaytolla* v. *Ahmed*, (1868) 3 Agra 70 ; (iii) *Collr. of Futtehpore*

SECTION 525. not on a transfer (*a*) without consideration [3] (*b*) by operation of law ; [4] but (*c*) it is not necessary that the land sold should be actually separated or defined.[5]

Illustrations. (1) With reference to a claim for pre-emption, (*a*) a HIBA BA SHART UL IWAZ is a transfer for consideration,[4] and pre-emption is claimable provided that it is completed by possession being transferred of the subjects of the gift, and of the return, to the donee and the donor, respectively.[6] But (*b*) on a HIBA BIL IWAZ, pre-emption is not claimable, (*c*) nor on a PARTITION of property amongst partners ; [7] (*d*) nor generally on a transfer of property in lieu of MAHR ;[8] *except* that (i) under Shafii law, pre-emption may be claimed by the other co-owners, where a share in land is transferred to the wife by way of mahr, or in consideration for a khul ; [9] (ii) under Hanafi law where a marriage is contracted without any mahr being agreed upon, and land is then sold to a third person or to the wife herself [10] in exchange for her mahru'l-mithl or "proper dower ;" [8] (iii) also where mahr has already become due to the wife, and the land does not form the subject of the mahr, but is transferred to the wife in consideration of her releasing her right to the mahr agreed upon ; [10] (*e*) the courts have taken different views as to whether a SALE IN EXECUTION of a decree is such a transfer as can give rise to rights of pre-emption.[11]

(2) B makes a claim against S, who compounds it by transferring to him

v. *Yad Ali*, (1866) 1 Agra 88. SALES & RE-SALES : (i) *Mahomed Raza K.* v. *Jawahir Singh*, (1867) 2 Agra 1 ; (ii) *Liakat* v. *Rashiduddin*, (1906) 29 All. 125.

[3] SALE DISGUISED as GIFT : pre-emption allowed : *Angan Lall* v. *Muhammad Husain*, (1891) 13 All. 409 ; *Chiragh Din* v. *Allah D.*, (1916) 51 Punj. Rec. 208, (No. 70) ; cf. *Fida Ali* v. *Muzaffer Ali*, (1882) 5 All. 65. See pp. 725 ff., s. 556, *nn.* *Bashir Ahmad* v. (*Mt.*) *Zubaida K.*, (1923) 1 Luck. 83 (transfer in lieu of *mahr*, held HABA BIL IWAZ : pre-emption disallowed. With all respect, result correct, but reasoning questionable) ; *Chaudhri Talib Ali* v. (*Mt.*) *Kaniz Fatma*, (1927) 2 Luck. 575 (docmt. called gift for consideration : pre-emption disallowed). Transfer from husband to wife may be considered peculiar & though consideration is MAHR, it may be taken to be free from pre-emption on fundamental ground that TRANSFER TO WIFE CANNOT be considered as TRANSFER INTRODUCING STRANGER. [Cf. *Lalla Nowbat L.* v. *Lalle Jewan L.*, (1878) 4 Cal. 831 (F. B.), now overruled by *Enatulla* v. *Kowsher Ali*, (1926) 54 Cal. 266].

[4] Bail. I. 472 (476) ; e.g. slave emancipated in EXCHANGE for mansion : no pre-emption : Bail. I. 471 (475) ; gift, charity, inheritance & bequest are given as *ill.* of transfer without consideration : Bail. II. 177 (par. 4). See also s. 525, *ill.* (1) ; *Ameer Ali* v. *Pearun*, [1864] W. R. 239 ; *Har Narain Pande* v. *Ram Prasad Misr*, (1891) 14 All. 333 ; *Nuzmoodeen* v. *Kanye Jha*, (1863) 1 Marsh. 555 = 2 Hay 651.

[5] *Gobind Chunder Goopta* v. *Raj Kishore Sein*, (1870) 14 W. R. 365.

[6] Bail. I. 472 (476). *Abdul Rahman* v. *Parsotam*, (1930) 57 I. A. 251, 256 (OU.) (a deed of *hiba bil iwaz* may either fall or not fall within pre-emption provisions of Oudh Laws Act, XVIII. of 1876, Ch. II.) ; *hiba bil iwaz* properly so called arises on two reciprocal gifts being made : two transfers : can there be a single deed of *hiba bil iwaz* ? But the deed referred to itself as *hiba bil iwaz*. See however cases noted.

[7] Hed. 560 (col. ii. par. 5) ; Bail. I. 475 (par. 2).

[8] Hed. 559 (col. i. par. 1, 2, 3, *ll.* 19 ff.) ; Bail. I. 475 (par. 1) (488) : cf. Bail. I. 483 (*ll.* 7-11) (488 *ll.* 8-12), 177 (par. 3).

[9] *Minhaj*, 207 (Bk. 18, s. 2) cited com. ; Hed. 559 (col. i. par. 1).

[10] *Fida* v. *Muzaffar*, (1882) 5 All. 65 ; but see com.

[11] In NEGATIVE : *Nuzmoodeen* v. *Kanye J.*, (1863) Marsh 555 = 2 Hay 651 ; *Abdul Jabel* v. *Khelatchandra*, (1868) 1 Beng. L. R. 105 = *Abdool Juleel* v. *Khellat* C. 10 W. R. 165 (neighbour or partner has every opportunity to bid at auction). In

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a mansion ; this is a transfer for consideration notwithstanding that S denied B's claim.[12] Pre-emption may consequently be claimed.

(3) S claims to own a house ; B compounds S's claim by paying to him Rs. 1,000 ; pre-emption is claimable if claim admitted by B, but not if denied.[13]

(4) S on his death-bed purports to sell his share (valued at Rs. 1,000) in the land to one of his heirs, by mahabat (s. 441A) viz. for Rs. 500. This sale will, in so far as it is valid, be a ground for pre-emption.[14]

(5) Pre-emption was claimed under custom. The custom proved had reference to voluntary transfers (intiqal) by co-sharers ; *held* that the cause of action arose as soon as a mortgage by way of conditional sale was effected ; not from the date when possession was taken in pursuance of a decree absolute.[15]

(6) An oral agreement to sell followed by payment of price and delivery of possession, gives rise to a right of pre-emption.[16]

Transfer by way of mahr and in lieu of mahr.

Where property is assigned as mahr to the wife, the question, under Hanafi law, whether pre-emption is claimable is in the Fatawa Alamgiri and Hidaya made to depend upon whether (i) the subject of transfer is itself the mahr, or (ii) the transfer is made in exchange or in consideration for mahr.

Mahr arises in law as an incident of marriage ;[17] giving the wife a right, the extinction of which may form the consideration for a transfer of property. This explains why if the husband " gives the house as dower, there is no pre-emption ; but if he gives it in exchange for dower, there is pre-emption."[18] The anomalous character of the right to mahr has been referred to.[19] The Prophet seems to have been extremely anxious that the mahr should not in any circumstances be permitted to lend weight to the suggestion that the wife was purchased by the husband, or sold by her guardian or parent, or that when the bride is competent to consent, her marriage can take place except by her consent. He strove hard on the one hand to prevent any pecuniary element being brought as an inducement for the consent, and he wished, on the other

AFFIRMATIVE : *Imam Sewdagur* v. *Abdul S.*, (1866) 5 W. R. 169 ; *Ajoodhia* v. *Jewboodh*, (1873) 6 N. W. 46.

[12] Hed. 559 (col. ii. par. 2, col. i. par. 4); Bail. I. 472 (*Il.* 5-12) (576). DISTINCTION between *ills.* (2) & (3) is that in *ill.* (2) person who becomes owner, accepts it in consideration of his claim : in *ill.* (3) if claim denied by B, he remains owner of house which he claimed before, & there is no *transfer* to him for consideration : Hed. 559.

[13] See *n.* 12, COMPROMISES held not to amount to such transfer as to give rise to pre-emption : *Lachmi Narain* v. *Manog Dat*, (1885) 7 All. 291 ; *Hanuman* v. *Udit Narain R.*, (1885) 7 All. 917.

[14] Bail. II. 192 ; to validate it consent of other heirs necessary,—(*a*) under Hanafi law, as to whole ; (*b*) under prevailing view of Shia law, in so far as it exceeds bequeathable 1/3 ; (*c*) whereas another Shia view is, that it is valid without such consent, as to whole, not ranking as bequest at all.

[15] *Suba Singh* v. *Mahabir S.*, (1917) 39 All. 5.

[16] *Abdulla* v. *Ismail*, (1921) 46 Bom. 302 ; *Sitaram* v. *Jiaul H.*, (1922) 48 I. A. 475 (A, holding 1/4 share, agreed to sell it, received portion of price, & stipulated to receive balance, & pass pucca deed later. Pre-emption allowed).

[17] See s. 92, com., p. 171.

[18] Bail. I. 475 (*Il.* 2-4) (479).

[19] See ss. 92, 108, 167 (lien for *mahr*) = pp. 170, 185 ff., 234 ; & ss. 372, 442 (gifts) = pp. 398, 477 ff.

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hand, to convert the wonted "price" for the sale of the woman, into "a token of respect."[20] So understood the rule, it is submitted, though technical in operation, is grounded on principle.

Fida Ali *v.* Muzaffar Ali. 5 All. 65.

Syed Ameer Ali says[21] that "the decision in Fida Ali *v.* Muzaffar Ali[22] does not seem to be correct," because "if a property is conveyed to a wife in discharge of the dower debt, in this case also there is no right of pre-emption....The reason of these rules is self-evident. The wife conveying to the husband and vice versa do not thereby introduce a stranger among co-sharers or neighbours."[21] The reason given applies, no doubt, where the husband and wife are living together on the subject of pre-emption, but this view does not seem to be taken in any of the texts, and no authority is cited by the learned author. Fida Ali's case has been followed.[23]

Shafii law.

In the Minhaj (Shafii text): "A portion of an immoveable property transferred as dower is subject to the right of pre-emption on the part of a co-proprietor, for a price valued according to the proportional dower the woman in question could claim; and the same rule is observed with regard to a transfer as compensatory price in case of divorce."[24]

(A) Right arises only when land completely transferred:

—complete according to which law?

526. Pre-emption is not claimable unless the land is completely transferred[1] by the seller to the buyer, so that the seller's interest in it ceases.[2] In each case the intention of the parties must be looked to for determining which system of law is to be taken as applying[3] and what date is to be taken as the

[20] Bail. I. 91.

[21] *Mah. Law*, I. 597, *n.* 1, (713, *n.* 6)

[22] *Fida Ali* v. *Muzaffar Ali*, (1882) 5 All. 65.

[23] *Nathu* v. *Shadi*, (1915) 13 All. L. J. 714. See also (*Syed*) *Mahomed Tukee* v. (*Sheikh*) *Hujjee* alias *Khujjai*, (1873) 5 N. W. 142, which however proceeded on construction of *wajibu'l-arz*.

[24] *Minhaj*, 207 (Bk. 18, s. 2).

[1] Hed. 559 (col. ii. par. 4), 560 (col. i. par. 1); Bail. I. 472 (476), 482 (*ll.* 5-11) (488)); II. 182. *Muhammad Niaz K.* v. *Md. Idris Khan*, (1918) 40 All. 322 (Court must consider & decide if transaction is IN SUBSTANCE SALE—however disguised, e.g. as lease); *Zamani B.* v. *Khan Md. Khan*, (1923) 46 All. 142 (out & out sale, without OPTION necessary); *Muhammad Yunis Khan* v. *Muhammad Saleh Khan*, (1930) 53 All. 169 (if there is option pre-emption claimable when option expires); *Kheyali Prasad* v. *Mullick Nazarul Alum*, (1916) 1 Pat. L. J. 174 (REGISTRATION necessary for completion); *Abdur Razzak* v. *Mumtaz Husain*, (1903) 25 All. 334 (COMPROMISE DECREE in suit for pre-emption no ground for pre-emption). See ss. 526A, 526B. *Sheo Lall Sahoo* v. *S. Rumzanee*, (1867) 2 Agra 35 (shares in *mauza* by arrangement between parties, made over to manager upon trust in part for debt of transferors, residue for transferors: no pre-emption); *Subhagi* v. *Muhammad Ishak*, (1884) 6 All. 463 (on mere proclamation inviting offers: no pre-emption). See also *Budhai Sardar* v. *Sonaullah*, (1914) 41 Cal. 943; *Sheikh Mohammad Jamil* v. *Khub Lal Raut*, (1920) 5 Pat. L. J. 740 (pre-emption claimable only on transfer of proprietary interest of MUKARRARI, i.e. leasehold); (*Mt.*) *Bibi Saleha* v. *Haji Amiruddin*, (1928) 8 Pat. 251 (Sir Sultan Ahmed, advocate, struggled against decision of Sultan Ahmed, J. in 5 Pat. L. J. 740).

[2] *Abdulla* v. *Ismail*, (1921) 46 Bom. 302 (NO REGISTERED DOCUMENT—pre-emption may arise); *Ladun* v. *Bhyro Ram*, (1867) 8 W. R. 255; *Soondur Kooer* v. *Lalla Rughoobur D.*, (1868) 10 W. R. 246; *Buksha Ali* v. *Tofer Ali*, (1872) 20 W. R. 216; *Mohno B.* v. *Juggurnathi Chowdhry*, (1865) 2 W. R. 78. See also ss. 526A, 526B.

[3] *Hamlyn & Co.* v. *Talisker Distillery*, [1894] A. C. 202, cited *Sitaram* v.

date of the sale with reference to which the preliminary ceremonies must be performed.[4] SECTION 526.

(1) S sells his joint interest in a village for Rs. 300, paid to him by B, who obtains possession, but no transfer under the Transfer of Property Act is executed or registered. *Held* (Mahmood J. dissenting), that the right of pre-emption arose.[5] *Illustrations.*

(2) S sells a dwelling house as a house to be inhabited as it stands, with the same right of occupation as B, but without the ownership of the site.

Sayad Siraj, (1917) 41 Bom. 636, 651. *Spurrier* v. *La Cloche*, [1902] A. C. 446 (= p. 679, *n.* 4).

[4] *Sitaram* v. *Jiaul Hasan*, (1921) 48 I. A. 475 (BOM.) (by passing Transf. of Prop. Act, IV. of 1882 no intention to alter directly or indirectly Muhammadan law). In *Najmunnissa* v. *Ajaib Ali K.*, (1900) 22 All. 343, (MUHAMMADAN LAW OF SALE carefully examined); *Fida Ali* v. *Muzaffar A.*, (1882) 5 All. 65. Cf. *Amjad Ali* v. *Mushtaq Ahmad*, (1895) 17 All. 454; see also 17 All. W. N. 121. In *Janki* v. *Girijadat*, (1885) 7 All. 382 (F. B.) (sale must be complete in accordance with Muhammadan law, not with law of India); *Begam* v. *Muhammad Yakub*, (1894) 16 All. 344 (F. B.) (Banerji, J. dissenting on this point, but concurring in decree on other grounds): explained by P. C. in 48 I. A. 481. *Abdulla* v. *Ismail*, (1921) 46 Bom. 302 (pre-emption claimable even if no REGISTERED sale deed). *Najmunnissa* v. *Ajaib A. K.*, (1900) 22 All. 343 (non-execution of sale deed, & want of registration, do not prevent pre-emption from becoming claimable but non-ascertainment of price & non-transference of possession under sale, do prevent it). *Budhai Safdar* v. *Sonaullah Mirdha*, (1914) 41 Cal. 943 (dissents from this view: held that pre-emption not claimable until sale complete in accordance with general law of India: i.e. after registration). *Sitaram Bhaurau* v. *Sayad Sirajul Khan*, (1917) 41 Bom. 636, 641 (approved in 48 I. A. 475) also dissented from view of Allahabad H. C. & held that IN EACH CASE INTENTION OF PARTIES MUST BE ASCERTAINED AS TO DATE when bargain to be considered as concluded. This view seems first enunciated by Brett, J., in *Jadu Lal* v. *Janki Koer*, (1908) 35 Cal. 575, 599; affirmed 39 I. A. 101 = 39 Cal. 915; again affirmed in 48 I. A. 475; *Nareshchandra Datta* v. *Gireeshchandra Das*, (1935) 62 Cal. 979. *Mohammad Bashir K.* v. *Kulsum B.*, [1927] 25 All. L. J. 742 (for purposes of AGRA PRE-EMPT. ACT, XI. 1922, (Local), s. 2, transfer in eye of law made on day when deed executed, not on day of registration: Ind. Registr. Act, s. 47). Cf. *Spurrier* v. *La Cloche*, [1902] A. C. 446 (if contracting parties reside in different countries their intention is TRUE CRITERION to determine BY WHAT LAW INTERPRETATION & effect of contract to be governed); *Hamlyn* v. *Talisker*, [1894] A. C. 202. See also *Chatenay* v. *Brazilian Submarine Telegr. Co.*, [1891] 1 Q. B. 79.

[5] *Janki* v. *Girjadat*, (1885) 7 All. 482 (F. B.). (i) Petheram C. J.: claim being based on *wajibu'l-arz* which refers to transfer of share "wholly or in part, by sale or mortgage, &...obviously means that if any co-sharer transfers his rights wholly or partly, right of pre-emption is to arise"; (ii) Straight, J.: if parties intend sale but deliberately omit to observe necessary legal formality of registered instrument to defeat pre-emption: court of equity would hesitate before permitting defence based on defendant's own intentional evasion of law; seller could not succeed in suit for possession of share against buyer on ground that there was no registered document, because consideration having been paid & possession obtained, buyer would have good defence. (iii) Oldfield, J.: if transaction amounts to sale in fact, failure of parties to comply with requirements of Act does not alter its nature. (iv) Broadhurst, J.: share transferred, though, with object of defeating pre-emption (under *wajibu'l-arz*), deed of sale not executed. *Held* by Mahmood, J., dissenting: pre-emption right did not arise: because (i) it cannot under Muhammadan law be claimed upon sale which is invalid, & which can take no effect, & when owner not divested of, nor purchaser invested with, proprietory title; (ii) answer to that question is turning point in decision of such cases; (iii) words of *wajibu'l-arz* did not refer to transfers of all kinds, but only to sales & mortgages; they did not include transfer of portions only of incidents [or rights] constituting ownership [cf. p. 345, *n.* 12]; (iv) nothing that could be called sale had taken place; (v) if transaction taken as mere agreement to sell, assuming that it could be specifically enforced, suit premature! following 7 All. 482. *Abdulla* v. *Ismail*, (1921) 46 Bom. 302 (Shah, J., emphasizes intention of parties).

SECTION 526.

Held, the right of pre-emption attaches to the sale.[6]

(3) S enters into a contract for sale; *held*, that P is not bound to defer enforcing pre-emption till the bill of sale is delivered or registered and payment made.[7]—*Sed quaere.*[8]

(4) As soon as a contract for sale is ratified by acceptance, and the vendor has gone so far that he cannot legally draw back, it is time for the pre-emptor to step in.[9]

(5) S, a Muslim owned 1/4 share in village of Vahal and Pataudi (Bom. Pres.). P, (S's uncle) owned the other 3/4 share. On 14 Oct. 1908, S agreed to sell his 1/4 to a Hindu, B, for Rs. 29,999, provided that if P was willing to purchase S's 1/4, and if S and P agreed to the purchase, then S should immediately return the earnest money to B. On the same date S gave notice of the sale to P stating that if P (as the owner of the 3/4 share) was desirous of purchasing the said villages, he should send S a cheque for Rs. 29,999 by return of post: that in the event of P not replying to this or paying the money within 2 days, S would close the bargain and obtain the sale proceeds. *Held*, (i) that the agreement of sale showed that the parties knew that "under whatever was the law, P, might have a right of pre-emption under Muhammadan law, or under some other law, and the whole transaction was made subject to the exercise by P of that right;" (ii) that the effect of the notice of sale (which B contemplated should be sent) was a recognition that P had a right of purchase as pre-emptor under the law which was treated as applying, "an intimation, an admission that there is a law of pre-emption which is doubtless, from the way in which it is referred to, a general law, and that P holds under that law;" (iii) therefore it was to the general law, not the mere terms of the letter to which reference had to be made, to see what these rights were; (iv) on the question when the sale had taken place (with regard to which date the requisite ceremonies and formations had to be performed) looking at what the parties had represented to each other, the Bombay High Court was right in following Jadu Lal's case;[10] (v) "that the parties represented that a full sale had taken place on 14 Oct., 1908, sufficient to justify P in proceeding[11] at once to the ceremonies and treating that as the crucial time."

As to a sale on credit, see s. 554. On the main point in s. 526, the original arguments are analysed in *ill.* (1), *n.*; Petheram, C. J., however seems to have proceeded on the construction of the wajibu'l-arz which brings his decision very near to the principle now settled by the Privy Council that the intention of the parties must be looked to. The war will now be waged over the intention.

[6] *Zahur* v. *Nur Ali*, (1865) 2 All. 99.

[7] *Luchmee Narain* v. *Bheemul Doss*, (1867) 8 W. R. 500; cf. *Girdharee Lall* v. *Deanutali*, (1874) 21 W. R. 311.

[8] See *Najmunnissa* v. *Ajaib*, (1900) 22 All. 343.

[9] *Nubee Bukhsh* alias *Golam Nubee* v. *Kaloo Lushker*, (1874) 22 W. R. 4.

[10] *Jadulal J. Sahu* v. *Janki Kuar*, (1908) 36 Cal. 575 affd. (1912) 39 I. A. 101.

[11] *Sitaram Bhaurau* v. *Jiaul Hasan*, (1911) 48 I. A. 475 (BOM.).

SECTION 526. Benami transactions.

Several cases dealing with benami transactions have come before the Courts, but they do not seem to enunciate any new principle beyond that the Court endeavours to get to the real transaction under whatever name the parties may have purported to act.[12]

(B) Seller's option postpones it—not buyer's.

526 A. (1) Where there is an option to the seller to dissolve the sale, pre-emption is not claimable until after the expiration of the option.[13]

(2) Pre-emption is claimable notwithstanding that there is an option to the buyer to dissolve the sale.[14]

(C) Mortgage gives rise to pre-emption when foreclosed.

526 B. Neither is (*a*) a mortgage, until finally foreclosed, such a transfer as can, under the general law, (apart from a contract or custom contained in a wajibu'l-arz or otherwise)[15] give rise to a right of pre-emption, nor is a (*b*) a lease,[16] notwithstanding that the lease is mourusi[17] or is in perpetuity (like a muqarrari), and however small the rent reserved might be.[18]

II. Pre-emption when buyer himself is pre-emptor equal in degree :

527.[19] Persons[20] whose claims to pre-emption are equal

[12] *Gunga Ram* v. *Moola*, (1870) 2 N. W. 200 ; *Beni Shankar Shelhat* v. *Mahpal Bahadur S.*, (1888) 9 All. 480.

[13] *Muhammad Yunis K.* v. *Muhammad Saleh K.*, (1930) 53 All. 169 (CONDITIONAL EXCHANGE, with reservation to either party during his life to cancel exchange : no pre-emption) ; *Zamani B.* v. *Khan Md. Khan*, (1923) 46 All. 125 ; *Gurdiyal Mundar* v. *Teknarayan S.*, (1855) Beng. L. R. (SUPP. VOL.) 166 = 2 W. R. 215 (mortgage in form of CONDITIONAL SALE) ; *Bhagwan Das* v. *Mohan Lal*, (1903) 25 All. 421 (on transfer of MORTGAGE by co-sharer mortgagee, to stranger, no pre-emption nor when sale repudiated by either seller or buyer) ; (*Mt.*) *Ojheoonissa B.* v. (*Sheikh*) *Rustom Ali*, [1864] W. R. 219. Some Shia authorities hold that option to seller does not prevent right from arising immediately.

[14] *Gurdiyal Mundar* v. *Teknarayan S.*, (1865) Beng. L. R. (SUPP. VOL.) 166 = 2 W. R. 215 (F. B.—Bayley, J., dissenting) ; *Bhowanee Pershad* v. *Purshunno S.*, (1869) 11 W. R. 282. But on foreclosure, pre-emption claimable : cf. *Batul B.* v. *Mansur Ali*, (1901) 24 All. 17 (after year of grace has expired, notwithstanding that decree for possession not obtained) ; *Tara Kunwar* v. *Mangri Meean*, 6 Beng. L. R. (APPX.) 114. Right to claim preferentially in regard to LEASE & MORTGAGE may be given by contract or custom, & will be enforced accordingly.

[15] *Lalji Miser* v. *Jaggu Tiwari*, (1910) 33 All. 104 (pre-emption clause of *wajibu'l-arz* may, of course, include perpetual lease) ; *Ahmed Ali K.* v. *Ahmed*, [1866] 1 Agra H. C. R. 101 (lease for 8 years—pre-emption hardly proper term for it : Spankie & Turnbull, JJ., refer to it as preferential claim).

[16] *Manick C.* v. *Bishaishar B. S.*, (1867) 2 Agra 99.

[17] *Dewanutulla* v. *Kazem Molla*, (1887) 15 Cal. 184 ; *Moorooly Ram* v. *Huree Ram*, (1867) 8 W. R. 106.

[18] *Dewanutulla* v. *Kazem Molla*, (1887) 15 Cal. 184 ; *Ram Golam S.* v. *Nursing Sahoy*, (1875) 25 W. R. 43 ; *Moorooly Ram* v. *Huree Ram*, (1867) 8 W. R. 106 (rent of one rupee per year) ; *Sheikh Mohammad Jamil* v. *Khub Lal Raut*, (1920) 5 Pat. L. J. 740 ; (*Mt.*) *Bibi Saliha* v. *Haji Amiruddin*, (1928) 8 Pat. 251 (Sultan *Ahmad* J.'s decision preferred to his argument as counsel).

[19] Sec. 527 referred to : *Enatulla* v. *Kowsher Ali*, (1926) 54 Cal. 266, 276, 277 (F. B.).

[20] Oudh Laws Acts, s. 9 : lots to be cast in such a case. Punjab Pre-emption Act, 1913, s. 17 under 5 heads for course to be followed. (Under Punjab Laws Act,

SECTION 527. in degree[21] to those of the buyer[22] stand in respect of pre-emption[23] on a footing of equality, and the property is divided equally amongst the buyer and all such persons.[24]

Illustration. S, B, and P are co-sharers in the land ; one co-sharer, S, sells his share to another co-sharer, B. The earlier decisions of the Calcutta High Court denied to the co-sharer, P, the right to pre-empt, but those cases are now overruled :[25] B and P will take the property in equal shares. The same results follow where B and P are khalits of S, participating in a right of way.[26]

Three classes of cases would fall within s. 527 : where the pre-emptor and the buyer are both co-sharers of the seller, or they are both khalits, or both neighbours.

Co-parceners, have the right not only to prevent the intrusion of an outsider, but to purchase the share of another co-parcener in equal proportions, whenever any co-parcener wishes to alienate his share.

1872, (now repealed) s. 12 : vendor or mortgagor to determine which of several persons equally entitled shall claim pre-emption). See s. 557, pp. 726 ff.

[21] If they become equal by purchaser buying share *pendente lite* : see s. 541 E, p. 709.

[22] I.e. if buyer is co-sharer then other co-sharers may pre-empt : if buyer is *khalit*, other *khalits* (as well as co-sharers) may pre-empt : if buyer is neighbour, other neighbours (as well as co-sharers & *khalits*) may pre-empt. See also, s. 540.

[23] "The right of all is equal" : Hed. 549 : the right ought really to be called right of joint purchase,—*co*-emption (in its etymological not its conventional sense) *with* the purchaser not *pre*-emption : under s. 527, the so-called pre-emptors do not have prior but equal right of purchase : s. 527 is accordingly stated in form simplifying position. Hed. 540 provides for safeguarding rights of absent pre-emptors equal in degree. See *Enatulla* v. *Kowsher*, (1926) 54 Cal. 266. See s. 540(2), p. 703.

[24] *Bahr-ur-Raiq*, Bk. on Pre-empn. Part. II. Egyp. ed. 143, 161 : *Raddu'l Muhtar*, v. 163, 152 : *Fatawa Alamgiri*, IV. 15, 16 (ch. 6); *Inayah & Durru'l-Mukhtar* : cited in *Amir Hasan* v. *Rahim Baksh*, (1897) 19 All. 466 (pre-emptor, *khalit* : property divisible equally *per capita* : Bail. I. 494 (500), s. 547, pp. 716 f.); *Enatullah* v. *Kowsher A.*, (1926) 54 Cal. 266 (F. B.); *Vithaldas Kahandas* v. *Jamietram*, (1920) 44 Bom. 887 (F. B.); *Muhammad Yakub* v. *Kanhai Lal*, (1921) 44 All. 83 ; *Ziauddin* v. *Abul Hasan*, (1923) 45 All. 487 ; *Nadir Husain* v. *Sadiq Husain*, (1924) 47 All. 324 (3 months after suit for pre-emption buyer purchased part of land : this purchase was attacked unsuccessfully as being by undue influence : *held* Court may take notice of facts that (i) buyer acquires interests in land, (ii) his acquisition is attacked, (iii) attack unsuccessful); *Masihuddin Ahmed* v. *Munir Ahmad*, (1925) 1 Luck. 29, Raza, J., LOTS ordered to be cast : cf. Oudh Laws Act, XVIII. of 1876, s. 9. (See s. 557, p. 726). *Abdulla* v. *Amanutullah*, (1899) 21 All. 292 (*Amir Hasan's* case 19 All. 466 followed : in such cases plaintiff need not sue for whole land sold, but for proportionate part : s. 540). For cases under *wajibu'l-arz*, see s. 524 C. Under AGRA PRE-EMPN. ACT (Local) XI. of 1922 where buyer is on same footing as pre-emptor there is no right of pre-emption (or co-emption) & property not divided between them : *Ashraf B.* v. *Muhammad Abdul Raoof*, (1927) 50 All. 404, 407.

[25] *Lalla Nowbat Lal* v. *Lalla Jewan Lal*, (1878) 4 Cal. 831 (no pre-emption where buyer is co-sharer with seller in land, nor unless pre-emptor has priority over buyer under s. 545, (p. 714); reason for pre-emption : to prevent introduction of disagreeable strangers as co-sharers or neighbours, which reason does not hold where buyer is already co-parcener); followed in *Gokaldas* v. *Partab*, (1916) 18 Bom. L. R. 693 which latter case was overruled in *Vithaldas Kahandas* v. *Jamietram*, (1920) 44 Bom. 887 (F. B.) : earlier Calcutta decisions ; *Baboo Moheshee Lal* v. *Christian*, (1866) 6 W. R. 250 ; *Teeka Dharee S.* v. *Mohur S.*, (1866) 7 W. R. 269 : overruled by *Enatullah* v. *Kowsher Ali*, (1926) 54 Cal. 266 (F. B.) (where authorities again considered).

[26] *Amir Hasan* v. *Rahim Baksh*, (1897) 19 All. 466 ; *Abdullah* v. *Amanatullah*, (1899) 21 All. 292.

SECTION 527. Right forfeited by pre-emptor joining an outsider as co-purchaser.

Where the buyer is a co-sharer who has associated a stranger[27] with himself in the purchase of a share, then another co-sharer is entitled,[28] at his option, to pre-empt[28] either the whole of the share sold, or the portion sold to the stranger,[29] since the joint owner forfeits his right as sharer by joining an outsider as a purchaser : [30] even though the portions or interests respectively purchased by the co-sharer and the stranger are specified severally in the sales deed.[31] On this last point, however, the decisions were dissented from [32] and overruled [33] in Allahabad. Nine co-owners were defendants in a suit for pre-emption. Three of them compromised with the pre-emptor. One of those who had not compromised was not allowed to treat the compromise as a sale, and claim pre-emption. The right is not affected by a decree obtained by one whose right was inferior to the pre-emptor's in a suit to which the pre-emptor was not a party.[34] Conversely, where the buyer has associated with himself in the purchase another co-sharer, and the rights of that co-sharer are inferior to those of the plaintiff in a pre-emption suit, the plaintiff will obtain a decree for pre-emption as against the whole property ; in other words, a buyer "although having an equal right with the plaintiff loses his right when he brings in as a co-vendee a co-sharer having an inferior right." [35]

§ 3.—PRELIMINARY CEREMONIES : THREE TALABS

I. FORMALITIES. The three talabs.

528.[1] Except[2] as hereinafter provided,[3] pre-emption cannot be enforced unless the pre-emptor takes each of the three steps mentioned in ss. 528 A, 528 B, 528 C, the first two of which are referred to as the "preliminary ceremonies."

(A) Immediate assertion : talab-i-muathibat.

528 A.[1] The pre-emptor must (subject to s. 528 D) assert his claim[4] immediately[5] on getting information of the sale : [6]

[27] "Stranger" = person inferior in respect of right to pre-empt to person claiming pre-emption (s. 522) : *Guptishwar Ram* v. *Rati Krishna Ram*, (1912) 34 All. 542.

[28] *Harjas* v. *Kanhya*, (1884) 7 All. 118. See *expl.* & s. 531, *ill.* (5).

[29] *Saligram S.* v. *Raghubardyal*, (1887) 15 Cal. 224.

[30] *Ganeshee Lall* v. *Zaraut Ali*, (1878) W. 343 ; *Munna S.* v. *Ramadhin S.*, (1881) 4 All. 252.

[31] *Shevbharos Rai* v. *Jiach R.*, (1886) 8 All. 462, 464, *per* Mahmood, J., explaining *Shewdyal Ram* v. *Bhyro Ram*, [1860] S. D. A. (N. W. P.) 53.

[32] *Ram Nath* v. *Badri Narain*, (1896) 19 All. 148 (three Judges). *Mushtaq Ahmad* v. *Amjad Ali*, (1896) 19 All. 311 ; *Bhupal Singh* v. *Mohun Singh*, (1896) 19 All. 324.

[33] *Abdur Razzaq* v. *Mumtaz Husain*, (1903) 25 All. 334.

[34] *Raj Narain Rai* v. *Dunia Pande*, (1910) 32 All. 840.

[35] *Guptishwar Ram* v. *Rati Krishna Ram*, (1912) 34 All. 542. See s. 531,, *ill.* (5), p. 696. Apparently giving full effect to the maxim *nosce ex sociis*.

[1] Sects. 528 to 530 must be read together. Several of them formed one section in first edition. They explain requirements for enforcement of pre-emption together with some closely allied points. Whole subject compendiously treated in s. 528 I, *ill.*, & com., pp. 688-690. See also ss. 529, (p. 691), 522(2)(*e*) (p. 663).

[2] See Punjab Pre-emption & Oudh Laws Acts, cited below : s. 557, p. 726.

[3] See s. 528 D, p. 686, (omission of assertion mentioned in s. 528 A).

[4] FORM of FIRST DEMAND, see s. 528 I, *ill.* (1), p. 688. He must state not merely that the right exists, but that he claims pre-emption ; hence, saying that he is *shafi*

SECTION 528A. such assertion is technically called the 'talab-i-muathibat.'[7]

(B) Confirmatory demand : talab-i-ish-had : before

528 B.[8] The pre-emptor must, as soon as practicabe,[9] confirm the assertion (s. 528 A) by making a (second) demand[10] (talab-i-ishhad) for pre-emption. The second demand must include a declaration of his having already asserted his claim ;[11] and must be made in the presence—

(1) Witnesses.

(*a*) of two[12] witnesses[13] [expressly called[14] upon to bear

[without other circumstances] not enough ; Bail. I. 482, (*ll.* 3, 4) (488). See *per* K. Husain, J., *Muhammad Nazir K.* v. *Makhdum Bakhsh*, (1911) 34 All. 53 reversed *ibid.* p. 55 ; *Chakauri Devi* v. *Sundari Devi*, (1905) 28 All. 50 ; *Mangru* v. *Parsotam Das*, [1920] 18 All. L. J. 1037 (saying " I have a right of pre-emption, how will the buyer take it," not enough to satisfy, s. 528 A) ; *Saiduddin* v. *Mohiuddin*, [1929] AIR (ALL.) 556 = 27 All. L. J. 857 (to say " I am pre-emptor & shall pre-empt " enough but merely to say, " I am the *shafi* (pre-emptor) is not enough : it is enough to say : " I shall or do claim, or have claimed *shafa* (pre-emption)").

[5] *Baijnath Gaonka* v. *Ramdhari Co.*, (1908) 35 I. A. 60 (CAL.) (DELAY EXPLAINED : utmost PROMPTITUDE necessary : any unreasonable or unnecessary delay being construed as election not to pre-empt) ; *Lal Mahammad Sarkar* v. *Husain Mahammad*, (1924) 29 C. W. N. 400 (delay caused by pre-emptor running to house of his co-sharer, instead of asserting at once & immediately on spot where he got information, fatal) ; *Qazi Rahim Baksh* v. *Bachauna*, [1930] 28 All. L. J. 711 (interval between 1st & 2nd demands ; 1st not made on premises nor in presence of vendors or vendees : no reference in 2nd to 1st : demands defective) ; *Mahanth Tokh Narayn Puri* v. *Ram Rachhya Singh*, (1925) 5 Pat. 96, 105 (delay may be explained : waiting to perform second ceremony till purchase price ascertained, justified).

[6] Hed. 550 ; I. 481-483 (487-489) ; II. 183 (par. 4) 195 (par. 2) ; see s. 529, p. 691 : invalid if made before sale completed : s. 533, p. 698. *Muhammad Askari* v. *Rahamtullah*, (1927) 49 All. 716 (mere notice that property going to be sold on certain date does not operate as estoppel, or deprive of right to pre-empt after actual sale) ; *Nareschandra Datta* v. *Gireeschandra Das*, (1935) 62 Cal. 979 (knowledge of sale, viz. when deed can be said to be a registered one) ; *Kheyali Prasad* v. *Mullick Nazarul Alam*, (1916) 1 Pat. L. J. 174 (payment & delivery not enough as they do not complete the sale).

[7] *Talab* = requisition, demand : *muathibat*, lit. = jumping up. See s. 529, com., p. 692.

[8] Sect. 528 B cited & applied : *Mohammad Raza Ali* v. *Md. Israr Hasan K.*, [1929] AIR (ALL.) 459 = 29 All. L. J. 531 (Sulaiman & King, JJ.) : *Imamuddin* v. *Muhammad Rais-ul Islam*, (1930) 52 All. 1005 (view expressed in s. 528 B, *n.* against express invocation of witnesses adopted). See p. 683, *n.* 1.

[9] *Jadu Lal* v. *Janki Koer*, (1908) 35 Cal. 575 ; 39 Cal. 9151 = 39 I. A. 101 ; *Nuraddin Mahomed* v. *Asgar Ali*, (312) 12 C. L. R. 312 ; *Jamilan* v. *Latif Hossein*, (1871) 8 Beng. L. R. 160 = 6 W. R. (F. B.) 13 ; *Mahomed Waris* v. *Hazee Emamooddeen*, (1866) 6 W. R. 173 ; (*Sheikh*) *Imamuddin* v. (*Mussamat*) *Shah Jan Bibi*, (1870) 6 Beng. L. R. 167 ; *Mohammad Raza A. K.* v. *Md. Israr Hasan K.*, [1927] AIR (ALL.) 459 = 27 All. L. J. 531 (delay of six months after first demand fatal).

[10] Right lost if *talab-i-ishhad* (demand) not made in due FORM : s. 528I, *ill.* (3) ; or (5), p. 688 f., for form. This separate overt act essential : *Jhotu S.* v. *Komul Roy*, (1868) 10 W. R. 119 ; *Razeeooddeen* v. *Zeenut B.*, (1867) 8 W. R. 463 ; *Muhammad Ahmad S. K.* v. *Madho Prasad*, (1916) 39 All. 133. Cf. *Ganga Prasad* v. *Ajudhia Prasad*, (1905) 28 All. 24.

[11] See s. 528 I, *ill.* (3), *n.*, pp. 688 f. ; *Sadiq Ali* v. *Abdul Baqi K.*, (1923) 45 All. 290 (OMISSION, in 2nd demand, to CALL ATTENTION OF WITNESSES to having already made 1st demand, fatal).

[12] Not necessary to produce BOTH WITNESSES : but fact that there were such witnesses who can bear testimony, must be satisfactorily proved : *Imamuddin* v. *Md. Rais-ul Islam*, (1930) 52 All. 1005, 1010. See *nn.* 14, 15.

[13] SERVANTS OF PRE-EMPTOR competent witnesses & all persons who are not

witness to it][15] and in the presence,—

SECTION 528 B. (2) Seller, or purchaser, or land.

(*b*) either of the seller[16] (if he is in possession of the land)[17] or of the buyer,[18] or on the land ;[19]

menials & not convicted of slander : *Muhammad Yunus K.* v. *Muhammad Yusuf*, (1897) 19 All. 334.

[14] "The INVOCATION OF WITNESSES is not required to give validity to that demand, but only in order that the pre-emptor may be provided with proof :" Bail. I. 483 (par. 2) (489); Hed. 551, (col. i. par. 4); but see Hed. 561, (col. i. par. 3); hence in India no witnesses ought, in strictness, to have been required ; cf. Ind. Ev. Act, s. 134, & so it was held in *Imamuddin* v. *Md. Rais-ul-Islam*, (1930) 52 All. 1005 (not absolutely necessary for pre emptor to call upon witnesses to bear witness to this) : see *n.* 15 A. But held otherwise in cases cited in *n.* 15-B(i)-(viii).

[15] A.—SPECIFIC INVOCATION OF WITNESSES NOT NECESSARY : enough, if witnesses are provided for the purpose & accompany pre-emptor & are present. Words in [ ] ought to be omitted in accordance with : (i) *Imamuddin* v. *Md. Rais-ul Islam*, (1930) 52 All. 1005, 1010 (immaterial whether WITNESSES brought by pre-emptor, from his house, or picked up on way, or chosen from those present with buyer : but at least 2 witnesses necessary to support pre-emptor : their mere presence, if they were inattentive & did not hear demand made, so as to be unable to give evidence in support of it, would be insufficient ; but so long as they heard demand being made & can bear testimony to it, no defect in demand); (ii) *Chotu* v. *Husain Bakhsh*, [1893] All. W. N. 101 ; (iii) *Muhammad Yunus K.* v. *Md. Yusuf*, (1897) 19 All. 334 ; (iv) *Ahmad Hakim* v. *Md. Hikmatullah*, (1926) 49 All. 385. B.—SPECIFIC INVOCATION OF WITNESSES NECESSARY : (i) *Isur Chunder Shaha* v. *Mirza Nisar Hossein*, [1864] W. R. 351 : (ii) *Ganga Prasad* v. *Ajudhia Prasad*, (1905) 28 All. 24 ; (iii) *Abdur Rahim* v. *Maidhar Gazi*, (1928) 32 C. W. N. 1163, 1165 ("be therefore witnesses therefor"); (iv) *Prokas S.* v. *Jogeswar S.*, (1868) 2 Beng. L. R. (A. C.) 12 ; (v) *Jadu S.* v. *Raj Kumar*, (1870) 13 W. R. 177 = 4 Beng. L. R. (A. C.) 171 ("calling upon others to be witnesses thereof"); (vi) *Dayamoollah* v. *Kirtee Chunder Surmah*, (1872) 18 W. R. 530 ; (vii) *Golakram Deb* v. *Brindaban Deb*, (1870) 6 Beng. L. R. 165 = 14 W. R. 265 ; (viii) *Ramdular Missir* v. *Jhumack Lal*, (1872) 8 Beng. L. R. 455. See s. 528 I, *ill.* (5).

[16] *Golakram* v. *Brindaban*, (1870) 6 Beng. L. R. 165 = 14 W. R. 265 : see s. 528 I, *ill.* (5) (where seller refuses). Cf. *Sham Lall Sahoo* v. *Ajfuroonissa*, (1874) 22 W. R. 184.

[17] *Inayat K.* v. *Muhammad Yusuf*, (1912) 10 All. L. J. 92 : (*talab-i-ish-had* made in presence of seller & 2 witnesses held invalid, seller not being then in possession).

[18] Hed. 551, 561, (col. i. par. 3); Bail. I. 483-484 (489-490). *Aliman Begam* v. *Ali Husain*, (1923) 45 All. 449 (if more purchasers than one : demand must be made in presence of all); but see *Muhammad Askari* v. *Rahmatullah*, (1927) 49 All. 716 (shares of all purchasers need not be pre-empted, & if demand made to one purchaser only, decree can be had in respect of only that purchaser's share). There is difference of opinion after buyer has taken possession of land :—(i) *may* demand of claim be made in presence of seller ?—as stated to be held by Imam Md. in *Jama Kabir* on "a liberal construction, though not on analogy," or (ii) *must* it be made either in presence of purchaser or on premises ?—as stated in Hed. 551 (col. i. par. 1), cf. *Janger Md.* v. *Md. Arjad*, (1879) 5 Cal. 509 ; (in presence of buyer though he had not taken possession); *Chamroo* v. *Puhlwan*, (1871) 16 W. R. 3 (it must be in presence of person in possession),—which (if it means that it cannot be made in presence of buyer unless he is in possession seems incorrect, &) explained away in *Ali Muhammad Khan* v. *Muhammad Said H.*, (1896) 18 All. 309. *Mahomed Waris* v. *Hazee Emamooddeen*, (1866) 6 W. R. 173 (delay of one day not fatal).

[19] *Kulsum B.* v. *Faqir Muhammad K.*, (1896) 18 All. 298 (undivided 1/8 of zamindari sold : demand may be made on any part of whole zamindari ; but if pre-emptor purposely goes to uninhabited & distant part to avoid its coming to ear of buyer, the demand might be held not to be *bona fide* or good); *Muhammad Usman* v. *Md. Abdul G.*, (1911) 34 All. 1 (demand from pre-emptor's own *chabutra*, which was held to form part of land sold, there being only "imperfect partition," so demand held valid). But where *talab-i-ishhad* made neither in presence of buyer nor seller, nor on land, it is invalid as such ; *Jadunandan S.* v. *Dulput S.*, (1884) 10 Cal. 1008 ; *Rujjub A. C.* v. *Chundi C. B.*, (1890) 17 Cal. 543 (F. B.).

SECTION 528 B. such a demand is technically called the 'talab-i-ishhad' or 'talab-i-taqrir.'[20]

(C) Enforcement talab-i-tamlik.

528 C.[1] The pre-emptor must enforce[21] the demand referred to in s. 528 B, by instituting a suit—[22]

(*a*) within a year of the purchaser taking possession of the land ;[23] or

(*b*) where the subject of pre-emption does not admit of physical possession, within a year of the instrument of sale being registered :[24]

such enforcement is technically called the 'talab-i-tamlik,'[25] or 'talab-i-khusumat.'[25]

II. INCIDENTS OF TALABS.

(A) Talab-i-muathibat when not necessary.

528 D.[1] (1) Though the assertion of the claim (s. 528 A) has not been made, the right of pre-emption may be claimed provided that the (second) demand (s. 528 B) is duly made at the time when the assertion ought to be made, viz. immediately on the pre-emptor being informed of the sale.[26]

(Shia-law) talab-i-muathibat.

(2) *Quaere,* whether under Shia law any immediate assertion or 'talab-i-muathibat' is necessary so long as the demand is made without unreasonable delay.[27]

(B) Sale on credit.

(3) Abu Yusuf holds that in a sale on credit, the pre-emptor need not (under Hanafi law) assert his claim until the time arrives at which the price is to be paid.[28]

(C) Information of sale to pre-emptor.

(4) Under Shia law the pre-emptor need not assert his

20 *Taqrir* = affirmation : *ish had* = testimony.

21 Bail. I. 484-485 (490-491); Hed. 550-551 ; cf. s. 528 I, p. 688.

22 Suit for possession : not mere declaratory suit, which is obnoxious to Spec. Rel. Act, s. 42 ; see *Charan Das* v. *Amir K.*, (1920) 47 I. A. 255 (N. W. PROV.).

23 Ind. Limit. Act X. of 1908, art. 10 : cf. *Ameer Ali* v. *Bhabo Soonduree Debia,* 6 W. R. 116 (case of conditional sale): *Raj Narain Rai* v. *Dunia Pande,* (1910) 7 All. L. J. 259 (meanwhile another pre-emptor bringing suit, or obtaining decree for pre-emption does not affect period of limitation); *Mehdi Hasan* v. *Baghcha Pande,* (1915) 13 All. L. J. 383 (do.).

24 See *n.* 23. *Batul Begum* v. *Mansur Ali,* (1901) 24 All. 17, (no instrument of sale & subject of pre-emption not admitting of physical possession, art. 120 will apply, not art. 10, i.e. 6 years period of limitation); *Kaunsilla* v. *Gopal,* [1906] 26 All. W. N. 73.

25 *Tamlik* = ownership : see s. 348, com. *Khusumat* = contest.

26 Bail. I. 484 (par. 2) (490); *Abdur Rahim* v. *Maidhar Gazi,* (1928) 32 C. W. N. 1163 (the two demands, viz. under ss. 528 A & 528 B, may be combined); *Koromali* v. *Amir Ali,* (1878) 3 C. L. R. 166 ; *Muhammad Usman* v. *Muhammad Abdul Ghafur,* (1911) 34 All. 1. Cf. s. 528 A, *ill.* (5); *Nundo Pershad* v. *Gopal Thakur,* (1884) 10 Cal. 1008.

27 Cf. Bail. II. 195 (par. 2) (even being present at time of sale & congratulating purchaser does not extinguish claim); Bail. II. 184 (par. 2); cf. *Jai Kuar* v. *Heera Lal,* (1870) 7 N. W. 1 (assertion unnecessary). Cf. s. 528 F, *nn.*

28 Hed. 556 (col. i.). See s. 554.

claim (by the 'talab-i-muathibat') unless information of the sale reaches him through trustworthy sources. Abu Hanifa's exposition of Hanafi law[29] agrees with Shia law, but Abu Yusuf and Imam Muhammad (whose exposition of Hanafi law is said to be the most correct) hold that the claim must be asserted by the pre-emptor, as soon as he is informed of the sale, and notwithstanding that he does not believe the information to be true.[29] SECTION 528D.

528E.[1] Under Shia law the pre-emptor must know the price at which the land is sold before he can validly claim to pre-empt,[2] and he may pray to the Court to determine the sum in fact agreed upon as the price between the buyer and seller,[3] and to decree his claim to pre-empt contingently on his paying the said price ;[4] provided that in such a case the burden is on the pre-emptor to show that the price in fact agreed upon is less than the stated price.[5] (D) Knowledge of price. Prayer that price be determined.

528F.[1] The formalities (if any)[6] with which a claim to pre-empt based on custom or contract, must be asserted, demanded, and enforced, are determined by an interpretation of the particular custom or contract.[7] (E) Special custom or contract.

[29] Hed. 551 ; Bail. I. 482-483 (488-489); II. 195 (par. 3); cf. s. 531, *ill.* (3).

[1] See p. 683, *n.* 1.

[2] Bail. II. 188 (*second*); (*a*) *Semble*, this saves pre-emptor's claim so long as he is not informed of price. (*b*) *Quaere*, whether it gives him right to be informed of price). (*c*) On deception or misinformation, his waiver or non-prosecution of his claim does not affect validity of his claim. Cf. *Abadi Begam* v. *Inam Begam*, (1877) 1 All. 521 (not Shia case). See s. 530B, p. 694.

[3] *Lajja Prasad* v. *Debi Prasad*, (1881) 3 All. 236, referring to *Eshri Das* v. *Binda Prasad*, (1861) S. D. A. (N. W. F.) Vol. 1, Part II, 892. Cf. *Abadi Begam* v. *Inam B.*, (1877) 1 All. 521 ; *Bhairon Singh* v. *Lalman*, (1884) 7 All. 23.

[4] But he must offer to pay same price & to take land on same terms as buyer. *Achurbur Panday* v. *Buchshee Ram*, (1864) 2 W. R. 38 ; *Kudhara* v. *Khuman Singh*, [1866] 1 Agra H. C. R. 265 ; *Durga Prasad* v. *Nawazish Ali*, (1878) 1 All. 591 (omission to aver in plaint willingness to pay actual amount of purchase-money not allowed to be remedied by amendment at last stage); *Naubat Singh* v. *Kishan Singh*, (1881) 3 All. 753 (1 All. 591 distinguished).

[5] But the presumption would be very light, cf. Ind. Evid. Act, s. 106 : "When any fact is specially within the knowledge of any person, the burden of proving that fact is upon him." *Abdul Majid* v. *Amalak*, (1907) 29 All. 618 ; *Bhagwan Singh* v. *Mahabir S.*, (1882) 5 All. 185. See s. 530B, *n.*

[6] *Fukeer Rawoot* v. *Emambaksh*, [1863] W. R. (F. B.) 143 = Beng. L. R. SUPP. VOL., 35, approved, in *Jadu Lal* v. *Janki Koer*, (1912) 39 I. A. 101 = 39 Cal. 915 affirming (1908) 35 Cal. 375, 585 (enforcement by suit must always be preceded by observance of forms prescribed in Muhammadan law); cf. *Sheojuttun Roy* v. *Anwar Ali*, (1870) 13 W. R. 189.

[7] *Jai Kuar* v. *Heera Lal*, (1874) 7 N. W. 1 (assertion unnecessary by custom of Hindus of Muhalla Abupura in town of Muzaffarnagar); *Zamir Husain* v. *Daulat Ram*, (1882) 5 All. 110 ; cf. *Ram Prasad* v. *Abdul Karim*, (1887) 9 All. 513 ; *Abdul Khan* v. *Shakira B.*, (1927) 50 All. 348. *Jagjivan Haribhai* v. *Kalidas Mulji*, (1920)

SECTION 528 G.

(F) Price :

(1) not to be tendered when asserting.

(2) non payment of by appellant.

(G) Talab-i-tamlik unnecessary if voluntary transfer.

528 G.[1] The pre-emptor need not tender the price at the time of asserting or demanding pre-emption.[8]

528 H.[1] The pre-emptor's right to appeal from a decree allowing pre-emption and specifying a day on or before which the price shall be paid, is not affected by his failure to pay it on or before the said day.[9]

528 I.[1] It may be unnecessary to institute a suit for the enforcement of pre-emption : as where, on the pre-emptor claiming it, its subject is voluntarily transferred to him.

Illustrations.

(1) *Talab-i Muathibat or assertion of claim* (*first ceremony* : s. 528(A) need not be in any particular form.[10] It may be made in the following terms : " I have demanded or do demand pre-emption." [11] Where the words uttered are ambiguous, it may, from the circumstances under which they are uttered, and the acts of the parties immediately following the utterance,[12] be inferred that the claim is made.

(2) P receives information of the sale by letter. The information is contained in the beginning or middle of the letter. He reads it on to the end without assertion of his claim : The right (according to some exponents of Hanafi law) is lost,[13] but according to others and according to Shia law the right is not lost so long as the pre-emptor uses all proper diligence so far as is customary : so that for making the assertion he need not hurry on a journey, or interrupt or delay his prayers or any religious duties.[14]

(3) ' *Talab-i-ishhad or demand of the claim* [15] (*second ceremony*) may [16] be

45 Bom. 604 (though Hindus in Surat subject to pre-emption as to HOUSES, doubtful if pre-emption adopted as to AGRICULTURAL LAND).

[8] *Khoffeh Jan B.* v. *Mahomed Mehdee*, (1868) 10 W. R. 211 ; *Karim Baksh* v. *Khuda B.*, (1894) 16 All. 247 ; *Nundo Pershad T.* v. *Gopal T.*, (1884) 10 Cal. 1008, 1018 ; *Lajja Prasad* v. *Debi*, (1881) 3 All. 236 ; *Heera Lall* v. *Moorut L.*, (1869) 11 W. R. 275 ; *Bulbood Singh* v. *Mahadeo Dutt*, (1865) 2 W. R. 10 ; *Nubee Buksh, alias Golam Nubee* v. *Kaloo Lushker*, (1874) 22 W. R. 4. " Price " : see s. 522(2)(*a*).

[9] *Kodai Singh* v. *Jaisri E.*, (1890) 13 All. 376 ; *Wazir K.* v. *Kale K.*, (1893) 16 All. 126. " Price " : see s. 522(2)(*a*), p. 663.

[10] *Jog Deb* v. *Mahomed*, (1905) 32 Cal. 982 ; Ameer Ali, *Mah. L.* I. 606, citing no authority, but cited in *Muhammad Nazir K.* v. *Makhdim Bakhsh*, (1911) 34 All. 53, 56, with remark : " he cites abundant authority for this proposition."

[11] Bail. I. 482 (488).

[12] *Muhammad Nazir Khan* v. *Makhdum Bakhsh*, (1911) 34 All. 53.

[13] Hed. 550 (col. ii. par. 3); Bail. I. 481 (487), citing *Hidaya* IV., 992. Cf. *Jarjan Khan* v. *Jabbar Meah*, (1884) 10 Cal. 383.

[14] Bail. II. 184 (par. 2).

[15] See s. 528 B, p. 684.

[16] Not necessarily in any particular form : *Jog Deb* v. *Mahomed*, (1905) 32 Cal. 982 ; *Ramdular Misser* v. *Jhumack Lal Misser*, (1872) 8 Beng. L. R. 455 = 17 W. R. 265 ; *Girdharee Singh* v. *Rojun Singh*, (1875) 24 W. R. 462 (declaration ought to be made before witnesses in substance to effect that first assertion had been made); *Nundo Pershad Thakur* v. *Gopal Thakur*, (1884) 10 Cal. 1008 (Garth, C. J. & Beverley, J. held that if first assertion made in presence of witnesses, & same witnesses present at second demand (*ishhad*), it is unnecessary for pre-emptor on second occasion to declare that he had already asserted claim by *talab-i-muathibat*), overruled in (i) *Rujjub Ali Chopedar* v. *Chandi Churn Bhadra*, (1890) 17 Cal. 543 (F. B.) (both, declaration of having made first assertion, & invocation of witnesses, necessary);

made in these terms : "B has purchased this mansion, and I have demanded the pre-emption,[17] and now do demand it : bear ye witness to this." [18] SECTION 528I.

(4) *'Talab-i-khusumat' or 'talab-i-tamlik' or enforcement* [19] of the claim may be obtained by a prayer in the following terms : "B has purchased a mansion" (describing its situation and boundaries), "and I am the shafee by reason of a mansion belonging to me," (the boundaries of which he should also explain). "Order him, therefore, to deliver it up to me." [20]

(5) P makes the talab-i-muathibat in the presence of witnesses, but in doing so, he is neither at the land, nor in the presence of the seller or buyer ; this does not operate as a valid talab-i-ish had, since "it is not shown that the first talab was made in the presence of either the seller or the purchaser or at the premises which constituted the subject of this sale." [20]

(6) P claims to purchase a specific quantity of land at a specific price ; this is not a proper claim to pre-empt, which must be made with an offer to pay the real price whatever it be.[21]

(7) P claims to pre-empt at the real price, alleging that the stated price (viz. Rs. 1,200) is fictitious, and the real purchase-money was Rs. 250 ; the first Court holds that the real or market value of the land was Rs. 250 ; this was held sufficient to show that the alleged price of Rs. 1,200 was fictitious [22]—*sed quaere.*

(8) P claims pre-emption, alleging that though the stated price is Rs. 775, the real price was Rs. 75. The buyer, B (a stranger) adduces evidence of the sale-deed ; and P gives evidence that a share in the neighbouring mahal was sold for Rs. 75. There is no other evidence, neither the seller nor the buyer being called. *Held,* that there is no evidence on which the lower Court can find the price to be Rs. 775. The case was remanded for further evidence being taken (*a*) as to the real contract price, or (*b*) as to the market value ; intimating that should neither be proved, no further remand would be granted, as it is a necessary part of the plaintiff's case to prove either (*a*) or (*b*), in order to show that the stated price was fictitious.[23]

(9) P, a pardanishin lady, on being informed by her nephew PA of the sale of the land to B, said : "I am the shafi of the property, how has he

(ii) *Akbar Husain* v. *Abdul Jalil,* (1894) 16 All. 383 (mention must be made of fact that *talab-i-muathibat* has been previously made) ; (iii) *Abbasi Begum* v. *Afzal Husen,* (1898) 20 All. 457 (do.) ; (iv) *Mubarak Husain* v. *Kaniz Bano,* (1904) 27 All. 160 (do.) ; (v) *Abid Husen* v. *Bashir Ahmed,* (1898) 20 All. 499 (do. notwithstanding, that same witnesses present at first assertion).

[17] Bail. I. 483 (489) ; Hed. 551 ; whether specific invocation of witnesses necessary ; see s. 528 B(*a*), p. 685, *n.* 15.

[18] See ss. 528 B, 528 C, pp. 684, 686.

[19] Bail. I. 485 (491). Muhammadan law gives "OPTIONS OF INSPECTION & DEFECT" : Hed. 553, see s. 549(1) : but see com.

[20] *Jadunandun Singh* v. *Dulput S.,* (1884) 10 Cal. 581 ; *Nathu* v. *Shadi,* (1915) 13 All. L. J. 714 (both DEMANDS may be COMBINED if there are witnesses to *talab-i-muathibat* = second demand). See ss. 528 B & 528 D, pp. 684, 686.

[21] *Achurbur Panday* v. *Buchshee Ram,* (1864) 2 W. R. 38 (no offer to pay real price whatever it might be : offer to purchase specific quantity of land at specific price. Court found quantity of land sold greater & price higher).

[22] *Sheopargash* v. *Dhanraj Dube,* (1887) 9 All. 225. See s. 528 D.

[23] *Agar Singh* v. *Raghuraj Singh,* (1887) 9 All. 471. See s. 528 D.

SECTION 528I. purchased it? Go to him and tell him to give me the property." PA took witnesses to B, and said, "My aunt says that she is the shafi of this land" and then told the persons present that he had told B what his aunt had said; *held*, that the demand (talab-i-ishhad) was not defective on the ground that no reference was made to the first assertion. Had the demand been made by P in person, Aikman, J., said he would have had no difficulty in holding it defective; but looking to the fact that it was made by an agent on behalf of an absent pre-emptor who was a pardanishin lady, the words used by the agent were held equivalent to the statement that P had asserted and was asserting her right of pre-emption.[24]

(10) S sells the land to B, BA, BB, BC, and BD; in making the demand of pre-emption, P says in the presence of BB and BC, "Whereas B and others have purchased the land and I asserted my right of pre-emption," etc., and proclaimed this also at the empty doors of the rest of the buyers; the demand *held* valid.[25]

PRELIMINARY CEREMONIES : SUMMARY.

1.—First assertion talab-i-muathibat

(1) The FIRST ASSERTION of the claim (called 'TALAB-I-MUATHIBAT' see s. 528 A) must be made,—

a.—as soon as possible.

(*a*) as soon as possible; this raises a question of fact: the dicta in the reports are not always not consistent or reconcilable. The Courts at times lean against decreeing pre-emption and seize technical objections against it. The Shia law does not require such extreme promptness in asserting the claim. It is doubtful whether it requires the first assertion at all: ss. 528 D(2), 528 I, ill. (2). But there does not seem to be any case decided on this point under Shia law.

b.—no special form necessary.

(*b*) No special form is insisted upon with reference to the first assertion, so long as a desire to pre-empt is asserted—not merely statement as a fact of having a right to pre-empt. The surrounding circumstances may be referred to for deciding whether the desire or intention to claim was asserted.

2.—Second demand, talab-i-ishhad.

(2) As to the (SECOND) DEMAND or the 'TALAB-I-SHHAD' (see s. 528 B)—

a.—Witnesses

(*a*) witnesses are necessary in India, though strictly in accordance with the texts they seem not to be necessary.

b.—presence on land, or of buyer, or seller.

(*b*) The (second) demand must be made either,—

(i) on the land; or

(ii) in the presence of the buyer; or

(iii) (so long as the land is in the possession of the seller) in the presence of the seller; but,—

(iv) it is doubtful whether it may validly be made in the presence of the seller if the buyer has taken possession of the land.

c.—form of second demand.

(*c*) It need not be made in any particular form, but it is essential that three matters be given expression to,—

(i) invocation of the witnesses;

[24] *Ahmad Shah K.* v. *Abadi B.*, [1897] 17 All. W. N. 23; relying on *Rujjab Ali* v. *Chundi*, (1890) 17 Cal. 534; *Akbar Husain* v. *Abdul Jalil*, [1894] All. W. N. 122.

[25] *Jog Deb* v. *Mahomed*, (1805) 32 Cal. 982. See *n*. 10.

(ii) declaration that the first assertion ('talab-i-muathibat') has already been made; SECTION 528I.

(iii) adherence to the desire to pre-empt.[26]

529. The assertion (or 'talab-i-muathibat')[27] and the demand (or 'talab-i-ishhad,' or "'talabi-itaqrir')[28] for pre-emption must be strictly proved[29] to have been made in proper form,[30] and without undue[31] delay.[32] (H) Strict proof.

Illustration. On 14 Oct. 1910, the plaintiff, an inspector of partition-amins of the Bareilly division, residing at Bareilly, while on tour, heard of the sale at Badaun of a house in the district of Saharanpur. The sale deed was dated 7 Sept. 1910. He immediately performed (1) the 'talab-i-muathibat' in the presence of witnesses. He also purported (2) to perform the talab-i-ishhad by sending to the buyer by post (owing to the buyer being at a distance) a letter signed in the presence of witnesses, claiming the right of pre-emption, and stating that the talab-i-muathibat had been properly made. The letter was duly received by the buyer: *held* that the second demand was not properly made.[33] Agent making second demand. The Court cited Fatawa Alamgiri: "If a pre-emptor comes to know of the sale while he is on his way to Mecca, and makes the talab-i-muathibat, but is unable to perform the talab-i-ishhad personally, he ought to appoint a vakil to make the claim of pre-emption for him. If he cannot find any one whom he may appoint his vakil, but finds a messenger, he ought to write a letter and in this letter he ought to appoint a vakil. If he fails to do so, his right of pre-emption will be lost. But if he can neither find a vakil nor a messenger, his right of pre-emption will not be lost until he finds one."[33] Fatawa Alamgiri. Messenger. The plaintiff proved neither that was unable to perform the talab-i-ishhad himself, nor that he was unable to find any one whom to appoint as his vakil. His

[26] *Baijnath* v. *Ramdhari*, (1908) 35 Cal. 402 = 35 I. A. 60.

[27] See s. 528 B. *Jarfan Khan* v. *Jabbar M.*, (1884) 10 Cal. 383; *Jhotee Singh* v. *Komul Roy*, (1868) 10 W. R. 119; *Abdul Hossein K.* v. *Gobind Chandra S.*, (1869) 11 W. R. 404.

[28] *Narohase Singh* v. *Luchmee Narain P.*, (1869) 11 W. R. 307; *Razeeooddeen* v. *Zeenut B.*, (1867) 8 W. R. 463; *Bhowanee Dutt* v. *Lokhoo S.*, [1864] W. R. 60.

[29] *Hosseini Khanum* v. *Lallun*, [1864] W. R. 117; *Issur Chunder Shaha* v. *Nissar Hossein*, *ib.* 351; *Jadu S.* v. *Rajkumar*, (1870) 4 Beng. L. R. (A. C.) 171; *Prokas Singh* v. *Jogeshwar S.*, 2 Beng. L. R. (A. C.) 12; *Ali Muhammad* v. *Taj*, (1876) 1 All. 288; *Surdharee Lall* v. *Laboo Moodee*, (1876) 21 W. R. 499; *Imamuddin* v. *Md. Rais-ul Islam*, (1930) 52 All. 1005.

[30] I.e. so far as form necessary: s. 528 I, *ill.* (1), (3), pp. 686 f; *Muhammad Khalil* v. *Muhammad Ibrahim*, (1915) 38 All. 201: see s. 529, *ill.*

[31] See comment, p. 692, on what is undue delay.

[32] *Minhaj*, 208 (par. 9) (Bk. 18, s. 2) on Shafi law. *Baijnath* v. *Ramdhari*, (1908) 35 Cal. 402; 35 I. A. 60; *Jarfan Khan* v. *Jabbar Meah*, (1884) 10 Cal. 383; *Ali Muhammad* v. *Taj Muhammad*, (1870) 1 All. 283; *Nazir K.* v. *Inayatulla*, (1893) 12 All. W. N. 24; *Ram Charan* v. *Narbir (Nurhur) Mahton*, (1870) 4 Beng. L. R. (A. C.) 216 = 13 W. R. 259; *Muhammad Wilayat A. K.* v. *Abdul Rab*, (1938) 11 All. 108; *Ajoodhja Pooree* v. *Sohun*, 7 W. R. 428; *Elahee Buksh* v. *Mohan*, 25 W. R. 9; *Gholam Hossein* v. *Abdool Kadir*, (1873) 5 N. W. 11: as to delay in making the DEMAND (ISH HAD), cf. s. 528 B, pp. 684 ff.

[33] *Muhammad Khalil* v. *Muhammad Ibrahim*, (1915) 38 All. 201, 203. The passage cited from *Fatawa Alamgiri* is referred to in Macn., Prec. 183.

SECTION 529. procedure was therefore defective. He could, staying where he was, have appointed a vakil and sent on the vakil, or he could have written a letter appointing a vakil : and he would have been excused the delay caused by the time he spent in finding a vakil and/or messenger for sending his letter of appointment.

The text explained. It is implied above that the actual talab-i-ishhad has to be performed personally by the pre-emptor or his agent,—not by a document such as a letter. Despatching a letter is not performing the ceremony. To hold otherwise would not merely add a new mode of performing the ceremony : it would totally alter the substance of the ceremony. It would mean that no one need go to the land or buyer (or seller) but that the ceremony may be performed by writing. The letter is referred to in the Alamgiri not as a substitute for or mode of performing the ceremony, but as a means for appointing a vakil to perform it. The rule is that delay is excused—"time does not run" during the period—during which the pre-emptor is not able either (*a*) to go himself to the land or to the buyer (or seller), or (*b*) to appoint a vakil for so going,—not that in any circumstances, the ceremony may be deemed to be performed though no person goes to the premises or to the buyer (or seller).

First ceremony. As regards the 'talab-i-muathibat' (s. 528 A)—

Evidence of pre-emptor alone. (1) the question has been raised whether the evidence of the pre-emptor alone is enough to prove its having been made ; [34]

What is undue delay. (2) a lapse before the assertion is made of (*a*) twelve hours,[35] or (*b*) of the night,[36] (*c*) the delay caused by the pre-emptor going either to the land,[37] (the subject of pre-emption) and making the 'talab-i-mutathibat' there, or (*d*) going to his own house to get the purchase-money prior to asserting it,[38] have all been *held* to be fatal to the claim ; (*e*) if the pre-emptor, on hearing of the sale, "enters his house, opens his chest, and takes out Rs. 47-4," and then asserts his claim : there has been held to be such unnecessary delay as to avoid the claim ; [39] but (*f*) rising from the seat [40] before making the claim is not undue delay ; (*g*) taking a short time for ascertaining the correctness of the information is not undue delay ; (*h*) a short time for reflection before making the first assertion has been allowed.[41]

Second ceremony. Delay in making the demand ('talab-i-ishhad'): see s. 528B, *nn.* The Shia law is different. See s. 528 I, *ill.* (2), p. 688.

(1) Preliminary ceremonies by agent, manager or guardian.

530. The assertion and demand (or preliminary ceremonies) for pre-emption may be made either by the pre-

[34] *Abdool Hossein K.* v. *Gobind Chandra S.*, (1869) 11 W. R. 404.
[35] *Ali Muhammad* v. *Taj M.*, (1876) 1 All. 283.
[36] *Nazir K.* v. *Inayatulla*, (1893) 12 All. W. N. 24.
[37] *Ram Charan* v. *Narnib Mahton*, (1870) 4 Beng. L. R. (A. C.) 216 = 13 W. R. 259.
[38] *Mona Singh* v. *Mosrad Singh*, (1866) 5 W. R. 203.
[39] *Jarjan K.* v. *Jabbar Meah*, (1884) 10 Cal. 383.
[40] *Maharaj Singh* v. *Lalla Bhanchook Lal*, [1864] W. R. 294.
[41] *Amjad Hussein* v. *Kharag Sen Saha*, (1870) 4 Beng. L. R. (A. C.) 203 = 13 W. R. 299.

emptor, or his duly authorized agent,[1] or manager,[2] or guardian.[3] Any person competent to own property, is competent to be authorized to make the ceremonies.[4] SECTION 530.

Under the Shia texts, if the guardian of a minor or person of unsound mind exercises or refuses to exercise a claim to pre-empt arising in his favour, and if the act or omission of the guardian is not for the benefit of the minor, then the pre-emption may be avoided, or enforced on attaining majority or recovering reason. The Hanafi authorities are doubtful on the point.[5] It is difficult to see how the Shia texts could be given effect to in our times, except in so far as they may affect the rights between the guardian and his ward, or perhaps where the disability of the pre-emptor has not been long in duration and the interests of third parties are not affected. Apart from other difficulties the bearing of the Indian Limitation Act IX. of 1908, s. 8, and Act XV. of 1877, s. 6 and s. 7 (paragraph 5) may have to be considered.[5] Under a wajibu'l-arz restricting pre-emption to persons competent to contract, the plaintiff, who was a minor at the time of the sale, unrepresented by a guardian, was held not entitled to enforce pre-emption by a suit brought on his attaining majority four years later.[6] Minor and guardian. Restriction in wajibu'l arz against minor.

530 A. The pre-emptor must take the sale[7] as it was made, and cannot alter its terms either as regards the property sold, (see s. 540) or price, or any other essential term, *semble*, not having reference to the personal relation between the seller and buyer.[8] (J) TERMS ON WHICH PRE-EMPTION ALLOWED : (1) terms of sale binding.

It is not always easy to distinguish the essential parts of the bargain from arrangements personal to the original buyer and seller, of a kind that cannot be transferred when the pre-emptor steps into the shoes of the original *Illustrations.*

[1] *Munna K.* v. *Cheddu S.*, (1906) 28 All. 691 ; *Ali Muhammad K.* v. *Muhammad Said Husain*, (1896) 18 All. 309 ; *Harirar Dat* v. *Sheo P.*, (1884) 7 All. 41 (laying down rule in general terms); *Abadi Begam* v. *Inam Begam*, (1877) 1 All. 521 (husband for wife); *Ojheoonissa Begam* v. *Rustam Ali*, [1864] W. R. 219 ; (*Syed*) *Wajid Ali K.* v. *Lala Hanuman Prasad*, (1869) 4 Beng. L. R. (A. C.) 139 ; 12 W. R. (F. B.) 484. AGENTS see com.

[2] *Sri Kishan* v. *Bachcha Pande*, (1911) 32 All. 637 (notice by member of joint Hindu family to accrue for benefit of all); *Jadu Lal* v. *Janki Koer*, (1908) 35 Cal. 575 (manager under Court of Wards); affirmed (1912) 39 I. A. 101 = 39 Cal. 915.

[3] Hed. 564-565 ; Bail. II. 180 ; see s. 271. See s. 530, com. *Amir Haider* v. *Ali Ahmad*, (1925) 47 All. 635 (= s. 530 B, p. 694, *n.* 16).

[4] Bail. I. 472 (par. 2) (477): "neither are manhood, puberty, & justice or respectability of character, conditions of its exercise."

[5] Cf. *Nanoo* v. *Tirkha*, [1876] S. D. A. (N. W. P.).

[6] *Raja Ram* v. *Bansi Das*, (1876) 1 All. 207.

[7] See s. 522(2)(*a*).

[8] *Madhub Chunder N. B.* v. *Tomee Bewah*, (1867) 7 W. R. 210 ; *Tawakhul Rai* v. *Lachman*, (1883) 6 All. 341 ; *Nihal S.* v. *Kokale S.*, (1885) 8 All. 29 (pre-emptor not to have benefit of PECULIAR INCIDENTS of payment of purchase money as arranged BETWEEN SELLER & BUYER, viz. that balance of purchase money to remain on credit & be secured by hypothecation deeds). See also *Sitaram Bhaurau* v. *Sayad Sirajul K.*, (1917) 41 Bom. 636, affmd. *Sitaram* v. *Jiaul Hasan*, (1921) 48 I. A. 475 ; *Shankar Lal* v. *Hashmi B.*, (1932) 54 All. 1023 & com.

SECTION 530A. buyer. (i) The benefit of an arrangement by which a portion of the price was to remain with the buyer in order that he might pay off a mortgage debt, was held to be personal to the seller and buyer : the pre-emptor was not allowed to claim the same terms ;[9] but (ii) the pre-emptor was allowed a deduction from the price originally fixed, where, after the sale, the seller and buyer agreed that the buyer should recover—as he did—for his own benefit, certain moneys due to the seller at the time of the sale.[10] (iii) The District Court had decreed a conveyance to the pre-emptor upon payment of Rs. 71, (though the price paid by the purchaser was Rs. 141) on the ground that though the seller proposed to sell 5 annas he had only 2½ annas : but the High Court[11] amended the decree by directing a conveyance to the plaintiff on payment of Rs. 141, the full amount of the purchase money : holding that the bargain must be taken as made : " any apportionment of the purchase money is altogether illegal."[12] (iv) But where certain persons purported to sell an 8 annas share of a village, who had title to only 6 annas 8 pies thereof, the owner of the other 1 anna 4 pies first instituted a suit and obtained a decree declaring his title to that share ; then he claimed pre-emption of the other 6 annas and 8 pies, and it was held that he had to pay only a proportional price.[12]

(2) True price and market price.

530 B. Where the real price agreed upon between the seller and buyer is in dispute, the proper course is for the pre-emptor (on whom the burden lies) to give some evidence that the alleged price is not the real price. This will shift the burden on the seller and the buyer, within whose knowledge the real price is. The market price may then have some bearing on the question.[13]

Minhaj,[14] (Shafii text) states that in case of disputes between the buyer and pre-emptor as to the price, the presumption is in favour of the buyer's statement : see s. 5 B, pp. 39 ff.

§ 4.—Loss of Right of Pre-emption.

I. OMISSION TO CLAIM : ACQUIESCENCE

531. A person otherwise entitled to claim pre-emption, loses that right if he expressly or impliedly waives it,[15] or

[9] (*Sheikh*) *Golam Ayhya* v. *Joy Mungul S.*, (1873) 13 W. R. 435.

[10] *Tajammul Husain* v. *Uda*, (1880) 3 All. 668.

[11] *Madhub Chunder N. B.* v. *Tomee Bewah*, (1866) 7 W. R. 210.

[12] *Muhammad Latif* v. *Gobind S.*, (1884) 5 All. 382. See also *Nihal S.* v. *Kokale S.*, (1885) 8 All. 29 noted s. 530 A, *nn.*, p. 693.

[13] *Ram Sarup Sahu* v. *Karamullah K.*, (1914) 36 All. 464 (no actual price); *Agar S.* v. *Raghuraj*, (1887) 9 All. 471 = s. 528 I, *ill.* (8), p. 687. See s. 528 E, *nn.* p. 687.

[14] *Minhaj*, Bk. 18, s. 2. Howard's Transl. 207.

[15] See ss. 533-535, p. 698, dealing with waiver at length. Bail. I. 499, (505), e.g. if he says, " I have made void the " *shufa*," or " have caused it to drop," or " I have released you from it,' or " I have surrendered it to you," whether pre-emptor is or is not aware of the sale, provided however that it has actually taken place.

omits[16] duly[17] to assert demand or enforce his claim,[18] or acquiesces in the sale of the land,[19] or any part thereof,[20] notwithstanding that he may have already asserted and demanded it,[21] or associates in a suit to enforce pre-emption a co-plaintiff who has no claim to it, and in that manner waives part of the claim, and extinguishes the whole of it.[22] SECTION 531.

Illustrations.

(1) S sells land to B. P, who has a right to pre-emption, on receiving information[23] of the sale,—

(*a*) omits without sufficient cause to claim immediately his right,[24] *or*

(*b*) makes an offer for the house to B,[24] *or*

(*c*) asks him if he will give it up to him,[24] *or*

(*d*) takes a lease of it,[24] *or*

(*e*) agrees to cultivate in muzaraat or jointly with B,[24] *or*

(*f*) on the day of the sale P obtains a written agreement from B to sell to P the land any time within a year, and then P pays the price and purchases it for himself,[25] *or*

(*g*) P acts in the sale, as the agent of the seller,[26]—

in each of these cases P will be taken to have acquiesced in the sale,[27] and loses any right he may have had to pre-empt the land.

(*h*) If P acts as the agent of the buyer, B, P's right is not extinguished,[26]—

(*i*) Nor where an agreement similar to that in (*f*) is entered into while P continues to assert his pre-emptive right, and on the strength of that right, and in his character as pre-emptor, offers, in order to avoid litigation, to take

[16] *Amir Haidar* v. *Ali Ahmad*, (1925) 47 All. 635 (pre-emption suit by uncle & minor nephew : uncle, who was not legal guardian, had consented to sale on behalf of himself & minor : minor not bound by uncle's consent).

[17] PREMATURE ASSERTION is not enough : *Muhammad Yunis K.* v. *Md. Saleh K.*, (1930) 53 All. 169.

[18] See ss. 528, 540, pp. 683, 703. [19] Bail. I. 743 (753).

[20] OMITTING TO SUE FOR PART OF subject is in effect a WAIVER as to that part; object of right of pre-emption to prevent intrusion of stranger ; not to give pre-emptor "CAPRICIOUS CHOICE" of ousting stranger from so much of land as he may choose to pre-empt (Mahmood, J.) : *Durga Prasad* v. *Munsi*, (1884) 6 All. 423 : s. 540.

[21] Bail. I. 400 (505). See *ill. Sparrow* v. *Cooper*, (1833) Hayes & Jones 404.

[22] *Guptishwar Ram* v. *Rati Krishna Ram*, (1912) 34 All. 542 (= s. 527, pp. 682 f); *Bhawani Prasad* v. *Damru*, (1882) 5 All. 197 ; *Bhupal Singh* v. *Mohan S.*, (1897) 19 All. 324 (such MISJOINDER not allowed to be rectified by amendment of plaint); cf. *Bhawani Kuar* v. *Narain Singh*, (1887) 7 All. W. N. 247 ; *Mahanth Tokh Narayn Puri* v. *Ram Rachhya Singh*, (1925) 5 Pat. 96 (JOINING AS CO-PLAINTIFF person who has NO CLAIM to pre-empt causes forfeiture : but joining persons who, not being strangers, had right to pre-empt, but had failed to qualify themselves, does not cause forfeiture).

[23] The more so where *wajibu'arz* required S to give notice, & S did so, but P took no action within reasonable time ; *Muhammad Wilayat Ali Khan* v. *Abdul Rab*, (1888) 11 All. 108.

[24] Bail. I. 499 (505); *Kishan Lal* v. *Ishri*, (1905) 28 All. 237.

[25] *Habibunnissa* v. *Barkat Ali*, (1886) 8 All. 275.

[26] Hed. 562 (col. i., par. 4). See under *ill.* (1) (*i*).

[27] *Baijnath Ram Goenka* v. *Ramdhari*, (1908) 35 I. A. 60 = 35 Cal. 402.

SECTION 531. the land from B for the sale price : [28] the distinction between (*g*) and (*h*) is stated to be, that in (*g*), P must annul the sale which was completed by himself in order to pre-empt, whereas in (*h*) he must enforce the sale to B through whom he claims.[28]

(2) Where property is sold in execution of P's decree,[29] or in execution of a decree at a public auction at which P has the same opportunity to bid for the property as other persons, P cannot exercise his right of pre-emption.[30]

(3) P sues for pre-emption, alleging that the real price was less than that stated in the sale deed. P had made no communication to S, the seller, after he became aware that the sale was negotiated for, neither that he claimed to pre-empt, nor that he declined to pay the ostensible price. *Held*, that P ought to have communicated with S, and not having done so, he must be taken to have countenanced the completion of the sale, and waived his right of pre-emption.[31]

(4) PA and PAA obtained decrees for pre-empting, 1/14 and 13/14 shares of the land on the 29 Nov., and 23 Dec. 1907, respectively ; a suit was brought on the 17th Dec. 1907 by P, whose claim, as pre-emptor, was prior to that of PA, and PAA. *Held*, that P was entitled to pre-empt, not having been a party to the suits by PA and PAA, and P's right was not affected by the decrees in favour of PA and PAA.[32]

(5) The sale was to a co-sharer jointly with two others, who were strangers, the consideration being one integral sum : *held* (i) that the co-sharer, having associated with himself strangers as buyers, must be deemed for the purposes of pre-emption, to be himself a stranger ; (ii) the claim of the other co-sharers to pre-empt could not be resisted by him, notwithstanding that the sale deed specified that each of the buyers took 1/3 of the land sold [33] and (iii) a person whose rights to pre-emption are inferior to those of the plaintiff, is deemed to that extent a stranger for the present purpose.[34]

II. DEATH OF PRE-EMPTOR BEFORE ENFORCEMENT : Abatement : Devolution.

532. (1) Under Hanafi law the right of pre-emption is extinguished where the pre-emptor dies before enforcing it by suit,[1] even if he has made the two preliminary ceremonies.[2]

[28] *Muhammad Yunus Khan* v. *Muhammad Yusuf*, (1897) 19 All. 334 ; *Muhammad Nasiruddin* v. *Abdul Hasan*, (1894) 16 All. 330.

[29] *Nuzmoodeen Goenka* v. *Kanye Jha*, (1863) Marsh 555 = 2 Hay, 651. But see s. 525, *ill.* (1)(*e*).

[30] *Abdul Jabel* v. *Khelat Chandra Ghose*, (1868) 1 Beng. L. R. (A. C.) 105 = 10 W. R. 165.

[31] *Bhairon Singh* v. *Lalman*, (1884) 7 All. 23.

[32] *Raj Narain Rai* v. *Dunia Pande*, (1910) 32 All. 340. Cf. s. 527, com.

[33] *Manna Singh* v. *Ramadhin S.*, (1881) 4 All. 252. *Harjas* v. *Kanhya*, (1884) 7 All. 118.

[34] *Gupteshwar Ram* v. *Rati Krishna R.*, (1912) 34 All. 542 (s. 527, pp. 682 f) ; cf. *Sparrow* v. *Cooper*, (1833) Hayes & Jones 404.

[1] Hed. 561 (col. ii. par. 2) ; Bail. I. 500 (506) ; *Muhammad Husain* v. *Niamat-un-nissa*, (1897) 20 All. 88 ; *Partab Singh* v *Daulat*, (1913) 36 All. 63 ; cf. *Sitaram Bhaurau* v. *Sayad Sirajul Khan*, (1917) 41 Bom. 636, 653 (= *n.* 2). See however *Wajid Ali* v. *Shaban*, (1909) 32 All. 623 (rights under *wajibu'l-arz*).

[2] *Pratab Singh* v. *Daulat*, (1913) 36 All. 63 ; cf. *Sitaram Bhaurau* v. *Sayad*

(2) Where the seller informs the pre-emptor of the proposed sale, and notifies him that, if he is desirous of pre-empting, he must pay the price within a stated period, and the pre-emptor exercises the option, giving a formal notice to the seller and asking for the address of the buyer and inspection of the deeds, and thereafter dies, and an administrator of his estate is appointed, the right of pre-emption vests in the administrator.[3] SECTION 532. Administrator.

(3) Under Shia and Shafii law, on the death of the pre-emptor, the right to pre-empt devolves upon his heirs,[4] in the proportion of their rights of inheritance.[5] Shia Law.

(4) On the death of a Hanafi pre-emptor, pending a suit for pre-emption, his right does not, under the Indian Succession Act, 1925, s. 306 [6] survive to his heirs and representatives who are neither executors nor administrators within the clear definitions of the terms in the said Act.[7] Effect of Probate Act.

1.—Reason for abatement.

The reason given for the right abating, under Hanafi law, is that the death of the pre-emptor extinguishes his ownership of his property (see s. 541) which is necessary to give rise to the claim : it cannot continue in the dead man ; as for his heirs, their right in the property devolves upon them after his death, i.e. after the sale ; and thus they were not owners at the time of the sale.[8]

2.—Effect of maxim about actio personalis and Probate Act.

The head-notes of both reports [9] of Sayyad Jiaul Hussain's case are (submitted) inaccurate : the Court adjourned the hearing of the appeal on the question of the right surviving to an administrator ; though it said, "we cannot doubt but that the intention of the legislature in the enactment was to make large innovations upon the personal law ... as expressed in the old maxim actio personalis moritur cum persona. Since that in our opinion is unmistakably the effect of s. 89 of the Probate and Administration Act,[6] we think that its operation must be strictly confined to the persons named in it."

Lord Macnaghten's observation [10] that the application of the doctrine of actio personalis moritur cum persona, is limited to actions in which remedy is sought for a tort, or for something which involves at any rate a wrong-doing—

Sirajul K., (1917) 41 Bom. 626, 653, affmd. *Sitaram* v. *Jiaul Hasan*, (1921) 48 I. A. 475 (pre-emption apparently based on contract : p. 480, *ll.* 22-26).

[3] *Sitaram Bhaurau* v. *Jiaul Hasan*, (1921) 48 I. A. 475, 478, 479. See *nn.* 2, 7.

[4] Hed. 561 ; Bail. II. 190, 191 ; the *Shaikh*, i.e. Muhammad-al-Hasan ibn Ali Aba Jafaral-Tusi, author of the *Mabsut*, holds that the right abates.

[5] Bail. II. 191 (*third*).

[6] Ind. Succ. Act, 1925, s. 306 = Prob. & Adm. Act, v. 1881, s. 89.

[7] *Sayyad Jiaul Hussain* v. *Sitaram Bhau*, (1911) 36 Bom. 144 = 13 Bom. L. R. 1340 ; *Sitaram Bhaurau* v. *Sayad Sirajul K.*, (1917) 41 Bom. 636, 653. See com.

[8] Hed. 562 (col. i., par. 1). [9] 36 Bom. 144 = 13 Bom. L. R. 1340.

[10] *United Collieries Ld.* v. *Simpson*, [1909] A. C. 391.

SECTION 532. was recently cited in deciding that the maxim does not apply where compensation is claimed to property on the strength of express or implied contract.[11] It is difficult to say whether the right of pre-emption as understood by the Hanafi texts falls within the category of tort or contract. It arises in many cases from contract, but its object is to safeguard the pre-emptor from annoyance which may be considered as a species of wrong-doing : s. 522, 528, 528 I, comm., pp. 664, 683, 690.

III. WAIVER.
(A) Express : implied.

533. After the right of pre-emption has arisen and before it has been enforced [12] it may be waived expressly or impliedly.

Illustrations. S makes an offer of sale to P, who refuses to avail himself of it, and consents to a sale to B ; P cannot afterwards claim to pre-empt.[13] But where there is neither sufficient proof of the refusal, nor evidence of consent to the sale to B, the right is not lost ; [14] nor where there is no absolute surrender, the refusal having been made simply in consequence of a dispute as to the actual price of the land.[15] Is a mere refusal to purchase proof of consent to the sale to B ? [16]

(B) Conditional or contingent waiver.

534. The right of pre-emption cannot under Hanafi texts, be waived conditionally or contingently on the happening of some future event. The authorities are divided whether a conditional or contingent waiver is operative absolutely (the condition or contingency being ineffectual).[17]

(C) Waiver on misinformation inoperative.

535. A waiver of the right of pre-emption based on misinformation [18] as to the amount or nature of the price, or the identity of the purchaser, does not, in so far as it is

[11] *Chunilal* v. *Sec. of St.*, (1910) 12 Bom. L. R. 769, 776.

[12] See s. 531, p. 694. Bail. I. 500 (par. 2) (506); II. 195 (par. 2); though some SHIA authorities express doubt as to WAIVER BY IMPLICATION.

[13] *Brajo Kishor Surma* v. *Kirti Chundra Surma*, (1871) 7 Beng. L. R. 19 = 15 W. R. 247.

[14] *Jehangeer Buksh* v. *Lalla Bikharee Lall*, (1868) 11 W. R. 480 = 7 Beng. L. R. 25 *n.*

[15] *Abadi Begam* v. *Inam Begam*, (1877) 1 All. 521 ; *Kanhai Lall* v. *Kalka Prasad*, (1905) 27 All. 670. Cf. *Shri Kishan Singh* v. *Bachcha Pande*, (1911) 33 All. 637.

[16] *Toral Komhar* v. *Auchhi*, (1872) 9 Beng. L. R. 253 = 18 W. R. 401 ; *Sheo Tuhul Singh* v. *Ram Kooer*, [1864] W. R. 311 ; *Kooldeep Singh* v. *Ram Deen S.*, (1875) 24 W. R. 198. Cf. *Indraj* v. *Clement*, [1915] 13 All. L. J. 288 (S offered to sell to P, who offered only Rs. 160, & refused to give more ; subsequently S sold for Rs. 235 ; held according to custom in village, vendor bound in first instance to offer property for sale to his co-sharers, therefore refusal of P to purchase must be considered to deprive him of his claim to pre-empt. See s. 535 *expl*.).

[17] Hed. 561 ; Bail. I. 502 (508); but see Bail. I. 500 (par. 3) (506); where it is said that it may be suspended on condition. The translator points out, Bail. I. 502 (508), *n.* 2, that condition referred to had already occurred in the first case, & was executory in latter.

[18] See Punjab Pre-emption Act & Oudh Laws Act referred to, s. 557, p. 726.

made in consequence of the said misinformation,[19] affect the right. SECTION 535.

Explanation.—The pre-emptor's refusal to purchase the land at a price which he believes, in good faith, to be fictitious and not real, is not a waiver, nor does it affect his rights ;[20] nor does the offer of the property by the seller to the pre-emptor before an agreement to sell it had been entered into.[21] But after the seller informs the pre-emptor of his desire to sell, and the pre-emptor declines to purchase on the ground that he has not the means, or any other similar ground, the seller may sell to a stranger.[22] Refusal to purchase the land.

P purports to waive his right of pre-emption on its being misrepresented to him,—(*a*) that the price was Rs. 1,000,—the real price being Rs. 500,—the right is not waived ; but if it was Rs. 2,000 or Rs. 999,—the waiver is valid ;[23] (*b*) that the purchaser was B,—if the real purchaser was BA, the waiver is invalid ;[23] (*c*) that the purchaser was B,—if the real purchasers were B and BA jointly, the waiver is valid as to B's share in it, but not as to BA's ;[23] (*d*) that the whole land had been sold,—only half of the land being really sold ; the right is extinguished under Hanafi law ; but not if the whole is sold and he is informed that only half is sold—[*sed quaere*,[23] see *ill.* (*f*)] ; (*e*) that the land was exchanged for one commodity,—and it was in fact exchanged for another commodity, the waiver is inoperative ;[23] (*f*) that 1/2 the land was sold for Rs. 100,—and in fact 1/4 was sold for 50, or vice versa,—pre-emption may be claimed ;[24] (*g*) that B and BA purchased it—and only B had in fact purchased it, or vice versa,—pre-emption may be claimed ;[24] (*h*) that A purchased it for himself,—and in fact he purchased it for B, or vice versa.—pre-emption may be claimed.[25] *Illustrations.*

536. The right of pre-emption is forfeited if it is purported to be released for a consideration to be paid to the pre-emptor. Under Hanafi law, the pre-emptor cannot lawfully claim payment of the consideration for the release ;[26] but he may lawfully agree to take only part of the land for a part of the price,[27] proportionate or otherwise. IV. FORFEITURE OF RIGHT. (A) Release.

19 Bail. I. 501 (par. 2) (507) ; II. 184.

20 *Sri Kishan S.* v. *Bachcha Pande*, (1911) 33 All. 637.

21 *Kanhai Lal* v. *Kalka Prasad*, (1905) 27 All. 670 (opportunity to buy must be given when definite agreement for sale at fixed rate entered into with stranger). Cf. *Indraj* v. *Clement*, [1915] 13 All. L. J. 288 = s. 533, *n.* 16.

22 *Naunihal Singh* v. *Ram Ratan*, (1916) 39 All. 127.

23 Bail. I. 501 (507) ; Hed. 562 (col. ii., par. 2) (563) ; *Minhaj*, 209 (Bk. 18, s. 2).

24 Bail. II. 187-188 (*first, fourth*). 25 Bail. II. 187-188 (*first, fourth*).

26 Hed. 561 ; Bail. I. 502 (508) ; II. 192 (*sixth*) : *semble* under Shia law payment of consideration may be enforced.

27 E.g. he may take 1/2 land for 1/3 of price—Bail. I. 502 (*ll.* 18-22) (508)—

SECTION 537. (B) Transfer of subjects of pre-emption

537. (1) The right of pre-emption is forfeited if the pre-emptor (before enforcing his right) purports to dispose of the subject of pre-emption to a stranger ;[28] but after a decree for pre-emption is obtained, the pre-emptor may sell or alienate its subject, though he has not executed the decree.[29]

(C) Partition.

(2) Where the right can be claimed only by co-parceners, it is extinguished on a partition being effected.[30]

A mortgage of the pre-emptor's own share or property prior to the sale, does not affect his right to pre-empt. But where the wajibu'l-arz gives not only in case of a sale, a right of pre-emption, but also a right to obtain a mortgage in priority to others, and if a co-sharer entitled to such prior right, in anticipation of exercising it himself, encumbers the share in question, he thereby forfeits his prior right.[31]

Sect. 536 refers to a release of the right to the seller ; s. 537 to what is in effect a transfer of it to an outsider.[32]

(D) Contract avoided or impossible of fulfilment.

538. Where the contract of sale is avoided, or it is impossible for the pre-emptor to carry it out, his right of pre-emption is extinguished.[1]

(E) Statutory forfeiture.

538A. The right of pre-emption may be forfeited by the pre-emptor being under some statutory disability as regards the purchase of the land in question.[2]

Illustrations.

The pre-emptor not being a member of the agricultural tribe within the meaning of the Bundelkhand Alienation Act, (Local Act II. of 1903), s. 3, there was no provision in the Act, entitling an intending purchaser to get the sanction of the Collector to bring a suit for pre-emption : *held* that the claimant could not be granted a decree for pre-emption ; that the Act provided that the property should not be sold to the pre-emptor, and absolved the seller from any customary obligation to first offer it to the pre-emptor.[2]

in which case he may be considered to release part of his right in consideration of part of purchase money.

28 *Rajjo* v. *Lalman*, (1882) 5 All. 180 (object being to prevent intrusion of strangers, not to benefit co-sharers pecuniarily) ; cf. *Durga Prasad* v. *Munsi*, (1884) 6 All. 423, 425, 426 (*per* Mahmood, J.), p. 695, *n.* 20. See *Minhaj ut Talibin*, 209 (Bk. 18, s. 2) for Shafii law.

29 *Ram Sahai* v. *Gaya*, (1884) 7 All. 107.

30 *Muhammad Mahbub A. K.* v. *Raghubar*, (1915) 38 All. 27.

31 *Rajjo* v. *Lalman*, (1882) 5 All. 180.

32 Cf. *Sheo Narain* v. *Hira*, (1887) 7 All. 535 ; *Lachmi Narain* v. *Manog Dat*, (1885) 7 All. 291.

1 Hed. 560 (col. i. par. 2) ; Bail. II. 179, (par. 2, inability to pay price), 196 (par. 2) ; e.g. where price cannot be determined, or the consideration has perished, transfer having been by exchange. Cf. Bail. II. 187, (par. 3) ; *Najmunnissa* v. *Ajaib Ali K.*, (1900) 22 All. 343 ; *Ojheoonissa B.* v. *Rustom Ali*, [1864] W. R. 219. Cf. *Busunt Koomaree* v. *Kali Persad S.*, (1862) Marsh. 11 = 1 Hay 32 (pre-emption upon re-sale, after first sale—with respect to which no claim made—has fallen through).

2 *Suraj Bhan* v. *Somwarpuri*, (1915) 37 All. 662.

Where the mahal in respect of which there exists a custom of pre-emption comes into the ownership of a single individual, the effect has been held to be that the custom is put an end to and not merely in abeyance.[3]

SECTION 538A. Mahal being owned by a single individual.

538B. For the purposes of the Indian Limitation Act, s. 19, the buyer (*a*) is not the predecessor in title of the pre-emptor and (*b*) the buyer's acknowledgment in his written statement filed after a suit for pre-emption has been instituted does not bind the pre-emptor.[4]

V. LIMITATION.

§ 5.—THE SUBJECT OF PRE-EMPTION.

539. Aqar[5] or land[6] alone may validly be the subject of pre-emption ;[7] provided first, that where the subject of pre-emption consists of a share in a village or a large estate, neither a neighbour who is not a co-sharer,[8] nor a participator in appendages[9] can claim it on the ground merely of vicinage or such participation ;[10] and, secondly, that under

I. Subject of pre-emption : Land alone.

Neighbour : large estate.

[3] *Kamrunnissa B.* v. *Sughra B.*, (1917) 39 All. 480.

[4] *Shankar Lal* v. *Hashmi B.*, (1932) 54 All. 1023 (pre-emptor does not derive his title through buyer, but stands in his shoes in respect of rights & obligations arising out of sale : acknowledgment by buyer of existence of mortgage).

[5] Cf. Punjab Pre-emption Act, s. 71 & Oudh Laws Act, s. 7 : see s. 557, p. 726.

[6] E.g. AGRICULTURAL ESTATE : (*Shaikh*) *Karim Buksh* v. *Kamrudeen Ahmed*, (1874) 6 N. W. 377 ; *Fazal Ahmad* v. *Tasadduq Husain*, (1919) 41 All. 428 (ZAMINDARI property) ; *Ilahi Jan* v. *Mohammad Ishaq K.*, [1919] 17 All. L. J. 687 (ZAMINDARI ESTATE : where right based on contract & contract has come to an end,—pre-emption may be claimed under Muhammadan law) ; (*Sheikh*) *Kadir Bux* v. *Ram Tahul Bhagut*, (1871) 3 N. W. 125 (claim for pre-emption under Act I. of 1841, s. 2, sustainable in respect of imperfect PUTTADARI TENURE) ; *Kesho Rai* v. *Binayak Rai*, (1868) 3 Agra 179 (pre-emption allowed in respect of a KOTEE & GOLAH as proved that under local CUSTOM such properties were subject to pre-emption). For Shafii law see *Minhaj*, 205, (Bk. 18, s. 1).

[7] Bail. I. 472 ; 473 (par. 4) ; 474 ; II. 175. See comm. *Sharaiu'l-Islam*, *Minhaj-ut-Talibin* cited therein.

[8] CO-SHARER in any land, large or small may pre-empt : *Jehangeer Buksh* v. *Bhickaree Lall*, (1869) 11 W. R. 71 = 6 Beng. L. R. 42, *n.* s. c. affirmed on review, *Re Petition of Jehangeer Baksh*, (1870) 7 Beng. L. R. 24 = 11 W. R. 480 ; *Mahatab Singh* v. *Ramtahal Misser*, (1869) Beng. L. R. 43 *n.* = 10 W. R. 314 ; *Saiduddin* v. *Latifunnissa*, (1921) 44 All. 115 (basis of pre-emption by SHARIKS (CO-SHARERS) in zamindari property is common liability to pay Govt. reven. : whether or not one pre-emptor's own share is within same sub-division of imperfectly partitioned *mahal* as share sold).

[9] E.g. (*Shaik*) *Karim Buksh* v. *Kamruddeen Ahmed*, (1874) 6 N. W. 377.

[10] *Munna Lal* v. *Hajira Jan*, (1910) 33 All. 28 (cases collated) ; *Re Petition of Chatternath Jha*, alias *Jhinga Jha*, (*Sheikh*) (*Shah*) *Mahomed Hossein* v. *Mohsin* (*Shah Mohsun*) *Ali*, (1870) 6 Beng. L. R. 41 = 14 W. R. (F. B.) 1 (*per* Couch, C. J., Mitter, J., authorities collated : in LARGER ESTATES or in VILLAGES, partner has right of pre-emption : not neighbour : pre-emption on ground of vicinity confined to property of small extent) ; *Ejnash Fooer* v. *Amjud Ally*, (1868) 2 W. R. 261 ; *Chowdry Joogul K. S.* v. *Poocha S.*, (1867) 8 W. R. 413 ; *Abdul Azim* v. *Khondhar Hamed Ali*, (1868) 2 Beng. L. R. (A. C.) 63 = 10 W. R. 356 ; *Abdul Rahim* v. *Kharag S.*, (1892) 15 All. 104 ; (*Sheikh*) *Mahomed Hossein* v. (*Sheikh*) *Mohsun Ali*, (1870) 14 W. R. 266 ; (*Sheikh*) *Karim B.* v. *Kamruddeen Ahmad*, (1874) 6 N. W. 377. Shia law does not give NEIGHBOURS right of pre-emption in any case ; s. 541(3).

SECTION 539. **Shafii law property which is incapable of division cannot be subject of pre-emption.**[11]

Illustrations.

(1) Movables cannot validly be the subject of pre-emption,[12] but trees[13] or buildings when transferred with the land on which they stand, or a dwelling house sold for occupation, without the ownership of the site,[14] may be the subject of pre-emption.

(2) A claim to mesne profits due before the date on which the right to pre-emption arose, cannot form the subject of pre-emption.[15]

1.—Meaning of aqar.

"The strict meaning of the word aqar is space covered with buildings, so that, properly speaking, the term is not applicable to zaiat.[16] But according to the Kifayah, and the Inayah, aqar in the sense in which it is liable to pre-emption includes a zaiat.[17]

"The Prophet has said that there is no shufa except in a ruba or mansion, and a hait or garden.[18]

2.—Of hait.

"Hait means properly a wall or that which surrounds, though applied elliptically to the enclosure (Freytag) ... It would seem that the right of shufa is, strictly speaking, applicable only to houses and small enclosures of land. It has been held, however, to extend to a whole mauza or village."[19]

3.—Shafii law. (Movables).

It is stated in the Minhaj-ut-Talibin, (Shafii text): "This right does not exist in reference to movable property, but only with regard to land and what is naturally included in it, like buildings and trees, and fruit not artificially fertilized. There is no right of pre-emption in the case of a hujra (room) supported on a roof, even a roof held in common; nor in the case of any thing that cannot be divided without lowering the value, such as a hall or a mill."[20]

4.—Shia law. Doubt as to pre-emption in regard to movables, &c.

The Sharaiu'l-Islam (Shia text) mentions that (1) some authorities hold that to obviate the inconvenience of divisions, pre-emption may be claimed in regard to movables, such as wearing apparel, household utensils, shipping, animals and the like; (2) doubt is expressed regarding rivulets, ways, baths, and other property, the division of which would occasion loss or

11 Hed. 555 (col. ii. par. 1). See com.

12 Bail. I. 475 (par. 3) (479); II. 176 (par. 1).

13 *Minhaj* (Shafii text) adds "& FRUIT not artificially fertilized;" but contrary held by authorities of repute.

14 *Zahur* v. *Nur Ali*, (1879) 2 Al.. 99.

15 *Emamooddeen Sowdagar* v. *Abdool Soobhan*, (1866) 7 W. R. 117.

16 Spelt *zuyut* by Bail. I. 472 (476 *n.* 2). According to Freytag *zaiat* is a field whether arable or pastoral. *Fatawa Alamgiri* III. 605 last 2 *ll.* citing *Kifayah* IV. 940 & *Inayah* IV. 263. Richardson: "An estate, productive farm, villa, any immovable possession. Land & water." *Alfaraidu'd-Durriya*: "Village, funded property, estate."

17 Bail. I. 472 (476) *n.* 2. *Ram Chand Khanna* v. *Goswami Ram Puri*, (1923) 45 All. 501 (CUSTOM OF PRE-EMPTION relating to land will not be presumed though custom of pre-emption relating to houses is admitted: former custom must be strictly proved).

18 *Hidayah* & *Kifayah* IV. 940.

19 Bail. I. 474 (478) *n.* 1, citing 3 Cal. S. D. A. 85.

20 *Minhaj* 205 (Bk. 18, s. 1) opening lines of Bk. on pre-emption.

damage ; and (3) as to apparatus of a well, such as wheels and buckets made use of in drawing water, which, though strictly movable, are by custom never removed from the well. But the correct opinion is stated to be that pre-emption is restricted to lands.[21] SECTION 539.

5.—Sale of house apart from site.

The sale of a house, apart from the site on which it stands, has been held (*a*) to be subject to pre-emption where the buyer means to occupy it, and does not intend to remove the building as old materials ;[22] but (*b*) that the owner of the land on which it stands is not entitled to pre-empt, "where his property in the land is wholly separate and distinct from the property in the house, which belongs to another person, with whom the owner has nothing in common."[23] (i) It appears from the reports that in the decision of 1879 the pre-emptor claimed as a neighbour,[22] but (ii) it does not appear how his vicinage arose—whether he was the owner of adjoining land (or house) or of the site on which the house sold was standing ; nor (iii) whether the claimant in 1870 omitted to claim as a co-sharer or neighbour[23] or (iv) was held not to be even a neighbour.[24] The pre-emptor in 1870 may have been a Shia, and then there would be no difficulty in understanding it.

(A) Whole land sold must be pre-empted.

Exceptions.

540. Pre-emption[1] must be claimed in respect of the whole of the property sold,[2] notwithstanding that the claimant is one of several joint pre-emptors,[3] provided that (1) a pre-emptor whose right of pre-emption extends to or affects a part only of the subject of sale,[4] may on payment of a proportionate[5] part of the consideration for sale,[6] claim to pre-empt such part alone ;[7] (2) where the buyer and the

[21] Bail. II. 175-177.

[22] *Zahur* v. *Nur Ali*, (1879) 2 All. 99.

[23] *Pershadi Lal* v. *Isshad Ali*, (1870) 2 N. W. 100.

[24] Cf. OWNERS OF UPPER & LOWER STORIES of house held to be neighbours & no more : s. 545, *ill.* (7) = *Ganeshi Lall* v. *Luchman Dass*, (1873) 5 N. W. 31.

[1] See s. 530 A, p. 693.

[2] See s. 529, p. 691. *Sheobharos Rai* v. *Jiach Rai*, (1886) 8 All. 462 (*per* Mahmood, J.). See com. & s. 527, pp. 681 ff. Where property described in plaint by error to be of less area than it is in reality, plaint may be amended by leave of Court : *Barkat Unnesa* v. *Muhammad Asad Ali*, (1895) 17 All. 288.

[3] Bail. I. 482 (*ll.* 15-22) (488), 492 (par. 2) ((499); II. 182 (par. 2). *Durga Prasad* v. *Munsi*, (1884) 6 All. 423 : *Cazee Ali* v. *Musseeutoollah*, (1882) 2 W. R. 285. Cf. *Hulasi* v. *Sheo Prasad*, (1865) 6 All. 455 ; *Arjun Singh* v. *Sarfaraz Singh*, (1888) 10 All. 182. *Abdul Khan* v. *Shakira B.*, (1927) 50 All. 348 (here claim arose partly under special Act & partly under general law : as demands not made, claim under general law failed : consequently other part of claim also dismissed = s. 540, *ill.* (1), p. 704) : but see *Amjad Khan* v. *Saadat B.*, (1931) 53 All. 524.

[4] *Saligram* v. *Debi Pershad*, (1874) 7 N. W. 38 (shares in two tenements sold, & pre-emptor co-sharer in only one of them). Of, if buyer himself entitled to pre-empt as against pre-emptor, rights of plaintiff being of no higher degree : see s. 527, pp. 681 ff : e.g. if buyer is one of co-sharers of seller 3rd co-parcener may claim to pre-empt 1/2 land : *Amir Hasan* v. *Rahim Bakhsh*, (1897) 19 All. 466 ; *Abdullah* v. *Amanatullah*, (1899) 21 All. 292.

[5] *Saligram* v. *Debi Pershad*, (1874) 7 N. W. 38 (several parts of land varying in price, may have to be separately valued).

[6] Cf. *Muhammad Latif* v. *Govind Singh*, (1883) 5 All. 382.

[7] Bail. I. 492 (par. 1) (498); II. 177 (par. 3), 183 (par. 2); *Abdullah* v.

SECTION 540. pre-emptor are in respect of pre-emption equal in degree,[8] the pre-emptor need not claim that part of the land which would not be allotted to him because[9] of the equal rights of the buyer,[9] under s. 527. The buyer has no option to rescind the sale of that part which is not pre-empted.[9]

(B) Sale of several distinct properties.

Explanation.—Where two or more distinct properties are sold by the same contract, one or more of them may be pre-empted without the other, notwithstanding that the pre-emptor is the same in respect of each of them.[10] Where the property is purchased by several co-purchasers the pre-emptor may pre-empt the share of one co-purchaser alone by making a demand solely to him.[11]

Illustrations.

(1) S sells land, over which P and PA have rights of pre-emption, and (P being absent) PA asserts his claim to half the land by pre-emption; or (both being present,) they each assert a claim to half of it. In both cases the assertion of the claim is void.[12] On similar grounds, pre-emption was not allowed to be claimed as to part of land under the AGRA PRE-EMPTION ACT (local) XI. of 1922, and as to the rest, under Muhammadan law;[13] but that decision was subsequently distinguished and corrected, and it was held that a statutory right cannot be taken away by common law outside the Act, and while the claim was dismissed so far as it was under general law, it was allowed in so far as it was under the Act.[14]

(2) S sells several houses in a street where there is no thoroughfare, and P desires to pre-empt one of them; if P's claim of pre-emption is based on partnership in the way, he cannot take a part of the property sold, for this would be to divide the bargain without any necessity: but if his claim be based on neighbourhood, and he is neighbour only to the house which he wishes to take, he may lawfully take it alone.[15]

(3) A, as the agent of B and BA, purchases plots of land from S and SA

Amanatullah, (1899) 21 All. 292; *Rowshun Koer* v. *Ram Dihal Roy*, (1883) 13 Cal. L. R. 45.

8 I.e. co-sharers or *khalits* or neighbours, as the case may be. See s. 527, pp. 681 ff.

9 The buyer cannot rescind the sale because the claim of *shufa* supervenes on what is his own property: Bail. II. 183 (par. 13). See s. 540, *ill.* (5).

10 Bail. II. 187 (par. 2); *Izzatulla* v. *Bhikari Molla*, (1870) 6 Beng. L. R. 386 = 14 W. R. 469; *Raghunandan Singh* v. *Majbuth Singh*, (1868) 10 W. R. 379 = 6 Beng. L. R. 387, *n.*; *Mt. Sarwari B.* v. (*Mt.*) *Razia K.*, [1929] AIR (ALL.) 156 = 27 All. L. J. 187 (plaint may claim pre-emption of some items omitting others for which also demand made).

11 *Muhammad Askari* v. *Rahmatullah*, [1927] 25 All. L. J. 473.

12 Bail. I. 482 (par. 1) (488).

13 *Abdul Khan* v. *Shakira B.*, (1927) 50 All. 348.

14 *Amjad A. K.* v. *Saadat B.*, (1931) 53 All. 524; *Zainab B.* v. *Umar Hayat K.*, (1936) 58 All. 873, 879 (Act amended: claim under Act need not include properties which may be pre-empted under custom or other law: 58 All. at 880).

15 Bail. I. 492 (par. 1) (498).

respectively ; P having the right to pre-empt both cannot pre-empt one of the plots without the other.[15]

(4) A and AA are both agents of B, and purchase plots of land from S. P may pre-empt either plot without the other.[16]

(5) S purported to sell his own share, and that of SA, a minor, in certain property to B, and covenanted to compensate B if SA did not, on coming of age, ratify the sale. P then sued for pre-emption. The trial Court dismissed the suit. The lower appellate court held that P could not enforce her claim in respect of SA's share : at its suggestion the plaint was amended so as to refer only to S's share. *Held,* that P was bound to claim her right against all the shares, and could not enforce it in respect of some only,—" having thought fit to enforce her claim only as regards the shares which are safe, this withdrawal entirely invalidated the whole claim." [17]

(6) P having a right to pre-empt the whole subject of sale consisting of (i) a share in a village, and (ii) a plot of land in a city, omits to make a prompt assertion of his claim. *Held,* that he cannot pre-empt even share (i), notwithstanding that he is willing to pay for it the total price agreed to be paid for both (i), and (ii), and to leave (ii) (as to which his right to pre-empt is not established) in the buyer's hands.[18]

1.—Reason : pre-emptor cannot pick out best part of bargain.

" The principle or ratio decidendi of denying the right of pre-emption except as to the whole of the property sold," explained Mahmood, J.,[19] " is that by breaking 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." [19] But where " the shares are separately specified, and the sale to the stranger is distinctly divisible, the reason for the rule does not exist. The rule applies only to those transactions which, while contained in one deed, cannot be broken up or separated ; and the rule should be so limited, for it would be a very great hardship, if the vendee by the association of a stranger in respect of a small but specified portion of the property purchased, should have to forfeit his entire right of purchase in favour of a sharer having equal but not preferential rights. Indeed, where the share of each purchaser and the price which he had paid for it are distinctly specified in the sale deed, there is really no breaking up of the bargain, as understood in the law of pre-emption, if the purchaser is ousted from the specific share which he has individually purchased along with others under the same deed of sale. Moreover, even under the strict rule of pre-emption, the pre-emptor, in dealing with a sale under which more persons than one have purchased, is entitled to say that he

2.—Limitations to the rule.

[16] Bail. I. 493 (par. 1 ; *ll.* 4, 5, of par. 2) (499). But see s. 540 *expln. n.* & *ill.* (4).

[17] *Abdool Guffoor* v. (*Mt.*) *Noor Banoo,* 10 W. R. 111 = 1 Beng. L. R. (A. C.) 87 (Court " could not shut eyes to fact that withdrawal of part of claim not spontaneous, but suggested by expressed opinion of judge " : " plaintiff yielding to influence which she thought she could not resist " : " but we are not at liberty to give effect to mere surmise " : suit dismissed : parties bearing their own costs).

[18] *Muhammad Wilayat A. K.* v. *Abdul Rab,* (1811) 11 All. 101, followed *Mujib Ullah* v. *Umed Bibi,* (1898) 21 All. 119.

[19] *Sheobharos Rai* v. *Jiach Rai,* (1886) 8 All. 462, 466.

SECTION 540.

objects to the intrusion of only one of the purchasers, and wishes to exclude him, pre-empting the specific share which such purchaser has individually acquired." [19]

3.—Distinction between joint sellers and joint purchasers.

Abu Hanifa held that the right to pre-empt any portion of the subject of the sale attracts the option of pre-empting the whole ; but Imam Muhammad and the Shia authorities [20] and the decisions in India hold otherwise.[21] Hanafi texts state [22] (*a*) that where several sellers jointly sell the land to one purchaser, the right of pre-emption can only be exercised as to the whole of the land sold ; but (*b*) when several purchasers buy land from one seller, the portion of land agreed to be sold to each seller, may by itself form the subject of pre-emption. The reason assigned being that in case (*a*) it would "occassion a discrimination in the bargain to the purchaser, and be productive of very great inconvenience to him, whereas in the case (*b*) the shafee being merely the substitute of one of the (five) purchasers, no discrimination in the bargain is occasioned." [23]

§ 6.—THE PRE-EMPTOR.

1. PERSONS ENTITLED TO PRE-EMPT.

541. (1) Under Hanafi law[1] pre-emption may (subject to s. 539, as regards shares in villages and large estates) be claimed by the sharik (or co-sharer), the khalit (or participator in appendages) and by the jar, (or neighbour) as defined respectively in ss. 541 A to 541 C,[2] and by no others.[3]

Shafii law : co-sharers alone.

(2) Under Shafii law pre-emption may be claimed only by co-sharers, and not by participators in appendages, nor by neighbours.[4]

Shia law : Two co-sharers.

(3) Under Shia law, pre-emption may be claimed only where two persons are co-sharers in undivided property, and one of them sells his share : it cannot be claimed by any others than co-sharers,[5] nor if there are more co-sharers than two.[6]

[20] Bail. I. 493 (par. 2) (499); Bail. II. 177 (par. 3); Abu Hanifa also seems to have held same opinion at one time.

[21] *Surdharee Lall* v. *Laboo Moodee*, (1876) 25 W. R. 499, 500.

[22] Bail. I. 492 (498); Hed. 564.

[23] Hed. 564. Reason in Bail. I. 592 (498) for rule (*b*): "bargain has been separate from the beginning."

[1] Cf. Punjab Pre-emption Act, 1913 : referred to in detail s. 557 below, pp. 726-728.

[2] Hed. 548 ; Bail. I. 473-474 (477-478).

[3] Cf. *Pershadi Lal* v. (*Syud*) *Irshad*, (1870) 2 N. W. 100 ; *Mathura Prasad* v. *Hardev Bakhsh S.*, (1920) 42 All. 477 (no right between OWNERS OF DIFFERENT PARTS of *mahal* divided by imperfect partition); (*Mt.*) *Bibi Saleha* v. *Haji Amiruddin*, (1928) 8 Pat. 251 (*muqarraridar*, holding under CO-SHARER, has no right to pre-empt as against another co-sharer. On MUQARRARIDAR see *Kally Dass Ahiri* v. *Monmohini Dassee*, (1897) 24 Cal. 440, 447). See s. 539, s. 701 as to LARGE ESTATES.

[4] *Minhaj*, 205 (Bk. 18, s. 1); Hed. 548, 549.

[5] Syed Saheb Ameer Ali says that a *khalit* has right of pre-emption under Shia law, but does not cite any authority, *Mah. Law*, I. 616 (737).

[6] Bail. II. 179 ; *Abbas Ali* v. *Maya Ram*, (1888) 12 All. 229 (neighbours have no right); *Saiyed Muhammad Raziuddin* v. *Raghubir Prasad*, [1918] 16 All. L. J.

(4) Rights of pre-emption arising under special enactments must be determined by construing them.[7] SECTION 541.

Sect. 541 to 541 H (pp. 706-710) must be read together. They all formed part of a single section in the first edition of this work. The illustrations to all of them will be found after s. 541 H, pp. 711 ff. The relative priorities of pre-emptors are stated in s. 545, p. 714.

541 A.[8] By the sharik or co-sharer,[9] is meant the owner[10] of an undivided[11] share in that property[12] of which the subject of pre-emption forms a part or share.[13] This definition is subject to ss. 541 D—541 H.[14] (A) Co-sharer of seller.

For the purposes of ss. 541A and 545, it has sometimes to be decided whether two pieces of land form separate estates, or are owned by co-sharers: partition extinguishes the relation of co-sharers, and may, therefore, extinguish the right of pre-emption, where the right inheres only in co-sharers. (i) Properties bearing separate numbers in the Collector's rent-roll have been held to be separate estates, implying a bar to pre-emption arising from co-parcenary;[14] and (ii) where, at a settlement of a village constituting a single mahal, a record of rights was framed, giving certain pre-emptive right to the co-sharers in the village, but subsequently the village was divided by perfect Owners of adjoining land.

507 (no right where there are more co-sharers than 2); *Husain Baksh* v. *Mahfuz-ul-Huq*, (1925) 47 All. 944, 947 (authorities collected: under Shia law no pre-emption where the properties concerned were never jointly owned, but merely connected by there being a COMMON PIECE OF LAND over which each house has right of way). Some doubt whether, where there are more joint owners of land than two, they have no right; (*Sheikh*) *Daim* v. (*Mt.*) *Asooha B.*, (1870) 2 N. W. 360 (claim allowed: arguing that Shia authorities doubtful & practice of Court being not to defeat a claim on this ground, see p. 79, *n.* 11). See also *Tafazzal Husain* v. *Hadi Hasan*, (1879) 6 All. W. N. 139. Both these decisions were dissented from in *Abbas Ali's* case, 12 All. 229.

[7] E.g. *Raja Birendra Bikram S.* v. *Brij Mohan Pande*, (1934) 61 I. A. 235 (OU.) (Oudh Laws Act, 1876: TALUKDARI MAHAL of several villages: under-proprietor may not pre-empt superior rights in village).

[8] Sect. 541-A cited & applied: *Mathura Parsad* v. *Hardeo Bakhsh S.*, (1920) 44 All. 477, 479.

[9] *Nand Lal* v. *Bansi*, (1898) 20 All. 19 (mortgagee of co-sharer is not co-sharer); *Muhammad Ali* v. *Hukam Kunwar*, (1905) 28 All. 246 (person who buys plot of groveland in village does not thereby become co-sharer in village, so as to entitle him to enforce pre-emption under *wajibu'l-arz* conferring such right upon co-sharers). See also *Kaleshar Rai* v. *Nabiban Bibi*, (1906) 28 All. 642; *Ali Husain Khan* v. *Tasadduq Husain Khan*, (1905) 28 All. 124.

[10] *Lekhraj* v. *Gurda*, (1904) 26 All. 212 (MANAGER OF HINDU TEMPLE, holding as such manager zamindari property on behalf of temple, considered owner for purposes of s. 541); *Padam S.* v. *Umrao S.*, [1923] 21 All. L. J. 527 (MORTGAGEE not entitled to pre-empt against co-sharers).

[11] See s. 541 H, *ill.* (5). *Aziz Ahmad* v. *Nazir Ahmad*, (1927) 50 All. 257 (owners of undivided shares in plot of land, divided by *kachcha* road, over which public have right of passage, are SHARERS).

[12] *Akhoy Ram Shahajee* v. *Ram Kant Roy*, (1871) 15 W. R. 223 (share in zamindari).

[13] *Nundo Pershad Thakur* v. *Gopal Thakur*, (1884) 10 Cal. 1008 (under Hanafi & Shafii law pre-emption may be claimed by one or more of PLURALITY OF CO-SHARERS).

[14] *Joobraj Singh* v. *Tookun Singh*, (1870) 14 W. R. 476.

SECTION 541A. partition into three separate mahals, the co-sharers in any one mahal were held to have no claim to pre-emption in respect of land situated in another mahal.[15] See *ill.* ss. 541 H, 545, pp. 711, 714.

(B) Participator in appendages.

541 B. By the khalit or participator in appendages,[16] is meant the owner[17] of property to which is annexed or on which is imposed a private[18] right of way or of water[19] [or other easement or appendage][20] such right being also annexed to, or imposed upon, the subject of pre-emption.[21] This definition is subject to ss. 541 D, 541 F and 541 G.

See s. 541 H, *ill.* pp. 711 f. Khalit literally means "mixed up." Baillie says that though rights of water and way are given as examples, it does not appear that a khalit in any other right than these, has the right of pre-emption.[22] See s. 545, com., p. 716.

(C) Neighbour.

541 C. By the jar or neighbour,[23] is meant the owner[17] of property adjoining the subject of pre-emption.

See *ill.* ss. 541 H, 545, pp. 710, 715 f.

II. TITLE OF PRE-EMPTOR.

(1) Expectancy or contingent right gives no title.

541 D. (1) The pre-emptor must, at the time of the sale,[24] and until the institution of a suit to enforce pre-emption,[25] and, *semble,* also until the decree[26] for pre-emption is passed[27] by the trial Court,[28] have the status by virtue of which he claims

[15] *Ghure* v. *Man Singh,* (1895) 17 All. 226; *Ram Gopal* v. *Piari Lal,* (1899) 21 All. 441. See also *Abdul Hai* v. *Nain Singh,* (1897) 20 All. 92; *Janki Prasad* v. *Ishar Das,* (1899) 21 All. 374; *Shiam Sundar* v. *Amanat B.,* (1887) 9 All. 234 (even after partition original *wazibu'l-arz* binding until new one shown to be made).

[16] (*Shaikh*) *Karim B.* v. *Kamruddeen Ahmad,* (1874) 6 N. W. 377. CONTRA *Karim* v. *Priyo Lal B.* (1905) 28 All. 127.

[17] *Lekhraj* v. *Gurda,* (1904) 26 All. 212 (manager of temple).

[18] Not thoroughfares, *Karim Baksh* v. *Khuda Baksh,* (1894) 16 All. 240.

[19] *Rokaiya Begam* v. *Ahmadi Khanum,* (1912) 9 All. L. J. 769.

[20] *Aziz Ahmad* v. *Nazir Ahmad,* (1927) 50 All. 257 (branches of TREE PROJECTING over land of neighbour does not give owner of tree any right as *shafi khalit*).

[21] Hed. 548; Bail. I. 473-474 (477-478).

[22] Bail. I. 476 (481). [23] See s. 539 (as to large estates).

[24] See s. 541 H, *ill.* (7), p. 712, so his having mortgaged it on previous occasion does not affect his right: *Ujagar Lal* v. *Jai Lal,* (1896) 18 All. 382; *Gokul Chand* v. *Ram Prasad,* 9 All. W. N. 127; s. 541 D(2).

[25] *Janki Prasad* v. *Ishar Dass,* (1899) 21 All. 274; *Muhammad Mahbub A. K.,* v. *Raghubar,* (1915) 38 All. 27; *Ram Hit S.* v. *Narain Rai,* (1904) 26 All. 389; *Ram Gopal* v. *Piari Lal,* (1899) 21 All. 441; *Rohan Singh* v. *Bhau Lal,* (1909) 31 All. 531 (right as at institution of suit, & not as at time of decree); *Kaleshwar Rai* v. *Nabiban B.,* (1906) 28 All. 642.

[26] *Ram Gopal* v. *Piari Lal,* (1899) 21 All. 441; *Sanwal Das* v. *Gur Prasad,* (1908) 10 Punj. L. R. 561 (F. B.) [over-ruling *Faiz Baksh* v. *Ramji Das,* [1875] Punj. Rec. 34]; followed: *Nuri Mian* v. *Ambica S.,* (1916) 44 Cal. 47, 58, *l.* 22; but see s. 541 H, *ill.* (7), p. 712 & *Narain Singh* v. *Parbat S.,* (1901) 23 All. 247.

[27] Not necessarily at execution of decree for pre-emption: *Ram Sahai* v. *Gaya,* (1884) 7 All. 107.

[28] *Nuri Mian* v. *Ambica Singh,* (1916) 44 Cal. 47, 55 ff. 58 *l.* 22.

pre-emption, viz. the status of co-sharer or participator or neighbour as the case may be. SECTION 541D.

(2) The right of pre-emption does not arise in favour of a mere expectant heir,[30] or from holding a reversionary, or any kind of contingent right or interest, falling short of full ownership.[30]

(3) Possession [31] is neither necessary [32] nor a substitute for the status by reason of which pre-emption is claimed ;[33] nor is such status affected by the share or property being mortgaged.[34]

(4) Where the buyer and the pre-emptor are equal in degree (s. 522) their claims of pre-emption in respect of the original sale are governed by ss. 527, 540.

Loss of right after suit brought.

Ought the Courts to insist on the claimant for pre-emption being entitled to claim it up to the time that the decree for pre-emption is passed, or is it enough if the right inheres in him at the time of the institution of the suit? That it must inhere in the plaintiff until the decree of the trial Court is passed, has been held in several decisions. This may involve the necessity for events after the institution of the suit being taken into account. The texts on pre-emption have been considered,[28] together with the cases in which it is incumbent upon a Court of justice to take notice of events that have happened since the institution of the suit, and to mould its decree according to the circumstances as they stand at the time the decree is made.[35] See s. 541 H, *ill.*

Events after suit instituted.

541 E. The purchaser by acquiring the status of a co-sharer pendente lite, (it has been held) does not deprive the plaintiff of his right to pre-empt.[1]

(2) Purchaser getting right of pre-emption pendente lite.

[29] So that by selling property (or his share in it), he loses his right : Hed. 562 (col. i. par. 3) : *Janki Prasad* v. *Ishar Dass*, (1899) 21 All. 274. But see s. 541 H.

[30] Hed. 562 : *Sakino Bibi* v. *Amiran*, (1888) 10 All. 472 (*per* Mahmood, J.). See ss. 541, 541H, *ill.* (8).

[31] E.g. TENANT cannot pre-empt : *Gooman S.* v. *Tripool S.*, (1867) 8 W. R. 437. Cf. *Bhajan* v. *Mushtak Ahmad*, (1883) 5 All. 324 (S sells his property to B in 1870, on condition that S has option to repurchase it at any time during 13 years : B deemed to be owner of property & not S, until option exercised).

[32] See s. 541H.

[33] *Beharee Ram* v. *Shoobhudra*, (1868) 9 W. R. 455.

[34] *Ujgar Lal* v. *Jai Lal*, (1896) 18 All. 382 ; *Gokul Chand* v. *Ram Prasad*, 9 All. W. N. 129 ; *Ali Ahmad* v. *Rahmat Ullah*, (1892) 14 All. 195.

[35] *Nuri M.* v. *Ambica S.*, (1916) 44 Cal. 47, 55, 58. Citing *Rai Charan Mandal* v. *Biswa Nath M.*, (1914) 20 Cal. L. J. 107 (cases collected).

[1] *Rohan S.* v. *Bhau Lal*, (1909) 31 All. 530 ; cf. *Kaleshar Rai* v. *Nabiban B.*, (1906) 28 All. 642 ; *Ram Hit S.* v. *Narain Rai*, (1904) 26 All. 380 (it seems to have been overlooked that s. 527, p. 681, became applicable) ; *Nadir Husain* v. *Sadiq Husain*, (1924) 47 All. 324 (purchaser & pre-emptor may become equal in degree & s. 527 will in that event operate).

[2] *Beni Shanker Shelhat* v. *Mahpal Bahadur Singh*, (1887) 9 All. 480 ; cf. *Gunga Ram* v. *Moola*, (1870) 2 N. W. 200.

SECTION 541F.

(3) Benami purchaser or presumptive heir not co-sharer.

541 F. (1) Neither a secret benami purchaser of a share in the land,[2] nor the presumptive heir of a living Muslim as defined in s. 285(11), is deemed a co-sharer for the purposes of ss. 541, 541 A and 541 D.[3]

(2) Pre-emption under the Oudh Laws Act, 1876, is not claimable by a person denying the title of the seller, alleging that the seller is not co-sharer with himself, and claiming to be himself solely entitled to the whole of the property.[4]

(4) Khalit is not necessarily owner of heritage dominant or servient to land.

541 G. If the owner of the subject of pre-emption and the claimant participate in the beneficial enjoyment of a private right of way or water [or other appendage, or easement : see s. 541 B] each becomes the khalit of the other,[5] though the properties owned by them may not be mutually dominant and servient heritages ;[6] where the appendage consists of an easement, it need not have become absolute[7] by having been peaceably enjoyed during the period of prescription.[8]

(5) Effect of partition.

541 H.[9] On a complete[10] partition, the community of interest ceases for the purpose of ss. 541 and 541 A ;[11] and it does not subsist where an inconsiderable part of the estate

[3] *Fida Ali* v. *Muzaffer Ali*, (1882) 5 All. 65 ; cf. s. 526, com.

[4] *Abdul Wahid K.* v. *Shaluka Bibi*, (1893) 21 I. A. 26 = 21 Cal. 496 ; OUDH LAWS ACT recognizes right of pre-emption in (i) co-sharers in sub-division, (ii) co-sharers of whole mahal, (iii) members of the village community, (iv) proprietor, —where the property is an under proprietary tenure, pp. 726 f, p. 727, *n.* 21.

[5] (*Sheik*) *Karim Baksh* v. *Kamruddeen Ahmad*, (1874) 6 N. W. 377 (COMMON APPURTENANCE in shape of undivided plot of land, some trees & tanks attached); *Mahtab Singh* v. *Ramtahal Misser*, (1868) 10 W. R. 314 = 6 Beng. L. R. (F. B.) 43 *n.* (FISHING RIGHTS).

[6] *Ranchhoddass* v. *Jugaldas*, (1898) 24 Bom. 414 (subject of pre-emption was SERVIENT HERITAGE ; RIGHT OF WAY) ; *Chand Khan* v. *Naimat Khan*, (1869) 3 Beng. L. R. (A. C.) 296 = 12 W. R. 162 (it was DOMINANT HERITAGE : IRRIGATION).

[7] *Baldeo* v. *Badri Nath*, (1909) 31 All. 519. [8] Cf. Ind. Easemts. Act, s. 15.

[9] Sect. 541 H = s. 541, *ill.* (6) in first ed. See s. 541 D ; *Janki Prasad* v. *Ishar Das*, (1899) 21 All. 374 ; *Dalganjan S.* v. *Kalka S.*, (1899) 22 All. 1 (F. B.).

[10] Not an IMPERFECT PARTITION : *Muhammad Usman* v. *Muhammad Abdul Ghafur*, (1911) 34 All. 1 ; *Mathura Prasad* v. *Hardeo Bakhsh*, (1920) 44 All. 477 ; *Saiduddin* v. *Latifunnissa B.*, (1921) 44 All. 114.

[11] *Munnu Lal* v. *Hajira Jan*, (1910) 33 All. 28 = s. 542 H, *ill.* (9) ; *Digambar* v. *Ram Lal*, (1887) 14 Cal. 761 ; *Brij Nath S. v. Dooly Mahtoon*, (1869) 11 W. R. 215 ; *Mohadeo S.* v. (*Mt.*) *Zeemutoonissa*, (1869) 11 W. R. 169 = *Mahadeo* v. *Ziatannissa*, 7 Beng. L. R. 45 *n.* = s. 545, *ill.* (4) ; (*Chowdhry*) *Joogul Kishore* v. *Poocha S.*, (1867) 8 W. R. 413 (separate AGREEMENTS with zamindar by co-sharers in taluqa TO PAY RENT, each being liable for his own share of rent only, subject to which arrangement lands continue *ijmali* : right of pre-emption not affected). *Wajibu'l-arz* : presumption that after PARTITION, no claim : *Dalganjan S.* v. *Kalka S.*, (1899) 22 All. 1, 30 (F. B.) ; *Ganga S.* v. *Chidi Lal*, (1911) 33 All. 605 ; *Mahadeo* v. *Jagar*, (1916) 38 All. 260. P. C. in *Digambar* v. *Ahmad*, (1914) 42 I. A. 10 (ALL.) (P. C. not prepared to dissent from Bannerji, J.'s statement that where " fresh *wajibu'l-arz* has not been prepared, it does not follow as matter of law or principle that the custom or contract in force before partition, is no longer to have effect or operation ").

is left undivided by oversight ; but where an integral portion of the property, as a wall, is purposely left joint and undivided, the community of interest subsists.[12] SECTION 541H.

(1) (*a*) The wife of a Muslim is not (for claiming pre-emption) a co-sharer with him in his property during his life-time,[13] (*b*) nor is a Hindu widow who—(i) by virtue of a compromise with the brother of her deceased husband, is in possession of property for her life, the compromise containing strict provisions against her alienating it,[14] (ii) nor if she is in possession of the property of her husband in lieu of maintenance, even though under a decree of Court ;[15] (iii) but if she has inherited it from her husband, she is the owner of it.[16] (iv) A Hindu widow in possession of a share in a village, holding a widow's estate, relinquishes it to her daughter : held the daughter may pre-empt in respect of a sale prior to the relinquishment.[17] (v) Members of a joint and undivided Hindu family, though not recorded in the Collector's book as sharers in the mahal, are co-sharers.[18] *Illustrations.* (6) Wife.

(2) S makes a gift of his mansion to R in 1900. In 1901 an adjacent mansion is sold. Then S revokes the gift he had made. S has no claim to pre-empt,[19] because S was not owner of the mansion at the time when the ground for pre-emption (s. 522(2)(*a*).) arose.

(3) Part of a land is WAKF, and the other part belongs to S, who sells it to B. Neither the mutawalli nor the beneficiary under the wakf, "not even if he be a single individual," can pre-empt.[20] If a mansion by the side of a wakf were sold, the wakif would have no claim to pre-empt ; nor the mutawalli or superintendent.[21] These two statements are from Shia and Sunni texts respectively. But under the Punjab Pre-emption Act II. of 1905, s. 13(1), (*seventhly*), the mutawalli could pre-empt.[22] That Act is now repealed, see s. 557, pp. 726 ff. (7) Wakf. (8) Mutawalli.

(4) The pre-emptor sells his own share of the land before he is informed of the ground for pre-emption ; the claim to pre-empt is lost.[23]

(5) S sells land to B, reserving an option to himself to cancel the sale ;

12 *Lala Prag Dutt* v. *Bandi Hossein*, (1871) 7 Beng. L. R. 42 ; s. c. *Lalla Puriag Dutt* v. *Bundey Hossein*, 15 W. R. 225 ; on review *vice versa* (1871) 16 W. R. 110.

13 *Fida Ali* v. *Muzaffar A.*, (1882) 5 All. 65 ; cf. *Amjad Ali* v. *Mushtaq Ahmad*, (1895) 17 All. 454 = [1895] 15 All. W. N. 95 ; (1897) 17 All. W. N. 121.

14 *Imamuddin* v. *Surjaiti*, [1895] 15 All. W. N. 85.

15 *Dila Kuari* v. *Jagarnath Kuari*, (1887)| 6 All. 17 ; *Karan S.* v. *Muhammad Ismail K.*, (1885) 7 All. 860 ; *Bhupal S.* v. *Mohun S.*, (1897) 19 All. 324, following (i) *Phopi Ram* v. *Rukmin Kuar*, [1895] All. W. N. 85 ; (ii) *Imamuddin* v. *Surjaiti*, [1895] 15 All. W. N. 85.

16 *Phulman Rai* v. *Dani Kaur*, (1877) 1 All. 452.

17 *Muhammad Yusuf A. K.* v. *Dal Kuar*, (1898) 20 All. 148 ; *Nabiban B.* v. *Shaikh Medu*, (1905) 2 All. L. J. 775 (Muslim widow recorded as in POSSESSION IN LIEU OF MAHR, may pre-empt in her capacity as heir of her husband).

18 *Gandharp Singh* v. *Sahib Singh*, (1885) 7 All. 184 (pre-emption allowed).

19 Bail. I. 126 (par. 3). 20 Bail. II. 178 ; I. 473 (6th).

21 Bail. I. 474 (*ll.* 12-14) (478-479).

22 *Jinda Ram Husain Baksh*, (1914) 69 Punj. Rec. 197 (No. 59).

23 Bail. II. 191, (*fourth*). Shaikh holds otherwise (see s. 532(3), p. 697, *n.* 4).

SECTION 541H. then subsequently the adjoining house is sold ; S can pre-empt the house under Hanafi law (being the neighbour). But if the option to cancel the first sale had been reserved by B, (and not by S), then B would have had the right to pre-empt the adjoining land. Now if P has the right of pre-empting S's land, he may pre-empt that land, but he does not on the second sale (viz. of the adjoining house) acquire the right of pre-empting the adjoining house, which S or B, as the case may be, may pre-empt, P's disqualification being that he was not owner of S's land at the time when the ground for pre-empting the adjoining house (viz. the first sale) arose.[24]

(6) Subsequently to the sale constituting the ground of pre-emption a co-sharer sells his share to a stranger. That stranger has no claim to pre-empt as a co-sharer under a wajibu'l-arz which gives the right to co-sharers.[25]

(7) P brings a suit claiming pre-emption. It is dismissed on the contention that she has no interest in possession in the land. She files an appeal. Eight days after, her share in the land is sold in execution of a decree in another suit ; *held*, that (*a*) want of possession does not affect the right of joint owners to pre-empt ; (*b*) the sale of the share pending the suit, cannot prejudice her rights which existed at the time when the suit was instituted.[26]

(8) On 20 June 1907, P purchases a share in a zamindari at an auction sale in execution of a decree. The sale is confirmed on 24 June. On 23 June S sells his share in the same zamindari to B. *Held*, that under the Civil Procedure Code, 1882, s. 316, P acquired the share on 24 June and so was not entitled to pre-empt. But under the Civil Procedure Code of 1908, s. 65, the property is vested in the auction purchaser from the date of the sale, and not from the time when the sale becomes absolute.[27]

(9) Two persons, P and S, do not become each other's khalits (*a*) by reason of P irrigating his field in one mahal from a well belonging to S situated in another mahal,[28] nor (*b*) of having the same burial ground and chaupal (i.e. village meeting place).[29]

(10) Pending P's suit for pre-emption, a decree for partition is made on 1 July under an application originally commenced by P, but from which P has withdrawn. On 9 July the Court dismisses P's suit for pre-emption on the ground that, by reason of the partition, he is no more a co-sharer in the property ; and this is upheld in first and second appeal.[30]

[24] Hed. 560 (col. i. par. 3). See s. 541A.

[25] *Sheo Narain* v. *Hira*, (1885) 7 All. 535. *Ill.* (4) & (6) are converse of each other. (5) & (6) are obalogous.

[26] *Sakina B.* v. *Amiran*, (1888) 10 All. 472 (Mahmood, J.). But, *semble*, where sale voluntary, it may = WAIVER of pre-emption ; *Ram Gopal* v. *Piari L.*, (1899) 21 All. 441 ; cf. *Nuri* v. *Ambica*, (1916) 44 Cal. 47, 58 (*l.* 22). See s. 541 D. p. 708.

[27] *Hasan Ali* v. *Mian Jan K.*, (1910) 33 All. 45. See s. 541D ; *Sakina B.* v. *Amiran*, (1888) 10 All. 472.

[28] *Munna* v. *Hajira*, (1910) 33 All. 28, 33.

[29] *Abdul Rahim K.* v. *Kharag S.*, (1893) 15 All. 104 (right to burial ground & *chaupal* being common to all inhabitants of place, could hardly be deemed APPURTENANCES to ownership of land).

[30] *Tafazzul Hussain* v. *Than S.*, (1910) 32 All. 567. See *Nuri Mian* v. *Ambica Singh*, (1916) 44 Cal. 47, 49, 58 *l.* 22.

(11) S takes a building lease from P, and erects a house on it ; *held*, that P has no claim to pre-emption, as he is neither a co-sharer nor a participator in the appendages of the house, nor owner of neighbouring land [31]—*sed quaere*. SECTION 541H.

Stranger and one having community of interest.

The meaning of the term "stranger" in the law of pre-emption, has been considered.[32] The word khalit is not improperly used to designate in a plaint for pre-emption, a sharik or partner in the substance of a thing ; and if it is not clear whether the plaintiff claims as sharik or khalif, it may be shown by express words, or inferred from the written statement.[33] Sharik may refer to a person occupying other houses in the same mansion.[34] A claim as khalit was not allowed to be amended into a claim as a neighbour.[35]

Co-parcener purchaser.

On the question whether one co-parcener can claim pre-emption when another co-parcener is the vendor, see s. 527, pp. 681 ff.

Territorial extent.

For territorial extent of the law of pre-emption, see s. 523 A, pp. 666 ff.

III. Competence to pre-empt.

(*a*) Majority.

542. Any person who is competent to hold property is competent to pre-empt.[1] Where the right arises under a contract or custom, it may be restricted to persons competent to contract,[2] or otherwise.

The Government, by acquiring land permanently, does not, for purposes of pre-emption, become a co-sharer in the village to which the land originally appertained, and the provisions contained in the wajibu'l-arz dealing with sales by co-shares in the village are not applicable.[3]

(*b*) Fiduciary relations. (Shia law).

(1) Guardian : ward's property.

(2) Guardian trustee.

543. Under Shia law the father or grandfather may pre-empt the share of his minor child or grandchild in property which belongs to them jointly ;[4] *sed quaere* in India.

The father and grandfather are the legal guardians of the property of their minor child or grandchild. It is explained in the texts that their pre-empting the minor's share is tantamount to purchasing it (which is permitted under Shia law).[5] In India a purchase by the guardian of his ward's property would not be permitted.[6]

31 *Pershadi Lal* v. *Irshad Ali*, (1870) 2 N. W. 100.

32 *Fida Ali* v. *Muzaffar Ali*, (1882) 5 All. 65. Cf. *Baldeo* v. *Badri Nath*, (1909) 31 All. 519 ; *Mahomed Tukee* v. *Hujjee alias Khujjai*, (1873) 5 N. W. 142.

33 *Lala Prag Dutt* v. *Bandi Hussein*, (1871) 15 W. R. 255 (= p. 711, *n.* 12) on review 16 W. R. 10. See s. 541 H.

34 *Gurreboollah K.* v. *Kebul Lall Mitter*, (1870) 13 W. R. 124.

35 *Gobind Row* v. *Girdharee Sahoo*, (1875) 24 W. R. 124.

1 Bail. I. 473 ; II. 110 (par. 2) ; (*Mt.*) *Punna* v. *Juggur Nath*, (1866) 1 Agra 236 ; *Ram Khelawun Rai* v. *Shiva Dass*, (1867) 2 Agra 76 ; *Jinda Ram* v. *Husain Bakhsh*, (1914) 49 Punj. Rec. 197, 200 (No. 97).

2 *Raja Ram* v. *Bansi*, (1876) 1 All. 207.

3 *Gaya Singh* v. *Ram S.*, (1905) 28 All. 235.

4 Bail. II. 180 (par. 4). See com. Cf. *Amir Haidar* v. *Ali Ahmad*, (1925) 47 All. 635.

5 Bail. II. (par. 4).

6 Cf. Guard. & Wards Act. s. 20. See s. 272 above.

SECTION 543. (3) Executor.

May an executor pre-empt? The question is answered in the Sharai'ul-Islam (Shia text) in the affirmative.[5] *Sed quaere* in India.

Pre-emption by guardian on behalf of ward.

544. (1) Pre-emption may be claimed on behalf of a minor [7] or person of unsound mind, by his guardian, [or of one who is absent [7] by his agent,[8]] or of a disqualified proprietor by his manager appointed by the Court of Wards,[9] provided that it is for the benefit of the ward to pre-empt.[7]

Avoiding such pre-emption.

(2) *Quaere,* whether where pre-emption is enforced by a guardian for his ward, and it is not for the ward's benefit, he may avoid it on attaining majority, or becoming sound of mind.[7]

V. PRIORITIES AMONGST PRE-EMPTORS.

(A) (1) Co-sharers. (2) Khalits. (3) Neighbours.

545. Co-sharers [10] in the land have priority in the right to pre-empt over participators in appendages,[11] and the latter have priority over neighbours.[12] *Quaere,* whether generally those whose interest in the land is closer have priority over those whose interests are less close ; [13] but it has been held that

[7] Cf. s. 271 ; Bail. II. 110 (par. 2): difficult to appreciate reference to absent person. Cf. *Amir Haidar* v. *Ali Ahmad,* (1925) 47 All. 635.

[8] *Shamsuddin* v. *Alauddin,* [1931] 29 All. L. J. 1083 (previous authority from pre-emptor to make demand, necessary).

[9] *Jadu Lal* v. (*Maharani*) *Janki Koer,* (1912) 39 I. A. 101 = 39 Cal. 915 (both (i) under Court of Wards Act, Bengal Act IX. of 1879, s. 40 & (ii) independently of provisions of that section).

[10] Bail. I. 476 (*ll.* 1-2): "A SHARIK (or partner in the substance) is preferred to a KHALIT (or a partner in its rights as of water or of way)." The explanations within the parentheses are from the *Hidaya,* vol. iv., p. 1 (413)—Bail. I. 470, *n.* 1 (481). *Khalit* = 'mixed with.' Though rights of water & way given as examples, it does not appear, says Baillie, that a khalit in any other right than these has the right of pre-emption. Bail. I. 476 (481), *n.* 1. See however ss. 541 G-H, comm. Cf. Punjab Pre-emption Act, s. 17 & Oudh Laws Act, s. 9 : s. 557, p. 727, (4).

[11] Hed. 548, 549 ; Bail. I. 476. See com., p. 716. *Ranchoddas* v. *Jugaldas,* (1899) 24 Bom. 414 ; *Golam Ali K.* v. *Agurjeet Roy,* (1872) 17 W. R. 343 ; *Hur Dyal S.* v. *Heera Lall,* (1871) 16 W. R. 107 ; *Gopal Sahi* v. *Ojoodhea Pershad,* (1865) 2 W. R. 47 ; *Khairuddin* v. *Gulam Mohiuddin,* (1914) 49 Punj. Rec. 147 (No. 43).

[12] *Karim* v. *Priyo Lal Bose,* (1905) 28 All. 127 ; *Chand K.* v. *Niamat K.,* (1864) 3 Beng. L. R. (A. C.) 296.

[13] (i) *Syeeduddin* v. *Latifunnissa,* (1921) 44 All. 114 ("no authority has been cited before us which lays down that the Muhammadan law recognizes DEGREES OF NEARNESS IN THE SAME CLASS OF PRE-EMPTORS : e.g. all who come within the definition of *shafi sharik* stand on the same footing." (ii) Priority does not seem to be alluded to in *Jadu Lal Sahu* v. *Janki Koer,* (1912) 39 I. A. 101 which was mainly relied upon. But (iii) seems implied in Bail. I. 476 (last line) (481) "because they are more specially intermixed with it." (iv) (*Mt.*) *Bibi Saleha* v. *Haji Amiruddin,* (1928) 8 Pat. 251 (MUQARRARIDAR holding under co-sharer has no right to pre-empt as against co-sharer : Das, J., pits Sultan Ahmed, J., vs. Sir Sultan Ahmed with evident enjoyment). See s. 539, p. 701. In LARGE ESTATES neighbours have no right of pre-emption, but co-sharers have : on "very sound principle, viz. that the right should be co-extensive with the inconvenience which it is intended to avoid," (*per* Mitter, J.): (*Sheik*) *Mahomed Hossein* v. (*Shah*) *Mohsun Ali,* (1870) 14 W. R. (F. B.) 266 = 6 Beng. L. R. 4 (penult. sent.); & (v) Syed Ameer Ali says if P has right of way over land, & PA has right to discharge water of his house on it, or if P is nearer neighbour than PA, then, in either case, P has priority over PA (*Mahom. Law,* I. 602 (719) no authority cited). (vi) Cf. on CONSTRUCTION OF WAJIBU'L-ARZ : *Lakhan Singh* v.

a khalit who is also a neighbour does not have any priority over another who is not a neighbour [14] and that a co-sharer who is a neighbour [or khalit] has no priority over a co-sharer who is not a neighbour [or khalit].[15] SECTION 545.

Illustrations.

(1) P is joint proprietor of part of the land sold, and PA has property contiguous to the whole of the land ; P has priority over PA.[16]

(2) (i) Joint owners of a beam laid on the top of the wall, are classed as neighbours. (ii) Laying beams on the wall of a neighbouring house, does not convert a neighbour into a joint owner.[13] (iii) If one has the right of collateral support from the party wall separating his property from that of his neighbour, he does not become his khalit.[17]

(3) S and P are joint owners of a house in a street ; S agrees to sell his share in it to B ; (*a*) P has the first right of pre-emption ; (*b*) if P waives it, it belongs to the inhabitants of the street equally, without any distinction between those who are contiguous, and those who are not, for they are all khalits in the way ; (*c*) if they all surrender the right, it belongs to a musalik or contiguous neighbour, who is not a khalit in the way.[18]

(4) (i) S[19] and P are joint owners of a house in a public road with a right of way over a private street ;[20] (ii) PA owns a house in the private street having a right of way over it ; (iii) PB is the owner of a house situated in the public road, adjoining[21] S and P's house, without participating in the right of way. Then (i) P is S's co-sharer, (ii) PA his khalit, and (iii) PB his neighbour. The same is the case if the houses of S and P, PA and PB are all of them in the same "mansion" [compound or enclosure], and PA has the same entrance from the public road but PB has a separate door [passage] of his own.[22]

(5) The owner of land through which the property pre-empted receives irrigation, has priority over a neighbour.[23]

(6) S and P had certain proprietary rights in an eight annas patti of a certain mahal. S mortgaged his share in the patti to B and BA. The mort-

Bishen Nath, (1910) 33 All. 299 ; *Jasoda Nand* v. *Kandhaiya Lal*, (1891) 13 All. 373 (provision in *wajibu'l-arz* preferring CO-SHARER OF SAME FAMILY to stranger) ; distinguishing *Ram Prasad* v. *Abdul Karim*, (1887) 9 All. 513.

[14] See *ill.* (3) ; *Karim Baksh* v. *Khuda B.*, (1894) 16 All. 247.

[15] *Roshun Mahomed* v. *Mahomed Kuleem*, (1867) 7 W. R. 150.

[16] Hed. 549 (col. i. par. 3).

[17] *Ranchoddas* v. *Jugaldas*, (1899) 24 Bom. 414 ; cf. *Karim* v. *Priyo Lal*, (1905) 28 All. 127.

[18] Bail. I. 476 (481) ; or rather private way, which is not thoroughfare ; Bail. I. 476 (481) *l.* 9, 477 (482) *ll.* 8-15 ; *Gooman Singh* v. *Tripool Singh*, (1869) 8 W. R. 437.

[19] Bail. I. 476-477 (481-482).

[20] Or right of watering their vineyards from small channel. Bail. I. 477 (482) *ll.* 16 ff.

[21] Not on opposite sides of thoroughfare. Bail. I. 477 (482) *l.* 10.

[22] Bail. I. 476-477 (481-482).

[23] *Chand Khan* v. *Naimat K.*, (1869) 3 Beng. L. R. (A. C.) 296 = 12 W. R. 162.

SECTION 545. *Illustrations.*

gagees foreclosed. B's brother had a small share in the other eight annas patti of the same mahal. *Held,* that P was entitled to pre-empt, for though the co-parcenery of the mahal could not be said to have ceased, nor those who were co-parceners in it to have become strangers to one another, yet there being a finding that the pattis were separate, a partition by metes and bounds was not necessary, and that a private partition, if full and final between the parties, would have the same effect on rights of pre-emption as a formal partition.[24]

(7) S is entitled to and sells the upper floor of a house together with a right of way through the house of a third party to P ; PA is the owner of the lower floor underneath S's floor ; *held,* that P is a khalit and has priority over PA who is only a neighbour,[25] *sed quaere.*

(8) In a pattidari village the shares in each patti have priority in the right to pre-empt in that patti.[26]

No priority is obtained by the pre-emptor being the buyer in the first instance ; all persons whose claim of pre-emption is equal (s. 522(2)(*b*)(*c*), p. 663) in respect of priority in the right to pre-empt are entitled to buy the property equally : s. 527, pp. 681 ff.

Where the right is claimed under a wajibu'l-arz, the priorities depend upon the terms of the wajibu'l-arz which may be on a principle differing from that of general Muhammadan law : see s. 523, p. 665 ; s. 524 A, p. 673. For instance, priority may be given to share-holders in a patti, then to those in a mahal, and lastly to those in a village. Such priorities may subsequently be taken away by a new arrangement.[27] Where two co-sharers bring two separate suits claiming pre-emption, the one that has instituted the first suit has no necessary priority. A decree may be made in favour of each plaintiff in respect of half of the property.[28]

(B) On waiver by prior pre-emptor accrual to next in degree.

546. On the prior[29] pre-emptor waiving or forfeiting his claim to pre-empt (s. 548) the pre-emptor next in priority becomes entitled to do so ;[30] provided that he asserts his claim immediately on getting information of the sale[31] and confirms and enforces his claim in compliance with ss. 528-530.

[24] *Digamber Misser* v. *Ram Lal Roy,* (1887) 14 Cal. 761.

[25] *Ganeshi Lall* v. *Luchman Dass,* (1873) N. W. 31 (custom amongst Hindu residents of town). Should not PA be considered to be co-owner of the house? Persons owning parts of same house seem to be more than neighbours.

[26] *Maharaj Singh* v. *Bhechook Lal,* (1864) 1 W. R. 233. Cf. *Farzand Ali* v. *Alimullah,* (1879) 1 All. 272 ; *Sangam Ram* v. *Sheobart Bhagat,* (1882) 3 All. 112 ; *Mahabir Parshad* v. *Debi Dial,* (1879) 1 All. 291.

[27] *Daria* v. *Harkhial,* (1909) 31 All. 274 ; *Yad Ram* v. *Cheda Lal,* (1913) 35 All. 478.

[28] *Salig Ram* v. *Kali Shankar,* (1905) 27 All. 465.

[29] Persons equal in priority : ss. 522(2)(*b*), 527, 547, pp. 663, 681, 716.

[30] Hed. 549 (col. i.); Bail. I. 476 (481). Abu Yusuf holds that prior pre-emptors absolutely exclude those after them, so that latter cannot come in at all.

[31] He must NOT WAIT TILL HE HEARS of waiver : Bail. I. 482 (*ll.* 11-14) (488) : So that he must assert his claim at same time as prior pre-emptor, if both hear of sale together.

547. Pre-emptors equal in degree are, under Hanafi law, entitled to pre-empt in equal shares, notwithstanding that they are co-sharers holding unequal shares in the land.[1] Under Shafii law the rights of co-sharers are in proportion to their respective shares.[2] The Hanafi rule has been applied to pre-emption under a wajibu'l-arz.[3]

SECTION 547.
(C) PRE-EMPTORS EQUAL IN DEGREE share equally.

Illustrations.

(1) S, P, PA, and PB own a plot of land jointly in following shares : S 3/8, P 1/3, PA 1/6, PB 1/8. S sells his 3/8. Then under Hanafi law—

(*a*) P, PA, and PB can each take a 1/3 of the 3/8, i.e. 1/8 of the whole ;

(*b*) if P waives his claim before it has been enforced, then S's 3/8 belongs to PA and PB in equal shares (i.e. 3/16 each) : see s. 548.

(*c*) P is absent, and PA and PB alone claim pre-emption, they each take S's 3/8 equally (i.e. 3/16 of the whole). Afterwards P appears and claims his share ; he must get 1/16 from PA and PB each so as to make up his 1/8. If after PA and PB enforce their claims, PA waives his claim,[4] then PA's share lapses and does not accrue to P and PB : see s. 548.

(2) S sells land. PA a neighbour, pre-empts in the absence of P (who is a khalit, thus having a claim of pre-emption prior to PA). Afterwards P returns, and claims to pre-empt. He gets the whole of the land from PA.[5]

Hanafi and Shafii law as to proportion of rights of co-owner.

Mahmood, J., has defended the equity and justice of the rule of Hanafi law that each co-sharer should have an equal share in the land pre-empted, saying that the reason upon which the law of pre-emption is framed is that the intrusion of a stranger is disagreeable to the pre-empted property : " This disagreeableness is not to be estimated in reference to the share in the property possessed by each pre-emptor, but in reference to each pre-emptor personally, and I hold that the equitable rule is to apportion the rights of the pre-emptors per capita."[6] In speaking of " the well-known rule of Muhammadan law," has Imam Shafii's different opinion been overlooked ? A co-sharer may have an infinitesimally small share in the property. Is it fair that he should be placed on terms of equality with another co-sharer whose interest in the property is substantial ?

548. On a joint pre-emptor [7] waiving his claim, the other acquires the right to pre-empt the whole land ; [7] provided (1)

(D) On one joint pre-emptor waiving his claim the other joint-pre-emptors become entitled to whole.

[1] Hed. 549 ; Bail. I. 494-495 (500-501); *Baldeo* v. *Badri Nath*, (1909) 31 All. 519 ; *Amir Hasan* v. *Rahim Baksh*, (1897) 19 All. 466 = p. 682, *n.* 24 ; *Maharaj Singh* v. *Lalla Bhechuk Lal*, (1865) 3 W. R. 71 (as to CO-SHARER); (*Mist*) *Khem Kurun* v. *Seeta Ram*, (1870) 2 N. W. 257 (as to NEIGHBOUR). Cf. s. 527, p. 682, *n.* 24.

[2] *Minhaj*, 208 (par. 2) (Bk. 18, s. 2); Hed. 549 (col. ii., par. 3).

[3] *Jai Ram* v. *Mahabir Rai*, (1885) 7 All. 720, 728 ; see com.

[4] Bail. I. 494-495 (500-501); Hed. 549-550.

[5] Bail. I. 495 (par. 3) (501, par. 3) Hed. 550.

[6] *Jai Ram* v. *Mahabir Rai*, (1885) 7 All. 720, 728.

[7] Singular includes plural in s. 548 & *vice versa*. Hed. 549 (col. ii.); Bail. I. 494, 495 (par. 2) (500-501); *Shamsuddin* v. *Alauddin*, [1931] 29 All. L. J. 1083 (one plaintiff being disqualified from pre-empting because he had not made demand—

SECTION 548. that the waiver is made before either the Court has decreed pre-emption,[8] or possession of the land been transferred to the joint-pre-emptors without such decree ; [after either of the said events, the rights of the pre-emptor who waives them lapse, and do not accrue to the other joint pre-emptor] ;[9] and

And must exercise the whole or waive the whole claim.

(2) where one joint pre-emptor so acquires the right of the other, he must either pre-empt or relinquish the whole land ; he cannot lawfully pre-empt the share either only of himself, or only of the other pre-emptor.[10]

Illustration.

P and PA being pre-emptors equal in degree (under a wajibu'l-arz), bring two rival suits to enforce their claims. The Court gives to P and PA decrees respectively for a 3 annas and a 2 annas 6 pies share, conditionally on their paying the price within 30 days ; and directs that in case P makes default in payment, PA should have the right to pre-empt P's share, on paying the price of that share within 15 days of such default, and vice versa. Both P and PA make default in paying within 30 days ; and then PA pays into Court (within 15 days of the default by P) the price of P's share ; *held,* (affirming Mahmood, J.,) that PA's claim is inadmissible, as the price does not cover the whole subject of pre-emption.[11]

§ 7.—LEGAL EFFECTS OF PRE-EMPTION.

I. GENERAL effect of enforcing the right :

549. (1) On the claim of pre-emption being enforced, the pre-emptor acquires the rights, and becomes subject to the obligations, arising between the buyer and the seller under the sale ;[12] provided that the pre-emptor is not entitled to the buyer's option for three days under the texts on Muslim law[13] of cancelling the sale ; but, *semble,* he has the options of inspection and defect ;[14] except in so far (if at all) as the said options are inconsistent with the terms of the decree for pre-emption made by the Court.

Pre-emptor comes in place of buyer.

Buyer becomes vendor of pre-emptor.

(2) If the sale has been completed when the claim to

does not make suit of other plaintiffs defective) ; *Chotu* v. *Husain Bakhsh,* [1893] A. W. N. 25 ; *Lal Behari Misra* v. *Equeen Md. Hajjam,* [1926] AIR (ALL.) 722 = 97 Ind. Cas. 340 (joining persons possessing right to pre-empt, but disqualified in equity, does not amount to waiver : acquiescence in sale at FRAUDULENTLY INFLATED PRICE does not estop).

[8] Where decree itself conditional on something being done (e.g. payment of price), right cannot be said to be decreed until condition fulfilled : *ill.* (1).

[9] *Ibid* ; *quaere,* can it be waived after being enforced without consent of vendor or vendee ?

[10] See s. 548, *ill.* ; s. 540, com. ; *Abdul Khan* v. *Shakira B.,* (1927) 50 All. 348.

[11] *Arjun S.* v. *Sarfraz S.,* (1888) 10 All. 182.

[12] Bail. I. 473 (par. 3) (477) ; II. 195 (*ill.* 4-6) ; *Shankar Lal* v. *Hashmi Begam,* (1932) 54 All. 1023, 1025.

[13] Hed. 560 (col. i. par. 2).

[14] Hed. 553, (col. i. par. 4). See com.

pre-empt is enforced, the original buyer becomes the new seller, with the pre-emptor as the new buyer.[15] SECTION 549.

(3) The pre-emptor does not become liable for any contingent charges incurred by the buyer, such as brokerage, agency, or the like.[16] Contingent charges.

(4) The buyer is entitled to receive or retain the rents and profits of the land during the interval between the date of its sale to himself, and its transfer [17] to the pre-emptor.[18] Rents and mesne profits.

(5) A pre-emptor is not entitled to put the seller to proof of his title to the land.[19] Proof of title.

(6) It is doubtful whether a claim to pre-empt creates an interest in the land.[20] Interest in land.

Illustrations.

(1) S agrees to sell to B land which is mortgaged to M for Rs. 50. P enforces his claim to pre-empt and take possession of the land. P is liable to M for payment of the mortgage debt, notwithstanding that P had no notice of the mortgage at the time when he claimed pre-emption.[21]

(2) S sells property to B, in Sep. 1908, for Rs. 1,150. P has the right to pre-empt it; but before his suit for pre-emption is barred, B sells to a third party, BA, for Rs. 4,000. *Held,* P is entitled to pre-empt the property on the terms of the sale of Sep. 1908 (viz. at Rs. 1,150) making BA a party to the proceedings.[22]

(3) During the pendency of a suit for pre-emption, the buyer re-sells the property to a person who originally had a right to pre-empt prior to that of the plaintiff, but who at the date of the sale is barred by limitation from enforcing it. *Held,* that the plaintiff's claim is not defeated by the re-sale.[23]

Whether pre-emptor takes from buyer or seller.

It is stated that the pre-emptor takes the property from the buyer, and not the seller;[24] and that the buyer must always be a party to the suit,[25] but

[15] Bail. I. 490-491 (496-497): sale having been completed, the original buyer has become owner. See com.

[16] Bail. II. 182.

[17] Under s. 551.

[18] *Deokinandan* v. *Sri Ram,* (1889) 12 All. 234 (F. B.); Mahmood, J., dissenting, held buyer entitled to profits until he actually obtained possession. See also *Ajudhia* v. *Baldeo S.,* (1884) 7 All. 674; *Deonadan Prashad S.* v. *Ramdhari C.,* (1916) 44 Cal. 575, 686 (P. C.); *Deo Dat* v. *Ram Autar,* (1886) 8 All. 502 as to MESNE PROFITS. Point now covered by form in which decree to be framed: s. 550(3), com., p. 721. Cf. s. 539, *ill.* (2), p. 702.

[19] *Sahodra B.* v. *Bagishri S.,* (1915) 13 All. L. J. 711 (plaintiff alleged that vendor entitled to much smaller share in property than he purported to sell, but that if Court found that vendor entitled to whole property then plaintiff willing to pre-empt whole). Cf. *Brooke* v. *Garrod,* (1857) 2 De G. & J. 62 = s. 523, *n.* 5(iv).

[20] *Sitaram Bhaurau Sayad Sirajul K.,* (1917) 41 Bom. 636, 650. See p. 720, *n.* 28.

[21] *Tejpal* v. *Girdhari Lal,* (1908) 30 All. 130.

[22] *Khettar Chandra Basu Mallik* v. *Nabin Kali Devi,* (1913) 35 All. 385; *Kamta Prasad* v. *Mohan Bhagat,* (1909) 32 All. 45.

[23] *Kamta Prasad* v. *Ram Jog,* (1913) 36 All. 60.

[24] Bail. II. 185 (par. 3) *n.* 7; cf. Bail. II. 175 (*ill.* 1-3), 183 (par. 2).

[25] Hed. 553 (col. i.); Bail. I. 485 (*ll.* 26-33) (491).

SECTION 549. after he has taken possession of the land, the presence of the seller may be dispensed with ;[26] even before the buyer has taken possession he is said to be the proprietor, and the seller the possessor : still, if, before the sale is completed by transfer of possession to the buyer, the pre-emptor claims it from the buyer, he may require the pre-emptor to take it direct from the seller.[25]

These incidents of pre-emption may have been in the minds of judges[27] who speak of the pre-emptor taking the property from the buyer and of the seller passing out of the transaction. Mahmood, J., and his colleagues held, however, upon the texts cited by him that the original notion underlying pre-emption was different.[28]

The successful pre-emptor's interest in the property pre-empted, before he has paid the amount fixed by the decree for pre-emption in his favour, has been held to be an interest which is not liable to attachment or sale.[28]

II. TIME when land transferred to pre-emptor.

550. (1) The land or subject of pre-emption[1] is not transferred to the pre-emptor, unless (either under a decree of the Court or otherwise) possession is given to and taken by the pre-emptor.[2]

Pre-emptor insisting on decree of Court.

(2) The pre-emptor may refuse to take possession of the land without an order of the Court, notwithstanding that the buyer or seller may be willing to transfer it to him.

III. FORM OF DECREE.

(3) The Court in decreeing[3] a claim to pre-emption (*a*) specifies a day on or before which the purchase money[4] shall be paid,[5] and orders that (*b*) on such payment into Court, together with the costs decreed possession of the land shall

[26] *Hira Lal* v. *Ramjas*, (1883) 6 All. 57.

[27] *Kudratulla* v. *Mahini Mohan Shaha*, (1870) 4 Beng. L. R. (F. B.) 134 = 13 W. R. (F. B.) 21 : per Peacock, C. J., Mitter, J. ; *Chundo* v. *Alimoodin*, (1873) 6 N. W. 28 ; *per* Parson, J. See s. 524. penut. par. of com., p. 673.

[28] *Gorakh Singh* v. *Sidh Gopal*, (1906) 28 All. 383. See Civ. Pr. Co., 1908, s. 60(*m*) [=1882, s. 266(*k*)] : " An expectancy of succession by survivorship or other merely contingent or possible right or interest...shall not be liable to such attachment or sale." See p. 719, *n.* 20.

[1] Or " the property " or " the land " : s. 522(2)(*a*), p. 662 : Hed. 550 ; Bail. I. 485.

[2] Hed. 550 : Bail. I. 485 (491). Refusal of pre-emptor to take possession would, no doubt, be considered by Court in dealing with costs. The seller, it is said, must be party to suit for pre-emption, so long as possession not transferred to purchaser,—after which he need not be party.

[3] *Shankar Lal* v. *Hashmi Begam*, (1932) 54 All. 1023, 1025 (result of decree not a resale by purchaser to pre-emptor).

[4] It is sufficient compliance with such order to deposit purchase-money less costs due to pre-emptor : *Ishri* v. *Gopal Saran*, (1884) 6 All. 551 ; *Parmanand Root* v. *Gobardhan Sahai*, (1906) 28 All. 678 = 3 All. L. J. 804 ; *Bichai S.* v. *Shami Nath*, (1910) 8 All. J., notes, 27 ; *Ali Husain* v. *Aminullah*, (1912) 10 All. L. J. 153 though different view taken by Tyrrel, J., in *Balmukand* v. *Pancham*, (1888) *0 All. 400. See *n.* 7.

[5] Where there was appeal against order that money be paid within a month : pending appeal, time expired : *held*, by High Court that dismissal by appellate Court on this ground wrong, inasmuch as condition was itself subject of appeal ; *Khurshed-un-nissa* v. *Alim-un-nissa*, (1912) 10 All. L. J. 421.

be delivered to the pre-emptor, or, where there are several pre-emptors equal in degree, to them respectively, in proportion, to the right of each ; (*c*) that title to possession accrues from the payment ; but (*d*) that if the purchase money and the costs are not so paid, the suit is dismissed with costs.[7] SECTION 550. Form of decree.

(4) A decree for enforcing pre-emption is a purely personal one and cannot be transferred.[8] Decree not transferable.

The Civil Procedure Code, O. xx. r. 14(1) contains the form as above stated for a decree in a pre-emption suit. Under r. 14(2) where the Court adjudicates upon rival claims to pre-emption,—

1.—Payment of consideration.
2.—Delivery of possession.
3.—Several claims,—

(*a*) if the claims decreed are equal in degree, O. xx., r. 14(1) takes effect in respect of a proportionate share of the property, including any proportionate share in respect of which the claim of any pre-emptor failing to comply with the said provisions would, but for such default, have taken effect ; and, (*a*) equal in degree.

(*b*) the claim of the inferior pre-emptor does not take effect until the superior pre-emptor has failed to comply with the said provisions. (*b*) different in degree.

The form of the decree in terms provides for several matters that follow as the result of the law laid down in the texts.[9] Thus, (i) where after making an assertion and demand of a claim to pre-emption, but before enforcing it, the pre-emptor dies, or forfeits his claim, (e.g., if he sells the property, from the ownership of which the right to pre-empt arises), the claim becomes void under the Muslim texts [10] (see however s. 532, pp. 696 f.) ; (ii) the pre-emptor is entitled to the profits of the land accruing after he has, by payment of the purchase-money, enforced pre-emption,[11] notwithstanding that there may be delay in the formal transfer of the land,[12] but (iii) he is not, before payment,[13] entitled to the rents and profits ; [13] (iv) as soon as the payment is made

4.—Payment into Court effectuates the transfer or completes pre-emption.

Mesne profits.

[6] See com. Under Hanafi texts, purchaser may refuse to give possession of land to pre-emptor until pre-emptor pays price for it : notwithstanding that Court may have ordered him to deliver it ; Hed. 552 (col. ii. par. 3).

[7] *Debi Saran Tiwari* v. *Guptar Tiwari*, (1914) 36 All. 514 (appellate Court in pre-emption suit enhanced amount decreed as payable by pre-emptor, but omitted to fix time within which enhanced amount to be paid, pre-emptor held entitled to reasonable time for payment having regard to enhanced amount (Rs. 801) : time within which in fact paid (one month & one day after decree) reasonable : plaintiff entitled to execute decree).

[8] But this cannot prevent pre-emptor mortgaging property subsequently to decree for purpose of paying price : *Bela Bibi* v. *Akbar Ali*, (1901) 24 All. 119 ; or even selling it to stranger permitting him to pay purchase-money into Court : *Ram Sahai* v. *Gaya*, (1884) 7 All. 7. See s. 537 (*expln.*).

[9] Cf. *Deonadhan Prasad S.* v. *Ramdhari C.*, (1916) 44 I. A. 80 = 44 Cal. 675, decided on Code of Civ. Proc. 1882, s. 214, which however, was less elaborate than corresponding provision in O. xx., r. 14. See *n.* 13.

[10] Bail. I. 485 (491). [11] *Deo Dat* v. *Ram Autar*, (1886) 8 All. 502.

[12] *Deokinandan* v. *Sri Ram*, (1889) 12 All. 234 (F. B.), (decree vests ownership in pre-emptor from date of payment of price : vesting not postponed till possession obtained) ; *Buldeo Pershad* v. *Mohun*, (1866) 1 Agra (REV.) 30. See *n.* 13.

[13] Hed. 553 (col. ii. par. 3) decree under O. xx., r. 14(1)(*b*) provides for this : " whose title shall be deemed to have accrued from the date of such payment."

SECTION 550.

5.—Appeal.

6.—Joint decrees.

7.—Death : abatement.

8.—Partial pre-emption.

into Court, the money is (so to say) converted into the subject of pre-emption, and so can no more be considered the property of the pre-emptor ;[14] finally (v) the pre-emptor's non-compliance with the terms of the decree and non-payment of the purchase-money do not affect his right of appealing from the decree : s. 528 H. (vi) Where there is a joint decree without any adjudication under O. 20, r. 14(2) of their respective rights, each plaintiff has the right to pre-empt the whole property.[15] (vii) If one of them dies pending an appeal and the appeal is allowed without his representatives being joined, the appeal abates as to that plaintiff, and he is entitled to possession if the pre-emption money in Court is paid over to the defendant with the consent of the surviving plaintiffs.[15] (viii) A stranger-purchaser cannot be required to submit to a partial pre-emption, nor is he entitled to demand it.[15]

(1) Position of buyer.

551.[16] The claim to pre-emption is not affected by the buyer's acts such as purporting to transfer or alienate the land, nor by his death ; provided that such acts take effect until the Court decrees the claim to pre-emption.[17]

Illustration.

If the buyer, B, purports to sell the land to BA, the pre-emptor can claim it either from B or BA ; and similarly, if B purports to make a gift or wakf of it, or to convert it into a mosque, or cemetary, or to let it on hire, the pre-emptor may annul the said acts.[18]

(2) Pre-emptor :

(i) Completed sale not affected by alteration or cancellation. Alteration of price.

552. After the completion of the contract of sale, alterations in, or additions to, or cancellation of, its terms, by the buyer and seller, do not affect the pre-emptor ;[19] provided that under Hanafi (but not Shia) law, where after the completion of the contract of sale—[20]

(1) the seller lessens the price, the pre-emptor is entitled to the benefit ; but (2) where the price is entirely remitted, the

[14] The money ceases to be pre-emptor's as soon as it is paid into Court, & so his creditors cannot attach it : *Abdus Salam* v. *Wilayat Ali*, (1897) 19 All. 256. See however *Sheo Gopal* v. *Najib Khan*, (1914) 36 All. 398 (trial Court decreed pre-emption : price deposited in Court by pre-emptor : decree reversed in appeal ; deposit attached by pre-emptor's creditor ; in second appeal trial Court's pre-emption decree restored, but on condition that amount taken away by attaching creditor be made good by pre-emptor since to that extent pre-emptor's debt discharged to his benefit).

[15] *Wajid Ali K.* v. *Puran Singh*, (1928) 56 I. A. 80 (ALL.).

[16] Sect. 551, & *ill.* cited & applied : *Muhammad Abdul Rehman Khan* v. *Md. Ayyub Khan*, (1924) 46 All. 889, 891. *Kamta Prasad* v *Mohan Bhagat*, (1909) 32 All. 45 (under *wajibu'l-arz*) ; *Khettar Chandra B. M.* v. *Nabin Kali D.*, (1913) 35 All. 385 (under custom).

[17] Bail. I. 497 (par. 2) (503-504) ; II. 185 (par. 2) ; Hed. 562 (col. i. par. 2).

[18] *Shankar Lal* v. *Hashmi B.*, (1932) 54 All. 1023.

[19] Bail. II. 185 (par. 2).

[20] Bail. II. 182-183, 184, (par. 3) ; *Bhadu Mahomed* v. *Radha Churn Bolia*, (1870) 4 Beng. L. R. (A.C.) 219 = *Bhodo Mahomed* v. *Radhu C.*, 13 W. R. 332. So that if purchaser subsequently agrees to pay higher price to seller, pre-emptor is not bound to pay enhancement, which must be "considered in law,.. a gift :" Bail. II. 183 (*ll.* 1-3) ; Hed. 555 (col. i. par. 3).

buyer has the benefit ;[21] and (3) where some defect is discovered in the property for which the seller agrees to compensate the buyer, the pre-emptor is entitled to the compensation.[22] SECTION 552. (ii) Defect in subject.

If the pre-emptor acquiesces in the sale, and then the seller and buyer agree to cancel it, the pre-emptor cannot (on the contention that the cancellation of the sale is a fresh transfer) claim to exercise the right of pre-emption.[23]

553. The buyer must (subject to ss. 553 A to E), give the land to the pre-emptor in the same condition in which it was when the seller gave possession thereof. (iii) Pre-emptor gets land in same state as purchaser.

553 A. Under Hanafi law, the pre-emptor has, subject to s. 553 D, the option of taking the land with the alterations or improvements, made by the buyer on payment of their value,[24] or of demanding that it be put back into its original state.[24] (iv) Improvements : alterations.

553 B. Where the subject of pre-emption [perishes or] becomes damaged after demand[25] by the pre-emptor, the pre-emptor has the option, on payment of the full consideration, of enforcing[25] his claim, or of waiving pre-emption ; provided that where the damage is caused by the act of the buyer he is responsible to the pre-emptor for the loss occasioned thereby.[26] (v) Deterioration of property.

553 C. Under Shia and Shafii texts, if prior to pre-emption being demanded,[25] the buyer plants trees or erects buildings on the land, (*a*) he has the option of removing them, and is not obliged to level the ground ; (*b*) and if he elects to remove them, the pre-emptor has the option of waiving his claim, or paying the full price for the land after they have been so removed ; (*c*) if the buyer declines to remove them, the pre-emptor has the option (i) of removing them himself, and paying to the buyer compensation for the loss if any that he may sustain ; or (ii) of taking possession of the whole and paying for them ; or (iii) of waiving the right of pre-emption.[27] (vi) Improvements in land.

[21] Hed. 555 (col. i. par. 2). [22] Bail. II. 187 (par. 4).

[23] Bail. II. 185 (*ll.* 1-5).

[24] Bail. I. 496 (502-503); Hed. 556 (col. ii. par. 2).

[25] Demanding & enforcing pre-emption as explained in s. 522(2)(*e*), p. 663, viz. as referring to *talab-i-ishhad* & *talab-i-tamlik*.

[26] Hed. 557 (col. ii. par. 2); Bail. II. 185, 186. There is amongst Shia authorities some dissent as to the proviso.

[27] Bail. II. 186 (par. 2, 3); Hed. 556 (col. ii. par. 2); Abu Yusuf's exposition of Hanafi law is to same effect.

SECTION 553D.
(vii) Cultivated land.

553 D. Where the land has been cultivated, the pre-emptor must wait until the ripening of the crops, after which he must pay to the buyer the full price of the land without making any deduction for its rent during the said period.[28]

(viii) Compensation for pre-existing defect & subsequently discovered.

553 E. If a defect existing in the land prior to the sale, is discovered after the sale, the pre-emptor has the option of avoiding the transfer to himself from the buyer. If the pre-emptor elects to avoid it, the buyer has the option either of avoiding the sale, or of demanding compensation, from the seller ;[29] and if the buyer elects to demand compensation, the pre-emptor has the option of pre-empting the property with an abatement in the price.[30]

V. Sale on credit : right of pre-emptor.

554. Where under the agreement for the sale the price is not payable until a specified time, the pre-emptor has—

Purchaser's right to defer payment to seller not affected by pre-emption.

(1) under Hanafi and Shia texts, the option of paying the price either immediately or at the specified time : in either case the land being transferred to him only when the price is paid ;[1] provided that (*a*) if the pre-emptor elects to pay the price immediately, and the land has prior thereto been already transferred to the buyer, and the sale completed, the buyer's right to defer payment of the price to the seller is not affected by the pre-emptor's election to pay the price immediately ;[2] (*b*) where the time when the price is payable is uncertain[3] [or unspecified] the pre-emptor has no such option to defer payment, but if he desires to exercise his right of pre-emption, he must pay it immediately ;[1]

(2) under Shafii texts the pre-emptor has the right of taking immediate possession of the land, and may delay payment of the price until the said specified time.[4]

Illustration. Land is sold on the terms that the price is not to be paid for a year. The right of pre-emption is exercised : (*a*) the pre-emptor has the option of paying the price immediately or after a year ; (*b*) if he enforces his right of

28 Bail. I. 496 (502-503); II. 188 (*fifth*); Hed. 557 (col. i. last 9 *ll.*) where it is stated that this is special exception to rule in s. 553 A, p. 723.

29 Bail. II. 192, 193 (*eighth*). See, however, with reference to these OPTIONS, Hed. 255, 258 (Bk. XVI., ch. iii, iv): Baillie, *Muhammadan Law of Sale.*

30 Bail. II. 187 (par. 4), 193 *n.* 8.

1 Hed. 555 ; Bail. I. 491 (497); II. 190. Cf. s. 557, com., par. 6-8.

2 Bail. I. 491 (497); Hed. 556 (col. i).

3 As, for instance, if credit is given "till harvest," or "the treading out of the corn." Bail. I. 491 (497).

4 Hed. 555 (col. ii. par. 3).

pre-emption after the land has been transferred to the buyer, the price must be paid to the buyer, not to the seller ; (*c*) if, after such transfer, the pre-emptor elects to enforce his claim, and pays the price immediately, then the buyer is not thereby bound to pay the price over to the seller until after the expiration of the year.[5] SECTION 554.

555. Where pre-emption arises from an exchange of the land (*a*) for some perishable object, which perishes,[6] or (*b*) where the object to be given in exchange is such that "there is no similar to it,"[7] in either case the pre-emptor may give to the seller the value of the object in lieu of it.[6] VI. Exchange of land : the consideration perishing.

§ 8.—Devices[8] for Evading Pre-emption.

556. Pre-emption is not favoured by the law,[9] and any device may be adopted (which is not fraudulent, or forbidden by any law for the time being in force), with the object of preventing the right of pre-emption from arising, or defeating the provisions of the law in favour of the pre-emptor.[10] PRE-EMPTION NOT FAVOURED BY THE LAW. Devices permissible.

Compare ss. 5, 522, 523, comm.

1.—Attitude of law towards pre-emption.

"The right of shufa is but a feeble right, as it is a disseising another of his property, merely in order to prevent apprehended inconveniences."[11] (This is stated to show why it is requisite that the shafi should without delay disclose his intention by making the demand,—which must be done in the presence of witnesses, otherwise it cannot be afterwards proved before the Kazi). In Madras pre-emption has been held to be opposed to justice, equity and good conscience (s. 5). Nevertheless, Imam Muhammad considered evasions abominable, Abu Yusuf, not taking that view. Mahmood, J., in an elaborate judgment,[12] says that though pre-emption operates as a restriction on free sale and thus tends to diminish the market value of property, yet it must have enough to recommend itself for even in the most civilized parts of Germany (this was said in 1885, more than half a century before the German destruction of Poland) a similar right (retractrecht) was maintained : that in India where distinctions of race, caste and creed prevail, the right must not be lightly dealt with ; since the intrusion of a stranger as a co-sharer must

2.—Defence by Mahmood, J.

[5] Bail. I. 491 (497). [6] Bail. I. 488 (par. 2).

[7] Bail. II. 183 (par. 3) : some Shia authorities hold that in such cases right drops.

[8] In Arabic *hila*, pl. *hiyal*.

[9] See s. 556, com. E.g. *Ajaib Nath* v. *Mathura Prasad*, (1886) 11 All. 164 ; *Ajodhya* v. *Sheo Shankar*, (1926) 2 Luck. 416.

[10] Bail. I. 504-506 (512-514) ; II. 196-197 ; Hed. 563 ; *Hamedmiya* v. *Benjamin*, (1928) 53 Bom. 525, 534.

[11] Hed. 550, cited in *Ram Charan* v. *Narbir Mahton*, (1870) 4 Beng. L. R. (A. C.) 216 = 13 W. R. 256. See *Dahyabhai* v. *Chunilal*, (1913) 38 Bom. 183, 187 ; *Nusrut Reza* v. *Umbul Khyr B.*, (1867) 8 W. R. 309 ; *Ali Muhammad* v. *Taj Md.*, (1876) 1 All. 283 ; *Kudratulla* v. *Mahini Mohun S.*, (1870) 4 Beng. L. R. (F. B.) 134 = 13 W. R. (F. B.) 21.

[12] *Gobind Dayal* v. *Inayatullah*, (1885) 7 All. 775 (F. B.) (*ad fin*).

SECTION 556. not only give rise to inconvenience but disturb domestic comfort, if not lead to breach of peace. Certain devices though considered abominable may have been allowed to defeat pre-emption : but Imam Muhammad, says Mahmood, J., "condemns all devices." The technicalities of the Muslim law of contract, procedure or evidence are not binding in India. If this is once conceded, he concludes, "it will be found that no 'tricks and artifices' can defeat the pre-emptive right in our Courts."

3.—Instances of devices.

The first six of the following devices are mentioned in the texts :[10] (1) transfer in the form of a hiba bil iwaz (not of a sale)[13] the land being nominally the subject of gift, and the consideration the iwaz ;[14] (2) giving a portion of the land to the purchaser, prior to sale,[15] by way of gift or sadaqa, demarcating or dividing it off[16] with a right of way thereto[17] common to the seller and purchaser ; (3) sale of trees on the land with their foundations to the purchaser, thus making him a co-owner of the land with priority over either a khalit or a neighbour ; (4) [ostensible statement of the consideration at a figure higher than that really agreed upon ; and subsequent composition of the price ostensibly agreed upon for an article of the value of the real price] ;[18] (5) [declaration that the sale is invalid or that it is with an option to the seller] ; (6) leaving unsold a strip of land along the boundary of the pre-emptor's land, so that his land actually does not adjoin the portion sold ;[19] (7) (the pre-emptor being a co-sharer) before a suit is brought for enforcing pre-emption, the buyer selling back the property to a co-sharer of the seller.[20]

§ 9.—PRE-EMPTION IN THE PUNJAB AND OUDH.

Pre-emption Act, 1913, Oudh Laws Act.

557. The Pre-emption Act (Punjab Act), I. of 1913 and Oudh Laws Act, XVIII. of 1876 regulate pre-emption in the provinces of Punjab and Oudh.

The main provisions of the two acts (hereinafter referred to as the Punjab Act & the Oudh Act respectively) are shortly stated below :—

1.—Pre-emption defined.

(1) The right of pre-emption is defined in the said Acts as a right (in the

[13] But note that under this device since *iwaz* must be agreed upon from start, viz. at time when the primary *hiba* made, the transaction would not be *hiba bil iwaz* but *hiba ba shartu'l iwaz* : & to that pre-emption would apply : ss. 523, *ill.* (1), 526.

[14] *Bashir Ahmad* v. (*Mt.*) *Zubaida K.*, (1925) 1 Luck. 83 (TRANSFER to wife IN LIEU OF MAHR called & held HIBA BIL IWAZ : *sed quaere* : s. 347, p. 351).

[15] *Chiragh Din* v. *Allah Din*, (1916) 51 Punj. Rec. 208 (No. 70) (transfer discovered to be really SALE, though DISGUISED AS GIFT : pre-emption allowed). *Muhammad Niaz K.* v. *Md. Idris K.*, (1918) 40 All. 322 (form of lease Rs. 250 paid down ; rent of 2 as. per year : issue being raised, Court *held* real nature of transaction sale : pre-emption allowed) ; but see *Ajodhya* v. *Sheo Shanker*, (1926) 2 Luck. 416.

[16] This necessary under Hanafi law : else gift void under doctrine of *musha*.

[17] Right of way makes grantee *khalit*, thus giving him priority over neighbour.

[18] But pre-emptor would be entitled to pre-empt on terms of real contract of sale, & not on ostensible or fictitious one : s. 528, e.g., p. 687, s. 530 B, p. 694.

[19] This device can defeat only neighbour ; besides it is imperfect, as it leaves strip undisposed of : Bail. I. 506, *n.*

[20] *Narain S.* v. *Parbat S.*, (1901) 23 All. 247. Contrast : *Kamta Prasad* v. *Mohan Bhagat*, (1909) 32 All. 45 ; *Khettar Chandra* v. *Nabin Kali*, (1913) 35 All. 385.

cases specified) of the persons therein mentioned or referred to, to acquire in preference to other persons, immovable property. In the Punjab Act the right is restricted (*a*) (in case of sales), to acquiring agricultural land, or village immovable property or urban immovable property, (*b*) (in case of mortgagees) to foreclosing the right to redeem village or urban immovable property.[21] The right is exercisable and enforceable in accordance with terms laid down in Acts, (which in certain respects recognize custom). SECTION 557.

(2) The right of pre-emption (*a*) is presumed to exist in all village communities, and to extend to the village site and the houses and lands within the village boundaries; and (*b*) may be shown by evidence to exist by local custom in any town or city. 2.—Presumption.

(3) In respect of a sale or foreclosure of a proprietary or under-proprietary tenure or a share in such tenure, the Oudh Act, s. 9 provides for priorities as follows: 1stly, co-sharers of a sub-division, in the order of the relationship to the vendor or mortgagor; 2ndly, co-sharers of the whole mahal, in the same order; 3rdly, any member of the village community; 4thly, if the property be an under-proprietary tenure, the proprietor. The Punjab Act provides for priorities in great detail under 16 heads: ss. 15, 16. 3.—Priorities amongst pre-emptors.

(4) Where two or more persons are equally entitled to pre-empt, the person to exercise the right are under the Oudh Act, s. 9, to be determined by lot. Cases where several pre-emptors are found by the Court to be equally entitled to the right of pre-emption, are in the Punjab Act, s. 17, provided for under 5 heads. 4.—Several pre-emptors.

(5) Under the Punjab Act, s. 19 and Oudh Act, s. 10, notice of the sale or foreclosure, together with a statement of the price at which the owner is willing to sell, or of the amount that is due for redemption, must be given to the persons who have the right to pre-empt, through the Court within the local limits of whose jurisdiction the property or any part thereof is situate. 5.—Notice of sale or foreclosure by seller or mortgagor.

(6) The right to pre-empt is lost or extinguished unless, within 3 months of the notice to the pre-emptor of the sale or foreclosure, he deposits in, or presents to, the Court a notice (of his intention to pre-empt),[22] for service on the vendor or mortgagor: Punjab Act, s. 20; Oudh Act, s. 11. Under the 6.—Notice of intention to pre-empt.

[21] (A) Under Punj. Act, ss. 3, 4, 5, 23, 24, PROPERTY WITH REFERENCE TO PRE-EMPTION IS CLASSIFIED under 3 main heads: (i) agricultural land,—as to which pre-emption is exercisable only in case of sales, & only provided that the sale is not in contravention of the Punjab Alienation of Land Act, XIII. of 1900, & provided also that pre-emption is not debarred by s. 14 of said Act; (ii) village immovable property,—(pre-emption exercisable in cases either of sale, or foreclosure of right to redeem); (iii) shop, sarai, or katra; or dharmsala, mosque or other similar building, (no right of pre-emption exists in respect of these); (B) Following particulars also laid down: (i) pre-emption in regard to AGRICULTURAL LAND & village immovable property is subject to provisions & limitations of Punj. Act, I. of 1913; (ii) pre-emption in respect of URBAN IMMOVABLE PROPERTY in any town exists only when custom of pre-emption proved to exist at time of commencement of said Act, viz. 14th Mar. 1913; (iii) no pre-emption exists within any CANTONMENT, unless notified by Local Government in cases of agricultural land; (iv) nor in respect of SALE BY or to (*a*) GOVERNMENT, or (*b*) by or to any LOCAL AUTHORITY, or (*c*) to any COMPANY under Land Acquisition Act, 1894, part VII. or (*d*) in respect of any sale sanctioned by the DEPUTY COMMR. under Punj. Alien. of Land Act, XIII. of 1900, s. 3(2). See p. 710, *n.* 4.

[22] For particulars to be contained in notice of intention to pre-empt, see par. (9)

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Punjab Act, s. 20, the Court may allow further time not exceeding a year, for the notice of intention to pre-empt.

7.—Payment by pre-emptor.

(7) As an alternative to the notice of intention to pre-empt the pre-emptor may under the Oudh Act, ss. 11-13 pay or tender (*a*) to the seller, the price, or the fair market value, of the property, or (*b*) to the mortgagee or his successor in title, the amount specified in the notice of foreclosure, or the amount really due for redemption on the footing of the mortgage.

8.—Deposit in Court.

(8) Under the Punjab Act, s. 22, the Court shall, before the settlement of issues in a suit for pre-emption, require the plaintiff to deposit 1/5 of the probable value of the land or property, or give security for such probable value. The same powers may be exercised by the Appellate Court.

9.—Real bona fide consideration.

(9) The pre-emptor may contend that the price at which the sale purports to have taken place, or the amount that is claimed for redemption, has not been paid, or not fixed, or not claimed, in good faith. The Punjab Act, s. 20, requires that the pre-emptor shall, in the notice of his intention to pre-empt, state whether he accepts, or does not accept, as correct the price for sale or amount due for redemption, stated in the seller's or mortgagor's notice of sale or foreclosure : and if the pre-emptor does not accept the statement as correct, to state what sum he is willing to pay.

10.—Court to determine real price or amount of mortgagee's claim.

(10) The Court under the Punjab Act, ss. 26, 27, 28 shall in such cases determine whether the price for the sale was paid, or was fixed in good faith, or the amount claimed by the mortgagee for redemption is claimed in good faith ; and if it finds that the price or amount was not so fixed or paid or claimed, or that the amount claimed for redemption was not due, or, though due, was not claimed in good faith, it shall fix as the price, for the purposes of the suit for pre-emption, the market value ; and for determining the market value, it may consider as evidence of value : (*a*) the price or value actually received, or the amount really due, (*b*) the amount of interest included in such price or value or amount, (*c*) the annual net assets, (*d*) the land revenue, (*e*) the value of similar land or property, (*f*) previous sales or mortgages.

11.—When price consists of debt exceeding market value of property.

(11) Under the Punjab Act, s. 25 when the price at which the sale purports to have taken place represents entirely or mainly a debt greatly exceeding in amount the market value of the property, the Court shall fix the market value as the price of the land or property, for the purposes of the suit ; and may put the vendor to his option either to accept such value as the full equivalent of the consideration for the original sale, or to have the said sale cancelled, and the vendor and vendee restored to their original position.

12.—Suit to enforce pre-emption.

(12) When the sale or foreclosure has been completed, the person entitled to pre-empt may under the Punjab Act, s. 21 bring a suit to enforce that right. The Oudh Act, s. 13 mentions 4 grounds on which a suit may be brought, viz. (i) notice due under s. 10 not given ; (ii) refusal of tender made under s. 11 or 12 ; (iii) price of sale not fixed in good faith ; (iv) amount claimed by mortgagee not really due, and not claimed in good faith, and in excess of market value of property mortgaged.

CHAPTER XII.

ADMINISTRATION.

§ 1.—PRELIMINARY.

558. In this chapter unless it is otherwise indicated, I. TERMS.

(1) "Probate" means the copy of a will certified under the seal of a Court of competent jurisdiction with a grant of administration to the estate of the testator ; [1] Probate.

(2) "Executor" means a person to whom the execution of the last will of a deceased person is by the testator's appointment confided ; [1] Executor.

(3) "Administrator" means a person appointed by competent authority to administer the estate of a deceased person where there is no executor ; [1] Administrator.

(4) "The estate" means all the property of any description whatsoever that a deceased Muslim owns at the time of his death, and in which his interest is not limited to his lifetime.[2] Estate.

(5) "The deceased" means a deceased person whose estate has to be administered. Deceased.

(6) Forensic recognition means a formal recognition by the Court [of the fact that a person is entitled to act as the representative of the deceased as (i) executor, (ii) or administrator, or (iii) holder of a succession certificate, or (iv) of other authority granted by the Court for the purpose.] [3] Forensic recognition.

[1] *Verbatim* from Indian Succession Act, XXXIX. of 1925 (referred to in *nn.* as Succ. Act), s. 2 : it consolidates the law : repealing & in many cases re-enacting previous Acts : see s. 563, com. *Appakoth Kombi Avulla* v. *Kottayi Matha,* (1934) 68 M. L. J. 289 (disputes out of valid agreement between common owners of property for management & enjoyment of it by turns & for income being utilized in particular manner). For English law see Administration of Estates Act, 1925 (15 Geo. 5, ch. 23).

[2] Word "ESTATE" used in this work in one of 3 senses : (*a*) In this chapter (i.e. for purpose of administration) = gross estate ; (*b*) in next chapter (i.e. for testamentary purposes) = net estate, viz. after funeral expenses & debts paid ; (*c*) in final chapter (on inheritance) = what is left over, after funeral expenses, debts & legacies have all been paid.

[3] Obtaining probate or letters of administration or certificate from Court, evidencing grant of administration to estate, or part thereof = obtaining FORENSIC RECOGNITION : *Purshotam* v. *Ranchhod,* (1871) 8 Bom. H. C. R. (A. C.) 152, 156 (Westropp, C. J. : Ways in which FORENSIC RECOGNITION may be obtained : (i) probate, (ii) letters of administration, (iii) certificate under Administrator-General's

SECTION 558. "Heirs sued": "absent heirs."

(7) Where a creditor of a deceased Muslim sues (for payment of the debt due to himself from the deceased) only some of the heirs of the deceased (who are in possession of assets of the deceased), and omits to sue the other heirs, the heirs, who are sued (viz. the defendants) are in ss. 567-574 referred to as "the heirs sued," and the rest of the heirs (who are not sued) as "the absent heirs," the plural including the singular in each case.[4]

The executor is called wasi in Arabic. The word wasi is derived from the same root from which wasiya (or will) is derived, and means "one who is authorized" (to do certain acts), and denotes the administrator appointed by the Court, as well as the executor appointed by the testator.

II. LAW GOVERNING estate of a Muslim.

559. The law applicable to the estate of a deceased Muslim is the Sunni or Shia law according as he professed to be a Sunni or Shia at the time of his death.[5] If he changes his religion, he changes his personal law, and that law will govern the rights of succession.[6] The Indian Succession Act, XXXIX. of 1925, applies to all Muslims, and excludes other rules on all points covered by it.[7]

Muhammadan law.
(1) Funeral expenses.
(2) Debts.
(3) Legacies.
(4) Inheritance.

The general principle that the rights and liabilities of the deceased should, as regards third parties, be left, as far as possible, in the same state in which they would have been had he continued to live, is subject to certain necessary exceptions. A simple rule of chronological priority cannot always be applied.

Muslim law, recognizes four distinct purposes to which the estate of the deceased is successively applicable: (1) his funeral expenses,[8] (2) his debts,

Act, 1913, ss. 31, 32, (iv) succession certificate under Succession Act, Pt. x. (ss. 370 ff.) = Succession Certificate Act, 1889, (v) certificate under Bom. Reg. No. VIII. of 1927). See Succession Act, 1925, s. 214, pp. 740 ff.

[4] *Jafri Begam* v. *Amir Muhammad Khan*, (1885) 7 All. 822 (F.B.) (s. 566, com. *n.* 9). Absent heir does not in this context, include heir who is sued but who does not appear, or take part in the proceedings: absent heir means one who is not sued at all.

[5] See ss. 1, 7, 9. *Hayat-un-Nissa* v. *Muhammad Ali K.*, (1920) 17 I. A. 73 = 12 All. 290 ("the law of succession is in any given case to be determined according to the personal law of the individual whose succession is in question"); *Nancy* alias *Zuhoorun* v. *Burgess*, (1864) 1 W. R. 272; *Balwant Rao* v. *Baji Rao*, (1920) 47 I. A. 213, 217; cf. *Appakoth Kombi Avulla* v. *Kottayi Matha*, (1934) 68 M. L. J. 289.

[6] *Mitar* v. *Maqbul*, (1930) 57 I. A. 313, 317 (OU.).

[7] *Ismail Abdul Latif* v. *Haji Ibrahim*, (1934) 59 Bom. 397. Even on points on which Muhammadan law may provide no remedy, "it by no means follows that an Indian Court would not AFFORD A REMEDY": *Kazim Ali Khan* v. *Sadiq A. K.*, (1938) 65 I. A. 219, 232, *ll.* 8-9.

[8] *Sajjad Hussain* v. *Muhammad Sayid*, [1934] AIR (ALL.) 71 (moneys spent on RELIGIOUS CEREMONIES for securing peace of soul of deceased held not to form part of funeral expenses: but (*submitted*) within limits such expenses are necessary part of funeral expenses): cf. s. 579 c(ii).

(3) his legacies, (4) the claims of his heirs.[9] The law of Islam is replaced by the Indian Succession Act, XXXIX of 1925,[10] ss. 320-323, 325 the effect of which is that funeral expenses have to be paid before all debts[11] (s. 320); next expenses of judicial proceedings for obtaining Probate or Letters of Administration (s. 321); next the wages for services within three months of the death of the deceased (s. 322). Under s. 323 : "Save as aforesaid no creditor is to have a right of priority over another; but the executor or administrator shall pay all such debts as he knows of, including his own, equally and rateably, as far as the assets of the deceased will extend." "Debts[12] of every description must be paid before any legacy" (s. 325). Requiring the payment of debts equally and rateably is introducing a great change in the position of the creditors of a person by his death.

SECTION 559.
1.—Funeral expenses.
2.—Judicial proceedings.
3.—Wages.

Equal and rateable payment.

560. Under Hanafi law, debts of which there is no proof except an acknowledgment by the deceased while in death-illness (marz-ul-maut),[13] are postponed to all debts of which there is other proof.[14] *Quaere,* whether this rule of law is abrogated by the Indian Succession Act, 1925, or otherwise.

III. DEBTS ACKNOWLEDGED in death illness.

This rule of Hanafi law seems in one of its aspects to be a portion of the substantive law of wills : the acknowledgment of a debt, when fictitious, is hardly distinguishable from a legacy. It need not of course be fictitious, and may refer to a debt not capable of being proved in Court, or of moral obligation only. Islam insists on payment of debts : and rather than take the risk of a real debt being unpaid, the rule about the bequeathable third is allowed to be infringed. Muslim texts accordingly hold that the release by a widow of her mahr even to a deceased husband, "is valid on a favourable construction of the law."[15] See the Koran II. 280-286, and the traditions[16] in which the Prophet is reported to have refused to pray over those who died in debt, without leaving any means for discharging their liabilities, until their creditors' claims were provided for, and to have said that "even martyrdom repeated thrice would not atone for debt undischarged."

1.—Insistence on payment of debts in Islam.

When the testator acknowledges a debt on his death-bed, and there is no other proof of the debt, it ranks, in regard to priority, under Hanafi law, midway between a legacy and a debt; it is of no effect if it is in favour of an

2.—Death-bed acknowledgment of debt.

[9] Bail. I. 683 (693); *Minhaj* 246 (Bk. 28, s. 1).

[10] Succ. Act, ss. 310 ff. = Prob. & Adm. Act v. of 1881, ss. 101-105. *Kazim Ali K.* v. *Sadik A. K.*, (1938) 65 I. A. 219 (LUCK.) reversing *Nawab Mirza Mohammad Sadiq A. K.* v. *Nawab Fakhr J. B.*, (1934) 9 Luck. 701.

[11] See Bail. I. 623-624 (630-634).

[12] "PROPER DOWER" of widow of deceased to be paid as debt, not legacy, though he may have married her in death-illness : ss. 103 B, 108 (pp. 181, 185); cf. s. 563, p. 740, *nn.* 1-7.

[13] On *marz-ul-maut* see s. 359 B & com., pp. 372-374.

[14] Bail. I. 640 (651), 684 (694); Hed. 436-438, 684-685 ; cf. *Minhaj*, 188, (Bk. 16, s. 1), Shafii law differing from Hanafi law.

[15] Bail. I. 544, 544 *n.* (553).

[16] *Mishcat-ul-Masabih*, Book XII., Ch. 9, parts I., II. and III.

SECTION 560. heir (except under the Shia Ithna Ashari law); on the other hand, as regards strangers, it is effectual apparently against the whole and not merely a 1/3 of the estate, having priority over legacies; this priority must be attributed partly to the duties referred to above, and partly to the fact that, should the acknowledger recover from his illness, the liability will remain on him to discharge the acknowledged debt to the full extent: it will not be in the nature of a donatio mortis causa.[17] See s. 600, *ill.*

3.—Commission to executor is legacy. Commission bequeathed to an executor under a will by way of remuneration or reward for his service as such, is not a debt but a legacy: s. 561 A.

§ 2.—REPRESENTATIVES OF DECEASED: POWERS.

I. Executor or Administrator

561.[18] The executor or administrator (where there is any) of a deceased Muslim is his legal representative for all purposes;[19] and all the property of the deceased vests in him as such.[20] It is his duty to collect the assets, discharge the debts, pay the legacies and distribute the estate amongst the heirs.

(A) Functions.

Illustrations.

(1) T says to E,—(*a*) "thou art my agent after my death;[21] or (*b*) "attend to my children after me;" or (*c*) "pay my debts," being then in a death-illness;[22] or (*d*) "to thee is the hire of 100 dirhams on condition that thou wilt be my executor."—E is executor in each case, and in (*d*) he is also an unconditional legatee of 100 dirhams.[23]

(2) T makes a will giving shares in his property to his widow, son and grandchildren, and to charity, and directs that the son "should continue in possession and occupancy of the full 16 annas of all the estate...All the matters of management in connection with this estate should necessarily and

[17] Cf. Justin. II. vii., 1, on *donationes mortis causa*, with very apt quotation from Homer there cited. Cf. ss. 349, 349 A.

[18] See ss. 561, 561A & 561B together = s. 561 in earlier edd.

[19] Cf. (*Mirza*) *Kurrat-ul-ain* v. *Peara S.* (*Nawab*) *Nazhat-ul-D.*, (1905) 32 I. A. 244 = 33 Cal. 116. Executor can, under Succ. Act 1925, s. 307 (= Act x. of 1865, s. 269 & Pr. & Ad. Act, 1881, s. 90), SELL PROPERTY of deceased for purpose of paying off his debts: *Abdul Majeeth* v. *Krishnamachariar*, (1916) 40 Mad. 243, 248. Cf. s. 562(2), pp. 737 f. for other cases.

[20] Ind. Succ. Act 1925, s. 211 (Pr. & Adm. Act 1881, ss. 4, 88): consequently no part of ESTATE VESTS in *heirs*: in any proceedings against administrator, heirs are competely represented: *Satra Gokaldas Marwadi* v. *Maria Conceicai*, [1883] P. J. (BOM.) 355. *Mohiddeen* v. *Syed Meer S.*, (1915) 38 Mad. 1099; *Ismail Abdul Latif* v. *Haji Ibrahim*, (1934) 59 Bom. 397, 400-402 (not necessary in all cases that any one except claimant & legal representative be parties). VESTING OF ESTATE not dependent on PROBATE: (*Shaik*) *Moosa* v. (*Shaik*) *Essa*, (1884) 8 Bom. 241, 255, 256; *Sakina Bibee* v. *Mahomed Ishak*, (1910) 37 Cal. 839; *Mahomed Yusuf* v. *Hargovandas*, (1923) 47 Bom. 231; *Venkata Subamma* v. *Ramayya*, (1932) 59 I. A. 112 (MAD.) (Hindu parties); *Shemail* v. *Ahmed Oomer*, (1931) 33 Bom. L. R. 1056.

[21] Bail. I. 622 (632); cf. *Minhaj*, 267 (Bk. 29, s. 7).

[22] *Ibid.* Ballie translates *marz* literally by "sickness"; in legal language that word means *marz-ul-maut*, as stated in the *Alamgiri*. See also *Bismillah Begam* v. *Shahr Bano B.*, (1913 Sep.) 18 Ind. L. J. 179, 184.

[23] Bail. I. 622 (632) (*ll.* 4-6). This is contrary to Succ. Act, s. 141, which applies to Hindus but not to Muslims.

obligatorily rest always and for ever in his hands." He also purports to restrict the right of alienation. The son retains possession and management till his death. *Held*, the son's son cannot prevent the plaintiff, a sharer, from taking the full proprietary right in it.[24] SECTION 561.

(3) The holder of a bond executed by a deceased person, sues the heirs of his debtor, describing them (1) as his representatives, and (2) as being in possession of his estate. The heirs are not proved to be in possession of the estate ; *held* that the suit should not on that account be dismissed, but a decree passed for payment out of the deceased's property and if there is no such property, the decree will remain unsatisfied ; costs to be paid out of the estate (if any), and not by the heirs personally.[25] Decree against heirs when no assets.

Except for the devolution of the property upon the heirs, most parts of the law of administration are adjective law, and accordingly the Muslim law of administration[26] is not enforced. The Indian Succession Act 1925, ss. 212, 213, 269 do not apply to Muslims, who are consequently under no necessity to apply either for probate, or letters of administration (except for obtaining a decree against a debtor of the deceased).[27] Muslim law of administration not applicable.

Where there is no executor or administrator, the heirs become the legal representatives, and they administer the estate, taking the place of the executor or administrator.[28] Representation of estate by the heirs.

The rules applicable to heirs of a Muslim when they represent his estate "are quite in accordance with the English law applicable to heirs and devisees as to real estate, and to executors as regards personalty."[29] But the heirs are not bound to postpone the distribution of the estate till all the debts are paid.[30]

561A. A commission given to an executor, though by way of remuneration, is a gratuitous bequest and payable only out of the bequeathable 1/3.[31] Commission to executor is legacy.

[24] *Muhammad Abdul Majid* v. *Fatima B.*, (1885) 12 I. A. 159 = 8 All. 39.

[25] *Madho Ram* v. *Dilur Mahal*, (1870) 2 N. W. 449 ; cf. *Kazi Khan* cited in *Jafri* v. *Amir Muhammad*, (1885) 7 All. 822, 841 (*ll.* 4-10) : If debtor dies without leaving any property in hands of heir, even then decree will be passed as to debt, so that creditor may take any assets of deceased that may be discovered.

[26] *Jafri Begam* v. *Amir Muhammad K.*, (1885) 7 All. 822, 842 (per Mahmood, J.).

[27] *Essafally* v. *Abdeali*, (1920) 45 Bom. 75.

[28] *Jafri B.* v. *Amir Muhammad K.*, (1885) 7 All. 827, 842 ; cf. *Hasan Ali* v. *Mehdi Husain*, (1877) 1 All. 533 ; *Bholanath* v. *Maqbul-un-nissa*, (1903) 26 All. 28 ; *Shankar Lal* v. *Mohammad Ismail*, [1930] 28 A. L. J. 989.

[29] (*Syud*) *Bazayet Hoosein* v. *Dooli Chund*, (1878) 5 I. A. 211 = 4 Cal. 402, 407, referring to Sugden, *Vend. & Purch.*, (1862) p. 665 ; cf. *Hamir Singh* v. (*Mt.*) *Zakia*, (1875) 1 All. 57, 58 ; *Pathummabi* v. *Vittil Ummachabi*, (1902) 26 Mad. 734, 738. Last cited case over-ruled : *Abdul Majeeth Khan S.* v. *Krishnamachariar*, (1916) 40 Mad. 243 (doctrine that one of several heirs may be sued as representing whole estate, provided that heir sued is in possession of whole estate, not accepted).

[30] *Pirthi Pal S.* v. *Husaini Jan*, (1882) 4 All. 361 ; *Chandmull* v. *Ranee Soondery Dossee*, (1894) 22 Cal. 259, 262, *ll.* 18 f. Sale, J. : in Hindu case under ordinary circumstances widow & heiress would be legal representative of deceased within meaning of Civ. Pro. Code, ss. 244, 252. See s. 566, p. 751.

[31] *Aga Mahomed Jaffer Bindaneem* v. *Koolsom B.*, (1897) 24 I. A. 196, 203 = 25 Cal. 9, 18 ; *A. E. Salayjee* v. *Fatma B.*, (1922) 1 Rang. 67 (P. C.) ; *Mahomed Hussein* v. *Aishabai*, (1934) 36 Bom. L. R. 1155, 1263.

PERSONS WHO REPRESENT A DECEASED MUSLIM.

1. Where a Muslim dies leaving a will—

(1) the executor (whether he obtains probate or not) is the legal representative, and all the property of the deceased vests in him as such, for all purposes that is to say—

(*a*) for collecting the property of and the debts due to the deceased and paying his funeral expenses and debts due by him (Ind. Succ. Act, XXXIX. of 1925, ss. 211, 319-323);

(*b*) the bequeathable 1/3 of the net estate vests in the executor for the purposes of the will, and

(*c*) the rest, as a bare trustee [A] for the heirs;

(2) the executor may, but need not, obtain probate (Succ. Act, ss. 213-214); but if he does not obtain probate,—

(*a*) no Court will pass a decree against a debtor of the deceased for payment of his debt (not being rent, revenue or profits, payable in respect of land used for agricultural purposes), and—

(*b*) no Court will proceed, on an application to execute, against such a debtor, a decree or order for the payment of his debt—

unless the executor (in lieu of obtaining probate) obtains

(*a*) a certificate granted under the Administrator General's Act, 1913, s. 31 or 32, mentioning the debt therein, or

(*b*) a succession certificate under the Succ. Act, 1925, part X.[B]

II. Where a Muslim dies intestate, letters of administration may, but need not, be obtained [C] (Succ. Act, s. 212(2), 214);

(1) if they are obtained, the administrator is the legal representative and all the property of the deceased vests in him as such for all purposes (Succ. Act, s. 211), that is to say—

(*a*) for collecting the property of and the debts due to the deceased, and paying his funeral expenses and debts due by him (Succ. Act, ss. 319-323):

(*b*) the rest of the estate vests in him as a bare trustee for the heirs;

(2) if letters of administration are not obtained, all the property of the deceased vests in the heirs who are then his legal representatives; but no Court will pass a decree, or proceed to execute a decree or order against a debtor of the deceased, for payment of a debt not being rent, revenue or profits payable in respect of land used for agricultural purposes, unless (instead of letters of administration) a certificate is obtained under the Administrator General's Act, 1913, s. 31 or 32, mentioning the debt therein or a Succession Certificate under the Succ. Act, part X.[C]

[A] (*Mirza*) *Kurrat-ul-ain* v. *Peara*, (1905) 32 I. A.: "BARE TRUSTEE" = p. 737, *n.* 5.

[B] Or certif. under (*a*) Succ. Certif. Act, 1889 (Act repealed), or under (*b*) Bom. Reg. VIII., 1827 (unrepealed, but as to heirs, superseded by Succ. Act, 1925: if certif. granted after 1 May, 1889, debt must be specified therein.

[C] *Essafali* v. *Abdeali*, (1920) 45 Bom. 75.

SECTION 561B. II. Heirs.

561 B.[1] Where a Muslim dies without appointing any executor,[2] and no person obtains letters of administration to the deceased's estate,[3] the whole of it vests[4] in severalty[5] as from the time of his decease,[6] upon his heirs in proportion to their respective rights of inheritance,[7] and subject to (*a*) their liability[8] to pay (in the same proportion),[9] out of their shares in the estate and other assets come to their hands and not duly accounted for, the charges[10] referred to in the Indian

[1] Sect. 561 B = s. 561(2) in last ed.

[2] If executor appointed, Succ. (or Prob. & Adm.) Act applies, whether probate obtained or not : (*Shaik*) *Moosa* v. (*Shaik*) *Essa* (1884) 8 Bom. 241, 255, 256.

[3] Cf. *Sakina* v. *Muhammad Ishak*, (1910) 37 Cal. 1839. During interval that must elapse between death of deceased, & grant of letters, heirs (it would seem) initially represent estate, but on grant rights of administrator relate back to death of deceased : Succ. Act, ss. 220, 221 = P. & A. Act, ss. 14, 15.

[4] (*Mt.*) *Jawai* v. *Hussain Bakhsh*, (1921) 3 Lah. 80 ; (*Nawab*) *Mirza Mahommad Sadiq Ali K.* v. (*Nawab*) *Fakhr J. B.*, (1934) 9 Luck. 701 (reversed *Kazim Ali K.* v. *Sadiq A. K.*, (1938) 65 I. A. 219) ; *Habiba* v. *Swa Kyan*, [1937] Rang. 322.

[5] *Abdul Khader* v. *Chidambaram Chettiyar*, (1909) 32 Mad. 276 ; *Abdul Majeeth* v. *Krishnamachariar*, (1916) 41 Mad. 243, 254. On rights of several HEIRS HOLDING LANDS IN COMMON, see *Midnapur Zamindary Co.* v. *Naresh*, (1924) 51 I. A. 293, 296 (= s. 393 A, p. 424, *n.* 10) ; *Ram Autar* v. *Ghulam Dastgir*, (1929) 51 All. 289 heir upon whom mortgagee rights devolve, are interested in the property as tenants in common, proportionately) ; *Khwaja Afzal* v. *Mohammad*, [1936] AIR (NAG.) 214 ; (*Mt.*) *Jawai* v. *Hussain Bakhsh*, (1921) 3 Lah. 80 ; *Muhammad Walli K.* v. *Md. Mohuddin K.*, (1919) 24 C. W. N. 320 (P. C.) (ALL.) (" succession of a Muhammadan is an INDIVIDUAL SUCCESSION " : Lord Dunedin) ; *Zebaishi B.* v. *Nazirudin K.*, (1934) 57 All. 445 (interest of each heir : definite, distinct, ascertained) ; *Alla Pichai Rowthan* v. *Pappathiammal*, (1918) 36 M. L. J. 184 (for LIMITATION ; heirs' cause of action not joint) ; *Vazir* v. *Dwarkamal*, [1922] AIR (SIND) 41. Contrast *Appovier* v. *Rama Subba Aiyan*, (1886) 11 Moo. I. A. 75, 89 (position of member of Hindu joint family & its " common chest or purse,") ; *Manni Gir* v. *Amar Jati*, (1935) 58 All. 594.

[6] (*Muhammaden*) *Abdul Saffur Rowther* v. *Hamida Bivi Ammal*, (1919) 42 Mad. 661 (INTEREST allowed to daughter on her SHARE IN HER FATHER'S BUSINESS on taking accounts from her brother who CONTINUED business after father's death). See s. 373 A, p. 302, on guardians admitting minors to benefit of partnership.

[7] *Jafri Begam* v. *Amir Muhammad K.*, (1885) 7 All. 822 ; cf. *Hasan Ali* v. *Mehdi Husain*, (1877) 1 All. 533 ; *Abdul Majeeth* v. *Krishnamachariar*, (1916) 40 Mad. 243, 253, (*per* Abdur Rahim, J.). See *Pathummabai* v. *Vittil Ummachabai*, (1902) 26 Mad. 734, 739 ; *Abbas Naskar* v. *Chairman*, (1931) 59 Cal. 691.

[8] Cf. *Bholanath* v. *Maqbul-un-nissa*, (1903) 26 All. 28. But devolution not contingent upon nor suspended till debts paid : *Jafri B.* v. *Amir Md. K.*, (1885) 7 All. 822, 832 ff. (F. B.) ; see, however, *Shankar Lal* v. *Mohammad Ismail*, [1930] 28 All. L. J. 989 (= s. 572, *n.*). *Kazim Ali K.* v. *Sadiq A. K.*, (1938) 65 I. A. 219 (estate consisted partly of PARTIBLE & PARTLY IMPARTIBLE PROPERTY, devolving under different systems of law : debt recovered only from partible property : RIGHT OF CONTRIBUTION held applicable as against impartible property).

[9] *Pirthi Pal S.* v. *Husaini Jan*, (1882) 4 All. 361 (creditor may recover from each heir proportion of debt for which he is liable) ; *Ram Charan Lal* v. *Hanifa K.*, (1932) 54 All. 796, 799 ; *Laloo Karikar* v. *Jagat Chandra*, (1920) 25 C. W. N. 258.

[10] (A).—(*Syud*) *Imdad H.* v. (*Mt.*) *Hosseinee B.*, (1870) 2 N. W. 327 (PARTITION NEED NOT BE POSTPONED TILL DEBTS PAID : decision prior to Pr. & Adm. Act, 1882 : relevent passages from *Hidaya* carefully collated, *held*, (i) debts of deceased must be paid before estate divided, but (ii) if creditors not present to assert their claims, division of estate need not be postponed ; (iii) creditors who later appear & assert their claims, entitled to set aside partition of estate, so as to render it available for satisfaction of their claims, or to hold heirs personally liable to extent of & in propor-

SECTION 561B. Succession Act, 1925, ss. 320-323,[11] and subject also (*b*) to the legacies (if any) validly bequeathed by him.[12]

Illustrations. (1) The plaintiff who was a minor, sued her brother and sister for her share in her father's property, which had been utilized by the latter to their own advantage. The claim was decreed with simple interest at 6 per cent.[13]

(2) One Abdul Karim Beg carried on a cloth trade. He died, leaving a widow and both adult and minor children. The adult sons, defendants, carried on the said trade, employing in it the shares of the other heirs in the estate : *held* (i) on the evidence, that the father's trade was continued by the defendants as a family business for the benefit of all the heirs, and that the shares of the other heirs could not be treated as loans, merely carrying interest ; (ii) that there is nothing contrary to law in Muslim adult members of a family carrying on such a family trade for the benefit of all the members of the family, including the minors and the females ; and legal consequences will follow, although not all the legal consequences that follow from such a family trade conducted by a Hindu joint-family; nor all the legal consequences of a lawful partnership : ss. 548 f ; (iii) that the eldest son assumed the management of the father's business as if he were in law, and conceived himself to be in fact, manager of a family business for the benefit of all, and his relation became fiduciary. Evidence from which this was deduced discussed : Indian Trusts Act, ss. 23(*f*), 88 became applicable.[14]

III. Successor to deceased executor.
(A) Hanafi law.

561 C.[15] (1) Under Hanafi law the executor of a deceased person may validly appoint a successor to himself for carrying out the purposes of the will under which he was appointed executor.[16] In the absence of such appointment, Abu Yusuf holds that the right devolves upon the survivors of two or more executors ; Abu Hanifa and Imam Muhammad that an application to the Court is necessary for its directions.[17]

tion to shares taken in estate). (B).—Is widow entitled to hold possession of estate in lieu of *mahr*? Pearson & Turner, JJ., dissented from (*Mt.*) *Meerun* v. (*Mt.*) *Najeebun*, (1867) 2 Agra, 335, earlier decision of their own (that widow having got possession on untenable ground of her being sole heir, was in wrongful, not lawful possession). See s. 108, p. 191, *n.* 25.

11 Succ. Act, 1925, ss. 320-323 = Pr. & Adm. Act, 1880, ss. 101-104.

12 *Amir Dulhin* v. *Baijnath S.*, (1894) 21 Cal. 311, 315 ; *Jafri B.* v. *Amir Md.* K., (1885) 7 All. 822, 842.

13 (*Muhammaden*) *Abdul Saffur Rowther* v. *Hamida Bivi*, (1919) 42 Mad. 661. On INTEREST see s. 4. Cf. s. 273 A.

14 *Abdul Rahim* v. *Abdul Hakim*, (1930) 54 Mad. 543 ; citing *Vrandavan* v. *Parshottam*, (1927) 28 Bom. L. R. 1481. See s. 273 A, p. 302.

15 Sect. 561 B (= 561(3), (4), in last ed.

16 Bail. I. 672 (par. 4) (684 par. 1) (executor may on approach of death appoint a successor though deceased had not committed that power to him). *Hafeez-oor-Rahman* v. *Khadim Hossein*, (1871) 4 N. W. 106.

17 Bail. I. 671 (par. 2, 3) (682); Abu Yusuf holds that survivor may act by himself after death of his colleague, just as one of several co-executors may act alone during lifetime of others. Where probate is obtained, entire representation accrues to surviving executors. Succ. Act, 1925, s. 226.

(2) Under Shia law (*a*) the executor may be authorized so to appoint a successor to himself, but, in the absence of being so authorized, the Sharaiu'l-Islam, holds the better opinion to be that he cannot lawfully do so ; [18] (*b*) where one of several executors dies without validly appointing a successor to himself, the right of administering the estate devolves upon the survivors ; [19] (*c*) it is doubtful whether the Court has jurisdiction to appoint a successor to a deceased executor so long as there is any surviving executor.[18]

SECTION 561C. (B) Shia law.

562. (1) After the payment of the funeral expenses and debts of the deceased, his executor [1] or administrator is an active trustee [2] for the purposes of the will [3] as to one-third of the net estate,[4] and a bare trustee [5] for the heirs as to the remaining two-thirds thereof.[6]

I. Powers and duties of executors and administrators.

(2) The powers [7] and duties of executors and administrators are defined in the Indian Succession Act, 1925, which applies to all persons in British India including Muslims.[8]

[18] Bail. II. 250 (par. 5), 249 (par. 3).

[19] Bail. I. 622 (632) cf. *Minhaj*, 267 (Bk. 29, s. 7).

[1] In whom estate vests : see s. 561, p. 732.

[2] And he is responsible for wilful default, or for investing moneys of estate in unauthorized or hazardous securities : *Mahomed Hussein* v. *Aishabai*, (1934) 36 Bom. L. R. 1155. See s. 565, p. 744.

[3] *Shemail* v. *Ahmed Omer*, (1931) 33 Bom. L. R. 1056 (mere fact that testator intended estate not to be divided during sons' minority, does not give rise to inference of intention to impose restrictions on powers of executor to dispose of property vested in him); *Balkrishna* v. *Vinayak*, (1931) 34 Bom. L. R. 113.

[4] Estate : see s. 558(4), p. 729.

[5] BARE TRUSTEE, viz. to whose office no duties were originally attached, or who, although such duties were originally attached to his office, would on requisition of his *cestuis que trust* be compellable in equity to convey estate to them, or by their direction : *Christie* v. *Ovington*, (1875) 1 Ch. D. 279, 281 (*per* Hall, V. C., adopting Dart, *Vend. & Purch.* 5th ed., 517); *In re Cunningham & Frayling*, [1891] 2 Ch. 567, 572. See, however, *Morgan* v. *Swansea Urb. San. Auth.*, (1878) 9 Ch. D. 582 (*per* Jessel, M. R.). See also Ind. Trusts Act, 1882, s. 56 ; Halsb. *Laws of Eng.* XXVIII. 86 *Trusts*, § 186.

[6] (*Mirza*) *Kurrat-ul-ain* v. (*Nawab Nuzhat-ut-dowla Abbas Hossein Khan alias*) *Peara Saheb*, (1905) 32 I. A. 241 = 33 Cal. 116.

[7] *Sir Mahomed Yusuf* v. *Hargovandas*, (1922) 47 Bom. 231 (EXECUTOR MAY SELL & convey testator's immovable property WITHOUT obtaining PROBATE or obtaining consent of all the heirs) ; *Azimunnissa B.* v. *Ali Khan*, (1926) 29 Bom. L. R. 434. *Abdul Majeeth* v. *Krishnamachariar*, (1916) 40 Mad. 243, 248. Has administrator power to borrow money for repairs? See *Chandbi* v. *Abdul Karim*, 1st App. 458 of 1928, decided Bom. H. C. 15th July 1931 (unreported): duty of administrator as bare trustee to transfer estate to heirs, but *semble* repair may be so urgent or beneficial as to be justifiable.

[8] Provisions of the Ind. Succ. Act, 1925, are dealt with in this chapter, only so far as necessary to show special application to Muslims : *Ismail Abdul Latif* v. *Haji Ibrahim*, (1934) 59 Bom. 397, 403 (costs of suit properly instituted for administration of estate are expenses in administering estate & first charge upon estate).

SECTION 562. Muslim executor or administrator.

The law in Muslim texts has been superseded in India by the Indian Succession Act, 1925. The Privy Council laid down the rules as stated in s. 562(1) with reference to an executor who had obtained probate.[8] The position of the administrator (whether with or without the will being annexed to the Letters) would presumably be similar. The Probate and Administration Act, v. of 1881, now re-enacted as part of the Indian Succession Act, 1925, (ss. 210-369, 391 : see below s. 563, com., p. 741), applies where there is a will and no probate has been obtained.[9] The rules have therefore, been stated in s. 562 without restricting them to an executor who has obtained Probate.

Representative's duty to perform contract of deceased.

It is the duty both moral and legal, of the legal representative to perform the contracts entered into by the deceased. The breaking of an enforceable contract is an unlawful act. It is not the duty of executors or administrators to commit such an act. Their duty is to honour the obligations of the deceased under the contract, unless an opportunity presents itself of coming to some arrangement that would be of advantage to the estate. The onus of proving the existence of such an opportunity lies upon those who, in taking the accounts, assert that a payment made by the representative in fulfilment of a contract entered into by the deceased, ought to be disallowed as an unlawful payment.[10]

Muslim law of administration compared with Indian Statutes.

Some of the rules laid down in the texts are compared below with the statutory provisions : (1) Where there are several executors,[11] the texts are not agreed whether one of several executors may act by himself without the concurrence of the others. The better opinion is, however, that he has power to act alone, only for the preservation of the goods of the deceased, or for providing the funeral expenses, or for the immediate necessity of his family, or property.[12] The Indian Succession Act, s. 311, empowers any one executor who has proved the will, to exercise the powers of all. But after a grant of probate, no other than the person to whom it has been granted has power to act as representative of the deceased.[13] See also s. 226 of the Act. (2) The Kazi may appoint a joint wasi (administrator) where the executor appointed by the testator is weak or incompetent.[14] There is no such power under the Act, ss. 222, 229. (3) The more approved Shia law agrees with s. 226 of the Act, by which, when probate has been granted to several executors, representation accrues to the surviving executors.[15] The Hanafi authorities also differ amongst themselves, but apparently the executor of a deceased executor takes the place of the latter.[16] (4) An executor, who is a minor, may, the texts lay down, act as

1.—Several executors.

2.—Kazi appointing executor.

3.—Survival of powers of joint executors.

4.—Minor. executor.

[9] (*Shaik*) *Moosa* v. (*Shaik*) *Essa*, (1884) 8 Bom. 241, 255, 256 ; see *Sakina* v. *Mahomed Ishak*, (1910) 37 Cal. 839.

[10] *Ahmed Angullia bin Hadjee M. S. A.* v. *Estate & Trust Agencies, Ltd.*, [1938] A. C. 624 (P. C.) (SINGAPORE).

[11] *Wasi* : see Fyzee, *Ismaili law of Wills*, 8-9.

[12] Bail. I. 670 ; II. 248, 249. *Daaimu'l-Islam* (Notes) see also *Ayderman Kutti* v. *Syedali*, (1912) 37 Mad. 514.

[13] *Chidambara* v. *Krishnasami*, (1914) 39 Mad. 365, 368 (Pr. & Adm. Act, 1881, ss. 2, 4, 82, 92 = Succ. Act, 1925, ss. 226, 211, 216, 311).

[14] Bail. I. 669.

[15] Bail. II. 249-251.

[16] Bail. I. 671, 672, 678.

SECTION 562.

such, but on application being made to the Kazi, the minor may be removed.[17] The Act prohibits probate or letters being granted to a minor or person of unsound mind : ss. 223, 236 ; but is silent as to a minor's capacity to act as executor without obtaining probate. The limited grant of administration where a minor is appointed executor, has its counterpart in Shia law, and (according to the two disciples) in Hanafi law.[17] (5) Observations similar to the last apply to executors who are not Muslims.[18] (6) Presumably probate would not be refused barely on the ground that the Court does not think the duly appointed executor (though not incapacitated by law) not to be a fit person. Under the texts, one who has been nominated an executor, may not be removed except for malversation ; though an administrator may be appointed to act jointly with him.[19] (7) Under the Hanafi law it is no part of the duty of an executor to partition the property amongst the heirs ; but in the partition he represents the minors. The legatee of a fraction of the estate is in the same position as an heir.[19] (8) Except by operation of the Act, the property did not vest in an executor under Hindu or Muhammadan law.[20] (9) The moral duty of accepting an executorship when asked to do so,[21] and the legal incapacity from renouncing after accepting, are not always clearly differentiated in the texts.[22] (10) The texts differ on the question whether an executor can purchase any part of the property of the deceased, but it seems they permit it at a fair valuation.[23] (11) " An executor is an ameen or trustee and, therefore, not responsible for any loss or destruction of the deceased's property unless occasioned by his departure from the conditions or rules of his office or by some personal neglect ; "[24] compare ss. 368 ff. of the Act. (12) Under s. 337 of the Act the executor is not bound to pay or deliver any legacy until the expiration of one year from the testator's death : the Sharaia provides that " in the case of a bequest, the transfer is to be decreed from the death of the testator and not from the time of taking possession."[25] (13) The wasi is allowed remuneration for his work as such, —which he cannot claim under English law : ss. 344 A, 561 A, pp. 340, 733.

5.—Non-Muslim executor.

6.—Removal of executor.

7.—Partitioning no part of wasi's duty.

8.—Property did not vest in wasi.

9.—Executor purchasing deceased's property.

10.—Liability for misapplication of funds

11.—Nature of executor's responsibility.

12.—Time for payment of legacy.

13.—Remuneration of executor.

562 A. Where the estate consists wholly or in part of

14. Paying legacies out of claims as realized.

[17] Bail. II. 248, 249 ; I. 669 ; cf. Ind. Succ. Act = Pr. Adm. Act, ss. 31, 32.

[18] See s. 564(3), p. 743.

[19] Bail. I. 669 ; II. 249, 251 ; cf. s. 564. See also Ind. Succ. Act, ss. 223, 298 = Pr. & Adm. Act, ss. 8, 85. Bail. I. 673-674 ; cf. Ind. Succ. Act, s. 211 = Pr. & Adm. Act, s. 4.

[20] Ind. Succ. Act, s. 211 = Pr. & Adm. Act, ss. 4, 99 ; *Jaykali* v. *Shibnath Chatterjee*, (1866) 2 Beng. L. R. (O. C. J.) 1 ; *Kherodemoney Dossee* v. *Doorgamoney D.*, (1878) 4 Cal. 455 (Markby, J.) ; (*Mirza*) *Kurrat-ul-ain* v. (*Nawab*) *Nazhat-ud-Dowla alias Peara Saheb*, (1905) 32 I. A. 244 = 33 Cal. 116.

[21] Bail. II. 250.

[22] Cf. Bail. II. 250 ; Bail. I. 665-667 ; *Ayeshabai* v. *Ebrahim Haji J.*, (1908) 32 Bom. 364, following *Rogers* v. *Frank*, (1827) 1 Y. & J. 409 ; cf. *In the Goods of Veiga*, 32 L. J. (P. & M.) 9 (Cresswell, J. refused to recognize RENUNCIATION of executor who had obtained probate, though Court of the domicile (Portugal) permitted him to renounce executorship & appointed another to act as executor in his stead) ; cf. Succ. Act, s. 229 = Pr. & Adm. Act, 1882 s. 16 ; Ind. Trusts Act, 1882, s. 10.

[23] Bail. II. 250 ; I. 681 (692) ; cf. Succ. Act, s. 310.

[24] Bail. II. 250.

[25] Bail. II. 207.

SECTION 562A. claims against third parties, legacies, if they amount to more than 1|3 of the assets in fact realized by the executor or administrator, are payable only to the extent of 1|3 of the assets actually in his hands, and 1|3 out of the further claims as they are realized.[26]

§ 3.—FORENSIC RECOGNITION OF REPRESENTATIVE.

I(A) FORENSIC RECOGNITION necessary for decree on debt.

563. The executor or a legatee under the will of a deceased Muslim, or a person claiming any right to any part of the property of an intestate,[1] may establish his rights as such executor, legatee or claimant, in any Court in India, without production[2] of a probate of the will under which the right is claimed,[3] or letters of administration with the will (if any) or an authentic copy thereof annexed ;[4] but for obtaining a decree or taking execution proceedings for enforcing payment of a debt by a debtor of a deceased person,[5]—forensic recognition[6] in one of the modes laid down in the Indian Succession Act 1925, s. 214 is necessary :[7] without such recognition no Court will pass such a decree or permit such proceedings.

[26] Bail. I. 631 (par. 2) (642); II. 236.

[1] Ind. Succ. Act, XXXIX. of 1925, s. 212(1): no right to any property of person who has died intestate can be established in any Court of justice unless letters of administration have been first granted by Court of competent jurisdiction, but s. 212(2) makes s. 212 inapplicable in case of intestacy of Hindu, Muhammadan, Buddhist, Sikh, Jain or Indian Christian.

[2] Probate or letters of administration are required by Ind. Succ. Act, s. 213(1), to be produced for establishing right as executor or legatee; but s. 213(2) provides that s. 213 shall not apply in the case of wills made by Muslims. *Venkata Subamma* v. *Ramayya*, (1932) 59 I. A. 112, 117 (MAD.) (GRANT OF PROBATE establishes the will as an authenticated will against all world, affords a ready means of proof of its contents, getting rid of multiplication of proofs. Ind. Ev. Act, ss. 41, 91; Succ. Act, 1925, s. 227; Prob. & Ad. Act. s. 12).

[3] But though probate not necessary & therefore every tribunal is competent to adjudicate upon genuineness of alleged will, if probate proceedings are going on, it is proper to adjourn proceedings in which genuineness of will arises pending probate proceedings; *Syed Abdul Alim Abed* v. *Badaruddin Ahmed*, (1923) 28 C. W. N. 295, 299; cf. *Chinnasami* v. *Hariharabadra*, (1893) 16 Mad. 380.

[4] *Sakina* v. *Md. Ishak*, (1910) 37 Cal. 839; (*Shaik*) *Moosa* v. (*Shaik*) *Essa*, (1884) 8 Bom. 244, 265; *Sir Mahomed Yusuf* v. *Hargovandas*, (1922) 24 Bom. L. R. 753 (EXECUTOR MAY SELL IMMOVABLE PROPERTY without obtaining probate & WITHOUT CONSENT OF HEIRS, unless will restricts his powers); *Essafally* v. *Abdeali*, (1920) 45 Bom. 75 (letters of adm. not necessary). See also *Sabju S.* v. *Noordin S.*, (1898) 22 Mad. 139, 141.

[5] This provision is intended for protection of debtors: payment to executor, administrator, etc., gives a discharge to debtor: Ind. Succ. Act, ss. 211, 297, 381, etc. There is nothing to prevent VOLUNTARY PAYMENT by debtor.

[6] FORENSIC RECOGNITION: explained s. 558(6), p. 729.

[7] Succ. Act, 1925, s. 214: see p. 742, com. *Mahamed Ishaq* v. *Sheikh Akramul Haq*, (1907) 12 Cal. W. N. 84 (heirs of wife, apparently through oversight allowed to sue without succession certificate for her *mahr*. Court considered only whether necessary for all heirs to be parties to suit. *Mahr* is a debt within terms of Act); (*Sayad*)

SECTION 563. Succession Act.

Probate is not necessary except that, for suing or taking execution proceedings in order to recover a debt due to the deceased, it is necessary to get some forensic recognition[s] of the right to represent the estate under the Indian Succession Act, XXXIX. of 1925, s. 214.

Indian Succession Act XXXIX. of 1925 Consolidating Act.

Indian Succession Act, 1925, incorporates following Acts : Figures in [ ] = ss. of repealed acts. Figures not in [ ] = ss. of Succ. Act, 1925.

(i) ss. 192-196, 198-210 = SUCC. PROPTY. PROTEC. ACT, XIX., 1841 [1-19];

(ii) s. 1 = IND. SUCC. ACT, X., 1865 [1]; 2 [3]; 3 [332]; 4, 20, 29, 58, 212, 213 [331] ; 5-19 [5-19] ; 21 [44] ; 22 [45] ; 30 [25] ; 32-34 [26-28] ; 36-49 [29-42] ; 35 [43] ; 59-191 [46-178] ; 211 [179] ; 212 [190] ; 213 [187] ; 216 [260] ; 217 [2] ; 219 [200-207] ; 220 [191] ; 221 [192] ; 222 [181-182] ; 223-226 [183-186] ; 227 [183] ; 228 [180] ; 229-235 [193-199] ; 236 [189] ; 237-264 [208-235] ; 265 [235 A] ; 266-271 [236-241] ; 272 [241 A] ; 273 [242] ; 274 [242 A] ; 275-278 [243-246] ; 279 [246 A] ; 280-283 [247-250] ; 284 (1, 2, 3) [251] ; 284(4) sched. V. [252] ; 285 [253] ; 286-288 [253 A-C] ; 289 sched. VI. [254] ; 290-297 [255-262] ; 299-300 [263-264] ; 301-2 [264 A, B] ; 303-307 [265-269] ; 308-309 [269 A, B] ; 310-317 [270-277] ; 318 [277 A] ; 319-323 [278-282] ; 324 (1), (2) [283-284] ; 325-366 [285-326] ; 367 [326 A] ; 368-369 [327-328].

(iii) ss. 50-56, 29 (2), 31 = PARSI INTEST. SUCC. ACT XXI. 1865 [1-7, 8].

(iv) s. 57 & sched. III. = HINDU WILLS ACT. XXI 1870, [2, 3, 6].

(v) ss. 210-369 = PROB. & ADM. ACT V. 1881, [1-147] ; 57 and sched. III. [154] ; 215 [152] ; 217 [150] ; 296 [157] ; 332, 333 (2), 334-337 [148] ; 338 [118] ; 339, 342, 344, 347, 359-9, 361, 263, [148] ; 338 [118] ; 391 [149].

(vi) ss. 265, 272, 276, 278, 284-289, 348 = DIST. DELEG. ACT VI 1881 [1-9].

(vii) s. 263 PROB. ADM. ACT, VI. 1889 [2, 11] ; 276 (1) (d), (e) [3] ; sched. VI., VII. [4] ; 289 sched. VI. [12] ; 290, 291 [5, 6] ; 290 sched. VII. [13] ; 296 [17] ; 307 [14] ; 317 [7, 15] ; 318 [16] ; [18-21] repealed by Acts XII. 1891, XI. 1899, XVII. 1914.]

(viii) ss. 197, 214, 215, 370-390 = SUCC. CERTIF. ACT, VII., 1889 [1-12, 14-28].

(ix) s. 267 = PROB. & ADM. ACT, V., 1890 [1-16] (except as repealed by Act III., 1913).

(x) ss. 2(*d*) 212, 269, 310 proviso = NATIVE CHRIST. ACT, VII. 1901 [1-5].

(xi) ss. 213, 273, 318 = PROB. & ADM. ACT, VIII. 1903 [1-4].

Ahmed S. v. (*Mt.*) *Bunyadi*, (1891) 26 Punj. Rec. 429 (No. 88). See *Shadi Jan* v. *Waris Ali*, (1926) 43 All. 493, = s. 564(2), p. 743, *n.* 12 ; *Raichand* v. *Jivraj*, (1930) 33 Bom. L. R. 1372 (on practice); *Chandra Kishore R.* v. *Prasanna*, (1910) 38 I. A. 7 (CAL.).

[s] Production of evidence of forensic recognition (s. 558(6).) required only for passing decree ; so for. recog. need not be obtained before suit instituted : *Chandra Kishore* v. *Prasanna Kumari*, (1910) 38 I. A. 7 (CAL.); *Shaik Moosa* v. *Shaik Essa*, (1884) 8 Bom. 241, 255 (par. 2). Suit to obtain family property from other members of family does not fall within purview of Act XXVII. of 1860, s. 18, i.e. is not for purpose of recovering debts : in re *Haji Ismail Haji Abdula*, (1880) 6 Bom. 452.

SECTION 563. Admin.-General Act.

Savings Bank Act.

Bombay Regulation VIII.

Holder of certificate accountable : s. 8, suit.

See also (i) ADMIN.-GEN. ACT III. of 1913, s. 37, under which Adm. Gen. is not bound to take out letters of administration of assets in respect of which he grants certificates under s. 31 or 32 ; but he may do so if he revokes certificate (s. 35) or value of estate exceeds Rs. 2,000. (ii) GOVERNMENT SAVINGS BANK Act v. of 1873. (iii) BOM. REG. VIII. of 1827 : preamble (*a*) it is in general desirable that the heirs, executors, or legal administrators of persons deceased should, unless their right is disputed, be allowed to assume the management, or sue for the recovery, of property belonging to the estate without the interference of Courts of justice, it is yet (*b*) in some cases necessary or convenient" [that Courts should be authorized to grant certificates of heirship or administratorship] : under s. 1, "the heir or executor or legal administrator may assume management, or sue for recovery of property," without previous application to Court for formal recognition ; ss. 2-5 provide for recognition of the right as heir or executor or administrator for purpose of rendering it more safe for persons in possession of or indebted to estate to acknowledge and deal with him, and authorize Court to grant certificate of heirship, executorship or administratorship after issue of proclamation and investigation ; s. 7 : *First*—An heir, executor, or administrator holding the proper certificate may do all acts and grant all deeds competent to a legal heir or administrator, may sue and obtain judgment in any Court in that capacity. *Second*—But as certificate confers no right to the property, but only indicates the person who for the time being is in legal management thereof, granting of such certificate shall not finally determine nor injure the rights of any person, and the certificate shall be annulled by the Zilla Court upon proof that another person has preferable right. *Third*—an heir, executor or administrator holding a certificate, shall be accountable for his acts done in that capacity to all persons having an interest in property in the same manner as if no certificate had been granted, s. 8 : refusal to grant certificate does not bar suit. (iv) Under ACT XXVII. of 1860, no debt was recoverable without certificate, s. 2, unless "the Court should have been of opinion that payment of the debt was withheld from fraudulent or vexatious motives, and not from any reasonable doubts as to the party entitled," ss. 3 and 15 : as between Probate and Certificate, with respect to debt specified in certificate, whichever was prior in time was to invalidate the other.

Modes of forensic recognition.

The Ind. Succession Act, 1925, s. 214 enumerates the 5 modes in one of which forensic recognition must be obtained before a Court will pass or execute a decree against a debtor of a deceased person : see s. 558(6), p. 729.

(B.) OBTAINING FORENSIC RECOGNITION.

564. (1) Probate of the will of a Muslim or letters of administration with the will annexed, may be obtained,[9] whether the will is oral or written.[10]

Certificate as to part of debt.

(2) The Allahabad High Court has held that one of

[9] Probate against interest of minor : citation against minor must be served upon duly appointed guardian : *Azimunnisa B.* v. *Ali Khan*, (1928) 29 Bom. L. R. 434.

[10] *Re will of Haji Mahomed Abba, Mariambi* v. *Hasan*, (1898) 24 Bom. 8.

several heirs of a deceased Muslim ought not to be granted a certificate under the Indian Succession Act, XXXIX. of 1925, ss. 214-370,[11] for collection of merely part of a debt due to the deceased.[12] The Calcutta High Court has held that a certificate may be granted to recover a fractional share of a debt which the applicant seeks to recover.[13] SECTION 564.

(3) The texts lay down that a non-Muslim cannot be lawfully appointed an executor of the will of a Muslim ; and if appointed, he must, on an application to the Court be removed,[14] but that, until he is so removed, his acts as executor are valid and effectual :[15] *semble,* the Courts in India will not remove an executor who is a Muslim at the time of his appointment, notwithstanding that he may subsequently have renounced Islam.[16] *Quaere,* whether they will remove or refuse to grant probate to a non-Muslim executor.[17] Non-Muslim executor : probate.

[11] Succ. Act, ss. 214-20 = Succ. Certif. Act VII. of 1889, ss. 2, 4.

[12] *Ghafur K.* v. *Kalandari B.*, (1911) 33 All. 327 (F. B.); *Muhammad Ali K.* v. *Puttan*, (1890) 19 All. 129 ; *Bismilla B.* v. *Tawassul H.*, (1910) 32 All. 335 ; *Sughra B.* v. *Md. Mir K.*, (1920) 43 All. 341 (succession certificate cannot be granted for proportionate part of *mahr*, to which plaintiff entitled as heir of deceased lady to whom *mahr* was due); *Shadi Jan* v. *Waris Ali*, (1921) 43 All. 493 (held succession certificate not required where an heir of wife sues an heir of husband for proportionate share of *mahr* claimable from heir of husband. *Quaere*, was *Gafur Khan's case*, 33 All. 327 distinguishable on ground suggested, viz. that in that case debtor was still alive & was being sued ? *Submitted* material point is not whether debtor living or dead. It is that where creditor dead, deceased's debtor is entitled to receive proper & valid discharge, & for that purpose person claiming to recover debt due to deceased, must obtain forensic recognition of his being deceased's representative so that he can establish right to recover & give valid discharge to debtor. Lindsay, J., said, p. 495 : " We are not dealing here with a claim against the debtor of a deceased person." But Court was in fact dealing with claim of deceased wife against deceased husband : both creditor & debtor having died, claim was against debtor of deceased wife, viz. husband). Cf. *Brajendra Sunder Banerji* v. *Niladrinath*, (1929) 57 Cal. 814 (F. B.).

[13] *Annapurna Dassee* v. *Nalini M. D.*, (1914) 42 Cal. 10 (succession certificate may be granted in respect of portion of debt : " debt " is comprehensive term which should receive liberal construction); *Mohamed Abdul Hossain* v. *Sarifan*, (1911) 16 C. W. N. 231, dissenting from *Ghafur K.* v. *Kalandari B.*, (1911) 33 All. 327 (F. B.); cf. *Ali Buksh* v. *Kareem Beebee*, (1804) 1 Macn. S. D. A. (SEL. REP.) 83.

[14] Executors divided into 3 classes (i) capable, (ii) weak & incapable to whom an assistant should be appointed, (iii) " the third is a profligate, an infidel or a slave, whom it is proper that the Judge should remove, & appoint another in his stead. Bail. I. 665 (676).

[15] Bail. I. 668 (679); II. 248 ; 249. So MINOR remains EXECUTOR until removed : Bail. I. 669 (680).

[16] See Caste Disab. Rem. Act, set out in s. 1 A com., (pp. 32 f.) Shariat Act, 1937, s. 3 set out : s. 6 A, p. 48, *n.* 7.

[17] *Moohummud Ameenoodeen* v. *Moohummud Kubeeroodeen*, (1825) 4 Cal. S. A. 49 ; (see Q. 2 & 3, ans. at pp. 51, 52, 55) = Morl., Dig. I. 251 (No. 109). Cf. *Henry Imlach* v. (*Mt.*) *Zuhoorroonisa*, (1828) 4 Cal. S. D. A. 301, 303 = Morl. Dig. I. 251 (No. 11); appointment of Christian executor held legal act, *per* Leycestor, C. J. & Sealy, J., Smith, second judge, dissenting—parties being Shias (see 4 S. D. A. 302). See s. 565, com.

SECTION 564. Removal of apostate, or non-Muslim or refusing probate.

Under the Indian Succession Act, 1925, s. 221(1), "probate shall be granted only to an executor appointed by the will. Under s. 223, "probate cannot be granted to any person who is a minor or is of unsound mind." No others are excepted from those to whom probate must be granted.[18]

Executor alone can get probate.

A non-Muslim executor has sufficient interest in the will to be entitled to prove it.[19] Where a non-Muslim is sole executor, even if it is held that his appointment is invalid, the Court may, if necessary, grant him letters of administration with the will annexed ; in any event the will cannot be declared to be invalid because, e.g. a Hindu is appointed executor.[19]

(C.) EFFECT OF PROBATE. LETTERS of ADMINISTRATION.

565. The grant of probate of a Muslim's will, or letters of administration to his estate with the will (if any) annexed, establishes conclusively the claim of the executor or administrator to represent the estate[20] as an active trustee as to 1|3 of the property for the purposes of the said will, and as a bare trustee[21] for the heirs as to 2|3 of the property.[22]

Illustration.

A lady died leaving her grandchildren as her heirs. She had, before her death, made various gifts to E, and appointed him executor of her will, in which she confirmed the gifts. Probate of the will was granted to E in 1909, in spite of caveats by the heirs. The heirs meanwhile instituted a suit in 1897, impeaching the gifts and will on the ground of undue influence. *Held*, that probate having been obtained of the will, it established E's claims to 1/3 of the estate for purposes of the will (i.e., as gifts to E) but the gifts to E having been shown to be made under undue influence, their confirmation by the will was effective only as a legacy, and valid only as to 1/3 of the estate, and as to the other 2/3, E was a bare trustee for the heirs.

Probate gives no title.

The executor of a Muslim takes no title as such to the property by virtue of the probate, except under the Indian Succession Act, 1925, ss. 211, 319-323. Hence the effect of probate must be that which is given by the Act itself, neither more nor less.[22]

Persons entitled to represent the deceased. 1.—Executor.

(1) The executor appointed by the deceased has (*a*) the first claim to obtain probate ; if he does not apply for it, the Court may in its discretion appoint (*b*) another, as administrator with the will annexed. In any case, (*c*) the executor is the representative for the purposes of the will, for only 1/3

[18] *Hara C. S.* v. *Doorgamoni*, (1893) 21 Cal. 195 (probate cannot be refused to duly appointed executor unless he is disqualified); following *Smethurst* v. *Tomlin*, (1861) 30 L. J. (PRO.) 269 ; *Re goods of Samson*, (1873) L. R., 3 P. & D. 48 (intention of deceased that that particular person shall have control over his property ; Court will not give another person such control unless armed with general power by legislature); Williams, *Executors*, (1912 ed.) I. 186, (1930 ed.) I. 306.

[19] *Jehan K.* v. *C. K. Mandy*, (1868) 10 W. R. 185 = Beng. L. R. Short Notes of Cases, p. xvi.

[20] *Ramchandra* v. *Ramabai*, (1936) 39 Bom. L. R. 165, 168. Succ. Act XXXIX. of 1925, ss. 273, 276. See table, p. 734.

[21] BARE TRUSTEE, explained : s. 562, p. 737, *n.* 5.

[22] (*Mirza*) *Kurrat-ul-ain* v. (*Nawab*) *Nuzhat-ud-Dowla/Nuzbat-ud-Dowla Abbas Hossein* alias *Peara Saheb*, (1905) 32 I. A. 244 = 33 Cal. 116 (*Nawab Nuzbat*). See s. 562, p. 737.

of the estate ; the rest of the 2/3 becoming vested in him as a bare trustee for the heirs ; (2) the person entitled next after the executor is one to whom letters of administration have been granted under the Indian Succession Act —who may be an heir, legatee or creditor of the deceased ; (3) where there is neither an executor nor administrator, the estate devolves upon the heirs collectively.

SECTION 565.
2.—Administrator.
3.—Heirs.

565 A. A person claiming an interest in the undistributed estate of a deceased Muslim may bring an administration suit for the ascertainment of the estate[23] and of the debts and liabilities relating to it ; for a proper allocation of the debts as between properties (if any) to which different rules of descent apply ;[23] or for an order that accounts be taken or enquiries instituted under the Court's directions either generally or restricted to specific questions ;[24] and for the declaration and delivery of the interests therein to those entitled to them. It is not necessary, though the plaintiff may know what the estate is, to bring a suit for partition.[24]

II. Administration suit : reliefs in.
Accounts.
Partition suit.

[23] *Kazim Ali Khan* v. *Sadiq A. K.*, (1938) 65 I. A. 219, 230, 231, *ll.* 3-5 (beneficiary's right that deceased's estate should be duly ADMINISTERED i.e., cleared of debts & valid legacies, & he should be given his share therein : his suit may take different forms : ADMINISTRATION SUIT : or for PARTITION, or for CONTRIBUTION ; but basis of his claim would be same, viz. to have due administration of estate. This right might also be enforced in a proper case by application for appointment of an ADMINISTRATOR : Succ. Act, 1925, s. 218, 65 I. A. p. 230, *ll.* 5-13 ; proper allocation of debts as between different properties : p. 231, *ll.* 3-5) ; see *n.* 24(viii) on this page.

[24] *Essafali Alibhai* v. *Abdeali*, (1920) 45 Bom. 75. See however (i) *Ismail Abdul Latif* v. *Haji Ibrahim*, (1934) 59 Bom. 397 (on UNNECESSARY ADMINISTRATION SUITS : ADMINISTRATION SUIT justified only if executor not administering properly so that intervention of Court necessary for safeguarding interests of persons beneficially entitled : difference between GENERAL ADMINISTRATION & directions as to specified rights). (ii) *Chandu* v. *Kunhamed*, (1891) 14 Mad. 324 (co-sharer under Muhammadan law has right to specific share in each item of property left by deceased, & may sue to recover that share from any person in possession of that property). (iii) *Zebaishi* v. *Naziruddin Khan*, (1935) 57 All. 445. (iv) Distinguish *Ishrappa* v. *Krishna*, (1922) 46 Bom. 925 (under Hindu law coparcener cannot be said to have particular share in any item of family property ; he has only undivided share in whole of it). (v) See *Narayan Vaijappa Bhandari* v. *Vaman Venkatesh Pai*, (1937) XVI. Bom. Law Journ. 12, 16, 23 (PARTITION & ADMINISTRATION SUITS COMPARED. Whether members of family themselves desire partition : PART. SUITS IN ENGL. : *Mildmay* v. *Quicke*, (1875) 20 Eq. 537 ; *Gilbert* v. *Smith*, (1876) 2 Ch. D. 686 *Sykes* v. *Schofield*, (1880) 14 C. D. 629 ; *Howard* v. *Fulland*, Seton *Judgts. & Orders.* II. 1791 ; ADMIN. SUIT : Daniell's *Chan. Prac.* (8th ed. 1914) I. 916). (vi) *Moideensa Rowther* v. *Muhammad Kasim R.*, (1915) 28 I. C. 895 (on death of Muslim, each heir becomes entitled to definite share of every part of estate : if one heir brings suit for PARTITION OF PART OF ESTATE, other heirs may contend that suit should be converted into one for general administration : so that question what properties formed part of the estate may be determined : but it cannot be contended that suit for partition of the particular property sought to be partitioned by plaintiff is not maintainable ; where defendants contended all along that such a suit was not maintainable at all & only in second appeal objection taken that whole of estate was not before the Court, they were left to bring their own suit for administration). (vii) *Kazim Ali Khan* v. *Sadiq A. K.*, (1938) 65 I. A. 219, 229-232 (decree for *mahr* as debt : contribution in course of administration, see *n.* 23). (viii) *Bajrang Bahadur Singh* v. *Beni Madho B. S.*, (1938) 65 I. A. 314 (OU.) (partition suit & res judicata).

SECTION 565B. III. Executor.

565 B. In appropriate cases the Court may take the administration away wholly or partially from the executor.[24]

§ 4.—LEGAL POSITION OF HEIRS AS REPRESENTATIVES.

I. GENERAL PRINCIPLES : ALTERNATIVES

566. The powers and duties of the heirs of a Muslim, in the absence of an executor or administrator, are subject to the adjective law of India [1] and to justice, equity, and good conscience.[2]

Heirs as representatives : powers : duties.

The Succession Act, 1925 contemplates as legal representatives only executors and administrators : s. 558 above. The heirs are not bound, as executors or administrators are, to postpone the distribution of the estate till all the debts are paid.[3] Decisions after the passing of the Act of 1881 have held that a rateable distribution of the assets is not necessary.[4] But *semble*, fraudulent (or perhaps even undue) preference of one creditor over another will not be countenanced but will be discouraged by the Court. See p. 749.

1. Law applicable when estate devolves on heirs.

2. Parties to suits involving rights or liabilities of deceased.

Strict rule of procedure.

Conflicts of decisions have mainly arisen in cases where neglect, or ignorance or fraud has resulted in a disregard of the facts or rules that (*a*) all the legal representatives of a deceased person must be parties to any transaction based on rights or liabilities arising from his acts ; and that (*b*) in the absence of an executor or administrator, all the heirs together, and not merely one or some of them, can represent the estate though he or they may be in possession and control of it, or of part thereof. The Courts have tried, in cases where these matters have been disregarded, to act so as neither to strain to too great an extent the forms of procedure established for safeguarding the rights of all parties, nor to make these forms themselves engines of oppression. This has not always been easy. Even in England, where the law is less complicated, differences of opinion have occurred.[5] The general principles have been strained to prevent their operating harshly, and the principles themselves have thereby occasionally become obscured.

Conflict of principles.

[1] *Jafri B.* v. *Amir Md. K.*, (1885) 7 All. 822, 841-845 (F. B.).

[2] *Bussunteram* v. *Kamaludin*, (1885) 11 Cal. 21. Cf. *Bissessur L. S.* v. (*Maharaja*) *Luchmessur S.*, (1879) 6 I. A. 233, 238 ("Court will look at SUBSTANCE OF TRANSACTION & will not be disposed to set aside an execution upon mere technical grounds when they find that it is substantially right" ; see ss. 559, 561, pp. 730, 732.

[3] *Pirthi P. S.* v. *Husain J.*, (1882) 4 All. 361 (decision prior to Prob. & Adm. Act, v. of 1881).

[4] (*Haji*) *Saboo Sidick* v. *Ally Md. Jan Md.*, (1904) 30 Bom. 270 ; following *Veerasokarajee* v. *Papiah*, (1902) 26 Mad. 792 (Hindu case). Cf. *Wahidunessa* v. *Shubrattan*, (1870) 6 Beng. L. R. 54 ; Prob. & Adm. Act, 1881, ss. 105, 107, &c. = Succ. Act, ss. 320 ff.

[5] E.g. *Rayner* v. *Koehler*, (1872) 14 Eq. 262 ; *Coote* v. *Whitington*, (1873) 16 Eq. 534 : *Re Dovett, Ambler* v. *Lindsay*, (1876) 3 Ch. D. 198. Malins, V. C. disallowed plea that, true legal representative not being party, suit must be dismissed, not followed *Cary* v. *Hills*, (1872) 15 Eq. 79 (Romilly, M. R.) ; Jessel, M. R. dissented in *Rowsell* v. *Morris*, (1873) 17 Eq. 20. *Penny* v. *Watts*, (1846) 2 Ph. 149 (Lord Cottenham unable to entertain claim, though there was only formal defect, which could not be remedied without incurring additional costs) ; *Dowdeswell* v. *D.*, (1875) 9 Ch. D. 294 (difference between general & limited representation to estate). See s. 565A, p. 745, *n.* 24.

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Questions connected with suits against some only of the deceased's heirs, may initially be grouped under two main heads, with sub-heads :—

I. Representative forensically authorized.

I. Where the legal representative has obtained forensic recognition (s. 558(6).) the executor or administrator must undoubtedly be a party to any suit relating to the rights or liabilities of the deceased. No one else can represent the estate.[6]

II. Where executors without probate or no will, nor letters.

II. Where there is no person forensically authorized to represent the estate,

(1) If there are any executors, they must all act jointly.[7]

A.—Five alternatives where only some heirs sued :

(2) If there are no executors, five alternatives are open : viz. the Court may hold, (i) that all the heirs must necessarily be parties, and that the absence of any of them makes the suit defective and dismissal must follow : (this view has never been acted upon);[8] (ii) that each heir represents the estate to the extent of his share in it, and is responsible for a proportionate part of every liability of the deceased : that therefore each heir may sue and be sued to that extent, but not beyond ;[9] (iii) that any one of the heirs (who is in possession of the estate) may sue[10] and be sued on behalf of himself and of the others : since the law is insistent on the debts of the deceased being paid by and to the heirs ;[11] (iv) that the person in possession of the property of the deceased,

(i)—All must be sued

(ii)—Each represents estate proportionately.

(iii)—Heir (in possession) represents all others.

[6] *Ismail Abdul L.* v. *Haji Ibrahim*, (1934) 59 Bom. 397 = p. 745, *n.* 24(vii).

[7] (*Shaik*) *Moosa* v. (*Shaik*) *Essa*, (1884) 8 Bom. 241, 255, 256. Ind. Succ. Act, 1925, s. 311 (= Prob. & Adm .Act, s. 92) empowers one executor to exercise powers of all, only in cases where probate has been obtained by him (there being no direction in will to contrary) : not where probate not obtained.

[8] Suggested, but rejected by Sargent, C. J., & Candy, J., in *Ambashanker* v. *Sayad A. R.*, (1894) 19 Bom. 273. *Zebaishi Begam* v. *Naziruddin*, (1934) 57 All. 445.

[9] (i) *Jafri Begam* v. *Amir Muhammad Khan*, (1885) 7 All. 822 (F. B.) (Mahmood, J.'s conclusion : learned & elaborate judgment : plaintiff, was deceased's brother & claimed as heir of deceased's parents, who though they were deceased's heirs—see ss. 614, 615—were absent i.e. not parties to suit by deceased's creditors, the suit being only against deceased's other heirs viz. his children : plaintiff " did not prefer any objection in the course of the suit, notwithstanding that he had full knowledge of the same " : 7 All. 824, *l.* 4 from bottom, *held* by Full Bench that (1) estate of intestate Muslim devolves upon his heirs immediately, not contingently on payment of his unpaid debts ; (2) decree for payment of debts of deceased Muslim (in contentious or non-contentious suit) against only such heirs as are in possession of estate, does not bind absent heirs (who are not parties to suit, s. 558(7).), nor convey to auction purchaser in execution of such decree, rights & interests of such heirs ; (3) if, in execution of such decree, property of deceased is sold, absent heirs entitled to recover from auction purchaser possession of their shares in property sold, but only upon payment of proportionate shares of deceased's debt, for which debt decree passed, & in satisfaction whereof sale took place) ; (ii) Sir Geo. Rankin referred to 7 All. 822 with admiration : *Kazim Ali K.* v. *Sadiq A. K.*, (1938) 65 I. A. 219, 232, par. 2 (LUCK.) & as particular application of right to CONTRIBUTION, not depending upon any rule peculiar to Muslim law, but on GENERAL PRINCIPLES OF EQUITY ; see ss. 12, 569, 572, 574, pp. 88, 766, 773, 775 ; (iii) Cf. *Abbas Naskar* v. *Chairman*, (1931) 59 Cal. 691 = *n.* 26 ; (iv) *Zebaishi B.* v. *Naziruddin*, (1934) 57 All. 445 ; (v) See s. 566 A(5), p. 754, *n.* 40 ; (vi) *Shahasaheb* v. *Sadashiv*, (1918) 43 Bom. 575 (= p. 755, *n.* 14).

[10] Cf. " Any one of the heirs of a deceased person stands as litigant on the part of all the others with respect to anything due to or by the deceased " ; Hed. 349. But the Muhammadan law is replaced by Pr. & Adm. Act, 1881, now Succ. Act, 1925 : (*Shaik*) *Moosa* v. (*Sh.*) *Essa*, (1884) 8 Bom. 241. Creditors' suits & administration suits are distinguished in com., pp. 748 ff.

[11] In this view same principle applies to Muslims as to Hindu heir, in possession & management of estate, alienating it for ancestral debts ; (i) first stated with reference to involuntary alienation in execution of a decree : *Davalava* v. *Bhimaji D.*,

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(iv)—Analogy with executor de son tort.

whether stranger, or heir—regarding property in excess of the share to which an heir is lawfully entitled, his possession cannot have materially different effect from that of a stranger—is liable to account for it on the analogy of an executor de son tort : [12] the Succession Act, 1925, ss. 303, 304 (re-enacting ss. 265, 266 of the Act of 1865) reproduce the English law, and govern Muslims not directly but as justice, equity and good conscience : [13] (the English law relating to executors de son tort will be more fully referred to, so that this view may be adequately considered : see below);

(v)—Creditor's suit like administration suit.

(v)' that a suit by a creditor is in the nature of an administration suit,[14] and as such binds the effects of the deceased, and not merely the parties to the suit : (this view is considered below next after the position of executors de son tort has been examined).

B.—Alternative (iv) : executors de son tort : English law.

There is a conflict in England on the question whether an executor de son tort may be sued without joining the proper legal representative ; but in a Calcutta case [12] the decisions which have been dissented from in England were cited and followed, without the conflict being referred to.[15] Were the reasons for which the said decisions are dissented from in England, and the other alternative courses[16] present to the minds of their Lordships in Calcutta ?

a.—He may be sued, but true representative necessary, still—

Lord Cottenham has thus explained the position and liability of an executor de son tort in England. Though a suit may be brought against him for the purpose of charging him, he does not represent the estate,[17] (as the rightful executors or administrators and, in their absence, under Muslim law, the heirs as a body, do). Therefore where a general administration is involved, the presence of the executor de son tort is not sufficient. An allegation that the executor de son tort had received assets sufficient to pay the claim did not,

(1895) 20 Bom. 338, 344 ; (ii) then Mad. H. C. held, that where one of several co-heirs is in possession of entire property, he may meet demand of creditor of deceased by *bona fide* voluntary sale in same manner as he may be sued alone, & property may be put to sale in execution of decree against him : *Pathummabai* v. *Vittil Ummachabai*, (1902) 26 Mad. 734, 739 = s. 567, *ill.* (10). But last decision over-ruled : *Abdul Majeeth* v. *Krishnamachariar*, (1916) 40 Mad. 243, 253 (one heir has no right to deal with shares of other heirs, 255, *ll.* 30-34 cited); *Allisaheb* v. *Sesho*, (1936) 33 Bom. L. R. 1238 (do.).

[12] *Amir Dulhin* v. *Baij Nath Singh*, (1894) 21 Cal. 311, 317, 318. See *n.* 26.

[13] Cf. Civ. Pro. Code, s. 2(11): any PERSON INTERMEDDLING with estate of deceased person included in definition of "LEGAL REPRESENTATIVE" : see *n.* 17.

[14] *Muttyjan* v. *Ahmed Ally*, (1882) 8 Cal. 370 ; *Amir Dulhin* v. *Baij Nath Singh*, (1894) 21 Cal. 311. See (i) cases collected in *n.* 26 ; (ii) *Jafri Begam* v. *Amir Muhammad K.*, (1885) 7 All. 825 (F. B.) (= *n.* 9(i).); (iii) s. 566 A, p, 754, *n.* 40.

[15] The Calcutta judges merely say "it has been held by a Judge of much experience," viz. Malins, V. C. So that perhaps they knew of conflict in England. Jessel, M. R.'s view,—supported as he is by Lord Romilly, M. R.—carries more weight & considered better authority.

[16] E.g. appointment of RECEIVER (*per* Lord Romilly, M. R.) *Cary* v. *Hills*, (1872) 15 Eq. 79.

[17] Result being that, though executor *de son tort* may be sued, he is not the only party necessary to suit for binding successors of deceased in reference to estate. Cf. Civ. Pro. Co. s. 2(11), ss. 50-52 : definition of legal representative includes one who intermeddles in estate, so that adding executor *de son tort* as party would not be misjoinder, but his presence cannot be sufficient. See Civ. Pro. Code, O. 20, r. 13 ; Sched. I., Appx. A, form No. 41 (FORM FOR PLAINT IN ADMINISTRATION SUIT by creditor against person who has possessed himself of property of deceased debtor); & Appx. D, form No. 17, § 13 (form for decree in admn. suit : which provides for enquiry as to heirs-at-law & next of kin). See p. 767, *n.* 14.

the Court explained, enable it to dispense with the presence of the personal representative. Even if the executor de son tort admitted that all the debts and the other legacies had been paid, the Court would not take his word for it.[18] "If, however, a sum had been separated from the mass of the personal estate to answer this legacy, and had got into the hands of the defendants, the Court would decree payment of it to the legatee without involving him in the general accounts of the estate." To this must be added that payments by an executor de son tort are good against the true representatives of the deceased, where the circumstances are such that the creditors might reasonably suppose the executor de son tort to be the true representative,[19] and the act itself was lawful, and one that the true representatives were bound to perform in the due course of administration.[20] In India much greater latitude prevails.

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b.—General administration not always necessary.

c.—Executor de son tort as representative.

Hence where a creditor sues some only of the heirs or other persons who are in possession of the assets of a deceased Muslim, and a decree is passed without objection to the absence of the other heirs, the defendants may to that extent be likened[21] to executors de son tort, and the application of the assets in satisfaction of the decree may, by analogy, be considered in the same light as payments by an executor de son tort of the debts of the deceased: see s. 567(2). There is, however, an important distinction. The texts on Muslim law do not, like English law, require the rateable payment of debts.[22] Consequently a payment on account of a debt, irrespective of its effect upon the other creditors' claims, may be a lawful and due application of the assets, within the meaning of the Code of Civil Procedure, 1908, s. 52. The insistence in England upon the legal representative of the deceased being made a party to a creditor's suit seems to be restricted to cases where a general administration is involved: and a general administration can seldom be required except for securing rateable distribution of the assets amongst the creditors. It would, therefore, seem that the strict rule of English law requiring the presence of the representative on the record, can seldom have application in the case of Muslims. In a case like Penny *v.* Watts,[18] regarding a Muslim's estate, probably the Court would not feel itself bound, as Lord Cottenham did, to order a general administration, against its own inclination.

c.—Creditors' suits and administration suits—

1.—Compared

2.—General administration.

3.—Rateable distribution in Muslim law: not essential.

The proposition that all creditors' suits are in the nature of administration suits, and that consequently in such suits any one heir may bind the whole estate,[23] is insufficent to meet the situations arising out of decrees to which all

4.—Creditors' suits: administration suits.

[18] *Penny* v. *Watts*, (1846) 2 Ph. 149, 152 (arg.) 153, 154. Cf. p. 490, *n.* 8(iv).

[19] Thus COLLUSION between creditor & some heirs, or knowledge by creditor of existence of other heirs, would prevent application of rule. Cf. *Assamathem* v. *Roy Lutchmeeput*, (1878) 4 Cal. 142.

[20] *Thomson* v. *Harding*, (1853) 2 El. & Bl. 630.

[21] *Amir Dulhin* v. *Baij N. S.*, (1894) 21 Cal. 311, 317, 318 (= s. 567, *ill.* (3).).

[22] *Haji Saboo S.* v. *Ally Md. Jan Md.*, (1904) 30 Bom. 270; following *Veerasokkarajee* v. *Papiah*, (1902) 26 Mad. 792; cf. Hed. 699 (Vol. IV. 545): "The depositor has himself the right to seize & carry away his deposit, if he finds it amongst the effects of the deceased, & the creditor has a similar right with regard to his debt." Bail. I. 679.

[23] *Mutty J.* v. *Ahmed A.*, (1882) 8 Cal. 370, s. 567, *ill.* (2); *Amir Dulhin* v. *Baij N. S.*, (1894) 21 Cal. 311 (= s. 567, *ill.* (3).

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heirs are not parties, for the reasons that : (1) such suits are not administration suits,[17] and (2) in administration suits one of several heirs cannot by himself sufficiently represent the estate.[24] The first part of the proposition has not escaped severe criticism. The proposition seems to be mainly based on the fact that in a creditor's suit, as well as in an administration suit, the decree is not personal against the defendants, but against the property belonging to the deceased come to their hands. The distinction between the two suits has elsewhere been closely scrutinized.[25] At the same time all English decisions require in an administration suit the presence of the true representatives of the deceased (i.e. the executor, or administrator, or all the heirs of a Muslim).[17] Lord Cottenham was at pains to show that if administration could have been avoided, the action before him would not have been defective for want of the true representatives,—but he found that administration could not be avoided. There may be, in any particular case, reasons why the Court may not consider it necessary to order general administration.[26] The suggestion that the (mufassal) Courts should assimilate ordinary creditors' suits to administration suits stands on a different footing. It is essentially directed to two objects, (1) an equal and rateable division of the assets amongst all the creditors (where the estate is not solvent), and (2) limiting the liability of the heirs sued to the deceased's property come into their hands, and not duly accounted for : measuring their liability not by their proportionate interests in the estate, but by the unaccounted assets of which they are possessed.[26] The

Assimilating Creditors' suits to administration suits.

[24] *Penny* v. *Watts*, (1846) 2 Ph. 149 ; *Rowsell* v. *Morris*, (1873) 17 Eq. 20 ; *Cary* v. *Hills*, (1872) 15 Ec. 79. See s. 575, pp. 776 f., s. 569, p. 767, *ill.* (2), *n.* 14.

[25] (i) *Jafri B.* v. *Amir Md. K.*, (1885) 7 All. 822, 844-845 (Mahmood, J., referring to form of decrees in administration suits annexed to Civ. Pro. Code, to show distinction : O. XX., r. 1, Schd. I., Appx. D, No. 17-22 ; (ii) *Bhagirthibai* v. *Roshanbi*, (1918) 43 Bom. 412, 422, 432 ; (iii) *Abbas Naskar* v. *Chairman, Dist. Board*, (1931) 59 Cal. 196 ; *Ram Charan* v. *Hanifa K.*, (1932) 54 All. 796 ; (iv) see p. 748, *n.* 17.

[26] (i) *Kishwur Khan* v. *Jewan Khan*, (1799) 1 Macn. Sel. Rep. 33, new ed. S. D. A. (CAL.) 25 (PROCLAMATION issued INVITING CLAIMS) ; (ii) *Muttyjan* v. *Ahmed Ally*, (1882) 8 Cal. 370 = s. 567, *ill.* 2, (goes further : stating decree will bind interest of absent heirs in assets in hand of heirs sued—though no proclamation) ; (iii) *Amir Dulhin* v. *Baij Nath Singh*, (1894) 21 Cal. 311 (= s. 567, *ill.* 3, do.) ; (iv) *Abbas Naskar* v. *Chairman*, (1931) 59 Cal. 691, 694 f. (1.—decree for entire debt, though passed in suit in which only some heirs are sued, is enforceable against all assets in hands of heirs sued : 2.—but held such a decree ought not to be passed unless heirs sued are sued as being in possession of assets not merely for themselves but for whole body of heirs : 3.—decree modified by Court : its amount reduced in proportion to share in estate of heirs sued : see s. 567, p. 754, *n.* 8) ; (v) *Bai Meherbai* v. *Maganchand*, (1904) 29 Bom. 96, 101 (Mufassal Courts enjoined to TREAT CREDITORS' SUITS against deceased's estate AS ADMINISTRATION SUITS, & to insist upon amendment of plaint on that basis : if plaintiff unwilling to amend, & claim proved, decree ought merely to give declarations that debt due & that creditor entitled to satisfaction of decree according to law in due course of admin., not otherwise ; (vi) *Bhagirthibai* v. *Roshanbi*, (1918) 43 Bom. 412, 422, 431, 434 (= p. 759, *n.* 27) ; (vii) *Byramji R.* v. *Heerabai*, (1908) 11 Bom. L. R. 250, 254. (viii) *Mathuradas* v. *Raimal*, (1935) 37 Bom. L. R. 642, 652 ; (ix) *Kissondas Premchand* v. *Jivatlal Pratabshi*, (1935) 38 Bom. L. R. 864, 883 ; (*contra* : criticism suggestive though (1) by single judge against appellate decision in 29 Bom. 101, which would have bound him had the point been material ; (2) decisions i to iv, herein, apparently not brought to notice of learned judge, (3) significance of procedure enjoined in 29 Bom. 101 & followed in I. S. D. A. (CAL.) 33 (25) seem not to be appreciated ; (4) nor realized that (*a*) while matters are still proceeding, Court may guide & direct what procedure should be followed in

course suggested is quicker and less formal than an administration suit : its adoption with due caution when practicable, and when the estate is suspected to be insolvent, seems (with respect) conducive to justice and equity. SECTION 566.

D.—Applicability of Succession Act where heirs represent estate.

Where the heirs are the only legal representatives of a deceased Muslim (viz. where he has not appointed an executor and forensic recognition has not been obtained), it becomes a matter of some importance to consider how far the provisions of the Succession Act, 1925 can take effect,—the application of that Act not having been made conditional on grant of probate or letters of administration, nor even on there being some person[27] who, by his acts, or otherwise, takes the place of an executor or administrator. Where the deceased has left a will and/or appointed executors, the effect of the Act on the rights and liabilities of the parties is generally clear. Most of the provisions of the Act relating to executors, though not all, are such as may be given effect to, irrespective of grant of probate. Where, however, there is no executor nor administrator, and the whole body of heirs represents the deceased, many of the provisions of the Act become inappropriate, if not inapplicable. The creditor may no doubt compel one of the heirs to obtain letters of administration, or failing that obtain them himself : ss. 218, 283. Where this is not done, and where the sections are not so worded as to restrict their applicability to executors or administrators, difficulty may arise in applying them to the body of heirs. Sects. 320 to 323 of the Act may be instanced. Another illustration is furnished by the devolution of the right of pre-emption.[28] The order in which payments are required to be made by the Act may be enforced as against an executor or administrator, but where the heirs themselves administer the estate it may be difficult to do so.[29] But (as Sir George Rankin pointed out recently), because under Muslim law there is no remedy, it by no means follows that a Court in India would not afford a remedy.[30]

1.—Difficulty of applying Probate Act to such heirs.

2.—Distribution of assets not necessarily rateable.

Where one of the heirs is in possession (whether it is a widow in lieu of mahr, or other heir) acquisitions out of funds of the estate will be considered as accretions to the estate.[31]

566A. (1) The Indian Limitation Act, 1908, art. 123, applies only to suits for recovering property as a legacy or a

II. Limitation Act, art. 123.

interest of justice (not for displaying learning & acumen of the Judge)—which is different from (*b*) Court determining effect upon rights & liabilities of parties, resulting from less suitable (perhaps wrong) procedure, actually adopted ; (5) questions though elaborately discussed, did not arise before learned Judge & his observations are therefore *obiter* ; (x) see s. 566A, p. 754, *n.* 40 ; (xi) s. 569, *ill.* (2), p. 767, *n.* 14.

27 E.g. an executor *de son tort*. 28 See s. 532, com.

29 (*Haji*) *Saboo S.* v. *Ally Md. J. M.*, (1904) 30 Bom. 270 (no necessity for heirs to DISTRIBUTE ASSETS RATEABLY amongst creditors). See s. 750, *n.* 5. Heirs may distribute estate amongst themselves notwithstanding the circumstance that small debt due : *Pirthi P. S.* v. *Hussaini J.*, (1882) 4 All. 361 ; *Ram Charan* v. *Hanifa K.*, (1932) 54 All. 796, 799. See also *Jafri Begam* v. *Amir Md. Khan*, (1885) 7 All. 822 ; *Amir Dulhin* v. *Baij N. S.*, (1894) 21 Cal. 311 : (*Syud*) *Imdad Hossein* v. (*Mt.*) *Hosseinee B.*, (1870) 2 N. W. 327. *Bussunteram* v. *Kamaludin*, (1885) 11 Cal. 421, 428 (where ESTATE COMPLETELY INVOLVED IN DEBT, heirs cannot take estate, nor is division then allowed before debts discharged).

30 *Kazim Ali K.* v. *Sadiq A. K.*, (1938) 65 I. A. 219, reversing 9 Luck. 701.

31 *Bakreedan* v. *Ummat-ul- F.*, (1905) 3 C. L. J. 541.

SECTION 566A. distributive share [33] from an executor or administrator or some person legally charged with [34] the duty of distributing the estate or in some method administering it.[35]

Members of a family living together : art. 144.

(2) Where members of a Muslim family continue to live as tenants in common,[36] limitation does not run under art. 123, from the time of the death of the deceased, but under art. 144, from the time when the possession of the defendants becomes adverse to the plaintiff.[37]

[33] DISTRIBUTION has special meaning : it is applied to division of personal (movable) estate of intestate : *Nurdin Najbudin* v. *Bu Umrao*, (1920) 45 Bom. 519, 522, approved, *Ghulam Muhammad* v. *Ghulam Husain*, (1931) 59 I. A. 74, 90 ; *Rustam Khan* v. *Janki*, (1928) 51 All. 101 (F. B.). Art. 123 " [suit] for a legacy or for a share of a residue bequeathed by a testator or for a distributive share of the property of an intestate " : twelve years, from " when the share or legacy becomes payable or deliverable."

[34] *Venkatadri Appa Rao* v. *Parthasarathi Appa Rao*, (1925) 52 I. A. 214 = 48 Mad. 312 (perfect STRANGER INTERMEDDLING WITH ESTATE of intestate might be treated as executor *de son tort* & held liable) ; *Rustam Khan* v. *Janki*, (1928) 51 All. 101, 113 (F. B.).

[35] *Ghulam Muhammad* v. *Ghulam Husain*, (1931) 59 I. A. 74, 88-89. Observations in *Maung Tun Tha* v. *Ma Thit*, (1916) 44 I. A. 42, 46, that Burmese son's right to share in his father's estate must be asserted within the period fixed by art. 123, does not overrule the previous decisions of Indian Courts ; (apparently the law in Burma is special), see *Rustam Khan* v. *Janki*, (1928) 51 All. 101, 104. *Issur Chunder Doss* v. *Juggut Chunder Shaha*, (1882) 9 Cal. 79 (suit for recovery of movable property by purchaser from A, legal representative, who had been granted succession certificate, barred after wrongful possession by stranger for three years : 19th Aug. 1873, Succ. Certificate granted to A & deft. ordered to deliver up movable property to A ; 21st Aug. 1875, A sells property to plaintiff ; plaintiff brings suit on 22 Mar. 78 for possession : suit held barred being for SPECIFIC MOVABLE PROPERTY to which art. 49 applied) ; *Keshav Jagannath* v. *Narayn Sakharam*, (1889) 14 Bom. 236, (certif. of administration under Reg. VIII. of 1927, s. 7(2) confers only right of MANAGEMENT & does not constitute representative of estate for DISTRIBUTING it amongst co-sharers) ; *Umardaraz Ali Khan* v. *Wilayat Ali K.*, (1896) 19 All. 169 (suit against widow by other heirs to recover part of mortgage debt recovered by her ; art. 120 applies) ; *Khadesa Hajee Bappu* v. *Puthen Veettil Ayissa Ummah*, (1910) 34 Mad 511 (F. B.) ; *Mahomed Riasat Ali* v. (*Mt.*) *Hasin B.*, (1893) 20 I. A. 155 (widow's suit to recover cash & movables of her husband as his heir is not suit for SPECIFIC MOVABLE property & not governed by art. 49 nor art. 123, but by art. 120) ; *Bashirunnissa* v. *Abdul Rahman*, (1921) 44 All. 244 ; (*Saiyad*) *Jaffar El-Edroos* v. *Saiyad Mahomed E. E.*, (1936) 39 Bom. L. R. 277 (claim for share in *muglai haq* : art. 120 applied).

[36] *Amrit Bibi* v. *Mustafa Husain & Manzur H.*, (1923) 46 All. 28, 30 (par. 3) (same principle applied as to deposits in Banks : two ladies living jointly & amicably : possession of one held possession of other). (*Raja*) *Mohammad Mumtaz A. K.*, v. *Mohan Singh*, (1923) 21 All. L. J. 757 (P. C.) (OU.) (*per* Lord Salvesen, J., see *n.* 37) ; *Kovummal Ammad* v. *Aranyadan A.*, (1936) 71 M. L. J. 145.

[37] *Rustam Khan* v. *Janki*, (1928) 51 All. 101 ; *Kallangowda* v. *Bibishaya*, (1920) 44 Bom. 943 (time begins to run against one TENANT-IN-COMMON when the other does some act, effect of which is either to EXCLUDE his co-tenant from joint property or to deny his right to share), followed *Nurdin Najbudin* v. *Bu Umrao*, (1920) 45 Bom. 519 ; *Bai Jivi* v. *Bai Bibanboo*, (1928) 31 Bom. L. R. 199 (possession must be asserted as being exclusive to knowledge of excluded co-sharer) ; *Abdul Kadir* v. *Aishamma*, (1892) 16 Mad. 61 (F. B.) (time runs from date of exclusion or dispossession & not from date when shares became deliverable on death of person to whom property originally belonged) ; *Mubarakunnissa* v. *Md. Raza K.*, (1924) 46 All. 377 (Transfer of Prop. Act, s. 41) ; *Shamim Ahmad* v. *Hesam-ul Haq*, [1930] 28 All. L. J. 1456 (many co-heirs : transfers in government records, granting of leases, do not amount to adverse possession or OUSTER) ; (*Mt.*) *Ahmad Bibi* v. *Shamas Din*, (1928) 10 Lah. 842 (possession never considered adverse if it can be referred to lawful title) ; *Thomas*

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(3) Article 127 does not apply to Muslims who are not proved to have adopted by custom Hindu joint family law.[38] Hindu joint family law : art. 127.

(4) Where one of the partners in a firm dies, his right to claim an account and a share of the profits of the partnership devolves on his heirs as joint claimants. Where a Muslim, having mortgaged his property dies, the equity of redemption devolves jointly upon all his heirs. The claims of the heirs and the cause of action based on the rights of claiming an account of the partnership and redeeming the mortgage are respectively one and indivisible, not separate and distinct. It is not competent for any of the heirs without the concurrence of the rest to discharge or release the surviving partners, or give them a discharge in respect of the claims or cause of action of redemption ;[37] consequently so long as one of the heirs of the deceased partner is a minor, a suit to enforce the said rights is not barred.[39] Joint rights in : (i) equity of redemption (ii) partnership.

(5) If part of the estate of a deceased person is alienated by some only of his heirs without authority from the other heirs to act on their behalf, such of the other heirs, as were Alienation by some heirs.

v. *T.*, (1855) 2 K. & J. 79 (co-heirs in possession are tenants-in-common : entry & possession of one must, in absence of EXPRESS OUSTER or DENIAL OF TITLE, be deemed to be on behalf of all); *Muhammad Bakhsh* v. *Fateh Muhammad*, (1929) 10 Lah. 849 ; (*Mt.*) *Jano* v. *Narsingh Das*, (1929) 11 Lah. 29 (nothing short of OUSTER makes co-owner's possession adverse); *Ma Bi* v. *Ma Khatoon*, (1929) 7 Rang. 744 (= *n.* 38); *Alla Pichai Rowthan* v. *Pappathiammal*, (1918) 36 M. L. J. 184 (for limitation, cause of action of heirs not joint); cf. *Saroothana Row* v. *Chinnasami Pillai*, *ib.* 157 ; *Muraduddin* v. (*Mt.*) *Umraobi*, [1933] AIR (NAG.) 27 (ADVERSE POSSESSION held proved); (*Mt.*) *Zainab* v. *Ghulam Rasul*, (1923) 4 Lah. 402 (barred after 12 years); *Shukrullah* v. *Zohra B.*, (1932) 54 All. 916 (case of Muslims living in COMMENSALITY : general observations). *Jamilunnissa* v. *Muhammad Zia*, [1937] (ALL.) 609 (INJUNCTION AGAINST act that would amount to OUSTER); (*Raja*) *MohammadMumtaz Ali K.* v. *Mohan Singh*, (1923) 21 All. L. J. 757 (P. C.) (OU.) (mere assertion in judicial proceedings by tenant or permissive occupier of rights which he does not possess does not make declaratory suit necessary); *Muhammad Azim* v. *Muhammad Saadat Ali*, [1931] AIR (OU.) 177.

[38] *Isap Ahmed Mograria* v. *Abhramji Ahmadji*, (1917) 41 Bom. 588, (F. B.) (art. 127 governs suit to enforce right to share in joint family property : period of limitation, 12 years from time when EXCLUSION becomes KNOWN TO PLAINTIFF). *Khwaja Afzal* v. *Mohammad*, [1936] AIR (NAG.) 214 ; *Ma Bi* v. *Ma Khatoon*, (1929) 7 Rang. 744 (art. 144 applicable to suit by co-owner dispossessed by another co-owner : not art. 123) distinguishing *Maung Tun Tha* v. *Ma Thit*, (1916) 44 I. A. 42.

[39] (i) *Ahinsa B.* v. *Abdul Khadir*, (1901) 25 Mad. 26 (claims of heirs not separate & distinct : p. 32, *l.* 11 : cause of action is one & indivisible : 35 bottom, 38, 41, *ll.* 4-5 : one heir cannot give discharge, 38 par. 2); (ii) *Gulam Goss* v. *Shriram P.*, (1918) 43 Bom. 487 (suit to redeem mortgaged property is indivisible &, if brought within 3 years of date when youngest plaintiff attains majority, is in time ; Ind. Limit. Act, s. 7); *Bolton* v. *Salmon*, [1891] 2 Ch. 48, 52 ; *Cholmondeley* v. *Clinton*, (1820) 2 J. & W. 134 ; Shah, J., added : "even treating possession of the mortgagee & his transferee as the possession of a purchaser...the result would be the same" : 43 Bom. 487 ; (iii) see also *Amir Dulhin* v. *Baijnath S.*, (1894) 21 Cal. 311, 315 ; (iv) *Jafri Begam* v. *Amir Muhammad Khan*, (1885) 7 All. 822, 842.

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minors at the time of the alienation, may sue for recovery of possession within 12 years from the date of the alienation or within three years from attainment of majority, whichever may be the later date.[40]

III. SUITS TO WHICH SOME BUT NOT ALL HEIRS ARE PARTIES.

567. (1) Where there is no executor or administrator of a deceased Muslim, if his creditor brings a suit[1] to which some but not all his heirs are made parties[2] the suit is not defective for non-joinder of the absent heirs (see s. 558(7).) as defendants ;[3] [provided that according to some decisions or dicta, the heirs sued must be in possession of the whole[4] of the estate].[5]

Decrees in suits to which all heirs are not parties.

(2) Where the heirs sued (i) are sued in their representative capacity,[6] (ii) are in possession of property left by the deceased,[7] (iii) have so acted that the creditor might reasonably suppose them to be rightfully representing the whole interest of the deceased in the said property,[8] and (iv) the debt or liability is such that the absent heirs are also bound propor-

[40] *Laloo Karikar* v. *Jagat Chandra Saha,* (1920) 25 C. W. N. 258 (decree for possession conditionally on REPAYMENT OF PROPORTIONAL part of ancestral debt out of assets); *Habiba* v. *Swa Kyan* [1937] Rang. 322 (similar order not made : such rule never having been put in force in Burma against representative of Burman Buddhist). See s. 566, *nn.* 9, 14 ; *Hamir S.* v. *Zakia,* (1875) 1 All. 57 (F. B.) = s. 567, *ill.* (7).

[1] Sect. 567 deals with SUIT BY CREDITOR to recover his debt ; s. 566 A with suit by HEIR to obtain his share in estate.

[2] See s. 558(7), as to "heirs sued," & "absent heirs."

[3] *Ambashankar H.* v. *Sayad Ali R.,* (1894) 19 Bom. 273, Sergeant, C. J., & Candy, J., refer lower Court to *Bussunteram* v. *Kamaluddin,* (1885) 11 Cal. 421 ; & *Pirthi P. S.* v. *Hussaini J.,* (1882) 4 All. 361 ; *Virchand Vajikaranshet* v. *Kondu,* (1915) 39 Bom. 729 (mortgagee sued son of mortgagor whose widow & two daughters were added after suit barred against them : yet suit decreed against all defendants); *Zebaishi* v. *Naziruddin K.,* (1934) 57 All. 445. See also *Ram Charan L.* v. *Hanifa K.,* (1932) 54 All. 796.

[4] Forms in Civ. Pro. Code (cited s. 566, p. 748, *n.* 17) referring to administration & creditors' suits, do not require that defendants should be in possession of whole property of deceased.

[5] See p. 756, *n.* 19 ; s. 567(2), p. 762 ff. ; s. 561, p. 733, *ill.* (3); s. 566, com., pp. 747 ff.

[6] In Hindu case said that where absent heirs are minors, it strengthens conclusion that those that are sued, are sued in their representative capacity—*per* Sargent, C. J. & Haridas, J. : *Jairam Bajabashet* v. *Joma Kondi,* (1896) 11 Bom. 361, 365 ; this hardly applies to Muslims. See s. 573, p. 773.

[7] See s. 567, *ill.* (1)-(4). Their POSSESSION of property said to make their position analogous to that of executor *de son tort* : *Amir D.* v. *Baij N. S.,* (1894) 21 Cal. 311 ; Ind. Success. Act, 1925, ss. 303, 304 = Act X. of 1865, ss. 265, 266 & Parke, B., in Ct. of Exch. in *Buckley* v. *Barber,* (1851) 6 Exch. Rep. 164, 183. See *n.* 8 (next following *n.*)

[8] *Abbas Naskar* v. *Chairman,* (1931) 59 Cal. 691, 696 (= s. 566, p. 750, *n.* 26(iv).) held that heirs must be in POSSESSION not merely for themselves but on BEHALF OF ALL ; so as to be bound to account for estate to the rest—principle not applicable where all heirs are made parties, as being each in possession of his own share of inheritance only. *Pandit Krishna* v. *(Mt.) Ahmadi,* (1935) 11 Luck. 199 (universal donee, who by condition of gift, took place of heirs in regard to payment of debts).

tionately to satisfy it,[9] then (subject to the right of the absent heirs to impeach the decree under s. 569) different views have been taken by the Courts, as to the form in which the decree ought to be passed and the effect that it ought to have.[10] SECTION 567.

(*a*) The High Court of Calcutta, the earlier decisions of Bombay and Rangoon,[11] and one decision [11] of the Lahore High Court hold that a decree may be passed for payment or satisfaction of the debt out of the whole of the deceased's assets in the possession of the heirs sued,[12] so as to bind also the interests therein of the absent heirs ; [12] provided that if the heirs sued are not sued in their representative capacity, or they have not acted as above referred to, or for any other reason it is more equitable so to order, (i) the whole of the claim may be ordered to be satisfied out of the shares in the estate of the heirs sued ; [13] or (ii) the heirs sued may be ordered to pay only parts of the debt proportionate to their respective shares in the estate.[13] The later decisions of the Bombay [14] [Calcutta] [15] and Rangoon [16] High Courts hold that the heirs sued do not represent absent heirs, and follow the Allahabad decisions [17] mentioned in s. 567(2) (*b*). (*a*) Calcutta Bombay, Rangoon Lahore decisions.

(*b*) The High Court of Allahabad,[17] the Chief Court of Oudh [18] and the later decisions of the Bombay [14] [Calcutta] [15] (*b*) Allahabad Oudh, Rangoon decisions.

[9] *Thomson* v. *Harding*, (1853) 2 El. & Bl. 630.

[10] Sects. 567 & 569 are complementary & must be read together. Court &/or plaintiff may not be aware that deceased left other heirs than those sued.

[11] *Meherunnessa* v. *Pereira*, (1920) 10 L. B. R. 389 (the report is not available to me : but this case seems to have followed earlier Calcutta & Bombay decisions) ; see *Habiba* v. *Swa Kyan*, [1937] Rang. 322.

[12] Cf. s. 567, *ill.* (1)-(4), p. 758. [13] Cf. s. 567, *ill.* (1), p. 758.

[14] *Bhagirthibai* v. *Roshanbi*, (1918) 43 Bom. 412 (well considered, strong judgments, in which *Khurshetbibi* v. *Keso V.*, (1887) 12 Bom. 101 ; *Devalawa* v. *Bhimaji*, (1895) 20 Bom. 338 are not followed) ; 43 Bom. 412 is followed in *Lala Miya* v. *Manubibi*, (1923) 47 Bom. 712. *Shahasaheb* v. *Sadasiv*, (1918) 43 Bom. 575, 581 (NON-JOINDER not fatal).

[15] *Sukur Md.* v. *Asmot M.*, (1923) 50 Cal. 978 (sale by two sons to satisfy mortgage decree in suit against all heirs—third son, three daughters, & widow, i.e. defendants 4-8 absent, & not parties to sale, "*Assamathemnessa's* & *Mutty Jan's* cases which may require reconsideration when a proper occasion arises," distinguished ; those cases assumed representation by some heirs in alienating ancestral property for the benefit of all) ; & see *Abbas Naskar* v. *Chairman Dt. Bd. 24 Perg.*, (1931) 59 Cal. 691, 694-696 (= s. 566, com., p. 750, *n.* 26(iv).).

[16] *Habiba* v. *Swa Kyan*, [1937] Rang. 322, 324 ("TREND except in Calcutta wholly in direction that ABSENT HEIRS NOT BOUND by proceedings" : authorities reviewed) ; *Jafri B.* v. *Amir Md. K.*, (1885) 7 All. 822 ; & *Bhagirthibai* v. *Roshanbi*, (1918) 43 Bom. 412 referred to as "leading cases" : *Meherunessa* v. *Pereira*, (1920) 10 L. B. R. 389 dissented from,

[17] Cf. s, 567, *ill.* (7), (9) ; *Manni Gir* v. *Amar Jati*, (1936) 58 All. 594.

[18] *Amir Jahan* v. *Khadim Husain*, [1913] AIR (OU.) 253 ; *Sakina Begum* v. *Shahar Banoo B.*, (1935) 10 Luck. 443.

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and Rangoon [16] High Courts hold that a decree so passed does not bind the absent heirs, and that the auction purchaser in execution of a decree against the heirs sued does not acquire the rights and interests in the property of the absent heirs.

(c) Madras decision.

(c) The High Court of Madras has held that where the heirs sued are in possession of all the effects of the deceased —but not otherwise—a decree may be passed binding also on the absent heirs.[19]

(d) Privy Council decisions. Estate represented where :

(3) The Court has a wide discretion [20] in allowing the estate of a deceased debtor to be represented [20] by one member of the family ; [21] and the mere fact that some heirs were absent

[19] *Pathummabai* v. *Vittil U.*, (1902) 26 Mad. 734 = s. 567, *ill.* (10), p. 761 ; *Abdul Majeeth* v. *Krishnamachariar*, (1916) 40 Mad. 243, 249, 256 (provision of Muslim law that decree against one heir in POSSESSION OF ALL EFFECTS of deceased is binding on all heirs if obtained after contest, is part of processual law—not based on ground that single heir if in possession of estate represents rest of heirs for purposes of administration generally) ; *Habiba* v. *Swa Kyan.* [1937] Rang. L. R. 322. *Davalava* v. *Bhimaji D.*, (1895) 20 Bom. 338, 345 states incidentally : "The creditor can seek his relief against one of several heirs in a case where ALL THE EFFECTS ARE in the hands of that heir." But in *Ambashankar* v. (*Sayad*) *Ali R.*, (1894) 19 Bom. 273, where question arose more definitely, no mention made of the point, Court seemed to be inclined to follow Calc. view, though for different reasons. In *Amir D.* v. *Baij Nath S.*, (1894) 21 Cal. 313 (= s. 567, *ill.* (3), p. 759, *nn.* 29, 31, failure to prove EXCLUSIVE POSSESSION of all assets, held not to involve failure to establish representative capacity, p. 315 : heir's liability to be measured not by extent of interest in estate, but by assets come into his hands, not disbursed duly in discharge of liabilities to which estate subject at death of propositus, p. 318).

[20] DISCRETION OF COURT under s. 567(3) is to allow one member of family (heir sued) to represent absent members : not to pass decree against persons neither parties to suit nor properly represented. *Bhagirthibai* v. *Roshanbi*, (1918) 43 Bom. 412, 425 (representation in regard to joint Hindu family is on totally different basis from representation amongst Muslim heirs). Cf. *Sukur Md.* v. *Asmot M.*, (1923) 50 Cal. 978 ; *Abbas Naskar* v. *Chairman Dt. Bd.* 24 *Perg.*, (1931) 59 Cal. 691, 696.

[21] *Khiarajmal* v. *Daim*, (1904) 32 I. A. 23, 35 (CAL.), Lord Davey said : "The Indian Courts have properly exercised a wide DISCRETION in allowing the ESTATE of a deceased debtor to be REPRESENTED BY ONE MEMBER of the family, & in refusing to DISTURB JUDICIAL SALES on the mere ground that some members of the family who were minors not made parties to the proceedings, if it appears that there was a debt justly due from the deceased & no prejudice is shown to the absent minors. But these are usually cases where the person named as defendant is de facto manager of a Hindu family property, or has assets out of which the decree is to be satisfied under his control." Then after holding that in suits in question deceased was not REPRESENTED IN LAW OR IN FACT, & that sale of his property therefore was without jurisdiction, null & void, & that even share of person on the record as defendant not bound by the sales because he was minor & not properly represented by any authorized person, this part of judgment concludes : "It is NOT A QUESTION OF FORM but one of substance. In coming to this conclusion their Lordships are quite sensible of the IMPORTANCE OF UPHOLDING THE TITLE OF PERSONS WHO BUY UNDER A JUDICIAL SALE, but in the present case the real purchaser was the judgment-creditor, who must be held to have had notice of all the facts." Earlier, same judgment said, 32 I. A. 33 = 32 Cal. 314, 315 : "Their Lordships agree that the sales cannot be treated as void or now be avoided on the grounds of any MERE IRREGULARITIES OF PROCEDURE in obtaining the decrees or in the execution of them. But on the other hand the Court had no jurisdiction to sell the property of persons who were not PARTIES to the proceedings OR PROPERLY REPRESENTED on the record. As against such persons the decrees & sales purporting to be made would be a nullity & might be disregarded without any proceedings to set them aside. If authority be desired for these elementary propositions it may be found in the judgment of Sir Barnes Peacock in *Kishen*

(i.e. not parties to the suit) is not enough to set aside a judicial sale : especially where,—(i) the debt was justly due from the deceased ; (ii) the absent heirs were minors ; and (iii) are not prejudiced by being absent ; (iv) the heir named as defendant was de facto manager, or had under his control assets out of which the decree is to be satisfied ;[21] and (v) the purchaser was led into the belief when he purchased the interest of the judgment-debtor, that he was purchasing the whole estate,[22] —in such cases judicial sales will not be disturbed on the grounds of any mere irregularities[23] of procedure in obtaining the decrees, or in the execution of them.[24]

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(i) absent heirs minors,
(ii) debt is justly due,
(iii) no prejudice,
(iv) defendant is manager, or
(v) has assets.

Chunder Ghose v. *Ashoorun*, (1883) 1 Marsh. 647." (= *n.* 22). Indian Courts recently have tended to hold rigidly that absent heirs (s. 558(7).) ought not to be bound : *Habiba* v. *Swa Kyan*, [1937] Rang. 322, 325, (= *n.* 16). Cf. *nn.* 22, 24. Point may still arise where (i) suit brought honestly, (ii) steps mentioned in s. 567(3), (4), carefully taken, (iii) liability of deceased fairly established, & (iv) all proceedings taken in good faith.

[22] *Kishen Chundra Ghose* v. (*Mt.*) *Ashoorun*, (1863) 1 Marsh. 647, 648, (*l.* 7) (if absent heirs prejudiced, though purchasers misled by heirs sued, that fact cannot prejudice those whose property purported to be dealt with in their absence : " in sale in execution of decree no property can be sold except that which belongs to defendants in suit—this consistent with reason & justice because if person although he has joint claim against two, chooses to elect one as his debtor & sues that one alone he can recover against that one person alone "). This case proceeds on two S. D. A. judgments referred to below & is cited & approved in *Khiarajmal* v. *Daim*, (1904) 32 I. A. 23, 33 (= *n.* 21) ; *Baboo Mohabeer Purshad Singh*, for self & guardian of *Baboo Nundesuree Purshad Singh* v. *Choonee Lall & others*, S. D. A. 1860, p. 280 & " a decision of 18th Dec. 1861, reported at pp. 191, 193, of the Sudder Decisions of that year in which it was held that at a sale under a decree the rights & interests of the defendant in the suit were alone sold."

[23] Thus *Bissessur L. S.* v. *Maharaja Luchmessur*, (1879) 6 I. A. 233, 237 (IRREGULARITY in drawing up DECREE) ; *Bai Meherbai* v. *Maganchand*, (1904) 29 Bom. 96, 100 (judgment creditor instead of asking for rateable DISTRIBUTION under Ind. Succ. Act, s. 282 (now = s. 322), executed it under Civ. Pro. Code, s. 257 A, now repealed).

[24] *Malkarjun* v. *Narhari*, (1900) 27 I. A. 216 = 25 Bom. 377 (important : see *nn.* 21, 22, 24 : per Lord Hobhouse : summary : If judgment debtor dies before full execution of decree, creditor may apply for EXECUTION AGAINST his LEGAL REPRESENTATIVE : Court therefore has jurisdiction either to revise such application or reject it as defective, or to order some further proceeding. If there is dispute whether (i) person proceeded against is or is not heir, or (ii) whether property had or had not devolved upon heir, it is for Court to determine such matters for purpose of execution. (iii) If it is found impossible to discover WHETHER ANY REPRESENTATIVE OF DECEASED IS IN EXISTENCE, it is for Court to say what step should be taken : all these matters, which might involve questions of nicety, are for Court to decide, jurisdiction is not lost if form of application is open to exception. Code requires Court to issue notice to party against whom execution applied for. If notice issued against person who objects that he is not right person, Court has jurisdiction to decide whether he is right person ; if Court decides wrongly, wronged party can only take course prescribed by law for setting matters right ; & if that course not taken, decision, however wrong, stands. If Court serves notice on person who does not represent estate, & on objection, erroneously decides that he does represent it, Court's error does not destroy its jurisdiction. A purchaser in Court sale cannot possibly judge of such matters even if he knows facts. He is not bound to enquire into accuracy of Court's conduct of its own business ; otherwise no purchaser at Court sale would be safe. Strangers to suit are justified in believing that Court has done that, which by directions of Court, (*sic* : Code ?), it ought to do. Case, where (*a*) debtor's estate is not made subject to decree of Court, (*b*) liability has not been established, & (*c*) process of execution has

SECTION 567. Mere irregularities in execution excused if estate liable.

(4) [25] If it is established that the deceased and his estate are liable in respect of a debt due by him and a decree is passed accordingly, then any irregularity taking place in executing the decree may be set right by proceedings under the Code of Civil Procedure, 1908, O. 21, r. 90: subject to such proceedings, the position of an innocent Court purchaser in good faith may become immune from attack in spite of irregularities during execution.[25]

But Court cannot sell property of persons not represented.

Explanation.—No such liability can be established where the Court has no jurisdiction to sell the property in question : [21] as where the owner of the property is neither party to the suit, nor represented on the record, [nor—*quaere*—allowed to be represented under the discretion herein referred to].[20]

Illustrations.

Ambashankar *v.* Sayad. 19 Bom. 378.

(1) A Muslim dies leaving a widow and a son, as his heirs. A creditor of the deceased brings a suit against the son alone, who, at the hearing admits the claim, but points out that the widow should also be a party : but she cannot be added as a party, the suit against her being barred by limitation. *Held*, the son can be sued alone without adding the absent heir as a party, and her SHARE in the estate will be BOUND TO PAY A PROPORTIONATE part of the debt. The estate not having been distributed, the Court observes that a question might arise whether the son's share in the estate is bound to pay not merely a share proportionate to his interest in the estate, but the whole debt.[26]

Muttyjan *v.* Ahmad A., (1882) 8 Cal. 370.

(2) A Muslim dies, leaving three heirs surviving. The estate is in the possession of two of them, who are sued by the creditors of the deceased. In execution of the decrees passed against the two heirs in possession, the deceased's property is sold. The absent heir then sues to set aside the decrees on the ground of fraud, which she is unable to prove. *Held*, that the absent heir is bound by the decree, though she was not a party to the suit in which it

nothing to rest upon, is quite different from case where (A) Court has by its decree established debtor's liability & (B) is in process of working it out against his estate. Cases also different where proceedings taken under O. 21, r. 90 (Code of 1882, s. 311), or by independent suit within year allowed for setting aside sales in such cases : necessity for DISTINGUISHING BETWEEN IRREGULARITY & NULLITY does not arise & general assertions of invalidity are quite appropriate to such cases) ; *Rewa Mahton* v. *Ram Kishen*, (1886) 13 I. A. 106, 111 (CAL.) (execution purchaser not bound to enquire into correctness of order for execution, any more than into correctness of judgment on which execution issues) ; *Akoba* v. *Sakharam*, (1887) 12 Bom. 101 (where minor son substantially before Court, proceedings showing clear intention on part of Court making decree to bind entire estate which was subject to debt, no technical or formal objection to prevail against giving full effect to decree) : *Kishen C. G.* v. *Ashoorun*, (1863) 1 Marsh. 647.

[25] Sub-ss. (3) & (4) somewhat overlap each other, but it is thought desirable to set out effect of Privy Council rulings in full. See also *Bhagirthibai* v. *Roshanbi*, (1918) 43 Bom. 412, 421, 424 ; *Sukur Mahomed* v. *Asmat Mandal*, (1923) 50 Cal. 978. Cf. s. 567, *ill.* (3), (4).

[26] *Ambasankar* v. *Sayad Ali*, (1894) 19 Bom. 273 : s. 588(7) : referred to in *Bhagirthibai* v. *Roshanbi*, (1918) 43 Bom. 412, 429 ; *Khurshetbibi* v. *Keso Vinayak*, (1887) 12 Bom. 101 not followed.

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was passed : all creditors' suits are in the nature of administration suits : *sed quaere* : [27] and that, therefore, the heirs in possession were bound to account for the assets come to their hands, and to that extent liable to pay the creditors, —the residue, if any, being divided among the heirs.[28]

Amir Dulhin *v.* Baij Nath, 21 Cal. 311.

(3) A Muslim dies. His creditor sues his widow, without making the other heirs parties. *Held* : the suit is properly brought against the widow, whose liability is to be measured not by the extent of her interest in her husband's estate, but by the assets come to her hands, which she had not duly disbursed in the discharge of the liabilities to which the estate was subject at her husband's death.[29]

Hendry *v.* Mutty Lal Dhur, 1 Cal. 393.

(4) A Muslim owes a debt for repairs to a house. He dies leaving a daughter and sister as his heirs. The daughter obtains a certificate under Act XXVII. of 1860 (repealed by the Succession Certificate Act) and directs further repairs to be done. The creditor then brings a suit against her alone, styling her as the daughter and representative of the deceased, to recover his original claim, and a further sum for repairs executed under her directions. The suit is undefended, and a decree obtained against her, in execution of which the house [30] is sold. The absent heir (the sister) then sues the daughter and the execution purchaser for possession of her share in the house ;[31] the claim was allowed : *held* that the daughter did not represent the whole estate and the sister's share could not be sold in the execution proceedings.

Khurshetbibi *v.* Keso Vinayak, 12 Bom. 101.

(5) A Muslim woman dies, leaving a son and a daughter as heirs. A creditor of the deceased brings a suit on the debt, and obtains a decree against "the deceased, represented by her minor son, represented by his guardian," —the daughter not being a party to the suit. *Held*, that the daughter is equally responsible for the debt, and bound by the decree, and the execution sale passes not only the son's but also the daughter's share in the estate, and

[27] DISTINCTION BETWEEN CREDITOR'S SUITS & ADMINISTRATION SUITS emphasized in *Bhagirthibai* v. *Roshanbi*, (1918) 43 Bom. 412, 431, 434 : *Mutty Jan* v. *Ahmed A.*, (1882) 8 Cal. 370 disapproved ; *Habiba* v. *Swa Kyan*, [1937] Rang. 322.

[28] *Muttyjan* v. *Ahmed A.*, (1882) 8 Cal. 370. (i) View that "CREDITORS' suit to be regarded as ADMINISTRATION SUIT" seems to have been first enunciated in *Kishwur Khan* v. *Jewan Khan*, (1799) 1 Mac., Sel. Rep. 33 = Cal. S. D. A. 25 : cf. *Abbas Naskar* v. *Chairm. Dt. Bd. 24 Perg.*, (1931) 59 Cal. 691, 694. [See on this view *Habiba* v. *Swa Kyan*, [1937] Rang. 322, 326, 327]. Two other views suggested by Morris, J., as having previously governed similar cases ; (ii) that the parties sued in representative character, & what passed at sale was property of deceased, citing (*Mt.*) *Nuzeerun* v. (*Moulvie*) *Ameerooddeen*, (1875) 24 W. R. 3 ; (iii) principle of Muhammadan law that one heir may stand as litigant on behalf of all heirs with respect to anything done to or by deceased whether it be debt or substance : see also s. 566, com. ; *Abdul Majeeth* v. *Krishnamachariar*, (1916) 40 Mad. 243, 257.

[29] *Amir Dulhin* v. *Baij N. S.*, (1894) 21 Cal. 311. See *Abbas Naskar* v. *Chairm.* (1921) 59 Cal. 691, 694 ; (*Mt.*) *Kaniz Abbas* v. *Bala Din*, [1925] AIR (OU.) 335.

[30] So stated by Garth, C. J. : *Hendry* v. *Mutty L. D.*, (1876) 2 Cal. 395, 398, *l.* 3 ; but reporter's statement of facts : "in execution, the daughter's interest in the house & land was sold"—which would leave nothing to be decided.

[31] *Hendry* v. *Mutty L. D.*, (1876) 1 Cal. 395, approved by Mahmood, J., in *Jafri Begam*, v. *Amir Md. K.*, (1885) 7 All. 822, 844, but does not seem to be noticed in any other decision : hardly consistent with *Muttyjan* v. *Ahmedally*, (1882) 8 Cal. 370 ; & *Amir D.* v. *Baij N.*, (1894) 21 Cal. 311 ; unless it can be brought in under principle of *Assamathem N.* v. *Roy Lutchmeeput S.*, (1878) 4 Cal. 142, on ground that suit undefended. See *Habiba* v. *Swa Kyan*, [1937] Rang. 322, 324.

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Davalava *v.* Bhimaji, 20 Bom. 338.

(6) A Muslim mortgages certain lands in 1862. On his death, the mortgagee sues his widow and son, and forecloses the mortgage. The daughters of the deceased who are his other heirs, are not parties to the foreclosure suit. *Held*, that the daughters cannot object to the decree simply because they were not parties to the suit ; that the widow and son were sued in their representative character (as representing the estate) and the proceedings against them, as such representatives, were effectual against the whole of the estate and not merely against the shares of the parties to the suit.[33]

Allahabad rulings. Hamir Singh *v.* Zakia, 1 All. 57.

(7) A Muslim dies, leaving two widows, and a minor daughter, as his heirs. The daughter is in possession of certain properties. The deceased's creditors obtain decrees against the widows, who in satisfaction of the decrees sell the said properties, purporting to execute the sale-deed on behalf of themselves and of the daughter, as her guardians (she having no legal guardian at the time). *Held*, the daughter is not bound by the decrees, or sale, and she can recover her share in the estate on paying her share of the deceased's debts, in satisfaction of which the sale was effected.[34]

Muhammad Awais *v.* Har Sahai, 7 All. 716.

(8) A Muslim dies leaving two heirs. One of them alone is in possession of the whole estate : a creditor of deceased sues the heir in possession, and obtains a decree against her : in execution the whole estate is sold by auction. *Held*, that the absent heir is not bound by the sale, and on payment by him of his proportionate share of the debt, which was paid off from the proceeds of the auction sale, he can recover his share in the property sold.[35]

Dallu Mal *v.* Hari Das, 23 All. 263.

(9) The Nawab of Tonk dies, leaving two heirs : a creditor of the Nawab obtains a decree against the whole estate, suing one heir alone (who is in possession) as representative of the Nawab. The other heir then orally transfers some portion of the estate to third parties and puts them in possession. After the transfer the judgment-creditor attaches the property so transferred, and claims to execute his decree not only against the right, title and interest in the said property of the heir sued, but against all the interest of the deceased in it. *Held*, that (i) the heir sued, could have objected to more than his own share in the property being attached under the decree, on the ground that as to the rest he was a trustee for the absent heir ; (ii) the third parties as transferees from the absent heir can likewise

[32] *Khurshetbibi* v. *Keso V.*, (1887) 12 Bom. 101 (Sargent, C. J. & Haridas, J.) not followed in *Bhagirthibai* v. *Roshanbi*, (1918) 43 Bom. 412, 423, 426, 428, 429, decree against widow & step-mother ; & daughter was absent heir—on grounds (i) that it misapplies to Muslims, rule evolved out of Hindu law, without stating reasons, (ii) is opposed to principle underlying *Isap A.* v. *Abhramji A.*, (1917) 41 Bom. 588 (F. B.). *Lala Miya* v. *Manubibi*, (1923) 47 Bom. 712 follows *Bhagirthibai's* case.

[33] *Davalava* v. *Bhimaji D.*, (1895) 29 Bom. 338 (*per* Ranade & Jardine, JJ.) followed in *Virchand* v. *Kondu V.*, (1915) 39 Bom. 729, (= p. 754, *n.* 8) but not followed in *Bhagirthibai's* & *Lala Mian's* cases : see *n.* 32.

[34] *Hamir S.* v. *Zakia*, (1875) 1 All. 57 (F. B.) : "It is only equitable to require that recovery of her share should be contingent on PAYMENT by her OF HER SHARE OF DEBTS for satisfaction of which sale effected : widows not competent to act as guardians of minor daughter." Possession of property by heir sued, emphasised in *Pathummabai* v. *Vittil U.*, (1902) 26 Mad. 736.

[35] *Muhammad Awais* v. *Har Sahai*, (1885) 7 All. 716.

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ask that the attachment be limited, to the share in the property of the heir sued (even though that heir had purported to transfer to the third person both his own and the other heirs' share herein)[36] because the possession of the third parties could only be disturbed by showing superior title ; (iii) the title derived from the decree against the heir sued, was superior to that derived by possession and oral transfer from the absent heir only to the extent of the share of the heir sued ; and (iv) the decree-holder must fail in attempt to disturb the third parties' possession except as to the interest of the heir sued.[36]

Madras ruling. Pathummabai *v.* Vittil Ummachabai, 26 Mad. 734.

(10) A Muslim dies, leaving three widows, two daughters, and one son. (*a*) One of the widows sells some of the deceased's property in discharge of his debts ; *held*[37] that the widow was not like the managing co-parcener in Hindu law, and thus not entitled to administer and manage the estate until partition ; the creditors, however, have a right to sue such heirs as have taken the estate, but they are entitled to have recourse to a single heir only when all the effects are in the hands of that heir ; [but[37] that it makes no difference whether the heir or heirs in possession meets or meet the demand of the creditors by a bona fide voluntary sale, or the property is brought to sale in execution of a decree obtained against him or them. *Held*,[38] therefore, that the sales by the widow for payment of the deceased's debts were valid and binding on the absent heirs].[37] (*b*) The widow sold item No. 11 to the defendant 13 in consideration of a debt of Rs. 25 due to him from the deceased, and of a further sum paid by him to the widow ; *held* that the daughter was entitled to receive her share in the said item No. 11 on payment of a portion of the debt (Rs. 25) proportionate to her share in the estate.[39] (*c*) The widow sold bona fide certain other property of the deceased, but not in the discharge of his debts ; *held* that the daughter was entitled to reclaim her share on payment of proportionate compensation for improvements.[40] (*d*) The widow allowed certain mortgage debtors of the deceased to redeem the mortgaged properties on payments of the full amounts due on the mortgage ; *held*, the daughter was entitled to recover from the mortgagors her share in the properties mortgaged in default of the mortgagors paying her within six months her share of the mortgage money.[41]

See also s. 569, *ill.* (3), (4).

The illustrations to s. 567 have been made specially numerous and full, for tracing out principles reconcileable to all important decisions.

[36] *Dallu Mal* v. *Hari Das*, (1901) 23 All. 263.

[37] Part of ruling enclosed in [ ] is overruled by *Abdul Majeeth* v. *Krishnamachariar*, (1916) 40 Mad. 243, 257 (F. B.).

[38] *Pathummabai* v. *Vittil U.*, (1902) 26 Mad. 734 (Benson & Bhashyam Ayyangar, JJ.), referring to alienation of items i., xviii, & xi., in favour of defendants 11, 12, 13, respectively—see p. 736, (par. 4), p. 737 (par. 6), p. 739 (par. 2), p. 740.

[39] Sect. 567, *ill.* 10(*b*), (*c*), (*d*) do not apply to s. 567, but it is convenient to have in one place all points decided. On (*b*) see *Abdul Majeeth* v. *Krishnammachariar*, (1916) 41 Mad. 243, 249.

[40] *Pathummabai* v. *Vittil*, (1902) 26 Mad. 374, relating to defts. 13, 14, items III. IV., pp. 737, (par. 6), 739 (par. 2).

[41] *Ibid.* relating to defendants 18, 19, items XV., XVI., p. 737 (par. 3).

SECTION 567. The question as to who are necessary parties to a suit, has been discussed in its general bearing in s. 566, com. pp. 746-751.

1.—Court's discretion to allow estate to be represented.

The Privy Council decisions referred to in s. 567(3), (4) lay down that, (A) the Courts have and ought to exercise a wide discretion on the question who should be deemed to represent the estate ; but that this discretion does not entitle the Court to disregard the elementary principles that (B) only the property of heirs who are either sued or are represented in the suit can be dealt with by the Court either at the trial, or in execution of the decree. The Court must therefore, carefully exercise its discretion under head (A), and having done so observe the principle marked (B). But further, there may be a decree establishing the liability of a deceased debtor and his estate in respect of a debt : and (C) in the course of executing that decree an irregularity may take place: that irregularity may be set right under O. 21, r. 90 ; and if not so set right, it may become indefeasible.

It is, therefore, necessary to consider the different aspects of the cases that appear before the Courts in the form, Whether the Court in the particular case ought to exercise its discretion of allowing the entire estate of the deceased debtor to be represented by the heirs sued : and what circumstances will justify the exercise of that discretion.

2.—Necessity for all heirs having possession of assets being before Court.

May a single heir be sued, without the other heirs being made parties, only in cases where all the assets of the deceased are in the possession of that heir ?[42] or to put the question in the form above suggested, Ought the Court to exercise its discretion of allowing the heirs sued to represent the whole estate only in such cases ? The point has never been in direct issue before the Court.

The forms in the Civil Procedure Code,[43] do not require that the defendant to a creditor's suit based on a debt due from a deceased person, should be in possession of the whole estate. Muslim law provides[44] that " a decree against one heir in possession of all the effects of the deceased, is binding on all if obtained after contest," as " a part of the processual law of that system." This is not based on the ground that a single heir, if he happens to be in possession of the estate of the deceased, represents the rest of the heirs for the purposes of administration generally " ;[42] but " the decree of the Kazi in such a case is in reality either in favour of or against a deceased ; and any one of the heirs may stand as his representative with respect to such decree." [45]

[42] So suggested in *Pathummabai* v. *Vittil U.*, (1902) 26 Mad. 734, 738 ; (Hed. 349 cited, viz. " any one of the heirs of a deceased person stands as litigant on the part of all the others with respect to anything due to or by the deceased "); *Hamir S.* (*Mt.*) *Zakia*, (1875) 1 All. 57, 59.

[43] Civ. Pr. Co., O. XX., r. 13 ; Sch. I., Appx. D, Nos. 17-20 (= p. 748, *n.* 17). *Jafri B.* v. *Amir Md. K.*, (1885) 7 All. 822, 844, 845.

[44] The rules of the *Hidaya* providing for the representation by the heirs in possession of the estate of a deceased Muhammadan, " ought to be disregarded as mere rules of procedure superseded by the Civil Procedure Code, as pointed out by Mahmood, J., in *Jafri B.* v. *Amir Md. K.*, (1885) 7 All. 822 (F.B.), & approved in *Amir D.* v. *Baij N. S.*, (1894) 21 Cal. 321 & in the judgment of Abdur Rahim, J., in *Abdul Majeeth* v. *Krishnamachariar*, (F.B.) 41 Mad. 243 " : *Bhagirthibai* v. *Roshanbi*, (1918) 43 Bom. 412, 431.

[45] *Abdul Majeeth* v. *Krishnamachariar*, (1916) 40 Mad. 243, 256 ; see Hed. 349 : see *n.* 44.

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3.—Reasons why possession of all the estate required.

On the other hand,[46] (1) every part of the estate is liable for the debts of the deceased,[47] and therefore all those who are in possession of any part of the estate must be before the Court : this may be safeguarded, by the form in which the decree is passed,[48] viz. a proportionate part of the debt may alone be ordered to be paid by the heirs sued ; (2) possession of assets is necessary for establishing " that the executor de son tort was really acting as executor, so that the creditor might reasonably suppose him to be the rightful representative " ; for it is only in such cases that the creditor is entitled (under English law) to retain as against the true representative of the deceased, payments made to him.[49] (3) It must not be overlooked that the heirs sued are entitled to apply that the absent heirs be brought on the record ; they may well be expected to take care of their own interests, by making such an application if thereby they have anything to gain. They ought not to be allowed to profit by omitting to do so and withholding the information from the Court ; (4) Where the absent heirs have notice of the proceedings, they have likewise the power to apply to be made parties, should they desire to defend the action. These and similar circumstances are borne in mind by the Court in exercising its wide discretion—s. 567(2)—in allowing or disallowing the estate to be represented by the heirs sued. (5) The absent heirs by allowing the estate to remain in the possession of the heirs sued, permit the latter to exercise a great deal of control over it : during their possession the estate may deteriorate or decay or fall into ruins : the Court may consider that in the circumstances the possession by the heirs sued (presumably with the acquiescence of the absent heirs) must also carry the concomitant rights of applying it (voluntarily or involuntarily) to the payment of the debts due from the deceased.

4.—Absent heirs can be made parties on application to Court.

5.—No decision on the point of possession of estate.

From the decisions so far given and the forms in the Civil Procedure Code, it does not follow that the Courts would decline to entertain a suit by a creditor of the deceased, if the whole of the estate[50] is not in the possession of the defendants impleaded ; for in Pathumma's and Devalava's cases,[46] the heirs sued were in possession of the whole estate. In some cases no part of the estate was in their possession. If it is alleged that part of the estate is in the hands of some third persons (an allegation which it is not in the interest of the heirs sued to make) no plaintiff would object to bringing them on the record. The Court would find some difficulty in determining whether all the estate is in the possession of the heirs sued.

[46] *Pathummabai* v. *Vittil U.*, (1902) 36 Mad. 734 ; *Davalava* v. *Bhimajo D.*, (1895) 20 Bom. 338. Cf. *Mathuradas* v. *Raimal*, (1935) 37 Bom. L. R. 692.

[47] Cf. *Kazim Ali* v. *Sadiq A. K.*, (1938) 65 I. A. 219 (LUCK.).

[48] Cf. *Madho Ram* v. *Dilbur Mahul*, (1870) 2 N. W. 449 ; *Pirthi P. S.* v. *Husaini J.*, (1882) 4 All. 361 ; *Ram Charan L.* v. *Hanifa K.*, (1932) 54 All. 796.

[49] *Thomson* v. *Harding*, (1853) 2 El. & Bl. 630.

[50] How is plaintiff, presumably a stranger, to know what the estate consists of, & whether it is all in possession of heirs sued ?—*Udaram Sitaram* v. *Rammu P.*, (1875) 11 Bom. H. C. R. 76, 83 ; *Narayn Vajappa* v. *Vaman*, (1938) xvi, Bom. L. Jl. 12, 14, 15 = p. 745, *n.* 24(v).

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6.—Sects. 567, 572 distinguished.

Sections 567 and 572 are in a sense complementary : *First*, s. 567 deals with the case where a creditor sues some only, and not all the heirs of a deceased person, for a debt due to the deceased, and brings a part of the estate to sale in execution of such a decree. This process is (it is evident) defective : the defendants in such a case are owners of only their own shares in the property brought to sale, and the execution purchaser ought in strictness to acquire no right over the shares therein of the absent heirs. Nevertheless, the decisions are that in certain circumstances, the execution purchaser may, even in such a case, acquire title to the entirety of the property. The correctness of these decisions must be determined (though it cannot be said that the decisions have always kept that point in view) upon the test, whether the Court can be deemed to have properly exercised its discretion of allowing the entire estate to be represented by the heirs sued (s. 567(3).). *Secondly*, s. 572 deals with the

7.—Decree after contest deemed against deceased.

powers of individual heirs privately to alienate assets of the deceased, though no decree has been passed against them. (i) A Full Bench has dissented from the view tending to assimilate the rules in ss. 572 and 567, on the ground (above referred to) that though under the Muslim processual law a decree against one heir in possession of all the effects of the deceased, is binding on all if obtained after contest, that rule is not based on the ground that a single heir, if he happens to be in possession of the estate of the deceased, represents the rest of the heirs, for the purposes of administration generally. But a decree against one of the heirs in such circumstances is treated in the texts as rendering the matter res judicata against the deceased [51] and not against the particular heir who is made defendant in the suit.[52] (ii) Pathumabai's [53] case on the other hand seems to have been based on the notion that the same rule

8.—Voluntary alienation : execution of decree.

ought to apply to voluntary alienation as to sales in execution : Bhashyam Ayyangar, J. Why, it seems to be asked should it not be considered (once the Court holds that there is a bona fide alienation for a debt of the deceased) that it is the deceased who is making the alienation, rather than the single heir purporting to represent the estate,—just as (where there is a decree, for payment of a debt due by the deceased) the law considers, as put by Abdur Rahim, J., that it is the deceased who is the judgment-debtor and not merely the individual heir ? In favour of such uniformity may also be cited the observation of Wallis, C. J., that it is probably for the benefit of the creditors as well as of individual heirs that there should not be a rigid rule requiring the whole body of co-heirs to join every alienation ; and where there is a debt lawfully due from the estate of the deceased there is a temptation to follow the easier course,—if it can be safely followed,—of avoiding an intermediate suit.

[51] See s. 567, *nn. Abdul Majeeth* v. *Krishnamachariar*, (1916) 40 Mad. 243, 257. Cf. *Khiarajmal* v. *Daim*, (1904) 32 I. A. 23 = 32 Cal. 296 = *ill.* (3, 4), s. 569, p. 768, *q.v.* But, with utmost respect, does not decree against deceased = that deceased is represented ? : deceased can be represented only by all his heirs : unless Court in its discretion considers *all* heirs to be represented by heirs who are parties to suit.

[52] *Abdul Majeeth* v. *Krishnamachariar*, (1916) 40 Mad. 243, 256.

[53] *Pathummabai* v. *Vittil U.*, (1903) 26 Mad. 734 ; see also *Hasan Ali* v. *Mehdi Husain*, (1877) 1 All. 533 ; *Khiarajmal* v. *Daim*, (1904) 32 I. A. 23 = 32 Cal. 296, 314, 318.

SECTION 567. 9.—General conclusion.

In the present state of the authorities the safest course for the Court appears that it should give careful and strict effect to the provisions of s. 567(3), (4) and to exercise, in view of all the circumstances, its discretion of allowing or not allowing the entire estate to be represented by the heirs sued, and then in the execution of the decree rigidly to adhere to the decision arrived at on the question of representation : in the absence of such an exercise of the Court's discretion, the heirs, *semble*, represent only their own interests.

IV. RIGHTS AND LIABILITIES OF HEIRS AMONGST THEMSELVES.

(A) Decree in favour of one heir enures for all.

567A. A decree for the recovery of the property of the deceased in the possession of a third person obtained by one of the heirs of a deceased Muslim, enures to the benefit not only of the plaintiff but also to that of the other heirs.[1] There is difference of opinion[2] as to whether the decree-holder ought to be given possession of more than his share.

Sect. 567A, in which the heirs are plaintiffs, is the converse of s. 567, in which the heirs are defendants. Sect. 567A must, in any case, be read in a sense that does not conflict with the enactments represented by s. 563, proviso.[3]

(B) Liability to contribute to co-heirs.

568. *Semble,* the heirs sued (s. 558(7).) may claim from the absent heirs[4] contribution[5] towards the satisfaction of a decree against themselves for payment of a debt due by the estate of the deceased ;[6] provided (1) that the said decree is not limited to the satisfaction of a part only of the debt proportionate to their own rights of inheritance in the said estate ; (2) that the contribution payable by the absent heirs is proportionate to their rights of inheritance,[7] and restricted

1 Sect. 567 A is from *Abdul Majeeth* v. *Krishnamachariar*, (1916) 40 Mad. 243, 256 (F. B.), *per* Abdur Rahim, J.

2 The three exponents of Hanafi law (Abu Hanifa, Abu Yusuf & Imam Muhammad) do not all take same view.

3 Sect. 563, proviso requiring forensic recognition for obtaining decree for payment of deceased's debt. Succ. Act, 1925, s. 215.

4 The decree might itself provide for rights & liabilities, *inter se*, of heirs sued. *Kazim Ali K. v. Sadiq A. K.*, (1938) 65 I. A. 219, 232, 233 (LUCK.) (if Court grants decree executable against different parts of estate, then as between heirs of the deceased, Court cannot refuse to carry administration beyond that point, or prejudice, by choice of executing creditor, rights *inter se* of beneficiary or legatees, over whom creditor has priority); *Ramskill* v. *Edwards*, (1885) 31 Ch. D. 100 ; *Dering/Deering* v. *Earl Winchelsea*, (1787) 1 Cox Eq. 318, 321, 2 Bos. & P. 270, 273 ; *Rambux Chittangeo* v. *Madhoosoodun Paul Chowdhry*, (1867) 7 W. R. 377.

5 *Kishen C. G.* v. *Mt. Ashoorun*, (1863) 1 Marsh. 647 ("if person proceeded against pays out of his own property he has right to claim CONTRIBUTION against his co-debtor". Peacock, C. J.); cited by Lord Davey : *Khiarajmal*, v. *Daim*, (1904) 32 I. A. 23, 33. But see *Abbas Naskar* v. *Chairman &c.*, (1931) 59 Cal. 691 ; *Kazim Ali K. v. Sadiq A. K.*, (1938) 65 I. A. 219, 233 last *l.* (not necessary to found claim to contribution on actual or implied promise).

6 Debts of deceased distinguishable from debts of individual heirs.

7 Cf. *Bussunteram* v. *Kamaluddin*, (1885) 11 Cal. 421 ; *Abbas Naskar* v. *Chairman &c.*, (1931) 59 Cal. 691. See com.

SECTION 568. to the assets of the deceased come to their hands, not duly accounted for.[7]

Distribution of assets.

This cumbrous process for effecting a rateable distribution of assets and liabilities, results from the parties not taking the proper course to have the estate of the deceased represented, and then distributed amongst themselves. The Court may decline to order contribution, on the ground that the heirs sued ought to have insisted on the absent heirs being made parties. When each heir has received his or her own due share, the process works out justly.[8] See s. 566, com., (assimilation of creditors and administration suits) pp. 749 f.

(c) Absent heirs setting aside execution.

569. (1) A decree for the satisfaction of a debt or liability of a deceased Muslim, obtained in a suit in which the heirs sued are not all the heirs of the deceased (s. 558(7).) may for sufficient cause[9] be impeached in so far as it affects the interests in the deceased's estate of absent heirs (who were not parties to the creditor's suit), and an auction sale in execution of the decree may to the extent of the absent heirs' shares, be set aside contingently on the absent heirs paying or satisfying a proportionate part of the said debt or liability, or on such other terms as may be just and equitable.[10]

Sufficient cause for setting aside execution : s. 567.

(2) In determining whether sufficient cause has been shown for setting aside such a decree and sale, the Court has regard (amongst other matters) to (*a*) the circumstances that guide it, under s. 567, in the exercise of its discretion whether the heirs sued ought to be allowed to represent the entire estate (including the interests of the absent heirs), and whether the decree ought initially to be so passed as to bind also the interests of the absent heirs ;[11] (*b*) the importance of uphold-

[8] Ind. Contr. Act, 1872, s. 146 ; Succ. Act, 1925, ss. 356 ff. ; Pr. & Adm. Act, 1881, s. 138 ; & Trans. of Prop. Act, 1882, s. 82, respectively refer to CONTRIBUTIONS from co-sureties, co-legatees, & from properties mortgaged for same debt.

[9] As e.g. that suit barred as against some of heirs : *Bussunteram* v. *Kamaluddin*, (1885) 11 Cal. 421 ; or there being some difficulty about appointing guardian, minor heir is discharged : *Ram Charan* v. *Hanifa K.*, (1932) 54 All. 796 ; *Mohammad Khan* v. *Nasiban*, [1930] 28 All. L. J. 1211 ; cf. *Shankar Lal* v. *Mohammad Ismail*, [1930] 28 All. J. 989 ; *Bhagirthibai* v. *Roshambi*, (1916) 43 Bom. 412 ; *Lala Miya* v. *Manubibi*, (1923) 47 Bom. 712.

[10] *Jafri B.* v. *Amir Md. K.*, (1885) 7 All. 822 (F. B.) Quest, (3) 825, 826, 845-847 ; *Hamir Sing* v. (*Mt.*) *Zakia*, (1875) 1 All. 57 (F. B.) ; see s. 567, *ill.* (7), (8), s. 569, *ill.* particularly (3) & (4) based on *Khiarajmal* v. *Daim*, (1904) 32 I. A. 237 = 32 Cal. 296 ; *Ladoo Karikar* v. *Jagat Chandra Saha*, (1920) 25 C. W. N. 256. In *Habiba* v. *Swa Kyan*, [1937] Rang. 322 (share released without payment of proportionate part of debt, see s. 566 A, p. 754, *n.* 40.

[11] See s. 558(7). Allahd. H. Ct. has ruled s. 567(2)(*b*), that decree can never bind absent heirs, & that Court grants relief almost as matter of course : *Jafri Begam* v. *Amir Md. K.*, (1885) 7 All. 822 ; *Bholanath* v. *Maqbulun Nissa*, (1903) 26 All. 28 ; *Ramcharan L.* v. *Hanifa K.*, (1932) 54 All. 796 ; (*Mt.*) *Kaniz Abbas* v. *Bala Din*,

ing the title of persons who buy under a judicial sale ; (*c*) amongst the circumstances that incline the Court to set aside such a decree are (i) that it has been passed by consent ; [12] (ii) that the purchaser is the judgment-creditor who has had notice of all the facts.[13]

SECTION 569.

Illustrations.

Assamathem Nessa *v.* Roy Latchmipat, 4 Cal. 142.

(1) The mortgagor of a property dies, leaving as his heirs a widow, a daughter, and a sister ; the mortgagee sues the widow and daughter not describing them as the representatives of the mortgagor in the title, but in the body of the plaint, he states that they are his heirs. He knows that the sister is also an heir, and has reason to believe that she is alive at Medina, but he does not make her a party to the suit. By consent a decree is passed against the widow and daughter. Under sales by the Sheriff not only their right, title and interest but also of the sister, the absent heir, were professedly purchased by a third party, and certificates issued by the Court accordingly. *Held*, that the decree and the execution founded on it did not affect the sister's share in the estate, which consequently did not pass to the execution purchaser.[13]

Bussunteram Marwary *v.* Kamaluddin Ahmed, 11 Cal. 421.

(2) A Muslim dies, leaving three persons as his heirs. One of the heirs (who is in possession of the whole estate) makes to a creditor of the deceased a payment on account of his debt without the consent of the other two heirs. But for this payment the debt would have been barred by limitation. The creditor then sues all three heirs for payment of the part of the debt still outstanding. *Held*, (*a*) that the lower Court having decided that the debt was barred as against two of the heirs, and there being no appeal against that decision, the heir who had made the payment was alone liable ; (*b*) that as that heir had not been sued in a representative capacity, and it was not proved that he had made the payment on behalf of the other two, as well as himself, the suit could not be considered an administration suit, and a decree could not be passed for payment of the whole debt out of the assets in his hands, but only for a part of it proportionate to his own interest in the estate ; (*c*) that in accordance with both Muhammadan law and justice, equity, and good conscience, that heir's share in the estate was not liable to be charged with the whole of the debt, but a proportionate part of it, inasmuch as he could not claim contribution from the other two heirs as against whom the debt was barred by limitation.[14]

[1925] AIR (OU.) 330 (brother of deceased held bound by decree against widow, who was in possession).

[12] *Assamathem Nessa Bibee* v. *Roy Latchmiput Singh*, (1878) 4 Cal. 142 = *Mir Ashruf Ali* v. *Roy Lutchimiput*, (1878) Cal. L. R. 233 (where decree initially passed by consent against one or more heirs of deceased debtor, it cannot legally bind absent heirs, & must be set aside in so far as it affects them). Cf. *Hendry* v. *Mutty Lall Dhur*, (1876) 2 Cal. 395 ; see p. 759, s. 567, *ill.* (3) & (4), *nn.*

[13] *Khiarajmal* v. *Daim*, (1904) 32 I. A. 231 = 32 Cal. 296 ; *Kishen C. G.* v. *Ashoorun*, (1863) Marsh 647, 648.

[14] *Bussunteram* v. *Kamaluddin*, (1885) 11 Cal. 421 (on ADMINISTRATION SUIT, see 11 Cal. at p. 425 (*second*) ff.) ; see also *Hendry* v. *Mutty Lall Dhur*, (1876) 2 Cal. 396 ; s. 567, *ill.* (1)-(7), pp. 758-60, *nn.* ; *Kazim A. K.* v. *Sadiq A. K.*, (1938) 65 I. A. 219 (CONTRIBUTION).

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Khiarajmal v. Daim, 32 I. A. 23.

(3) Two brothers, Nabi Baksh and Ali B. were together entitled to 1/2 of certain lands. Nabi on behalf of himself and his brother executed a mortgage in 1874, and renewed it in 1878. In 1879 a mortgage suit was brought against Nabi by the mortgagee.[15] Nabi signed a petition that the suit be referred to arbitration. Shortly afterwards Nabi died, leaving two widows, an infant son (Md. Hasan) and an infant daughter. The names of the widows and son were added on the record and the usual summonses served on them. An award was made, and on 20 Dec. 1879 the judge made an order on it. The judge was satisfied that the widows and son were prepared to accept the award of the arbitrator ; in 1881, in execution of the award, 1/2 of the lands belonging to the two brothers Nabi and Ali were sold—the widows and son having been served with a notice of the sale. *Held*, (*a*) that Nabi's estate was sufficiently represented for the purpose of the suit,[16] although the name of his infant daughter was omitted from amongst those who were brought on the record, and that therefore her share in the equity of redemption of the 1/2 of the lands which was purported to be sold in execution of the decree was bound by the sale, and irredeemable ; but (*b*) that the share of Ali Baksh the other brother, could not be sold in execution of the decree on the following grounds :—" Nabi, however, executed the mortgages of 1878 on behalf of his brother (Ali) as well as of himself ; Ali is still living and is a plaintiff in the present suit and one of the respondents. It must be presumed that Nabi was authorized to sign the mortgages for his brother [Ali]. At any rate Ali by suing for redemption admits it. And possibly it might have been held that Nabi's authority extended to representing him [Ali] in Waliram's suit. But by no possibility could it be considered that he [Ali] was represented [in the arbitration and the proceedings following it] by the widows or infant son of his deceased brother [Nabi]. In fact his interest in the property seems to have been ignored altogether. He is not mentioned as a debtor in the award, and there is no decree against him. The Court therefore had no jurisdiction to sell his share." [16]

Khiarajmal v. Daim, 32 I. A .23.

(4) One Naurez[17] mortgaged 1/6 share in certain lands in 1874. He died leaving a widow and four children including a son, Amir. After Naurez's death, Amir, while he was a minor purported to renew the mortgage so far as Naurez's original interest was concerned. On Naurez's original mortgage, and its renewal by Amir, suits were brought against (1) " Naurez, deceased by his legal representative Amir, by his guardian A. Nawaz," and (2) Amir described, as " a minor of 14 years, representative of Naurez, by his uncle A. Nawaz." The judge " seems to have accepted without question the statement on the record that Amir was legal representative of Naurez and A. Nawaz was his guardian, and never applied his mind to the matter." Doubtless he would have done so, if the suits had proceeded in the ordinary course, but one of

[15] The owners of the other moiety were also parties to the mortgage suit & reference to arbitration.

[16] *Khiarajmal* v. *Daim*, (1904) 32 I. A. 23, 34 = 32 Cal. 296, 313.

[17] *Khiarajmal* v. *Daim*, (1904) 32 I. A. 23, 30, 31, 36 = 32 Cal. 296, 309, 310, 315.

them was cut short by the agreement for arbitration, and in the other there was "in effect a consent decree," *Held*, that (1) the estate of Naurez was "not represented in law or in fact in either of the suits, and the sale of his property was therefore without jurisdiction and null and void," (2) the share of Amir, the minor son, in his father's estate was not bound.[17] SECTION 569.

570. After the estate has been distributed [18] amongst the heirs, their joint liability ceases, and thenceforth each heir is liable to pay to the creditors of the deceased only a part of the debts, proportionate to his own interest in the estate ; [19] such liability being limited to the assets come to his hands,[20] for the due application of which he cannot account.[21] (D) After distribution joint liability ceases and each proportionately liable.

A Muslim dies leaving three heirs, who divide the estate amongst themselves in accordance with their rights. A creditor of the deceased sues two of his heirs but not the third : the two heirs sued held liable to pay parts of the debt proportionate to their shares in the estate and not the whole of it.[22] *Illustration.*

Cf. Succession Act, 1925, s. 359 (Probate and Administration Act, s. 138) : "When the executor has paid away the assets in legacies and he is afterwards obliged to discharge a debt of which he had no previous notice, he is entitled to call upon each legatee to refund in proportion." Mahmood, J., has pointed out that, on the authority of Kazi Khan, the heirs may be sued even though they have no assets in their hands.[23] Suing heirs who have no assets.

Sect. 570, *ill.* was decided a year after the Probate and Administration Act came into force. Sect. 105 of that Act (= Indian Succession Act, 1925, s. 325 = Succession Act, 1865, s. 285 : "Debts of every description must be paid before any legacy") does not directly apply to the present point, which affects not legatees but heirs. But the principle of English law is that if any executor (whose place is taken, in his absence, by the heirs of a Muslim), considering the assets in his hands to be sufficient for all purposes, pays the legacies before Distribution prior to payment of creditors.

18 DEBTS have PRIORITY over inheritance. The heirs, therefore ought not to take anything for themselves before paying off creditors of deceased : & acting contrary to their duty ought not to improve their position. Cf. *Soniram Jeetmull* v. *R. D. Tata*, (1927) 54 I. A. 265, 269 *ll.* 26-29 (position cannot be bettered by neglecting to perform statutory duty). Difference of opinion amongst Courts regarding liability of individual heirs to be sued (s. 567), explains how rule in s. 570 arises. According to All. H.C. (s. 567(2)(*b*).) towards whose view other Courts tending, (see p. 755, *n.* 16) liability of heirs, both before & after distribution, is as stated in s. 570.

19 *Pirthi Pal* v. *Husaini Jan*, (1882) 4 All. 361 ; *Bussunteram Marwari* v. *Kamaluddin Ahmed*, (1885) 11 Cal. 41 ; *Ambashanker* v. *Sayad Ali*, (1894) 19 Bom. 273 ; *Abbas Naskar* v. *Chairman &c.*, (1931) 59 Cal. 691 ; s. 570, *ill.*

20 *Muttyjan* v. *Ahmedally*, (1882) 8 Cal. 370, 374 ; *Bazayet Hossein* v. *Dooli Chund*, (1878) 5 I. A. 211 (= 4 Cal. 402, 408 ; *Amir Dulhin* v. *Baij Nath S.*, (1894) 21 Cal. 311, 316-317.

21 (*Mt.*) *Wahidunnissa* v. (*Mt.*) *Shubbrattan*, (1870) 6 Beng. L. R. 54, 59. See *Hamir S.* v. *Zakia*, (1875) 1 All. 57 (F.B.).

22 *Pirthi Pal S.* v. *Hussaini Jan*, (1882) 4 All. 361 ; *Ram Charan* v. *Hanifa K.*, (1932) 54 All. 796 ; *Kazim Ali K.* v. *Sadiq A. K.*, (1938) 65 I. A. 219 (LUCK.).

23 *Jafri B.* v. *Amir Md. K.*, (1885) 7 All. 822, 841 (Citing *Kazi Khan* : see s. 561, p. 733, *n.* 25. Cf. *Madho Ram* v. *Dilbur Mahul*, (1870) 2 N. W. 449.

SECTION 570. Heirs must set aside assets for debts.

the debts, and afterwards finds the debts to be larger than he expected, he is not entitled to plead the payment of the legacies as a defence to a creditor suing for payment of his debt.[24] Our Courts may, on the analogy of s. 105, and of the rule of English law, hold that the heirs are bound, before distribution, to set aside sufficient assets to satisfy the creditors of the estate, and that where they do not do so, they will not be allowed, in regard to debts of which they have notice, to plead distribution of the assets, any more than the English executor is allowed to plead payment of legacies ; and the Calcutta High Court has ruled, " the liability of an heir is to be measured not by his interest in the estate, but by the assets come to his hands.[25]

(E) ALIENATION : INDIVIDUAL HEIRS :

Rights of transferees in good faith for consideration.

571. Each heir of a deceased [1] Muslim has, subject to the Transfer of Property Act, s. 52,[2] the right to dispose of his own interest (but not more than his own interest) in the estate (whether before or after distribution)[3] in any manner that he may think fit, and to pass a good title to a transferee in good faith for consideration, notwithstanding that debts[4] may be due from the estate to the creditors of the deceased.[5]

Illustrations.

(1) A Muslim dies in 1861, leaving as his heirs a widow, and two sisters. The widow obtains decrees against the sisters, in 1884 for her mahr, and in 1865 for her share in the estate. The sisters remain in possession of their shares in the estate, and incur debts, for which a decree is passed against them. In 1868, the property is sold. The widow claims that the property is taken by the execution purchaser subject to her right to be paid the mahr thereout. *Held*, that the widow cannot follow the property in the hands of the

[24] *Re Lovett, Ambler* v. *La Lindsay*, (1876) 3 Ch. D. 198.

[25] *Muttyjan* v. *Ahmed A.*, (1882) 8 Cal. 70 ; *Amir Dulhin* v. *Baij N. S.*, (1894) 12 Cal. 311.

[1] *Asa Beevi* v. *S. K. M. Karuppan Chetty*, (1917) 41 Mad. 365 ; *Sumsuddin* v. *Abdul Husein*, (1907) 31 Bom. 165 (during life-time of any person, his PRESUMPTIVE HEIRS have only expectation or hope of inheritance,—which cannot be transferred, or renounced, Transf. of Prop. Act, s. 6(*a*)—*quaere* as to renunciation).

[2] While SUIT by widow for *mahr* PENDING, if another heir transfers immovable property, transferee takes property subject to decree that may be made in widow's suit : (*a*) she may get mere money decree, which will not affect the transfer : (*Syud*) *Bazayat H.* v. *Dooli Chund*, (1878) 5 I. A. 211 = s. 571, *ill.* (2) : see also s. 571, *ill.* (3). *Bhola Nath* v. *Maqbulunnissa*, (1903) 26 All. 28 ; *Abdul Rahman* v. *Inayati Bibi*, [1931] AIR (OU.) 63 ; but (*b*) if she gets DECREE CREATING CHARGE on properties, that charge will prevail against transferee : *Mahomed Wajid* v. *Tayyabun*, (1878) 5 I. A. 211, 224 = 4 Cal. 402, 410. Transf. of Prop. Act, s. 52 : (immovable property cannot be dealt with, by any party to suit, so as to affect rights of any other party).

[3] But not any particular property,—until distribution : *Mansab Ali* v. (*Mt.*) *Nabiunnessa*, [1934] AIR (ALL.) 702.

[4] Debt may consist of unpaid *mahr* of widow, provided that widow not holding possession in lieu of *mahr* : (*Syud*) *Bazayat H.* v. *Dooli C.*, (1878) 5 I. A. 211 = 4 Cal. 402 = s. 571, *ill.* (2).

[5] (*Syud*) *Bazayet H.* v. *Dooli Chand*, (1878) 5 I. A. 211 = 4 Cal. 402, 406, 408, approving *Wahidunnissa* v. *Shubrattun*, (1870) 6 Beng. L. R. 54. See also *Jafri B.* v. *Amir Muhammad K.*, (1885) 7 All. 822, 828, 833 ; *Land Mortgage B. Ld.* v. *Bidyadhari*, (1879) 7 Cal. L. R. 460, 463 ; *Abdul Majeeth* v. *Krishnamachariar*, (1916) 40 Mad. 243, 244, 253, 254.

execution purchaser, but her remedy is to claim the mahr from the sisters to the extent of the assets that they may have received from the estate for which they are not able duly to account.[6] SECTION 571.

(2) A Muslim dies in 1865, leaving as his heirs three widows, (who claim large parts of the estate for mahr) and a son (who claims under a muqarrari). While disputes are going on between the widows and son, he executes in 1866, a mortgage bond, charging a portion of the estate with the payment of Rs. 4,800. Subsequently, the widows obtain decrees against the son to account for the assets in his hands, to pay thereout their mahr claims, and the debts of other creditors of the deceased, and after satisfying the creditors, to divide the residue amongst the heirs. In 1867, the mortgagee attaches and sells the mortgaged property in execution of a decree on his mortgage. *Held*, (*a*) that before the suits by the widows were instituted, the son had the right to convey either by absolute sale or by mortgage his own share in the estate, and the son's mortgagee acquired a good title, notwithstanding that debts might be due to the deceased's creditors ;[7] (*b*) that the widows cannot follow the mortgaged property in the hands of the execution purchaser ;[7] (*c*) that alienations by the son pending the suits by the widows are affected by the doctrine of lis pendens, and are bound by the decrees obtained in the said suits,[8] and as the decree in favour of the widow against the son provided for the payment of the mahr out of the properties of the deceased, the auction purchaser was bound by the decrees in favour of the widow.[7]

(3) A Muslim dies leaving as his heirs a widow, daughter, and sister. The daughter purchases the widow's interest in the estate, and mortgages both that interest and her own, amounting to 10/16 of the estate. The mortgagee subsequently purchases the 6/16 share to which the sister is entitled, and then brings a suit against the daughter on the mortgage, and obtains a decree for the sale of the property. He also obtains a decree for possession of the 6/16 share transferred to him by the sister. Both decrees are transferred and the transferee gets into possession of 6/16, on 9 Feb. 1875, and 10/16, on 12 Sept. 1875. On 26 Jan. 1876, a creditor of the deceased attaches the property in execution of a decree which he had obtained on 13 July 1872, but which had not been completely satisfied. *Held*, that the property in the hands of the transferee is not charged with the payment of the debts of the deceased, and that the creditor of the deceased cannot attach it.[9]

(4) A Muslim dies leaving two heirs. A creditor of the deceased sues one of the two heirs and obtains a decree against her. In execution of the decree the deceased's property is sold. Meantime the second heir sells her share in the estate. *Held*, that a purchaser from the second heir acquires the whole of the second heir's interest in the estate,—not subject to the satisfaction thereout

[6] *Wahidunnissa* v. *Shubrattan*, (1870) 6 Beng. L. R. 54, 68 = 14 W. R. 239. The P. C. "entirely concurred in this view of the law." See s. 571, *ill.* (2).

[7] (*Syud*) *Bazayet Hossein* v. *Dooli Chund*, (1878) 5 I. A. 211 = 4 Cal. 402.

[8] *Mahomed Wajid* v. *Bazayet Tayyubun*, (1878) 5 I. A. 211, 224 = 4 Cal. 402, 410. Transfer of Prop. Act, s. 52.

[9] *Land Mortgage Bk.* v. *Bidyadhari Dasi*, (1879) 7 C. L. R. 460.

SECTION 571.

of the decree against the first heir, obtained by the deceased's creditor, to which decree the second heir was not a party.[10]

Cf. Indian Succession Act, 1925, s. 307 ; which corresponds to the Probate or Administration Act, s. 90. Only sub-s. (1) of s. 90 was contained in the corresponding section of the Succession Act, 1865,—s. 269.

When does estate vest in heirs ?

The estate does not, if there is an executor or administrator (s. 561), vest in the heirs, nor in any case until the death of the ancestor. Until his death it is a mere spes successionis, incapable of being transferred (s. 371). As to the priorities between the creditors of the heirs and of the deceased, see s. 572.

Co-owners have no right over each other's shares, unlike partners.

Abdur Rahim, J.[11] points out that under Muhammadan law (1) the co-heirs are said to have shirkat-ul-milk (i.e. ownership of property as tenants in common, or as translated by Hamilton, "partnership by the right of property"). As to this co-ownership, it is not lawful for one co-owner to perform any act with respect to another co-owner's share, without that other's permission, each co-owner being a stranger to the other's share. But of course it is lawful for each to dispose of his own share either to the other co-owner or (subject to the rights of pre-emption) to one who is not a co-owner ;[11] (2) this is distinct from shirkat-ul-aqd, or partnership by contract, the ordinary partnership for carrying on business.

A lady was in[12] possession of the deceased's whole estate : [13] the plaintiff questioned her alienating it [14] partly for satisfying the debts of the deceased, and partly for some purpose of which there was no evidence. The Court set aside the alienations in so far as (*a*) they were not made for payment of the debts of the deceased, and (*b*) they infringed the plaintiff's rights.[13] The proposition[13] that one of several co-heirs may, if all the effects of the deceased are in his hands, meet the demand of a creditor of the deceased by a bona fide voluntary sale of the assets, just as they may be brought to sale in execution of a decree against him,[15]—is dissented from by Abdur Rahim, J., presiding over a Full Bench : the distinction is pointed out between a decree against a single heir and a voluntary alienation by him.[16]

Voluntary alienation : sale in execution : distinguished.

(F) DECEASED'S CREDITORS AND DEBTORS. WIDOW creditor and heir.

571 A. The widow of a Muslim normally becomes on his death an unsecured creditor of his estate for the unpaid

[10] *Sitanath D.* v. *Roy Lutchmiput S.*, (1882) 11 Cal. L. R. 268.

[11] *Abdul Majeeth* v. *Krishnamachariar*, (1916) 41 Mad. 243, 255 (F. B.); Citing Hed. 217.

[12] *Pathummabi* v. *Vittil Ummachabi*, (1902) 26 Mad. 734, 736 (par. 5); 737 (par. 2, 6); 739 (par. 2). See s. 567, *ill.* (10).

[13] On possession of entire property on behalf of co-sharers & as representing them : *Sukur Mahomed* v. *Asmot Mandal*, (1923) 50 Cal. 978.

[14] Viz. items XI. III. IV. in favour of defts. Nos. 13, 14.

[15] Wallis, C. J., In referring to F. B. : "If the balance of convenience may be regarded, I am not sure that it is for the benefit of creditors, any more than of co-heirs, to lay down a rigid rule that ALIENATION can be made only BY THE WHOLE BODY OF CO-HEIRS, or in a suit to which they are parties" : *Abdul Majeeth* v. *Krishnamachariar*, (1916) 40 Mad. 243, 249.

[16] *Abdul Majeeth* v. *Krishnamachariar*, (1916) 40 Mad. 243, 256 (F. B.); *Sukur Mahomed* v. *Asmot Mandal*, (1923) 50 Cal. 978.

part (if any) of her mahr. Her position as such creditor is peculiar because she is both (*a*) creditor, and (*b*) heir ; and if (*c*) peacefully and without force or fraud, she gets into possession of property belonging to her deceased husband in lieu of her mahr, she may acquire a lien.[17] A charge may also be created by a decree in a suit for the mahr.[18]

SECTION 571. Widow's lien.

572. Until any specific portion of the property of a deceased Muslim is actually alienated to a transferee in good faith for consideration, the creditors of the deceased may have their claims satisfied out of the said property in priority to the creditors of any of the heirs.[19] A mere money decree against an heir for his personal debt does not amount to such an alienation.

(G) Priority of creditors of deceased over creditors of heirs.

Mere money decree does not affect such priority.

A Muslim dies, leaving as his heirs, a widow, and a son. On 27 July 1899, the widow obtains a simple money decree against the estate for her unpaid mahr, not charging any portion of the estate with the payment. On 19 Sept. 1899 in execution of her decree, she attaches certain shares belonging to her husband's estate. A creditor of the son also holds a simple money decree[20] and in execution of his decree, attaches, on 21 Nov. 1899, the same shares. *Held*, that the estate devolved upon the heirs subject to the liability to pay thereout the debts of the deceased ; that a mere judgment against an heir (the son) for his personal debt did not amount to such an alienation of the assets as would to any extent defeat the creditors of the deceased. Therefore the widow's decree—she being a creditor of the deceased—had priority over the son's creditor's decree: who could, therefore, bring the said shares to sale, subject to the rights of the widow under her decree for mahr, but not otherwise.[21]

Illustration.

573. One of several heirs of a deceased Muslim, though he be in possession of the whole estate of the deceased, has

(H) Alienations by one heir for paying creditor of deceased.

[17] See s. 108, pp.185 ff., *nn.*

[18] *Qasim Husain* v. *Habibur Rahman*, (1929) 56 I. A. 254, 258 (PAT.); *Mahomed Wajid* v. *Bazayet Tayyuban*, (1878) 5 I. A. 211, 223, 224 = s. 571, *ill.* (2)(*c*).

[19] *Bhola Nath* v. *Maqbul-un-nissa*, (1903) 26 All. 28, 35 ; *Shankar Lal* v. *Mohammad Ismail*, [1930] 28 All. L. J. 989 (heirs sought to be made insolvents so as to make assets of deceased vest in Official Assignee : Prov. Insolv. Act, v. of 1920, s. 28 (2) ; *held*, that under s. 4(1) of the Act, Court has to decide questions of title or priority : which discretion must be so exercised as to give PRIORITY TO CREDITORS OF DECEASED with reference to assets of deceased). Cf. *Sukur Mahomed* v. *Asmot Mandal*, (1923) 50 Cal. 978 ; *Mathuradas* v. *Raimal*, (1935) 37 Bom. L. R. 646 (duty of executor to pay CREDITORS EQUALLY & RATEABLY : Ind. Succ. Act, 1925, s. 323 : right of creditors to FOLLOW ASSETS in hands of other creditors, who have received undue preference).

[20] If there had been a bona fide mortgagee or purchaser the case would have been different ; (*Mt.*) *Wahidunnissa* v. (*Mt.*) *Shubrattun*, (1870) 6 Beng. L. R. 54 ; *Bhola Nath* v. *Maqbul-un-nissa*, (1903) 26 All. 35 ; *Bazayet H.* v. *Dooli C.*, (1878) 4 Cal. 402 = 5 I. A. 211 ; *Kinderley* v. *Jervis*, (1856) 22 Beav. 1.

[21] *Bhola N.* v. *Maqbul-un-nessa*, (1903) 26 All. 35.

SECTION 573. no authority,[22] for discharging the debts of the deceased or otherwise, voluntarily [22] to alienate more than his own interest in property belonging to the estate.[23] His acknowledgment of a debt does not necessarily prevent limitation running against the other heirs and their interests in the estate.[24]

Two questions are involved in s. 573 : (1) Whether any of the heirs can, as against his co-heirs or other representative of the estate, plead, as due administration of the assets, payment to a creditor of the deceased. (2) Whether the transferee acquires good title to property so transferred.

Both questions had been answered in the affirmative,[25] without discussion. But the decision was subsequently over-ruled and it has now been laid down as in s. 573,[23] by a ruling that reconciles s. 573 with s. 574.

The question has been sufficiently discussed in ss. 567, 571, 572, comm. But some general considerations affecting s. 573, are now referred to.

Such alienations and acts of executor de son tort.

A single heir making payments for the satisfaction of the debts of the deceased, takes upon himself to represent the whole of the estate, without having due authority to do so. Each heir represents only a fraction of the estate proportionate to his own interest in it. It would therefore seem that the position of such an heir is partly analogous to that of an executor de son tort in England.[26] Payments so made by such a person are held good against the true representatives of the deceased only where (*a*) the circumstances are such that the creditor may reasonably take the person paying to represent the estate [26] : amongst the circumstances to be taken into consideration are whether such person "has assets out of which the decree is to be satisfied under his control ;" [27] and (*b*) the payment (or other dealing with the estate) is such as the true representative would have been bound to make [28] : e.g. if the debt

[22] *Mohammad K.* v. *Nasiban*, [1930] 28 All. L. J. 121 (original act was voluntary : son executed promissory note to discharge deceased's debt ; in execution of decree on this note property sold : *held*, daughter's share not bound by Court sale : nor were they bound to pay proportionate part of father's debt).

[23] *Abdul Majeeth* v. *Krishnamachariar*, (1916) 40 Mad. 243 (F. B.) over-ruling *Pathummabi* v. *Vittil Ummachabi*, (1902) 26 Mad. 734, 739. Cf. *Jafri B.* v. *Amir*, (1885) 7 All. 822. CONTRA : *Hasan Ali* v. *Mehdi Husain*, (1877) 1 All. 533 ; *Mohammad Khan* v. *Nasiban*, [1930] 28 All. L. J. 1211 (decree on voluntary promissory note by son to pay deceased's debt : execution sale : sister's shares not bound : not ordered to pay PROPORTIONATE PARTS OF DEBT) ; *Ghulam Goss* v. *Shriram Pandurang*, (1918) 43 Bom. 487 (one of several heirs not competent to discharge or release deceased's equity of redemption).

[24] *Bussenteram M.* v. *Kamaluddin A.*, (1885) 11 Cal. 421.

[25] *Pathummabi* v. *Vittil Ummachabi*, (1902) 26 Mad. 734, 736 (both questions arose with reference to defts. 11, 12, 17, involving item i, xviii, & xi, respectively).

[26] Cf. Ind. Succ. Act, 1925, ss. 303, 304 = Act X. of 1865, ss. 265, 266 : *Thomson* v. *Harding*, (1853) 2 El. & Bl. 630 ; *Jafri B.* v. *Amir Md. K.*, (1885) 2 All. 822, 825 (question 3).

[27] *Khiarajmal* v. *Daim*, (1904) 32 I. A. 23 = 32 Cal. 296 (s. 567(3), *n.* 21). Cf. *Pathummabi* v. *Vittil Ummachabi*, (1902) 26 Mad. 734, 738 ; *Davalava* v. *Bhimaji Dhondo*, (1895) 20 Bom. 335, 345 ; *Hamir Singh* v. (*Mt.*) *Zakia*, (1875) 1 All. 57, 59 (F. B.). So, conversely not being in possession of estate, no defence where heirs are sued by deceased's creditors : s. 561, *ill.* (3).

[28] *Graysbrook* v. *Fox*, (1565) Plowd. 275, 282 ; *Buckley* v. *Barber*, (1854) Exch.

was not due,[29] the other heirs would not be bound by the transfer or dealing.[30] SECTION 573.

Similar considerations presumably affect the title that the alienee acquires in such circumstances. Where the property is transferred to a third person in good faith for valuable consideration, the creditors or heirs of the deceased cannot follow it in the hands of the transferees : the mere existence of debts payable by the estate do not affect the title of the transferee, even though he has knowledge of the debts ; [30] so that such debts or charges are not in the nature of a trust [31] on the property of the deceased, binding on the transferee : ss. 571, 572. This does not imply that the whole of any particular property may pass by the act of one of several heirs. Each heir may transfer only his rights in the property, but such rights are transferable without being charged with payment of a proportionate part of the deceased's debts. Title acquired by alienee from single heir.

574. One of several heirs of a deceased Muslim can give a valid and sufficient discharge to a debtor of the deceased only for a part of the debt, proportionate to the heir's own interest in the estate.[1] (1) Payment to one heir of debt due to deceased.

A Muslim dies, leaving two heirs. A mortgagor of the deceased pays the mortgage-debt to one of the heirs alone. *Held*, that the mortgagor is bound to pay over again to the other heir his share in the mortgage debt.[2] *Illustration.*

Though a single heir may purport to act as the representative of the deceased so that the debtor may reasonably suppose him to be such, still the heir is not clothed with authority to give a discharge to the debtor any more than he is to pass a good title to a creditor of the deceased. A distinction was at one time made between the cases under ss. 573, and 574 : that every creditor of the 1.—Individual heir cannot give valid discharge to debtor.

Rep. 164, 183 (*per* Parke B.); *Thomson* v. *Harding*, (1853) 2 El. & Bl. 630, 639 ; s. 567(2).

29 *Khurshetbibi* v. *Keso Vinayek*, (1887) 12 Bom. 101, 103.

30 (*Syud*) *Bazayet H.* v. *Dooli C.*, (1878) 5 I. A. 211 = 4 Cal. 402, 401 ; (*Mt.*) *Wahidunnissa* v. (*Mt.*) *Shubrattun*, (1870) 6 Beng. L. R. 54 ; see also *Jafri B.* v. *Amir Md. K.*, (1885) 7 All. 822, 828, 833 ; *Land Mortg. Bk. Ld.* v. *Bidyadhari D.*, (1880) 7 Cal. L. R. 460, 463. See *n.* 29.

31 As to TRUSTS, see Ind. Trusts Act, s. 96 ; Lewin, *Trusts*, (10th ed.) 1045. *Fakruddin* v. *Abdul Hussein*, (1910) 35 Bom. 217 (purchaser of trust-estate with KNOWLEDGE OF TRUST bound by trust, though he has paid full value) ; cf. *Mathuradas* v. *Raimal*, (1935) 37 Bom. L. R. 646 ; (s. 572, *n.* 17).

1 *Pathummabi* v. *Vittil U.*, (1902) 26 Mad. 734, 737 (par. 3, 4), 739 (par. 3 relating to defendants 18, 19 : items xv, xvi) ; *Gulam Goss* v. *Shriram Pandurang*, 43 Bom. 487 (= s. 566, p. 753, *n.* 39) ; *Sukur Mahomed* v. *Asmot Mandal*, (1923) 50 Cal. 979 (in Muslim system no member represents family as *Karta* binds Hindu family = one member's act does not bind other members). *Ram Autar* v. *Ghulam Dastgir*, (1929) 51 All. 589 (one heir of USUFRUCTUARY MORGAGEE may not give valid discharge for whole mortgage debt) ; *Ahinsa B.* v. *Abdul Kadir S.*, (1901) 25 Mad. 26, 39. Cf. Ind. Contr. Act, 1872, s. 40. *Sitaram* v. *Shamlal*, (1903) 27 Bom. 292 (payment by mortgagor to one of mortgagee's heirs does not discharge).

2 (*Haji*) *Saboo Sidik* v. *Ally Mahomed Jan M.*, (1904) 30 Bom. 270 following *Veerasokharajee* v. *Papiah*, (1902) 26 Mad. 792 (every payment on account of a debt is perfectly lawful irrespective of its effect upon other creditors : & is due application of assets with Civ. Pro. Code, s. 52) ; (*Syud*) *Jafur Hossein* v. *Hingun Jan*, (1867) 8 W. R. 160 ; *Joogul Kishore S.* v. *Kalee Churn S.*, (1876) 25 W. R. 224 (onus on heirs to show that assets have been utilized or disbursed for deceased's liabilities : they must file inventory & prove how estate applied).

SECTION 574. estate was entitled to receive his entire debt out of the assets, and if any heir discharged the duty of paying off the creditor, he only gave to the creditor his due; but that no single heir was entitled to receive the deceased's entire debt, so that the debtor could effectually give to each heir only that heir's own due.

2.—Every part of property liable for debt.

3.—Whole of any property may be given in satisfaction of any creditor.

The converse of the rule in s. 574 does not hold: In other words, while (i) each heir has a proportional interest in every sum due to the estate, yet (ii) it cannot be maintained that (inasmuch as every part of the property of the deceased is liable for the payment thereout of all the deceased's debts) each creditor is entitled only to a proportionate part of each item of the estate, and can have only such portion thereof transferred to him as will leave the rights of other creditors therein unaffected. To take an example: (1) a person dies, leaving as his heirs two sons: a debtor of the deceased cannot get a lawful discharge for the entire debt from one son alone: one son's receipt for any portion of the debt beyond a 1/2 of it will be an ineffectual discharge as against the other son. But, (2) if the deceased leaves property of the value of Rs. 10,000, and there are two creditors, each to the extent of Rs. 10,000, then in the absence of fraud the two sons may transfer the entire property to one creditor alone, who would then acquire a valid title to the whole, and not only to half of it.[2]

4.—Rateable payment not prescribed.

For Muslim law, unlike English law, does not prescribe a rateable payment of debts. It can only be in cases where the assets are not sufficient to discharge all the debts that the point can be of importance.[3] In such cases, of course, the creditors have other remedies. Moreover the fact that a particular remedy is not available under Muslim law or procedure, does not mean that there will be none afforded in India.[4]

§ 5.—PROTECTION OF ESTATE.

Steps for protecting property of the deceased: Appointment of—
1. Curator.
2. Administrator-General.
3. Receiver.

575. Where there is danger of misappropriation, deterioration or waste of the estate,[5] the Court may deliver possession of the property to some person under the Indian Succession Act, 1925, ss. 192-210, or authorize and enjoin the Administrator-General or a receiver to collect and take possession of it.

The Administrator-General's Act (ss. 17, 18) applies only where assets are within the Presidency towns. See the Civil Procedure Code, O. XL., for the appointment of receivers. If the estate has been taken possession of by a person who is not the legal representative, and no other person is constituted as such, the proper course in England appears that a bill be filed for a receiver to take care of the property until a legal personal representative is appointed. Lord Romilly, M. R. said: "You cannot administer the personal estate of

Cary *v.* Hills. L. R. 15 Eq. 79.

[3] See s. 566, com., pp. 748 f.: creditors' & administration suits.

[4] *Kazim Ali K.* v. *Sadik A. K.*, (1938) 65 I. A. 219, 232 *ll.* 5-9.

[5] See Ind. Succ. Act, XXXIX. of 1925, s. 195, par. vii, (ss. 192-210 = Succ. Prpty. Protec.) Act, XIX. of 1841 ("Curator's Act"). Cf. *Mathuradas* v *Raimal*, (1935) 37 Bom. L. R. 642.

SECTION 575.

a testator in Chancery unless you have his legal personal representative before the Court; if you were able to do so, you would work great injustice. If at the hearing of an administration suit, the Court finds that it has not the legal personal representative of the testator before it, then its arm is paralyzed, and it can do nothing." If the plea in substance says that there is no legal personal representative of the testatrix, and it is not alleged that any person other than the defendant has been constituted her legal personal representative, though it is alleged that the defendant has possessed himself of every part of the personal estate; that would not entitle the plaintiff in England to the relief of general administration. "If a person has taken possession of the estate, you may file a bill for a receiver to take care of the property until a legal personal representative is appointed, and the Court will appoint a receiver for that purpose; but that is a totally different thing from making a decree for general administration." [6]

Necessity of some one to represent the estate.

Wrongful possession.

Receiver.

[6] *Cary* v. *Hills*, (1872) L. R. 15 Eq. 79, 82. Sect. 566, com., p. 748. Muslim law empowers Kazi to appoint joint manager where executor appointed by deceased incompetent. See ss. 562, 565 A; *Ismail Abdul Latif* v. *Haji Ibrahim*, (1934) 59 Bom. 397.

CHAPTER XIII.

WILLS.

§ 1.—PRELIMINARY.

TERMS.

576. In this chapter unless it is otherwise indicated—

Will.

(1) "will" [1] means the legal declaration of the intentions [2] of a Muslim with respect to his property, which he desires to be carried into effect after his death ; [3]

Estate.

(2) "estate" means all the property [4] that a deceased Muslim owns at the time of his death, after his funeral expenses have been paid and his debts discharged ; [5]

Bequeathable third.

(3) "The bequeathable third" means one-third of the "estate" after payment of the funeral expenses and the debts of the deceased.[6]

Will defined.

"Will," it is said in the Hidaya, "means the endowment with (i) the PROPERTY of anything after death." [7] Later it is said that a bequest may be made of (ii) the SERVICE or wages of a slave or the USE or rent of a house either for a definite or indefinite period : "because as an endowment with USUFRUCT either gratuitous or for an equivalent is valid during life, it is consequently so after death ; and also because men have occasion to make bequests of this nature, as well as bequests of actual property." [7] The defini-

Bequest of
i—corpus
ii—usufruct

[1] *Wasiyyat* is term for wills generally. Where what is bequeathed is not full ownership of any physical object, but USUFRUCT OR RIGHTS IN THE OBJECT, the disposition is styled *wasiyat bil manafi* : ss. 580(2)-(4), 366 A, pp. 792 ff., 380 ff.

[2] I.e. ultimate will, or effective expression of his wishes about his estate, discovered by the law after scrutiny of the instruments which express his last will : so that it is inaccurate to speak of a man leaving two wills : *Douglas-Menzies* v. *Umphelby*, [1908] A. C. 224, 233, cited & followed (*Ahronee*) *Shemail* v. *Ahmed Omer*, [1931] 33 Bom. L. R. 1056 = [1931] AIR (BOM.) 533.

[3] Ind. Succ. Act, XXXIX of 1925, s. 2 = Prob. & Adm. Act V. of 1881, s. 3.

[4] Property of any description whatever, except property in which interest of deceased limited to his life time. Texts as usual refer in regard to subject of bequest to leading distinction (s. 366A p. 380) between *ayn* or SUBSTANCE & USUFRUCT : s. 576, com.

[5] Cf. s. 558(4), p. 729, *n.* 2.

[6] Over the bequeathable 1/3 there is testamentary power : see ss. 579-579 E. Where what is bequeathed is not full ownership of any determinate article but rights in it, viz. its USUFRUCT or produce &c. the usufruct or rights must be valued for determining whether they come within bequeathable 1/3 : s. 580(2), p. 793. See also s. 366 A, p. 380.

[7] Hed. 670, 692 (col. ii. par. 3); Bail. I. 613 (623).

tion in the Fatawa Alamgiri is almost identical in terms : but it combines the two classes of bequests : " To bequeath is in the language of law to confer a right of property in (i) a specific THING, or (ii) in a PROFIT or ADVANTAGE in the manner of a gratuity, postponed till after the death of the testator." [7] The examples given of the second class of bequests are " the service of a slave, or the occupation of a mansion, or the produce (ghallat) of both, or of lands and gardens."[7] The Sharaiu'l-Islam says : " To bequeath is to confer a right to the SUBSTANCE or USUFRUCT of a thing after death ; it requires declaration and acceptance." [8] The Arabic word for will is wasiyat, meaning " precept." The earliest wills amongst the Arabs appear to have been nuncupative : in many cases made in the midst of battle and surrounded by the tribesmen. [9] The attention in the texts to bequests of fractions of the estate, and the form of the interest in the estate given by the law to many of the heirs, suggest the testamentary nomination of a universal successor : an easy step being to nominate more persons than one to form conjointly the universal successor : then an apportionment amongst the legatees. SECTION 576. Nomination of universal successor.

The provision that a will operates only upon that portion of the estate which is left over after the testator's debts have been paid, takes the place of the rules against gifts and wakfs in fraud of creditors contained in ss. 359, 461. CREDITORS' RIGHTS : How protected.

577. The will of a Muslim [10] is governed in India, subject to the Indian Succession Act, XXXIX. of 1925, by the Muhammadan law.[11] Law appealable to wills.

An interesting example of the interplay of customary, statutory, and Muhammadan, law was furnished by a case in which a Muslim owned (inter alia) bhagdari lands. Such lands are subject both to custom and to the Bhagdari Act (Bom. V. of 1862, II. of 1910) : (1) on intestacy where there is no son, such lands devolve by custom upon the widow for life, and after her upon the nearest male agnate (the daughter and sister being excluded); (2) alienation of parts (bhags) other than a recognized sub-division is declared null and void so as to prevent dismemberment of a bhag : ss. 3 & 5. There being no evidence that the testamentary capacity of a Muslim had been converted by custom into something different from the ordinary capacity of a Muslim testator, it was held that the possession of bhagdari property did not affect testamentary capacity ; except that to some extent such property may be taken out of the operation of a will (viz. if the will provides for such a division of the testator's property as would be contrary to the Act). [12] *Illustration.*

[8] Bail. II. 229. See Fyzee, *Ismaili Law of Wills*, Intr.

[9] Rom. law ; Gaius, II. 101, Just. II., x, 1.

[10] I.e. one who dies Muslim : on conversion to or from Islam his personal law changes & that law governs his succession which applies to his new religion : *Mitar Sen* v. *Maqbul*, (1930) 57 I. A. 313, 317.

[11] See s. 1, com. Cf. (*Shaik*) *Moosa* v. (*Shaik*) *Essa*, (1894) 8 Bom. 241.

[12] *Ahmad Asmal* v. *Bai Bibi*, (1916) 41 Bom. 377 (will invalid for infringing s. 578) ; cf. (*Ahronee*) *Shemail* v. *Ahmed Omer*, (1931) 33 Bom. L. R. 1056.

§ 2.—Testamentary Competence and Capacity.

1. COMPETENCE TO MAKE A WILL.

Shia law : Will of suicide invalid.

578. (1) A Muslim of sound mind [13] who has attained majority under the Indian Majority Act is competent to make a will. [14] Under Shia law a will made after the testator has wounded himself mortally, or taken poison for committing suicide, is invalid ; but if he makes his will and then commits suicide, the will is valid.[15]

Majority : soundness of mind.

Will by (1) minor : (2) lunatic.

(2) A bequest made by a person while a minor, may be validated [16] by subsequent ratification. [17]

(3) A will made by a testator whose mind is unsound does not become valid by his subsequently becoming of sound mind. [17] A will made by a person while of sound mind becomes invalid if the testator subsequently becomes permanently unsound of mind. [18]

Onus.

(4) The onus of proving that a will is invalid under s. 578 is on the person impugning the will.[13]

Age of testamentary competence.

The question as to the age at which a Muslim may make a will requires a consideration of both the Indian Majority Act and the Muhammadan law—the latter forms the rule of decision in questions relating to succession " except in so far as such law has by legislative enactment been altered or abolished."[19]

Succession Act not applied.

The Indian Succession Act X. of 1865, s. 46 (to which Indian Succession Act XXXIX. of 1925, s. 59 corresponds) [20] specifically dealt with the question of the age at which a person may make a will. The said section was not applied to Muslims, nor incorporated in the Probate and Administration Act V. of 1881, or in any other Act to which Muslims were subject. On the other hand it is incorporated in the Hindu Wills Act. Five years after the enactment of the Indian Succession Act, 1865, however, the Indian Majority Act, 1870, was

Wills not excepted from Majority Act.

[13] Roman law did not permit DUMB TO MAKE WILL ; Justin. II. xix, 4 ; III. xix, 7 ; Gaius, III. 105.

[14] Bail. I. 617 (627) (624) ; II. 232 " all proper bequests in favour of his relatives & others are lawful," if he has attained 10 years of age & is capable of discernment " : *sed quaere* : Bail. I. 617 (627), 614 (624); Hed. 673 ; *Minhaj*, 259 (Bk. 29, s. 1). See com. *Hardwari Lal* v. *Gouri*, (1911) 33 All. 525 ; *Bai Gulab* v. *Thakorelal*, (1912) 36 Bom. 622.

[15] Bail. II. 232 (par. 2); *Mazhar Husen* v. *Bodha B.*, (1898) 21 All. 91 (P.C.): WILL OF SUICIDE valid, when made in contemplation of taking poison, but before poison actually been taken ; onus of proving that will written after swallowing poison rests on party impugning will : *ib.* 98. See s. 579 E, p. 792.

[16] *Sic.* Bail. I. 617 (627). [17] Bail. I. 617 (627).

[18] Ameer Ali, *Mahom. Law*, I. 467 (573-574) citing *Kazi Khan* : if person makes will & then becomes permanent lunatic, will becomes void. But when madness has not lasted over 6 months, bequest not avoided.

[19] The exception is not expressly mentioned in the case of High Courts. See Table of Enactments in Ch. II., p. .

[20] Succ. Act, 1925, s. 59 : " Every person of sound mind not being a minor may dispose of his property by will." But " The provisions of this part (ss. 57-190) shall not apply to testamentary succession to the property of any Muhammadan " : Succ. Act, s. 58(1).

passed, providing that minors shall be deemed to have attained majority on completing 18 or 21 years;[21] and only questions relating to marriage, divorce, adoption, and religion or religious usages, are excepted from its operation. So that, by implication, majority in the matter of succession (and the law of wills forms a part of the law of succession)[22] is to be governed by the Majority Act: in other words, the provisions of Muhammadan law, as to majority so far as the law of wills is concerned, are by implication "altered or abolished" by the Indian Majority Act. SECTION 578.

But (if the matter is considered in a strictly technical manner) before it can be held that the Majority Act affects the competence of a Muslim to make a will, it must be held that either the Majority Act or the Muhammadan law requires the attainment of majority as a condition precedent for testamentary competence, namely, that under either the Act, or the Muslim texts, attaining majority is a necessary qualification for having the power to make a will. For this purpose it has first to be ascertained whether the attainment of majority is necessary for competence to make a will under Muhammadan law; and then whether or not majority will be determined in this connection by the Indian Majority Act. The Act does not contain any specific provision of substantive law, laying down the effect, as regards juristic acts generally, of a minor attaining majority, or of continuing to be a minor. Again under Shia law, majority does not seem to be a necessary ingredient of testamentary capacity, inasmuch as that law fixes an age (viz. 10 years) independently of the age of majority for competence to make a will. If this is so, then strictly speaking, the Shia law of wills must be deemed to be unaffected by the Indian Majority Act, and a Shia who is ten years old, and has discretion, must be considered competent to make a will. The Courts would, no doubt, strive hard to avoid this conclusion, and would scarcely hesitate to read into the Majority Act a provision which, though not expressed, seems to be its implied object and purpose, and without which it would almost be rendered nugatory.[23] Under Hanafi law, on the other hand, competence to make a will connotes puberty; and puberty being the age at which, under Muhammadan law, a person attains majority, it has to be ascertained with reference to each subject and context, whether the term puberty must by operation of the Indian Majority Act be replaced by the words "attainment of 18 or 21 years (as the case may be)." In coming to a decision on this point as regards wills (should the question ever arise) the Courts will, no doubt, be influenced by the close analogy that testamentary capacity has to contractual capacity. A will purported to be made by a person under 18 years would (apart from the doubts above referred to) be peculiarly liable to attack on the ground of undue influence. See also s. 11 (2) p. 77.

Two questions:

1.—Is attainment of majority an ingredient in testamentary capacity?

2.—How must majority be determined?

a.—Shia law.

b.—Hanafi law.

c.—Will of minor and undue influence.

[21] The two divisions (law of succession & of minority) are cross divisions: for it is plain that law governing minor who purports to make will falls within both divisions. See Holland, *Jurisp.*, 7th ed. (1895) 122, 123 which brings out this point with great clearness by a tabular statement.

[22] *Mancharji Pestonji* v. *Narayan L.*, (1863) 1 Bom. H. C. R. 77, 80, 81.

[23] See *Krishnamachariar* v. *Krishnamachariar*, (1913) 38 Mad. 166, 174, 175.

SECTION 578. *d.*—Shafii law agrees with Hanafi, not Shia law.

As some doubt has been expressed [24] as to whether the Shafii law on this point does not agree with Shia law, the following translations from Shafii texts may be useful : (1) "A will is valid if made (i) by one who is capable of duties being imposed on him, and free (although he may be a non-Muslim), so also (ii) by one who is under inhibition on account of imbecility, according to the faith (of Shafii), but (iii) not by an insane man, (iv) nor a man who is not in his senses, (v) nor a child ; though (vi) according to one authority it may be valid if made by a child who has discernment." [25] (2) "The constituent parts (of a will) are : the legatee, the object of bequest, the words (of appointment) and the testator. It is required of him (i.e. the testator) that he be capable of having duties imposed on him, being free, and having freedom of will for action, and it would not be valid without these conditions." [26] No doubt under the Indian Majority Act no minor would be considered to be capable of having duties imposed on him.

Pardanishin ladies.

578A. Testamentary dispositions made by pardanishin women are subject to the rules in s. 359A with the necessary modifications.

II. TESTAMENTARY CAPACITY, (A) HOW LIMITED.

579. Under systems of Muhammadan law other than the Ithna Ashari Shia law [27] a testamentary disposition [28] is (unless validated under ss. 579A and 579B), invalid, if, and in so far as, it purports—

(1) One-third of estate.

(*a*) to dispose of more than the bequeathable third,[29] or

(2) Bequests to heirs invalid

(*b*) to benefit any of the testator's heirs, [30] or

[24] Hed. 673.

[25] *Minhaju't-Talibin*, Wills, (*ll.* 1-3).

[26] Shaikhu'l-Islam Zakari al Ansari's *Manhaj*, Book on *Wasaya* (*ll.* 1-4).

[27] As to Shia Ithna Ashari law, see s. 579C, pp. 788 ff.

[28] Payments to be made to executors are gratuitous bequests. See s. 561A, p. 733.

[29] Sect. 576(3); Hed. 671 ; Bail. I. 614 (624), 634 (645-646), etc. ; II. 233 ; *Minhaj* 260 (Bk. 29, s. 2). *Muhammad Junaid* v. *Aulia B.*, (1920) 42 All. 497, 499 ; see also *Abdul Majeeth* v. *Krishnamachariar*, (1916) 40 Mad. 243, 254 ; *E. C. Jeewa* v. *H. H. Yacoobally*, (1928) 6 Rang. 542 (1/3 to charity); *Badrul Islam Ali Khan* v. *Ali Begum*, (1935) 16 Lah. 782 (bequests for pious purposes also must be within bequeathable 1/3); contrast, p. 786, s. 579C(ii) (Shia law).

[30] *Zarifunnissa* v. *Shafiq-uz-zaman*, (1925) 55 I. A. 303, 315, *ll.* 10-12 (CENTR. PROV.); *Salayjee* v. *Fatima B.*, (1922) 1 Rang. 60 (P. C.) = 25 Bom. L. R. 301 ; *Bafatun* v. *Bilaiti K.*, (1903) 30 Cal. 663, 686 ; *Fatima* v. *Ariff*, (1881) 9 Cal. L. R. 66. Heirs, i.e. ACTUAL HEIRS at death, not presumptive heirs at time of bequest : s. 579C, p. 787, *ill.* (5). *Irshadullah Khan* v. (*Md.*) *Fakhira B.*, (1936) 12 Luck. 592 (heir, though determined by CUSTOM & not by Muhammadan law, will have rights under s. 579(*b*), unless by custom that right taken away) : see also Shariat Act, 1937 : s. 6A pp. 47-51. *Upon Petition of Keramat-ul-Nissah Bibi*, (1817) 2 Morl. 120 ; *Jumeenooddeen Ahmed* v. *Hossein Ali*, (1865) 2 W. R. Mis., 49, (will DISINHERITING all heirs) ; *Qadir Ali K.* v. *Nowsha B.*, (1867) 2 Agra 154 (altering rights of heirs) ; *E. C. Jeewa* v. *H. H. Yacoobally*, (1928) 6 Rang. 542 (shares of heirs can not lawfully be reduced or enlarged : nor can enjoyment of legal share be restricted : but, heirs may consent to will : s. 579A) ; *Mahomed Mudun* v. *Khodezunnissa* ALIAS *Khookee B.*, (1865) 2 W. R. 181 (more than 1/2 to daughter) ; *Shek Muhammad* v. *Shek Imamuddin*, (1865) 2 Bom. H. C. 53 (2nd ed. 50) (= p. 785, *n.* 14 to brother without consent of HUSBAND) ; *Baboojan* v. *Muhammad Nurool Haq*, (1868) 10 W. R. 375 ; *Qomuttoonnissa B.* v. *Areefoonnissa B.*, (1865) 4 W. R. 65 ; *Mahomed Hussein* v.

(*c*) to benefit an object opposed to Islam as a religion.[29] In determining under s. 579(*a*) whether the bequests exceed the bequeathable third, (i) bequests that are void for some reason other than because they are in excess of the bequeathable third are not taken into account ;[31] (ii) where the bequest is of the usufruct, its capital value must be determined and that value adopted for the purposes of s. 579(*a*).[32]

SECTION 579. (3) Not opposed to Islam.

As to Shia Ithna Ashari law, see s. 579 c, *ill.* and com., pp. 788 ff.

579 A. (1) Bequests[1] in excess of the bequeathable third and/or in favour of any heir (s. 579), are validated[2] and will be given effect to, if, after the testator's death,[3] the heirs[4] whose rights are affected by such dispositions[5] consent thereto, expressly or impliedly[6] [or by passive acquiescence][7] such

(B) Consent of heirs validates (1), (2).

Aishabai, (1934) 36 Bom. L. R. 1155 (heir cannot be benefited even in form of commission for acting as executor : s. 561 A, p. 733) ; *Muhammad Jumaid* v. *Aulia*, (1920) 42 All. 497, 502 bottom (if legacies given to heir & also to stranger, heir will take his full legal inheritance, & no more, out of whole estate ; & legacy to stranger will have to abate, if necessary, so that it may come out of 1/3 ; but so as to allow full inheritance out of whole estate to heir) ; *Muharram Ali* v. *Barkat Ali*, (1930) 12 Lah. 286 ; *Ghulam Muhammad* v. *Ghulam Husain*, (1931) 59 I. A. 74, 85 (par. 3), 86 (par. 4) ; (*Mt.*) *Ghulam Jannat* v. *Rahmat Din*, (1934) 15 Lah. 889.

31 *Muhammad Junaid* v. *Aulia*, (1920) 42 All. 497 (p. 500, *ll.* 1-4, will set out : question dealt with on pp. 501-3.) In other words all legacies which are invalid in themselves are first eliminated : then, if valid legacies exceed bequeathable 1/3, they abate proportionately : so that if testator makes a bequest of 1/3 of his estate valid in other respects & also an invalid bequest of another 1/3 of estate, the valid bequest of 1/3 of the estate will be given effect to, without abatement.

32 (*Mt.*) *Ghulam Jannat* v. *Rahmat Din*, (1934) 15 Lah. 889. See Bail. II. 240, 241 ; Hed. 692, 693 : set out s. 580, pp. 792-4 & *nn.*) : CAPITAL VALUE must be determined when legacy consists of USUFRUCT.

1 Payments to executor (though as remuneration for administering the estate) are gratuitous bequests, & must be subject to s. 579 : see s. 561 A, p. 733.

2 Validity conferred by consent of heirs prevails only in so far as bequest contravenes s. 579 : heirs' consent cannot validate BEQUEST VOID FOR OTHER REASONS : *Abdul Karim* v. *Abdul Qayum*, (1906) 28 All. 324 ; *Nasir Ali* v. *Sughra*, (1920) 1 Lah. 302. On question whether bequest void for other reasons, these ss. must be read subject to *Amjad Khan* v. *Ashraf K.*, (1927) 59 I. A. 213 ; see s. 444, pp. 497, 501.

3 *Bafatun* v. *Bilaiti K.*, (1903) 30 Cal. 683 : *Nasir Ali S.* v. *Sughra B.*, (1910) 1 Lah. 302 (consent during life not enough in Hanafi law) ; *Nusrut* v. *Zeinunnissa*, (1871) 15 W. R. 146 ; *Cherachom Vettil Ayisha Kutti Umah* v. *Valia Pudiakel*, (1865) 2 Mad. H. C. R. 350 ; *E. C. Jeewa* v. *H. H. Yacoob Ally*, (1928) 6 Rang. 542. Ameer Ali, *Mah. Law* I. 486 (593) states that heir's consent during last illness of testator is irrevocable, because heir is supposed to have then acquired right. No authority cited.

4 Who are heirs can of course be determined only after death of testator, & heirs so determined, must consent. Bail. I. 615 (625) ; Hed. 67, col. i, par. 3 ; s. 579c, *ill.* (5), p. 787. Consequently IF THERE ARE NO HEIRS, testamentary powers may be exercised to the full. Cf. ss. 579 B, 633, 647, 648.

5 A person may sign will merely as witness without expressing consent : *Nisar* v. *Mohammad Ali K.*, (1932) 59 I. A. 268, 274 (par. 5) ; *Qadirjahan B.* v. *Fazal Ahmed*, (1928) 26 All. L. J. 691 (there is no contingency if bequest granted subject to heirs consenting).

6 *Salayjee* v. *Fatima B.*, (1922) 1 Rang. 60, 62 = 25 Bom. L. R. 301 (P. C.) (evidence of IMPLIED CONSENT canvassed : Lord Phillimore) ; *Ma Khaoton* v. *Ma*

SECTION 579A. consent has been held to be valid and effective though the heir is insolvent when he consents. [8]

(1) Where only some heirs consent.

(2) Bequest validated by consent of heirs : not gift requiring possession.

(2) Where some of the heirs consent and the others do not,[9] the bequest (in so far as its validity needs consent) is payable out of the shares of the consenting heirs alone.[10]

(3) A testamentary disposition validated under s. 579 A(1), operates (except under Shafii law) as the act of the testator,[11] and not as a gift by the heirs ; and to complete the transfer of the bequest to the legatee it is not necessary (except under Shafi law) that possession of its subject be transferred.[11]

(c) When no heirs.

579 B. In the absence of heirs and as against the right of the State to take by escheat, the testator may bequeath the whole of his property by will.[12] Where a testator dies leaving only a wife|husband as his|her heir and no blood relations,

Mya [1936] AIR (RANG.), 448 ; *Mahomed Hussein* v. *Aishabai*, (1934) 36 Bom. L. R. 1156 ; *Daulatram* v. *Abdul Kayum*, (1902) 26 Bom. 497 (= *n.* 8).

[7] Macn. 244, 245 ; *Ramcoomar Chunder Roy* v. *Faqueeroonissa B.* (1862) 1 Ind. Jur. (O.S.) 119 (heiress continues to reside in house bequeathed to her : *held*, not = consent to will, in absence of some act of actual consent or ratification) ; *Khadijah B.* v. *Suffer Ali* (1865) 4 W. R. 36 (heir affixes his signature to will, without undue influence : this may mean consent) ; *Sharifa B.* v. *Gulam Mahomed*, (1892) 16 Mad. 43 (do.) See also *Cherachom Vittil* v. *Valia*, (1865) 2 Mad. H. C. R. 350 ; *Nusrat Ali* v. *Zeinunnissa*, (1871) 15 W. R. 146 ; *Daulatram* v. *Abdul Kayum*, (1902) 26 Bom. 497 ; *Mahomed Hussein* v. *Aishabai*, (1934) 36 Bom. L. R. 1156 ; *Irshadullah K.* v. (*Mt.*) *Fakhira B.*, (1936) 12 Luck. 592.

[8] *Azizunnissa* v. *I. M. Chiene*, (1920) 42 All. 593 (husband & son of testatrix, being INSOLVENT, CONSENTED before & after testatrix's death to property being bequeathed wholly to daughter, consent held effectual ; there being conflict between Insolvency Act, 1907, s. 16 (Act V., 1920, s. 28, Act III., 1909, s. 17) & Muhammadan law, held, latter must prevail. But, *submitted* (i) Islamic law disapproves of DEFEATING CREDITORS, (ii) moreover, consent before testator's death is ineffectual ; after death, creditors' rights having already arisen in respect of insolvent heirs' interest in estate, can insolvent heirs part with their rights of inheritance when by doing so they do not lose anything, but deprive their CREDITORS of their (the creditors') just claim to be paid out of what would have been taken as inheritance by heirs unless they renounced it ? (iii) Do not insolvents' rights of inheritance vest in Offl. Assignee on insolvency ?—ss. 17/28 of Insolv. Acts ? *Abdul Rehman* v. *Purbi Din*, (1937) AIR (OU.) 239 (immaterial if consenting heirs declared insolvent before or after execution of will : more so, if declared insolvent long after execution of will) ; *Daulatram* v. *Abdul Kayum*, (1902) 26 Bom. 497 (consent of heirs may—notwithstanding Civ. Pro. Code, s. 276 (now s. 64)—be given after attachment. *Sed quaere*, when heirs purported to renounce inheritance, was right to inherit theirs. was it not Offl. Assee.'s ?) On converse point, cf. Hed. 673, col. ii. bequest by insolvent heir void). *Kali Charan* v. *Mohammad Jamil*, [1930] A. L. J. 588 (consent after insolvency, held (*submitted* correctly invalid).

[9] *Salayjee* v. *Fatima B.*, (1922) 1 Rang. 60 = 25 Bom. L. R. 301 (P. C.).

[10] Hed. 674. Irrespective of subject of bequest being within or beyond bequeathable third. But there is nothing to prevent heir consenting either to payment out of his own share in estate of (i) only part of bequest, proportionate to his own share in estate : or (ii) of entire bequest.

[11] Hed. 671, col. ii ; Bail. I. 616 (626), II. 233. See s. 579 C, *ill.* & Com.

[12] E.g. in *Moohummud Ameenoodeen* v. *Md. Kubeeroodeen*, (1825) 4 S. D. A., (CAL.) 49 ; cf. *Ekin Bibee* v. *Ashruf Ali*, (1864) 1 W. R. 152. See ss. 633, 647.

if he is a man, he is entitled to bequeath of 5|6 of his estate ; and if a woman to bequeath 2|3 of her estate.[13] SECTION 579B.

Illustrations.

(1) A Muslima dies leaving her husband, and no other heirs. She purports to bequeath 1/2 of her property. The bequest is, as against her husband, valid only to the extent of 1/3 of the estate. Hence 1/3 is, in the first instance, given to the legatee ; and the husband takes his legal share of 1/2 of the net estate, i.e. 1/2 of 2/3 =1/3 of the whole. Then out of the residue (i.e. 1/3) that would have escheated to the State, the legatee can again take 1/6 to complete the 1/2 that is bequeathed to him. So that ultimately the estate is thus divided : the husband takes 1/3 ; the legatee 1/3 + 1/6 = 1/2 ; and 1/6 (subject to ss. 633, 647) escheats to the State.[14]

(2) A Muslim dies leaving him surviving only his wife. He purports to bequeath all his property to a stranger. The legatee takes 5/6, and his widow 1/6. The legatee takes in the first place 1/3 as legacy ; then the widow takes her Koranic share, viz., 1/4 of 2/3=1/6; and then the residuary 3/6 does not escheat to the State, but goes to the legatee.[14]

Case when husband or wife is sole heir.

See also s. 579 C, *ill.* and com. If the deceased leaves only a husband or wife surviving, the survivor is entitled to take his or her Koranic share in the estate, amounting to 1/2 or 1/4, but is not entitled to take the residue of the estate by return as defined in s. 625, (see also ss. 633, 647). Moreover, the 1/2 or 1/4 Koranic share is determined with reference only to the net estate, i.e. not only have the creditors of the deceased to be first satisfied, but the deceased has the right to make a will disposing of 1/3 of the whole of the net estate which is left over after funeral expenses and creditors have been paid in full : so that the husband or wife is in truth entitled to receive only 1/2 or 1/4 of 2/3, i.e. husband 1/3 and wife 1/6 of the net estate after the funeral expenses and creditors have been paid. In effect the deceased has testamentary capacity over the 5/6 or 2/3 as the case may be.

(D) Exceptions under Shia law.

579 C.[15] The Shia Ithna Ashari law [16] agrees with the law

[13] Bail. I. 634 (645). See s. 579 B, *ill.* (1), *n.* 14. Where only husband or wife survives, he or she takes only fraction of estate of deceased as Koranic share & is not, as against testamentary disposition made by deceased, entitled to claim residue of estate. See s. 579 C, *ill.* (7), (8), p. 787 ; also (Chapter on Inheritance), ss. 625, 633, 647 (husband to take final 1/6 instead of State).

[14] Bail. I. 634 (645) ; s. 581, *ill.* (2), p. 797 & *n.* But see (*Shek*) *Muhammad* v. (*Shek*) *Imamuddin*, (1865) 2 Bom. H. C. R. 50, 53 (will held totally invalid, as testatrix purported to give to her brother her whole property disregarding her husband's rights). Law seems to be that where there is ATTEMPT TO EXCLUDE AN HEIR, will is invalid ; but *ill.* (2) indicates that purporting to bequeath whole property to stranger is not necessarily equivalent to such attempt. (See however s. 5C). In 2 Bom. H. C. R. 50, no one argued that will was valid to extent of 1/3. Judgment meagre : brother probably also heir, which would be another ground for holding will invalid ; for though judgment holds it invalid as bequest of whole of her property, "which it was not lawful for her to make," ground taken by H.C. hardly enough to avoid will *in toto*. In *Bafatun* v. *Bilaiti Khanum*, (1903) 30 Cal. 683, 686 (point raised, but H. C. held that testatrix, Bechun Bibi left also nephew as heir besides husband, & that will in favour of nephew invalid).

[15] Sect. 579C cited & applied : *Husaini B.* v. *Muhammad Mehdi*, (1927) 49 All. 547.

[16] Bail. II. 236. *Husaini* v. *Muhammad*, (1927) 49 All. 547, 549 (consent to

SECTION 579C. as stated in ss. 579–579B with the following modifications,

1. Consent during lifetime.

(*a*) the consent validating bequests under s. 579A, may be lawfully given in the life-time of the testator, and need not be ratified after his death ; [17]

(*b*) the testator may, without the consent of his heirs, lawfully bequeath—

2. Bequests to heirs.

(i) legacies to any of his heirs, payable out of the bequeathable 1|3 ; [18]

3. Bequests for incumbent religious duties.

(ii) any part of his estate (even if it exceeds 1|3) for the performance of such religious duties as are incumbent on himself ; [19]

4. Bequest in muzaribat.

(iii) the whole or any part of his estate by way of muzaribat or qeraz [20] on the terms of an equal division of profits between the legatee and the testator's heirs,[21] *set quaere*.[22]

Illustrations.

(1) A Hanafi makes a will, and leaves, to a stranger, a house which exceeds in value the bequeathable 1/3. If his heirs consent to the bequest after his death, the bequest is valid.[23]

(2) T makes a will leaving property, whether exceeding in value the bequeathable 1/3 or not, for a purpose prohibited by Islam. The will is not validated by the heirs' consent.[24]

(3) A Muslim may not lawfully make a will (*a*) for building Jewish synagogues,[25] or (*b*) Christian churches,[25] or (*c*) for translating the Taurit,

will at its execution, before death of testator sufficient in Ithna Ashari law); *Mahabir Prasad* v. *Syed Mustafa Husain*, (1932) 8 Luck. 246, 260; decision reversed on another point): [1937] AIR (P. C.) 174 = 41 C. W. N. 933 = [1937] A. L. J. 1014.

17 Bail. II. 233, Shia Ismaili law agrees with Hanafi law : see p. 789, *n.* 34.

18 Bail. II. 244 (par. 2). See *Fahmida K.* v. *Jafri*, (1908) 30 All. 153 the remarks thereon = s. 581, *ill.* (3); *Amrit B.* v. *Mustafa Husain*, (1923) 46 All. 28; *Husaini Begum* v. *Muhammad Mehdi*, (1927) 49 All. 547.

19 Bail. II. 234. Similar provision in Shafii law : *Minhaj*, 246 (Bk. 28, s. 1), contrast *Badrul Islam Ali Khan* v. *Ali Begum*, (1935) 16 Lah. 782.

20 QERAZ & MUZARIBAT have same meaning. Richardson explains "*qeraz* = repaying requiting (good or bad), going partnership ; trading with another's capital. . . ." "*muzaribat* = selling the goods of another for half the profit, . . . partnership." Bail. I. 161, *n.* 3 : *muzaribat* = "a contract in which the capital is contributed by one party & the labour & skill by the other, with a mutual participation in the profit." *Tahrir-ul-Ahkam*, (Shia text): "*Muzaribat* or *qeraz* is a legal transaction, by unanimous consent. It is the delivery of property by one person to another, that he may labour with it, under a provision that the labourer shall be a partner in the gain, without being subjected to any share of the loss. . . . a contract of *muzaribat* may be executed by a person on his death-bed, & if he provide more than the ordinary hire for the manager, this provision becomes binding, in the event of his death, over the whole of his property."

21 Bail. II. 234 (par. 4); *Tahrir-ul-Ahkam*, Book on *Qeraz*, Ch. 1.

22 See com. : "Bequest for *muzaribat*." 23 See cases in s. 579, *mn.* pp. 782 f.

24 Cf. *Abdul Karim* v. *Abdul Qayum K.*, (1906) 28 All. 324.

25 Bail. I. 625 (635) ; II. 230.

or Injeel (the law or gospel),[25] or (*d*) aiding a tyrant or oppressor,[25] or (*e*) directing that so much of his property should be given to named persons for reading the Koran over his grave,[26] or (*f*) that his grave be plastered, or a vault or arch be placed over it, unless such precautions are required against the ravages of wild animals,[26] or (*g*) that he should be buried in his mansion, or that poor people should be buried in it, unless he directs that his mansion be converted into a general cemetary,[26] or (*h*) for shrouds to Muslims, unless it is restricted to poor Muslims, *sed quaere*.[27] SECTION 579C.

(4) T directs that 1/3 of his property should be spent after his death on building a masjid. This is valid.[26]

(4A) "When the bequest of 1/3 of one's property is made 'for good purposes' (wujuh-ul-kheir) it may be expended in erecting bridges or masjids or for students of learning."[25]

(5) T, a Hanafi, bequeaths a legacy to his presumptive heir, his brother; afterwards a son is born to T, who thus becomes the sole heir of T (excluding the brother). The bequest to the brother is valid without the son's consent.[28]

(6) A Hanafi has a son, and two brothers. He leaves a legacy to one of the brothers, then the son dies in the testator's lifetime. The legacy to the brother is not valid without the consent of the other brother, both having become his heirs upon the death of the son.

(7) T devises the whole of her estate to a stranger with the consent of her sons, whose subsequent conduct showed that they acquiesced in the bequest after her death. The property is then attached in execution of a decree against her sons, and the legatee sets up the will to remove the attachment; *held*, that the attachment must be removed from the whole of the property and not merely from 1/3, as the sons had by their conduct acquiesced in the will after the death of the testatrix.[29]

(8) T dies, acknowledging a debt to his wife, and also leaves to his wife and two strangers his whole net estate after payment of the debt: the strangers take the bequeathable 1/3; the widow her legal share of 1/4; and the other heirs the balance 5/12.[30]

1.—RESTRICTION ON TESTAMENTARY POWERS.

a.—Sunna.

b.—Bequeathable third.

The restriction of testamentary capacity to a 1/3 of the estate has been referred to the following traditions for its ultimate authority—"Sa'd ibn Abi Wakkas said: 'I was ill in the year of the conquest of Mecca, and was near dying, and the Prophet came to see me, and I said: "Oh Messenger of God, verily I have much property, and no heir except my daughter, may I then make a will, leaving all my wealth for religious and charitable purposes?" He said, "No." I said, "May I do so with 2/3 of it?" He said, "No." I said, "Shall I with 1/2 of it? He said, "No." I said, "May I with 1/3 of it?" His Highness said, "Make a will disposing of 1/3 in that manner; for 1/3 is a great deal, particularly of this great wealth which you possess, for

[26] Bail. I. 624 (634). [27] Bail. I. 625 (635).

[28] Bail. I. 615 (par. 3) (625). See also cases cited: s. 579, *nn.* 582 f., & *Bafatun* v. *Bilatee Khanum*, (1903) 30 Cal. 683, 686 = p. 785 (s. 579 B), *n.* 14.

[29] *Daulatram* v. *Abdul Kayum*, (1902) 26 Bom. 497.

[30] *Muhammad Junaid* v. *Aulia B.*, (1920) 42 All. 497, 502.

SECTION 579c. verily if you die and leave your heirs rich, it is better than leaving them poor to beg ; for verily the money which you expend for God's pleasure, you will be rewarded for, even to the mouthful which you lift up to your wife's mouth." [31]

c.—Another version of tradition.

Sa'd ibn Abi Wakkas said : 'His Highness came to see me when I was sick, and said, "Have you made your will leaving anything to be expended in the road of God, and for charitable purposes?" I said, "Yes, I intended to do so." He said, "In what proportion of your wealth have you intended so doing?" I said, "All my wealth is for the road of God." The Prophet of God said, "Then what have you left your children?" I said, "There is no necessity for my leaving anything to them, for they are rich." His Majesty said, "Make your will leaving 1/10 in the road of God." And I continued repeating my desire to leave more, till at last the Prophet said, "Then make your will leaving 1/3 for that purpose, and 1/3 is a great deal."'" [32]

d.—This rule harmonizes with general scheme of succession.

The traditions cited above may, standing by themselves, have been interpreted as having reference only to the particular circumstances : but the law of intestate succession discloses one great principle underlying the reforms in the law introduced by the Prophet. Those reforms consist in the main of an amendment of the pre-existing customary rules of succession, so that persons who were not recognized as heirs by the customary law, acquire rights under Islam (ousting to the extent of the rights so acquired, the customary heirs). The rights given by Islam to the newly entitled heir comprise, as a rule, 1/2 the interest that is still left to those who used to take under the customary law—

e.—Bequeathable third how fixed.

or as the Arabic idiom would have it "the property is to be divided in thirds," —those whose rights were prior in time, taking twice as much as those who had just acquired them, i.e. the customary heir took 2/3, and the Islamic heir 1/3. May it not be that this same principle was vaguely and sub-consciously introduced in regard to wills? It finds place in the books of all the schools. Thus

f.—Will completes scheme of succession.

the scheme of the law of (intestate) succession is not complete, unless it is borne in mind that, while definite fractions of the estate are given to the various heirs recognized by the law, there is left over 1/3 of the estate in the discretion of

g.—Second aspect : heirs disqualified from legacy.

the testator to be dealt with in accordance with his particular circumstances, and it is an injunction of the Prophet that every man with a family should make a will. So that, no person is permitted (according to the most general view of the law) to disturb the operation of the law amongst those who are already recognized as heirs. Yet, with reference to those who are not heirs, the scheme in the mind of the law giver is not complete unless the testamentary powers are utilized for the purposes of providing those who do not succeed under the general law. Unfortunately the assumption that every man will act with the necessary prudence, is not always justified.

2.—BEQUEST TO HEIRS.

The difference between the Ithna Ashari and other schools about bequests in favour of heirs deserves special attention.

Allowed by Ithna Asharis.

The Sharaiu'l-Islam pronounces that "a bequest in favour of one's kindred is highly proper whether they be his heirs or not." [33]

[31] *Mischat-ul-Masabih*, XII, xx. 1. [32] *Ibid.* XII. xx. 2. See *n.* 33.

[33] Bail. II. 247 (par. 6). Observe that Koran II. 177 (cited p. 6) describes the

SECTION 579C.

Ismaili Shias do not permit bequests to heirs.

On the other hand, such bequests are invalid not only under Sunni law, but also under the other school of Shia law, viz. the Shia Ismaili law. The reason assigned for such invalidity in the Daaimu'l-Islam—the most authoritative text amongst the Mustalian Ismailis (unprinted),—is that the law of succession, being laid down in the Koran, it is setting at nought the precepts of Islam to attempt to alter the relative rights of the heirs : see s. 579(*c*). This is shown by the following official translation of portions of photographed extracts, from the said work.[34]

Ismaili authority Daaimu'l-Islam.

"Question : No will for an heir ?" [35] "I said to (? asked) the Syed (may peace be on him), 'Is it stated that no will shall be executed in favour of an heir ?' He said, 'Yes.' I asked, 'Is then a gift allowable in favour of an heir ?' He said, 'Yes.' I said [? asked] 'What is the meaning of his (that is the Prophet's) words : "No will shall be executed in favour of an heir" ?—If one says while one is sick, "I give my 1/3 to such and such a one of my sons," will not that be allowable ?' then he (may peace be on him) said, 'Does he take the 1/3 as well as the inheritance ? [If so [36]] it is not allowable, unless it is allowed by the heirs ?' Then he said, 'A gift made during sickness is also not allowable because a gift made during sickness is tantamount to a will.' I say verily in the opinion of Syed a will made in favour of an heir is not allowable under any circumstances, whether (it is made) during health or during sickness... [37] And it is stated on the authority of him, (peace be on him) that if a bequest to an heir had been allowed, he would have been given, out of the inheritance, more than what is appointed for him by Him, [i.e. God] (be His name honoured and glorified), and whoever makes a bequest to a [particular] heir of his, certainly reduces the right which God has appointed for him [i.e. another heir] and acts contrary to His Book (be His memory glorified) and the act of a person who acts contrary to His Book shall not be allowed." The view taken by the Ithna Ashari authorities is opposed to this reasoning, and is based on the Koran :

3.—Gift in death illness like bequest.

> "It is prescribed for you, when one of you is face to face with death, if he leave any property, that he bequeath unto parents and near relatives in kindness. (This is) a duty for all those who ward off (evil)."—Koran II. 180.

righteous man as giving his wealth for love of Him first of all (i) to his kinsfolk, then (ii) to orphans, (iii) the needy, (iv) the wayfarer and (v) those who ask.

[34] Made in the case of *Tyabally* v. *Abdulali*, (unrep.) : suit 555 of 1910, Bom. H. C. (O.O.C.J.). Cited & applied *Sarof Ali* v. *Safiaboo*, (1935) 71 M. L. J. 247, 249. For text as well as closer scholarly transl. see Fyzee, *Ismaili Law of Wills*, (1933) 82-84, §§ 19-21 (Arabic text 51-53); (1929) 31 Bom. L. R. *Journ.* 84.

[35] The text of this portion appears in margin.

[36] The words "if so" inserted by Offil.Transl. seems out of place. Strabo XV. 1. 64, *fin.* warns us that to expect correct translations from interpreters, who know nothing of the subject, is "like asking water to flow pure through mud."

[37] Words omitted refer to another point, viz. "He said, about a man who had bequeathed to another man a share out of his 1/3, that he (i.e. the legatee) should be given 1/6 thereof, because the shares allotted to heirs come out of six, & this is the unanimous opinion (of the Jurists) for far as we know,"—on which there is a note by the Official Translator : "According to the Koran the share of a legal heir is any

SECTION 579C. The Sura in which this verse occurs was, however, promulgated in the second year of the Hijra (i.e. in 622-623 after Christ), whereas the verse by which parents are declared to be heirs is Sura IV. 12, promulgated after the battle of Ohod in the third year of the Hijra. The later verse replaced by a definite rule of law what was merely a recommendation in the earlier Sura. So that it may well be argued that the recommendation of a legacy in favour of parents was made when they were not heirs, and was the first step towards giving them the right to inherit. This view is supported by the following tradition: "Abu Umamah said 'I heard the Prophet of God say in his Khutbah' (in the year of his farewell pilgrimage), 'Verily God has given to everyone his right, then there is no will for heirs.'" [38]

4.—Reason for difference of views. The reasons why such different interpretations were put on the same verse of the Koran, by the Ithna Ashari Shia and the other Muslims, are not easy to find out. Throughout the law, however, it will be found that the original customs of the Arabs have a much more stable position in the Hanafi than in the Shia system. Possibly some of the causes of this may be that while Shia law developed somewhat later, it continued developing for a longer period;[39] and it did so in countries where the original laws of the Arabs were neither established, nor sufficiently known nor ascertainable. The rules against the evasion of the provisions introduced by Islam in favour of new heirs, were no doubt necessary in the days of Islam when the Arabs had recently been forced to abandon their customs relating to inheritance (especially in regard to the exclusion of women), and when there was a natural tendency to revert to them as far, and as often, as possible, or to bring about the same result by testamentary dispositions. When, however, those customs had been forgotten, or in places where they were never prevalent, there may have seemed less necessity for insisting that the relative rights of the heirs should not be so disturbed.[40]

5.—CONSENT OF HEIRS: WITHDRAWAL NOT VALID. The Hanafi authorities lay down that if the heirs have once consented they cannot lawfully withdraw their consent.[41] But the author of the Sharaiu'l-Islam states, as to Shia law, that if the heirs at first assent, and then declare that their assent was given through a mistake as to the value of the bequest, or as to its excess over the third of the estate, the decree will be given for the

one of the following 6 shares: 2/3; 1/2; 1/3; or 1/8." Cf. Bail. I. 689 (par. 3) (699).

[38] *Mishcat-ul-Masabih*, XII. xx., 2.

[39] (i) *Ithna Ashari* Shias recognize 12 successive IMAMS or heads of religion; (ii) *Ismailis* only 7; (iii) *Mustalian Ismailis*, 21 imams (list above p. 34). *Journ. B. B. R. A. S.*, 135; (iv) *Nizari Ismailis* (see W. Ivanov, *Ismailiyya, Enc. Isl. Suppl.*) believe in succession of Imam continuing till present day; (v) present Aga Khan is 84th in line of Imams acknowledged by his follows. Shafii lived after Abu Hanifa, & travelled extensively. His system agrees on many points with that of Shias.

[40] "And when it is said unto them: Follow that which god hath sent down, they say: We follow that wherein we found our fathers. What! Even though their fathers were wholly unintelligent and had no guidance"?—Koran II. 170.

[41] Bail. I. 616 (626); Hed. 671; Bail. II. 236 (Shia). *Mahabir Prashad* v. *Syed Mustafa Husain*, (1932) 7 Luck. 246, 260 reversed on another point: [1937] AIR (P. C.) 174.

amount that they admit. An exception is, however, made where the bequest is of a slave or mansion, the value of which must have been known to the heirs, and the consent once given cannot in such a case be retracted.[41] SECTION 579C.

As the testator may, under Shia Ithna Ashari law, obtain the consent of the heirs to his bequests during his life-time, the question may be raised whether, if the presumptive heirs for the time being give their consent, the will becomes valid even against other heirs, whose rights to inherit arise subsequently to the will. So it was held in a case governed by Hindu law on the point of alienation by a widow.[42] It would seem that the analogy of that case would not apply in Muhammadan law.[43] The Hanafi law lays down in clear terms that the actual heirs after the death of the testator must consent to bequest beyond 1/3,[44] just as the legacy is invalid only if it is in favour of one who is actually heir after the death of the testator : s. 11(2), p. 77. But the complication of consent previous to the testator's death does not arise, except in Ithna Ashari law. Consent of presumptive heirs.

The Jawahiru'l-Kalam[45] a Shia text, has a long comment (too lengthy to be quoted) on the passage in the Sharaiu-l-Islam on which s. 579 clause (*6*) (iii) is based : (1) the Shia faqihs appear to be agreed that during the minority of the children of the testator, either the whole property, or at least the shares of the minor children, may be bequeathed in muzaribat ; (2) where the heirs are not the minor children of the testator, the testator has the power of bequeathing in muzaribat not only 1/3 of his property, but apparently any portion of the property, so long as the benefit to the wasi (viz. the person to whom the property is bequeathed in muzaribat) does not exceed 1/3 of the testator's estate. So far there seems little dissent, but some (including the author of the Sharaiu'l-Islam)[46] seem to hold that the whole property may be so bequeathed regardless of the restriction contained in the last sentences. 6.—BEQUEST FOR MUZARIBAT : SHIA LAW. Of over one third.

Restrictions on testamentary capacity of some kind or the other, are to be found in most systems of law. Thus in Hindu law the restriction is based on a division of the property into ancestral and self-acquired. In England the statutes of Henry VIII. dealing with wills[47] enacted that all persons seised in fee simple might ... by will in writing devise to any other person ... 2/3 of their lands held in chivalry, and the whole of those held in socage : which on the alteration of tenures by the statute of Charles II. amounted to the whole of their landed property except their copy-hold tenements." The French Civil Code provides that advantages resulting from donations inter vivos or from wills cannot exceed (*a*) 1/2 of the property of the person who has made such disposition—if he leaves (i) only one legitimate child at his death, or (ii) one or more ascendants in each of the paternal and maternal lines ; or (*b*) 1/3 of 7.—ANALOGOUS LAW. Hindu law. English. French.

[42] *Bajrangi* v. *Manokkarnikar*, (1907) 30 All. 1.

[43] See *Fahmida* v. *Jafri*, (1908) 30 All. 153 (but apparently not quite accurate in so far as it implies that Shia law requires consent of heirs to be given after death of testator).

[44] Bail. I. 615 (625). [45] *Jawahiru'l-Kalam*, IV. 656-658.

[46] Bail. II. 234 (par. 4); *Tahriru'l-Ahkam*, Book on *Qeraz*, Ch. I.

[47] 32, Henry VIII., c. 1 ; 34 Henry VIII., c. 2 Comm. law : see Blackst. *Com.* II. 492.

SECTION 579C. Athenian.

the estate if he leaves two children; (*c*) 1/4 if he leaves ascendants in only one line.[48] At Athens the laws of Solon for the first time gave testamentary powers, but restricted it to the cases where the testator had no legitimate children.[49]

III. CUSTOM.

579D. Particular classes of Muslims may by custom acquire the power of disposing of the whole of their property by will.[1]

IV. Burden of proof on legatee.

579E. *Semble,* the burden of proof is on the legatee to show that the will does not infringe ss. 579-579D.[2]

V. BEQUEST OF USUFRUCT OR RIGHTS IN PROPERTY.

580. (1) A bequest[3] may be validly made of anything[4] that, at the time of the testator's death, is in existence and capable of being transferred.[5]

[48] Henry Cachard, *French Civil Code,* (1895) pp. 213, 214, artt. 913, 915.

[49] Grote, *Hist. Greece,* III. 183, 184.

[1] *Shariat* Act, 1937, (see s. 6A, p. 47) seems to have expressly omitted mention of testamentary capacity amongst those subjects, on questions relating to which, rule of decision shall (notwithstanding any custom or usage to contrary) be personal law of parties. E.g. CUTCHHI MEMONS. *Adv.-Gen.* v. *Jimbabai,* (1917) 41 Bom. 181; *Abdulsakur Haji Rahimtulla* v. *Abubakkar Haji Abba,* (1929) 54 Bom. 358 (wills of CUTCHHI MEMONS to be interpreted according to Hindu law); *Fidahusein Pirmahomedalli* v. *Bai Mangibai,* (1935) 38 Bom. L. R. 397 (SHIA ITHNA ASHARI). Some of these cases however seem, in disregard of Ind. Ev. Act & law relating to proof of custom—see, s. 10A(1), pp. 72 ff.: *Gobinda N. S. Sharma* L. S., (1931) 58 I. A. 125),—to treat questions of custom as though they were questions of law; decision on question of custom given in previous case, being "followed" as though (without being adduced in evidence) it were binding upon other parties in later case.

[2] *Krishnamachariar* v. *Krishnamachariar,* (1913) 38 Mad. 166, 176; cf. *Mazhar Husen* v. *Bodha B.,* (1898) 21 All. 91 (P.C.); *Cukoomut Bibee* v. *Warris Ali,* (1874) 22 W. R. 400. See p. 780, *n.* 15.

[3] The Egyptian Code (based it seems on *Raddu'l-Muhtar* V. 481-4; *Hidaya* IV. 668 = Hed. 692-5; *Zaidutambani* II. 307, 308, 311, 313) contains various details. See Abdur Rehman, *Instit. of Mussulm. Law, artt.* 488-493, which, *submitted,* are rules for interpreting grants: s. 5C, p. 41. Similarly Bail. I. 665 f.

[4] Bail. I. 614 (624), 652 (663): "for as the PROFITS (MANAFI) [USUFRUCT] of a thing may be TRANSFERRED by a person during his lifetime with or without a consideration, so they may in like manner be transferred after his death; the thing being in a manner detained in his (viz. the testator's or his heir's) ownership, that the legatee may enjoy its profits, in the same way as a person in whose favour a *wakf* or appropriation has been made, enjoys its profits by virtue of the ownership of the appropriator." Hed. 692: *Minahj,* 260 (Bk. 29, s. 1): "The following things may be left by will: (1) 'the child with which a certain slave is pregnant'—words which imply the condition that the child is born alive, & indicating that conception had already taken place at the moment of the disposition. (2) The USUFRUCT of things that are not consumed by use. (3) The FUTURE FRUIT of a tree, the future young of an animal & the future children of a slave. (4) One of two slaves at the choice of the legatee. (5) An impure thing, provided its use is not forbidden by the law, e.g. a trained dog, manure, grape juice not intended for fermentation."

[5] (A)—SERVICE OR WAGES OF A SLAVE, OR USE, OR RENT, OF HOUSE, for definite or indefinite period, mentioned several times in texts as valid bequests: e.g. Bail. I. 652 (663); Hed. 692; cited s. 576, pp. 778 f. (B)—Transactions relating to *manafi* or USUFRUCT or *ghalla* have been too little appreciated: e.g. in *Amrit B.* v. *Mustafa Husain,* (1923) 46 All. 28, 31, BEQUEST OF USUFRUCT FOR LIFE VALUED as equivalent to total value of property of which only usufruct for life bequeathed. (C)—*Ghulam Jannat* v. *Rahmat Din,* (1934) 15 Lah. 889 (= p. 793, *n.* 8). (D)—Cf. Bail. II. 240, 241,: "If a person should bequeath the service of his slave, the fruit

(2) The service of a slave, or the right [5] to occupy a house [6] during a future period of time,[7] or to take the rents or future produce or usufruct [8] (or part of the rents, produce or usufruct) [9] of movable or other property [10] for a limited time,[11] or for the life-time of the legatee, may validly be the subject of a bequest.[12] SECTION 580.

of his garden, the residence of his house or anything else of a USUFRUCTUARY NATURE for ever or for a fixed time, the ADVANTAGE OR PROFIT TO ARISE THEREFROM MUST BE VALUED and should it not exceed 1/3 of the testator's estate the bequest is valid, while if more than 1/3 the legatee is to have as much as 1/3 will cover, & the legacy is void as to the excess." (E)—Hed. 692, 693 : heirs & legatees are to use a slave alternately in due proportions ; & as to house, division advised. The passage does not deal with question of determining bequeathable 1/3 expressly : but it commences : " if the whole of the property of the testator consists of the slave or the house." (F)—Bail. I. 654 (665) : " when the slave is within 1/3 of the testator's property the legatee is entitled to what he may earn for the period of his own life, though the earnings should exceed 1/3 of the property " ; " in like manner as to the bequest of the testator's garden or the occupancy of his mansion, or the service of his slave." In valuing estate, capital value taken, & future produce not added.

[6] Called *wasiat bil manafi* = bequest having reference to [i.e. intended to effect a grant of] usufruct : translated USUFRUCTUARY WILL (Bail. I. 652 (663) ; Hed. 692), which does not sufficiently indicate real nature of bequest.

[7] Bail. II. 240 : bequest of fœtus in womb, or of whatever may be produced by female slave or particular tree, is quite valid : as is also that of residence of mansion for future period.

[8] Cf. Hed. 693 II. par 1. " The usufructuary legatee, ... Shafii maintains, . becomes as it were proprietor of the article ... USUFRUCT (according to him) being EQUIVALENT to ACTUAL PROPERTY." (*Mt.*) *Ghulam Jannat* v. *Rahmat Din*, (1934) 15 Lah. 889 ; (Mt. Samon granted usufruct for life ; & corpus to the 4 daughters).

[9] E.g. 20 *dirhams* a year from the produce of a garden—Bail. I. 658 (669) ; Bail. I. 655 *n.* (666 *n.*), citing *Kifaya* IV. 1480 : *Mahomed Hussein* v. *Aishabai*, (1934) 36 Bom. L. R. 1155, 1163 (s. 580 overlooked ; bequest of MONTHLY PAYMENT treated as if it were " a gift out of the future income of the estate," & would be " a gift in future & therefore ineffective in Muhammadan law " ; but the right decision was reached circuitously by holding that " the testator had clearly provided that the remuneration must be paid out of his property meaning out of the corpus of the estate & that is not ... a gift *in futuro*.") *Ghulam Muhammad* v. *Ghulam Husain*, (1931) 59 I. A. 74, 85 (grant to A with provision for MAINTENANCE of B OUT OF INCOME only ; with no proprietary interest in property to B : referred to as onerous gift to A, with trust in favour of B. No abhorrence was expressed to payment having been expressly ordered to be made out of future income).

[10] SUBJECTS OF BEQUEST divided under 3 heads : (1) produce of garden or land, occupancy of mansion, service of slave, (2) fruit, (3) wool etc. of an animal : in (1) existing & future produce always included so long as legatee lives ; in (2) included only if given " for ever ; " in (3) never included. But *submitted*, these are questions of interpretation of bequest & intention of testator : s. 5 C, p. 41. Point to note is that these various classes or forms of gifts or bequests may be lawfully made : accordingly words of testator must be scrutinized, to ascertain if his intention can be identified with any out of the alternative intentions which may be lawfully given effect to. Texts put interpretations upon Arabic words & expressions : those interpretations can be of little assistance in interpreting deeds in our times in India which are in English or Indian vernaculars. But texts show that when certain intentions are clothed in apt words they will be given effect to. See p. 794, *ill.*

[11] Bequest may be either FOR PARTICULAR YEAR, e.g. year 460 A.H. or without any specification. Bail. I. 652, 653 (663, 664) : first stated as to service of slave bequeathed for limited time, & then : " every thing that has been said as to the service of a slave for a year, is equally applicable to the produce of a slave—i.e. what may be obtained by hiring him out for a year; or to the occupancy of a mansion for a year : whether the year be particularized or not."—*Durru'l Mukhtar*, 832.

[12] Bail. I. 652 (663) ; *Minhaj*, 265 (Bk. 29, s. 5).

SECTION 580.

(3) Where the bequest is of a right to take the profits of a house, the legatee, except under Shafii law, has no right to live in it.[13] Under Shafii law the legatee becomes "is it were the proprietor of the house."[14]

(4) The testator may bequeath the usufruct to one person and the property itself to another.[15]

Illustrations.

(1) T makes a will in 1880 providing that a legatee should have the right to occupy the testator's house during the year 1890. If the testator dies in 1885, the bequest is valid,[16] but if he lives till 1891, it is void [or rather of no effect][16] and if the bequest is valued at more than the bequeathable 1/3, then the period of residence has to be apportioned with the heirs, so that the value of the interest taken by the legatee falls within 1/3.

(2) "T bequeaths,—

(*a*) "The produce of his garden or land or the occupancy of a manor,"—the legatee is entitled to the existing and future produce, whether the legacy purports to be "for ever" or not;[17]

(*b*) "the fruit in his garden,"[17]—if there is some fruit in the garden at the testator's death, the legatee takes the existing, but not the future fruit, unless specifically stated,[17]

(*c*) "the wool of his flocks" or "their progeny," or "their milk," "for ever,"—the legatee is entitled only to the wool or progeny or milk existing at the testator's death, and not the future produce,[17]

(*d*) his mansion to L, and the right to occupy it to LA;—both bequests—of the corpus, and the usufruct—are valid and effectual.[18]

(3) T by his will leaves 1/3 of his estate to L. The testator is afterwards killed by the wrongful act, neglect, or default of a third person, and the testator's executors sue him, and recover damages in respect of the death of testator. The legatee is entitled to 1/3 of the damages so recovered.[19]

Bequest of service, or of produce, or for limited time.

Cf. "A bequest of the service of a slave or the occupation of a manor, or the produce of both, or of land and gardens, is lawful. And it is lawful for a

[13] Apparent reason: heirs entitled to manage property, & to give produce to legatee, who is given no right to occupy house. Of course heirs may permit him to occupy it; cf. Bail. I. 653 (665). But such propositions in texts must be very cautiously applied when language of grant is not Arabic: see s. 5 c, pp. 41 ff., also s. 443, com., p. 486, citing *Mannox* v. *Greener*, (1872) 14 Eq. 546, 461.

[14] Hed. 693 (col. ii. par. 2); see however reference in *n.* 13 to s. 5 c.

[15] Hed. 694, col. ii.; Bail. I. 657 (668); details follow which *submitted* refer to construction: s. 5 c: but gist is that grant of SUBSTANCE ordinarily carries with it right to take USUFRUCT: therefore "substance" may mean "substance *plus* usufruct." Hence, after grant of "substance" to A, if "usufruct" is granted to B, it may mean grant to A of substance plus usufruct: & to B of usufruct, viz. usufruct being granted twice, first to A and then to B; i.e. bare substance is granted to A above, & usufruct to both A & B: in which case usufruct is taken by A & B in moieties. Real question, therefore is whether grant to A was of substance in narrower sense (viz. of "bare substance") or wider sense (viz. substance plus usufruct).

[16] Bail. I. 652 (663); s. 5 c & *n.* 13. [17] Bail. I. 655, *n.* (666 *n.*) :. 5 c.

[18] Bail. I. 656 (667): s. 5 c & *n.* 13. [19] Bail. II. 234.

limited time."[20] But ordinarily it will be presumed that the full proprietary interest is bequeathed, where either the unlimited right to take the profits is bequeathed, or where the testator purports to impose restrictions as regards use or alienation which he cannot lawfully impose.[21] SECTION 580.

580 A. (1) *Semble,* a grant (which expression in this context includes a settlement or other disposition by way of trust) may be deemed to be a testamentary disposition, and as such take effect only subject to the limitations and restrictions applicable to wills (ss. 579–579 C), if under the grant (*a*) the usufruct of, or rights in, some property, is or are reserved to the grantor himself for his life-time, and (*b*) the property or the usufruct thereof or rights therein is or are granted to other grantees subject to such reservation. VI. Reservation of usufruct to grantor for life may render disposition testamentary.

(2) *Semble,* such a grant will be deemed to be a testamentary disposition if, on a consideration of its terms and the circumstances, for practical purposes all the rights of an owner[22] are held to be in effect reserved, for the grantee's life-time, to himself ; but if the grantor cannot, after the grant, be held, for practical purposes, to be the owner for the period of his life, the grant will be deemed to be a present disposition inter vivos.

(3) This section must be read subject to decisions or provisions of law, establishing the validity of or permitting specified dispositions as gifts : see e.g. ss. 352, 369.

Courts have sometimes come very near the question involved in s. 580 A, but do not seem so far to have dealt with it directly. Grants or dispositions which would in Muslim terminology be treated as grants or dispositions of the usufruct (which, it has been submitted, are equivalent to grants or dispositions of rights not amounting to full ownership) have not received due attention. So long as this neglect continues, the question will continue to give rise to vague doubts and difficulties, though they may not be perceived to arise in the form of a definite issue. The issue must, however arise sooner or later. The chief difficulty in determining it is the conflict between (1) the power of absolute disposition inter vivos, (2) limitations and restrictions on testamentary powers and (3) the attempts to circumvent them, in view Grants of usufruct.

[20] Bail. I. 652 (663); Hed. 692.

[21] *Faiz Muhammad K.* v. *Muhammad Said K.*, (1898) 25 I. A. 77 = 25 Cal. 816 ; *Khajoonunissa* v. *Raheemunnissa,* (1872) 17 W. R. 190 ; *Muhammad Abdul Majid* v. *Fatima B.*, (1885) 12 I. A. 159 = 8 All. 39. See Trans. of Prop. Act 1882, s. 8.

[22] Using expression, " owner for life " in loose sense = person whose rights, except that they are restricted for time of his life, closely resemble those of an owner : see s. 443 A, com. : *deteriora sequor.*

SECTION 580A. particularly of novel methods of dealing with property, and fresh combinations of rights as subjects of disposition. On usufruct, see s. 366 A, pp. 380 ff.

Dispositions in death-illness.

Transactions that are in fact testamentary are at times attempted to be passed off as transactions inter vivos. Gifts in death-illness are a common illustration : s. 600 : the donor purporting to make a gift at a juncture when he expects shortly to die. The ostensible gift is expected in fact to come into operation after his death. In a different form a similar evasion of testamentary law may be brought about by purporting to make an immediate disposition, (e.g. by creating a trust) under which the settlor takes such rights or interests that for practical purposes he continues to enjoy the property during his life-time just as he would if he remained the owner : the effective dispositions coming into operation only after his death. The facilities that trusts offer, and the example of England, provoke Muslims in India to make settlements through trusts of this nature. Trusts, therefore, require some attention.

When effective disposition postponed till death.

Trusts and Muslim law.

At one time it used to be unconcernedly stated that trusts were unknown to Muslim law. That misconception has now disappeared. The dangers of introducing notions from English law into discussions relating to the law of Islam have frequently been referred to in this work. But with due caution,[23] it may be permissible to refer to the close analogy between what is done (1) when the legal and equitable interests are transferred to different persons under English law, and (2) when under Muslim law the bare corpus is transferred to one person but the usufruct to another or a succession of persons. As stated before the corpus can under the conceptions of Muslim law be transferred only once and for all. When once transferred, the corpus is completely transferred. But usufruct is something that has duration, something capable of and inducing division into distinct successions one after another, or limitation to a stated duration—such as a named period. Such a settlement by way of trust as has been referred to must be considered in the light of the following considerations.

Notion of usufruct.

The first step is to recognize that the corpus and the usufruct are different. Secondly, that the usufruct in the case propounded[24] consists of the total benefit to be derived from the property, so that the corpus is a mere husk, thus the disposition of the corpus may be left out of consideration. Thirdly, though the usufruct is nominally parted with by the settlor for all time, yet in fact it is retained by himself for his life-time. The conclusion is that the settlement must be regarded as if it merely consisted of the provisions in favour of the beneficiaries other than the settlor : so regarded it falls under the denomination of usufructuary wills and is subject to testamentary limitations and restrictions.

Question that arises,—

The question is, however, full of all those doubts that beset the development of law and its adaptation to entirely new conceptions affecting dispositions of and dealings with property. What has been above stated is based on the assumption that the settlor retains or reserves to himself rights of usufruct

[23] See p. 490, *n.* 8(iv).

[24] USUFRUCT or *manafi* may of course be narrowed down to single very restricted right : e.g. of personal residence, or merely picking flowers. But present discussion deals with usufruct comprising total benefit derivable from the property.

of such a nature that he in effect remains the owner[22] during his life-time. For instance the disposition may in terms provide that the settlor during his life time, shall receive all the rents and profits and all the benefit derivable from the ownership of the property, and in addition reserve the absolute and unrestricted power of revoking the disposition. In such a case it may be difficult to say that he has disposed of anything during his life-time or that he has parted with any of those rights over the property which would have accrued for his own benefit during his life-time if he had not made the grant. It would be easy to hold such a disposition to be testamentary. On the other hand, where the settlor is at any rate, unable to sell or otherwise alienate the property, and must be content to take merely its income, it may seem more feasible to conclude that the disposition begins to take effect from the time when it is made, that he has parted with some of the rights that would have accrued to him if he had not made the disposition. It may be a nice question depending upon all the circumstances and the time of the disposition, whether it is to be pronounced as being testamentary or as inter vivos.

SECTION 580A. Does the disposition in fact take effect immediately?

Sect. 580 A is with great respect, submitted for acceptance by the Courts.

581. Where a testator purports to exclude some of his children [or, *quaere,* other heirs] from their legal interests in his estate, the words of exclusion will be treated as null and void, and will not be interpreted as equivalent to a legacy of 1|3 of the estate in favour of the heirs who are not excluded.[25]

VII. EFFECT OF ATTEMPT TO EXCEED POWERS. (A) Disregrad of rights of heirs.

(1) A says in his will: "I give my son's" or "my daughter's share in my estate to L." If it is meant thereby to displace the son or daughter, and to make the legatee take his or her place, the bequest is void.[26] But if it means, "I give to L as much as to my son," or "as my daughter," the legacy is valid, and the son's or daughter's portion will be ascertained, and an equal portion given to the legatee, provided that that portion does not exceed the bequeathable 1/3.[27]

Words purporting to exclude children, of no effect.

(2) A Muslim dies leaving a widow, and no other heirs. His will purports to bequeath the whole of his estate to L. If the widow does not consent to the will, as against her it is valid only as to the bequeathable 1/3; of the other 2/3 she takes her 1/4 share as Koranic sharer, i.e., 1/6th of the whole estate. The rest is then available for L who thus ultimately gets 5/6th.[28]

Illustrations.

(3) A Shia died leaving him surviving two daughters.[29] His will purported

[25] Bail. I. 629 (639); II. 238. See however, Bail. I. 634 (645-646); s. 581, *ill.* (2); s. 579, *ill.* (1), *n.*; *Muhammad Junaid* v. *Aulia B.*, (1920) 42 All. 497.

[26] Bail. I. 629, (639), 634 (645-646).

[27] I.e. legatee will share just like son or daughter: not in priority to them, as would be the case with other legatees subject of course to rules in ss. 579-579 c; Bail. I. 629. See s. 5 c. Caution: rules of CONSTRUCTION primarily for Arabic documents.

[28] Bail. I. 634 (645-646). In (*Mt.*) *Bakht Begum* v. *Faja Khan*, (1880) 16 Punj. Rec. 239 (No. 104), point seems overlooked: held that legatee took only 1/3.

[29] *Fahmida Khanum* v. *Jafar Khanum*, (1908) 30 All. 153 (did not make it clear that bequest was wholly void not because it exceeded bequeathable 1/3, nor because

SECTION 581. to bequeath the whole of his property to one daughter; it was held to be wholly invalid; each daughter declared entitled to 1/2 of the estate.[29]

Sect. 581 follows from s. 580 : If one heir may not be preferred to the detriment of another, much less may any heir be absolutely excluded. These rules, complement the rules against adoption : the ties of blood can neither be disregarded nor can any other tie take their place : either act would "induce a breach of the ties of kindred." [30]

(B) Disregard of rule of bequeathable 1/3.

582. Where the heirs do not consent to a testamentary disposition consisting of several bequests that in the aggregate exceed the bequeathable third,—the bequests must abate in conformity with the following rules,—

Effect of will bequeathing more than 1/3.

(1) Under Hanafi law—

(i) Abatement of legacies exceeding 1/3.

(*a*) the bequests must first (subject to cause (*d*) of this sub-section) abate equally and rateably,

(*b*) next, the proportionate part (so abated) of each bequest, which is for a secular (viz. not for pious) purpose must be allotted to it;

HANAFI LAW.

(ii) Legacies for pious purposes.

(*c*) thirdly, the proportionate parts (so abated) of bequests for pious purposes, (if any) must be aggregated and, the aggregate distributed so that priority is given to the extent of the full bequest, in the following order,—

(i) the fara'iz (or actually prescribed charities) have precedence over other bequests for pious purposes;

(ii) next come the wajibat, i.e. purposes considered necessary, though not prescribed;

(iii) thirdly the nawafil, or voluntary purposes;

(iv) within each of the said three divisions, after bequests (if any) for objects to which priority is expressly given by Hanafi texts,[1] each has priority in the order of mention in the will;[2]

bequest was in favour of heir, but because its purpose was entirely to disinherit one of two heirs). Had only 1/3 of estate been bequeathed, bequest would under Ithna Ashari law, have been entirely valid; had bequest exceeded 1/3 (but not been vitiated by desire to disinherit one of heirs), it would have been void as to excess alone. Reference to necessity of obtaining assent after death of testator, seems to confuse Shia Ithna Ashari with other systems of law. See s. 581, com. Followed in *Amrit B.* v. *Mustafa Husain*, (1923) 46 All. 24 (bequest to widow); *Husaini Begum* v. *Muhammad Mehdi*, (1927) 49 All. 547 (recognizes that in 30 All. 153 one of heirs entirely excluded, & that that ruling to be confined to cases so excluding).

30 Hed. 671.

1 Ind. Succ. Act. s. 327 : If after payment of debts, necessary expenses & specific legacies, net assets not sufficient to pay all general legacies in full, latter shall abate or be diminished in equal proportions; & in absence of any direction to contrary in will, executor has no right to pay one legatee in preference to another. Cf. *Mathura-*

(*d*) Abu Hanifa holds (Abu Yusuf and Imam Muhammad dissenting) that a bequest, exceeding in value the bequeathable 1|3, must (except where it consists of a legacy of money, in the form of muhabat[3]), be reduced in competition with other bequests, in the first instance to 1|3 and thereafter must abate as above provided. SECTION 582. (iii) Any single legacy exceeding the 1/3.

(2) Under Shia law— SHIA LAW.

(*a*) bequests of prior date take priority over those of later date, unless there is anything indicating that the later bequest was intended as a revocation of the former.[4] It is presumed, unless a different intention appears, that of two bequests contained in the same testamentary document, the one mentioned later, is later in point of time.[5] (iv) Priority according to date.

(*b*) where two legatees are successively given 1|3 of the estate, the later bequest is presumed[6] to be a revocation of the earlier ;[7] (v) Legacies of fractions of estate.

(*c*) where the bequest to the said legatees does not consist of an exact 1|3 of the estate but of some other fraction, a question of construction arises whether—

(i) there is an assumption on the part of the testator to deal with more than 1|3 of the estate,—in which case the bequest that is earlier in point of time has priority over the later,[7] or

(ii) there is such a repugnance between the two bequests as to indicate that the testator did not intend both bequests to take effect, but only one : in which case the later bequest prevails, and the former is presumed to be revoked.[8]

Illustrations.

(1) "A man has made a will that (*a*) 100 dirhams shall be paid to the

das v. *Raimal*, (1935) 37 Bom. L. R. 642 (creditors to be paid equally & rateably : all rights of legatees on same basis).

[2] Texts abound on relative merits of pious bequests & charities. Texts may have to be produced in Court, if necessary. Following order appears in *Fatawa Alamgiri* & *Hidaya* : (*a*) Haj (or pilgrimage), (*b*) *Zakat*, (*c*) Alms, (*d*) Expiation, (*e*) *Sadaq-i-Fitrat*, (*f*) Sacrifices, (*g*) Vows. Bail. I 626 (637); Hed. 688.

[3] See s. 582, com., p. 801. *Muhabat* : see s. 441, p. 477. For Shafii law, see *Minhaj*, 261 (Bk. 29, s. 2).

[4] Bail. II. 212 (*ll.* 9-21 of par. 2). [5] Bail. II. 212 ; see s. 582, com.

[6] There is no such presumption under Hanafi law : Bail. I. 626.

[7] Testator presumed to know & to bear in mind that he can bequeath only 1/3 of estate : Bail. II. 235.

[8] Bail. II. 234-235.

SECTION 582. faqirs, (*b*) 100 to his relatives and (*c*) the poor should be fed in expiation of the prayers that he has missed [for which 40 dirhams would be required]. Then he dies [leaving 216 dirhams] : and there are one month's prayers due from him : 1/3 of his estate is not enough to pay for all these bequests. In such a case, Shaikh Muhammad ibn al-Fazl has said that the 1/3 should be divided in this way [with the following priorities] : (I.) 100 [should be allotted] for the faqirs, (II.) 100 for the relations, and (III.) [a sum should be allotted] for paying the price of feeding [the poor] at the rate of two maunds of wheat for each prayer [this sum, as stated above, amounts to 40 dirhams ; so that the total legacies amount to 240 dirhams ; and the bequeathable 1/3 is only 72 ; hence] (iv.) the legacies must abate in the proportion of 72 to 240, [i.e. they must be reduced to 30, 30 and 12 respectively] ; and (v.)then (*a*) whatever amount comes to the share of the relations [i.e. 30 dirhams] should be given to them, and (*b*) out of whatever portion comes for the faqirs [i.e. 30 dirhams] and for feeding the poor [i.e. 12 dirhams] (altogether 42), the food for the poor should first be paid out, and after the food has been paid out in full [i.e. 40] then (*c*) the faqirs will be paid, i.e. the loss will be borne by the share of the faqirs [who get only 2 dirhams]. This is in the Fatawa Kazi Khan." [9]

(2) T, a Sunni, dies leaving estate worth Rs. 15,000. He purports to bequeath two houses worth Rs. 4,000, and Rs. 6,000 respectively. *Semble,* the legatees take half of the houses bequeathed to them respectively, the heirs taking the other halves.[10]

(3) A Shia's net estate is valued at Rs. 3,000. In his death-illness he purports to make (i) a wakf of Rs. 1,000, (ii) a colourable sale for Rs. 1,000 of property valued at Rs. 2,000, and (iii) a gift of Rs. 1,000. The heirs do not consent. As each of these dispositions must be regarded as a bequest of Rs. 1,000, the first according to priority of date will prevail : the rest are invalid.[11]

(4) T dies leaving a son and a daughter. He purports to bequeath 3/4 of his estate to the son, and 1/4 to the daughter. Under Hanafi and Shia Ismaili law the bequests are invalid, and the daughter is entitled to take 1/3 of the estate.[12] If the will is governed by the Shia Ithna Ashari law, the bequest that is earlier in point of time will prevail to the extent of the bequeathable 1/3, and the later bequest will have effect only out of the surplus

[9] *Fatawa Alamgiri* IV. 324 ; (*Wasaya,* ch. 5). Words in [ ] added by me : legacies originally = 100 for *faqirs,* 100 for relations, 40 for prayers, i.e. 240 in all, & bequeathable 1/3 = 72 : there is abatement in proportion of 72 to 240 ; or 3 to 10 ; which reduces legacies to 30, 30 & 12. Then legacy for secular purposes (so abated) is paid out (i.e. 30 to relatives), whereas two (abated) legacies for pious objects, (viz. 30 for the *faqirs,* & 12 for prayers) are aggregated making together 42, out of which legacy for expiation of prayers, (which is incumbent duty) is satisfied, in full (i.e. 40 are given to it) leaving 2 for *faqirs.*

[10] There is no express authority as to mode in which abatement takes place under Hanafi law where specific legacies exceeding bequeathable 1/3 are given & not consented to.

[11] Bail. II, 212 ; cf. Bail. II. 234-235.

[12] *Fatima* v. *Ariff,* (1881) 9 Cal. L. R. 66.

(if any) left over of the 1/3 ; i.e. if the bequest to the son is earlier, he takes 1/3 as legatee, and the other 2/3 is inherited by the two in the proportion of 2 : 1 ; and if the daughter's legacy is earlier she takes (out of the bequeathable 1/3) as legatee 1/4 of the estate, and the son then takes 1/12 (i.e. 1/3—1/4) as legatee, and the residual 2/3 is finally inherited by the two in the proportion of 2 : 1. SECTION 582.

(5) In 1900, a Shia makes a bequest of Rs. 75. In 1901 he makes a bequest of Rs. 100. He dies in 1902, leaving Rs. 300. The first bequest of Rs. 75 will be paid in full, and the second legatee can take only Rs. 25.[13]

(6) A Shia dies, and a will is found amongst his papers in the following terms : " I give to L a legacy of Rs. 75, and to LA a legacy of Rs. 100." It will be presumed that the legacy to L was earlier, and it will therefore have priority in the same manner as in *ill.* (5).[13]

(7) A Shia dies leaving a will, saying : " I bequeath 1/3 of my estate to L." There is also a codicil to the will, in which he says " I bequeath 1/3 of my estate to LA." LA will take 1/3 of T's estate, and the earlier legacy to L is considered as revoked.[14]

(8) A Shia makes a will purporting to bequeath 1/4 of his estate to L. Then he makes a codicil leaving 1/4 of his estate to LA, saying that 1/2 of his estate should go to his heirs. The bequest to L has priority, and LA gets 1/12 of the estate (i.e. 1/3 minus 1/4).[14]

(9) A Shia says in his will : " My daughter's son is living with L, a stranger. I give to L, 1/4 of my estate." Then he makes a codicil saying, " L has ceased to maintain my daughter's son, who is now living with LA. I give to LA 1/4 of my estate." The legacy to L is revoked.

Legacy of more than 1/3.

Abu Hanifa differs on one point relating to abatement of legacies from his disciples. The Fatawa Alamgiri does not indicate according to which view the fatwa was given. But apparently the view of the majority would prevail. Abu Hanifa holds that if any one of the legacies is by itself in excess of 1/3 of the estate, then (unless the legacy (i) takes the form of mahabat, or (ii) consists of a sum of money) such a legacy, is to be cut down to 1/3, and the legatee shares only in that proportion in competition with the other legatees. So that if a legacy is left of 1/2 of his estate to L, and 1/4 to LA, according to Abu Hanifa the bequeathable 1/3 of the estate has to be divided between them in the proportion of 1/3 and 1/4, and not of 1/2 and 1/4. The two disciples do not accept this view, and according to them, L and LA would share in the proportion named by the testator, i.e. 1/2 and 1/4.[15]

Mode of determining priority of legacy in point of time.

Under Shia law, bequests for performing religious duties incumbent on the testator rank as debts, but all the other debts have priority over them.[16] Where it is doubtful which of two repugnant bequests was first made, the Shia authorities require it to be determined by casting lots.[13] In India *semble*, this rule of Shia law would have no force, as the question would be determined

[13] Bail. II. 212 ; cf. Bail. II. 234, 235.
[14] Bail. II. 234, 235.
[15] Sect. 582(1)(d). *Muhabat* = s. 441 A, p. 477.
[16] Bail. II. 234 ; see ss. 560, 579 c(*b*)(ii).

SECTION 582. in accordance with the Indian Evidence Act. The Oudh Laws Act, s. 9, cited s. 557, com. p. 727(4) provides for casting lots as a method of determining priority, not as a means for determining a question of fact.

VIII. Where there is accession to bequest :

(A) Before acceptance.

(B) After acceptance.

583.[17] An accession to the subject of the bequest accruing before actual partition or distribution of the estate, (even if it accrues after the bequest has been accepted by the legatee on the death of the testator), forms part of the subject of the bequest : and in such a case the bequest, together with the accession, must be within the bequeathable 1|3, or they must (unless the heirs consent to it) abate in accordance with s. 585.[18]

(C) Accession and abatement.

585.[17] Where a bequest abates under s. 533, owing to an accession to the subject of bequest—

(1) according to the two disciples, the original subject of the bequest and the accession both abate equally and rateably, and the legatee takes only such parts of each as together make up the bequeathable 1|3 ;[19]

(2) according to Abu Hanifa the legatee is entitled to have the whole of the bequest (in so far as it falls within the bequeathable 1|3, and is otherwise valid) satisfied out of the subject of the bequest as it was prior to the accession, and if the bequest is valid beyond the value of the original subject, then to have recourse to the accession.[19]

Illustrations.

(1) A bequest is made of a mare, which foals after the death of the testator but before partition of the estate. The mare and foal are together valued at less than the bequeathable 1/3. The legatee is entitled to both.[18]

(2) T dies leaving estate worth Rs. 900, and bequeaths a mare of the value of Rs. 300. Between T's death, and partition, the mare foals. The foal is valued at Rs. 300. The estate becomes worth Rs. 1,200. According to Abu Hanifa, the legatee is entitled to the mare, and to 1/3 of the foal. According to the two disciples he is entitled to 2/3 of the mare and 2/3 of the foal.[19]

§ 3.—THE LEGATEE : COMPETENCE : JOINT LEGATEES.

I. Competence to hold property : competence to be legatee.

586. (1) A bequest may be made by a Muslim for the benefit of any person capable of holding property,[20] or an institution,[21] or a religious or charitable object.[22]

17 Sect. 583 now consolidates ss. 583 & 584.

18 Bail. I. 638 (644-650). "Koodoori has related that in this case the increase is not a legacy & comes out of the whole of the property." See s. 5 c, pp. 41 ff.

19 Bail. I. 639 (650).

20 Bail. II. 230 ; I. 625 (635).

21 Bail. I. 625 (624).

22 Bail. I. 625 (635).

(2) A bequest to a person not in existence at the time when the bequest is made, is void ; unless it is for a child, who, at the time [when the bequest is made][23] is in the womb of its mother, and is born within six months after.[24] SECTION 586. Bequest to unborn person.

The legatee is required by the Fatawa Alamgiri and the Hidaya to be in existence at the time of the bequest, and not at the time of the testator's death. The author of the Sharaiu'l-Islam states similarly that "a bequest in favour of a foetus hereafter to be conceived by a particular woman, or to whomsoever may hereafter be found of the children of such a man, is altogether null and void."[25] The Egyptian Code, on the other hand, speaks of apres la mort du testateur, and is relied upon in a judgment[26] where the distinction was not material as the testator had died in 1861, and the plaintiff who claimed as legatee under the will was not born till 1884. Would not the will be taken as a continued gift made up to the time of death, so that the rule in the Egyptian Code be applicable in India too? See also s. 5 c. Legatee must be in existence at time bequest made.

A bequest may be validly made by a Muslim in favour of a zimmi, i.e. a non-Muslim living under the protection of a Muslim government ; whereas a bequest in favour of a hostile non-Muslim is not valid.[26] Bequest to non Muslim.

587. A bequest becomes void if the legatee (who has attained puberty, and is not unsound of mind) causes the death of the testator, whether the bequest is made before, or after, the act causing death.[27] Under Hanafi (but not Shia Ithna Ashari) law a bequest is also void if the legatee has unintentionally caused the death of the testator.[28] Abu Hanifa and Imam Muhammad hold, (Abu Yusuf dissenting) that such a bequest may be validated by the consent of the heirs, and that if the legatee is the sole heir, the bequest to him is valid.[29]—*sed quaere.*[30] II. Legacy to murderer void.

The original root or source of inheritance amongst the pre-Islamic Arabs was closely connected with the blood-wite and blood-feud : the right to inherit Reason for rule.

[23] But see s. 586, com.

[24] Hed. 674 ; Bail. I. 617 (627); II. 244, 246 ; *Abdul Cadur* v. *Turner*, (1884) 9 Bom. 158. 163 ; TAGORE CASE, i.e. *Juttendromohun Tagore* v. *Ganendromohun T.*, (1872) L. R. I. A., SUPP. Vol. 47, 70, to which 9 Bom. 163 refers, requires legatee to be in existence at testator's death, Ind. Succ. Act, 1925, s. 90 (see below, s. 594, p. 813, *n.* 8), does not apply to Muslims.

[25] See Bail. I. 616 (626), 169-171 *nn.*; Bail. II. 244 (par. 2) ; Shia law uncertain on several points. Cf. *Skinner* v. *Orde*, (1871) 14 Moo. I. A. 309, 323 ; see also Ind. Succ. Act, 1925, s. 90 & s. 594 below.

[26] *Skinner* v. *Orde*, (1871) 14 Moo. I. A. 309.

[27] Bail. I. 615-616 (625-626). "The slayer is disqualified from inheriting," *ib. n.* 1.

[28] The *Sharaiu'l-Islam* does not seem to contain anything on effect of legacy to slayer, but no doubt law of bequest is same as that of inheritance. See com.

[29] Bail. I. 615-616 (625-626), 695 (705), 676 (687) ; II. 369.

[30] See s. 587, com. ; Bail. I. 615-616 (625-626).

SECTION 587. seems to have depended upon the duty to observe the duties of feuds. The murderer himself could, therefore, in no way be qualified to inherit. The Courts in England had to fall back upon general principles in order to exclude Mrs. Maybrick and Crippen from benefits out of the estates of the persons they had murdered.[31] "It is clear," said Sir S. Evans, "that the law is that no person can obtain, or enforce any rights resulting to him from his own crime, neither can his representative, claiming under him, obtain or enforce any such rights. The human mind revolts at the very idea that any other doctrine could be possible in our system of jurisprudence." Similar decisions have been given in the case of Hindus.[32] Cf. ss. 606(3), 639(1).

English law.

III. Bequest for charity. General charitable intention.

588. A bequest made in the way of God, or disclosing on the part of the testator, a general charitable intention is lawful, and must be expended on good objects, and for the benefit of the poor.[1]

For "good purposes."

If a person bequeaths 1/3 of his property "for good purposes," it may be expended in erecting bridges or mosques or for students of learning.[1] In the will of a Khoja, written in the English language and form, a gift of a fund "to be disposed of in charity as my executor shall think right," was held valid,[2] and a scheme directed to be settled for the application of the fund to charitable objects, by analogy of 43 Eliz., c. 4.[2] But where, under colour of a religious bequest, there is really a legacy to the trustee personally, it will rank as such, and if the (nominal) trustee is one of the testators' heirs, it is not valid without the consent of the other heirs.[3]

In charity as executor shall think fit.

IV. Consent of legatee necessary.

589. (1) The express or implied assent of the legatee after the death of the testator, is necessary to complete the legatee's title to the bequest ;[4] he may disclaim the bequest,

[31] Cf. *Cleaver* v. *Mutual Ass. Fund*, [1892] 1 Q.B. 147, (held on general principles : (i) though executors of Maybrick could recover sum for which his life insured in favour of his widow, yet (ii) Mrs. Maybrick having been found guilty of his death could not demand that sum from executors) ; this decision followed in *estate of Cora Crippen*, [1911] P. 108, 112. Same rule prevails where crime consists of manslaughter & not murder ; *Re Hall, Hall* v. *Knight & Baxter*, [1914] P. 1 = 119 L. T. Rep. 587 ; see however, *Re Houghton, Houghton* v. *Houghton*, [1915] 2 Ch. 173 ; *re Pitts*, [1931] 1 Ch. 546 (whether this rule of public policy will prevail against statutory provision in Administration of Estates Act), 1925, s. 46.

[32] *Vedammal* v. *Vendanayaga*, (1907) 31 Mad. 100 ; but see *Gangu* v. *Chandrabhagabai*, (1907) 32 Bom. 275.

[1] Bail. I. 625, (635) *ll.* 25-28. See s. 457(4 A) GENERAL CHARITABLE INTENTION is defined in s. 457(4 B), p. 533 ; see also s. 481, pp. 595 ff.

[2] *Gangbai* v. *Thavar Mulla*, (1863) 1 Bom. H. C. R. 70, argued that, though English word *charity* used in will, testatrix in her instruction had used word *dharam* which embraces many objects of benevolence not recognized as charitable : *held* parol evidence inadmissible to explain what she meant by word charity : her general object was charity, & Court cannot be called on to speculate upon particular view she might have had, as to objects on which that charity should be conferred, beyond what she thought proper to express. See s. 481, pp. 595 ff.

[3] *Khajooroonnissa* v. *Rowshan Jehan*, (1876) 3 I. A. 291 = 2 Cal. 184.

[4] Bail. I. 614 (624); II. 229. See *n.* 5. Cf. s. 5 c (rules of construction).

provided that he has not, at any time after the death of the testator, already assented to it.[5] SECTION 589.

(2) A legatee may under Shia law validly accept part of the bequest, and disclaim the remainder ; *sed quaere*.[5] Partial assent.

(3) A legatee, who survives the testator, but dies without assenting to or disclaiming the legacy is under Hanafi texts presumed to have impliedly assented to the legacy ;[4] under Shia texts the right to assent or disclaim, devolves on his heirs.[5] Death without assent.

Illustrations.

(1) The owner of a farm, having as such, a right to graze his cattle on L's field, bequeaths his farm to L. If L accepts the legacy, the easement is extinguished under the Indian Easements Act, s. 46. But if L dies without accepting it, under Shia law the easement may remain unextinguished, since the heirs of L may accept the legacy, and may not be the owners of the field.[5] Under Hanafi texts, L's dying without disclaiming the legacy is implied acceptance : would it cause the easement to be extinguished ?[4]

(2) A bequest is made of partly paid up shares in a Company. The legatee survives the testator, but dies without assenting to or disclaiming the legacy. Under Hanafi texts the heirs of the legatee are apparently bound to pay the calls on the shares out of the legatee's estate, if any, *sed quaere ;* under Shia texts they would have the option to disclaim the legacy.[5]

Implied acceptance.

Acceptance may be inferred from conduct, as giving effect to a bequest, or purchasing something on account of the heirs, or paying debts : in which cases the acceptance takes effect as if made in express terms.[4] Where the defendant refused to pay calls on shares on the ground (amongst others) that he had never accepted their transfer to him, Lord Lindley said : "No one can be made the beneficial owner of shares against his will. Any attempt to make him so can be defeated by disclaimer."[6] "Nothing enters the proprietorship of man without his option (consent) except inherited property."[7] Ownership cannot be thrust on anyone.

Roman and English law.

Roman Law required "extraneous heirs" to accept a bequest in order to perfect it : with heirs of the same family, acceptance was presumed unless the bequest was rejected.[8] English law does not require acceptance by the grantee to vest the property in the donee. But when he obtains knowledge of the transfer, he may repudiate it.[9]

590. Unless a different intention is indicated[10] (1) under V. Legatee pre-deceasing testator.

[5] Bail. II. 230, illustration referring to bequest of female slave & her unborn child to her husband. See *nn.* 4, 6.

[6] Cf. *Hardoon* v. *Belilios*, (1901) A. C. 118, 123 ; pp. 126, 172, discuss facts which held to amount to acceptance.

[7] *Ashbah-un-Nazair* cited *Jafri B.* v. *Amir M. K.* (1885) 7 All. 822, 833 : see s. 345, p. 341, *n.* 3(vi), s. 443, p. 480, *n.* 4.

[8] Gaius II. 153-170.

[9] *Butler & Baker's Case*, (1591) 3 Rep. 25 ; *Thompson* v. *Leach*, (1691) 3 Mad. 296 ; *Siggers* v. *Evans*, (1855) 5 E. B. 367 ; *Standing* v. *Bowring*, (1885) 31 Ch. D. 283.

[10] That CONTRARY INTENTION if expressed will be given effect to, follows from

SECTION 590. Hanafi law a bequest to a legatee who pre-deceases the testator lapses, and becomes part of the residue ; [11] (2) under Shia law the bequest passes to the heirs of the deceased legatee ; if he leaves no heirs, the bequest lapses.[12]

VI. Joint legatees—

(A) share equally.

591. A bequest jointly to several named or otherwise ascertained legatees, is, unless a different intention is indicated, divided equally amongst all the legatees.[13]

(B) mentioned as a class : rank as single individual.

591 A. Where a legacy is given to a class of persons described generally, they collectively rank as a single legatee in competition with such other individuals or classes as are legatees together or in common with themselves. [13]

Illustration.

Under a bequest of the bequeathable 1/3—(*a*) to L, and to faqirs,—L takes 1/6 and the faqirs 1/6 ; (*b*) to the testator's cousins (3 in number) and to faqirs and to miskins (poor persons)—the 3 cousins (as they fall under s. 592) take each 1/15, the faqirs 1/15, and the miskins 1/15.[13]

(C) On death of joint legatee no right of survivorship unless deceased legatee disqualified ab initio.

592. Under Hanafi law the whole of a bequest made to several legatees collectively, of whom one or more predeceases the testator, is taken by the surviving legatees : [14] unless (1) there is any indication that each legatee is to take only a definite part of the bequest, or (2) [at the time when the bequest is made] all the legatees are in being, competent to take and so described as to be capable of identification : and they fulfil the conditions on which the bequest is made : [15] in either case each surviving legatee takes only such a part of the bequest as he would have taken if all the legatees had survived the testator.[16]

general principles as well as because it is expressly provided that a legacy may be given to " the heirs of such a one " : Bail. I. 648 (659) ; Hed. 693, col. i, 3 ; " If the article were to devolve to legatee's heirs, it induces the consequences of their being entitled to the use of the testator's property *without his consent*, which is contrary to law."

[11] Bail. I. 631 (642) ; *Oomuttoonnissa Beebee* v. *Areefoonnissa Beebee*, (1865) 4 W. R. 66, though legacy purported to be to her nephew, *nasl baad nasl batn baad batn* : (see s. 511 (5 A), p. 639, on this phrase) : but it purported to exclude heirs in favour of nephew. Cf. Ind. Succ. Act, 1925, s. 105 (= Act X. of 1865, s. 92).

[12] Bail. II. 247 (par. 3) ; *Husaini Begum* v. *Muhammad Mehdi*, (1927) 49 All. 547, 550. Some Shia authorities agree with Hanafi view.

[13] Bail. I. 636 (647). [14] Bail. 631-636 (642-647).

[15] See s. 5 C. For words in [ ] see s. 586(2), p. 803.

[16] PRINCIPLE : (i) where a person conjoined with another enters into bequest & then comes out of it by failure of condition, he does not occasion any accession to right of the other, (ii) where he does not enter into bequest for want of personality or competence (*ahleeut*) the other takes whole : Bail. I. 632 (643), citing *Durru'l Mukhtar*, 824. Cf. *Ammabi Mahmula* v. *Abasaheb*, (1930) 55 Bom. 401. See s. 5 C, pp. 41 ff.

SECTION 592.

(1) A bequest is made to the child of *L*, 'en ventre sa mére,'—

(*a*) if within six months after the testator's death, *L* gives birth to a dead child, the bequest fails ; [17]

Illustrations.

(*b*) if *L* gives birth to two children, one alive, and the other dead, the living child takes the whole bequest ;

(*c*) if *L* gives birth to two children who are both alive, and then one dies, the living child takes half of the bequest, and the heirs of the one that dies, take the other half.[18]

(2) T bequeaths 1/3 of his property,—

(*a*) to L and LA (LA being dead at the time of the bequest, whether with or without T's knowledge) or

(*b*) to "L and LA, if LA is alive," (LA being dead) or

(*c*) to L and L's posterity,[19] or

(*d*) to L and L's child, (and L's child dies before T,) or

(*e*) to L and to such of his children as may be poor, (and none of his children are poor,)—

(*f*) "to L and LA, if LA survives me," or "if LA is poor" (and LA predeceases T, or becomes rich),

(*g*) "to L and the children of LA, if they become poor," (and the children of LA do not become poor), or

(*h*) to L and L's heir,—

In each of these cases L takes 1/3 of the estate. [20]

(4)[20] T leaves 1/3 of his property "to L, and to LA," or "between L and LA." The repetition of the word "to" and the use of the word "between" shows that he wished them to take severally, and neither L nor LA can take more than 1/6. [21] But see *ill.* (5) & s. 5 c. pp. 41ff.

(5) T leaves his property "between L's children and LA's children," and one of them has no children, the whole goes between the children of the other, there being no indication that they are to take severally. [21] But see *ill.* (4).

(6) T leaves a legacy of 1/3 of his property to L and LA. Both L and LA survive the testator. But L dies before accepting the legacy, and then LA accepts it. LA takes the whole 1/3. If L had died before T, LA would have taken only 1/6.[21]

(7) T leaves 1/3 of his property "to L and to such children of LA as may become poor." At T's death, if none of the children of LA are poor, L takes the whole 1/3 ; if some are poor, then L and such children take per capita.[21]

(8) T bequeaths 1/3 of his property,—

[17] Bail. I. 617 (627). [18] Bail. I. 618 (628).

[19] In original, word for "posterity" is *aqib*, literally = "those that are to follow." Cf. "As to B's [*aqib*] posterity, as they are to follow him after his death, they are to be considered as non-existent at present." Bail. I. 632 (643): *nemo est haeres viventis.*

[20] [Ill. (2) f. n. = ill. (3) in earlier edn.] Bail. I. 631 (642).

[21] Bail. I. 632. Cf. *l.* 22 with *l.* 29 (644 *l.* 2 with *l.* 5); s. 5 c, pp. 41 ff.

SECTION 592.

(*a*) "to the sons of L." If L has no sons at the date of the will, but before T's death sons are born to L, they take the bequest. If L had 3 sons, at the time when T made his will, and then two of them die, and two other sons are born to L previous to T's death, then all three sons surviving T take the legacy equally ;

(*b*) "to LS, LSA, LSB, the sons of L," then on LS and LSA predeceasing T, LSB will take 1/3 of the legacy (i.e. 1/9 of T's estate) and LSC and LSD will not take anything, as they were not mentioned in the will.[22]

(9) T, a Hanafi, purports to leave a legacy of Rs. 100 to L, a stranger, and to LA, an heir. L can take Rs. 50, but LA cannot take his Rs. 50 unless the other heirs consent.[23]

(10) T bequeaths his mansion to L, and the right to reside in it to LA. Here both bequests take effect as stated. But if T first bequeaths to LA, the right to reside and then the mansion to L, then if they are mentioned connectedly they take what is mentioned for them respectively, but if they are mentioned separately, then L takes not only the whole of the mansion exclusively, but shares with LA the right to reside in it.[24]

(11) Where at the time that the bequest is made, one or more of the legatees is or are not in being, or having been described generally, there is no one answering the description and fulfilling all the conditions on which the will purports to give the legacy, and which are required by law to entitle him or them to take it, his/their part accrues to the survivors.[25]

§ 4.—FORM OF WILL.

No formality necessary.

593. A Muslim is not obliged to observe any special formality [1] in making his will, and his intentions with respect to his property [2] which he desires to be carried out after his death, in whatever form they are declared, may operate as a will,[3] provided that they are declared with sufficient clearness to be capable of being ascertained.[4] In particular, the will

[22] Bail. I. 635 (646). [23] Bail. I. 636-637 (647-648).

[24] Hed. 690, col. ii ; Bail. I. 657-658 (668-669). See s. 580(4), p. 794, *n.* 15 for an explanation of this.

[25] Bail. I. 631-634 (642-645).

[1] *Mahomed Altaf* v. *Ahmad Buksh*, (1876) 25 W. R. 121 (P.C.) ("by the Muhammadan law NO WRITING REQUIRED to make a will valid, & no particular form even of oral declaration is necessary, so long as the intention of the testator is sufficiently ascertained.")

[2] *Jeswunt Singjee* v. *Jet Singjee*, (1844) 3 Moo. I. A. 245, 258 (see s. 346 com. p. 347) ("I have no son & I have ADOPTED my nephew to succeed to my property & title" : held to be neither deed of gift nor will).

[3] (*Mt.*) *Natho* v. *Rahim*, (1891) 26 Punj. Rec. 285 (No. 55) (CLEAR INTENTION to bequeath necessary : mere fact of saying that another one is his son, & *malik* & *waris*, both during his life & after his death—may not, in itself, be enough to show such intention) ; *Sarabai Amibai* v. *Mahomed Cassum*, (1918) 43 Bom. 641 (ATTESTATION not necessary).

[4] E.g. in (*Prince*) *Suleman Kadr* v. *Darab Ali Khan*, (1881) 8 I. A. 117 (CAL.). See *Minhaj*, 262, 263.

need not be framed or worded in any technical form or language ;[5] it may be oral and need not be in writing ;[6] if in writing, it need not be signed[7] by the testator, or attested[8] by witnesses. If oral, no specific number or class of witnesses need be present at the time of the nuncupation ;[9] but in cases of dispute the best evidence[10] procurable is insisted upon.[11]

SECTION 593.

Writing not necessary nor witnesses.

Will need not be attested.

A bequest requires declaration and acceptance, and " by declaration is to be understood any word demonstrative of such an intention : as if a person should say, ' give such an one after my death,' or ' this is for such an one after my death,' or ' I have bequeathed it to him.' "[12] Such dispositions made on DEATH-BED, as are not to take effect till after the testator's death, are treated as legacies. Such as are to take effect immediately take effect according to some as legacies : according to others as against the whole estate.[13]

Bequest requires declaration and acceptance.

[5] (*Saiad*) *Kasum* v. *Shaista*, (1875) 7 N. W. 313 (instrument calling itself TAMLIKNAMA valid AS WILL) ; *Thakur Ishri S.* v. *Baldeo S.*, (1884) 11 I. A. 135, 141, 143 (OU.) = 10 Cal. 792, 800-802, 807 ; *Abdool* v. *Tajoodin*, (1904) 6 Bom. L. R. 263, 264, 268 ; *Mazhar Husen* v. *Badha Bibi*, (1898) 21 All. 91 (P. C.) (LETTER as WILL). See also *Kuvarbai* v. *Mir Alam*, (1883) 7 Bom. 170 ; *Din* v. *Krishnagopal*, (1908) 36 Cal. 149 (matrimonial arrangement deed as WILL, Hindu parties) ; *Krishna* v. *Sundara*, (1931) 58 I. A. 1481 (a document, containing the words : " you shall be my son & entitled to my property as a son," with others of testamentary nature ; registered by deceased in miscellaneous register, not in Book III. where wills should be registered : *held*, reversing H. CT., to be WILL) ; *Re goods of Morgan*, (1866) L. R. 1 P. & D. 214 ; *Robertson* v. *Smith*, (1870) L. R. 2 P. & D. 43 (guiding principle in determining whether a paper is or is not of testamentary character : is it intended that gift should be dependent on his death ?) ; Williams, *Executors* I(i)(2), s. 3, (10th ed.) 95, (12th ed.) 61.

[6] ORAL WILLS recognized in *Kishwar* v. *Jewan*, (1799) Cal. S. D. 25 = 1 Mac. Sel. Rep. 33 = 1 Morl. 619 ; (*Nawab*) *Aminud-Dowlah* v. (*Syed*) *Roshun Ali Kh.*, (1851) 5 Moo. I. A. 199 (Shia) ; *Baboo Beer Pertab Sahee* v. *Maharajah Rajender Pertab S.*, (1867) 12 Moo. I. A. 1, 28 ; *Tameez B.* v. *Furhut*, (1870) 2 N. W. 55 (absence of writing where ample time available, may throw doubt on fact of words being used as expression of will, but cannot affect validity of will if proved) ; *Mahomed Altafali K.* v. *Ahmed Buksh*, (1876) 25 W. R. 121 (P. C.) ; *Saiad Kasum* v. *Shaista B.*, (1875) 7 N. W. 313 ; *re will of Haji Mahomed Abba*, (1899) 24 Bom. 8 (PROBATE granted of ORAL WILL), followed in *Gokul* v. *Mangal*, (1903) 25 All. 33. Cf. *Re R. C. Stable, Dalrymple* v. *Campbell*, (1918) 146 L. T. 43 (NUNCUPATIVE WILL not of soldier, admitted to probate).

[7] *Aulia* v. *Alauddin*, (1906) 28 All. 715 (will not signed by testatrix nor by any one on her behalf, but found by Distr. J. reversing Subdte. J. to represent will of lady, & that she was competent at time to make it : upheld as valid will).

[8] *In re Aba Satar*, (1905) 7 Bom. L. R. 558 (Cutchhi Memon's will written & signed : unattested : probate granted) ; *Sarabai* v. *Mahomed*, (1919) 43 Bom. 641 (Cutchhi Memon's will).

[9] Cf. Ind. Succ. Act, 1925, (which does not apply to Muslims). See com.

[10] *Ram Gopal* v. *Aipna Kunwar*, (1922) 49 I. A. 413.

[11] *Baboo Beer Pertab* v. *Maharajah Rajender Pertab*, (1876) 12 Moo. I. A. 1, 28 (" He who rests his title on so UNCERTAIN A FOUNDATION AS THE SPOKEN WORDS of a man since deceased, is bound to allege as well as to prove with the utmost precision the words on which he relies with every circumstance of time & place ") ; *Venkat Rao* v. *Namdeo*, (1931) 58 I. A. 362 ; *Shivappa* v. *Rudrava*, (1931) 34 Bom. L. R. 539 ; *Mahabir Prasad* v. *Mustafa*, [1937] AIR (P. C.) reversing 8 Luck. 246 (Court must be satisfied (*a*) of effect of oral direction given, (*b*) that directions intended to operate as will).

[12] Bail. I. 623 (633).

[13] Bail. II. 229, 256 ; see *Ali H.* v. *Fazal H. K.*, (1914) 36 All. 431 ; s. 459 A, p. 549.

SECTION 593. No formality required in a will.

So if a person says, "If any event should happen to me, then I give a legacy of Rs. 100, to such a person, or Rs. 1,000 to him out of my 1/3,"[14] or if "A sick man makes a bequest, and being unable to speak from weakness gives a nod with his head, and it is known that he comprehends what he is about—if his meaning be understood, and he dies without regaining the power of speech, the bequest is lawful."[15] Thus a deed in the form of a gift, referring to itself as tamlik-nama but providing that possession of the property was not to be given to the donee till after the death of the donor, was construed as a will, and effect was given to it as far as possible.[16] Similarly, a testamentary disposition in a wajib-ul-arz may operate as a will.[17] But the principle was held not to apply in a case where the parties intended the disposition to operate during the life-time of the donor, and where it had been contended that possession had been given.[5]

Deed of gift given effect to as will.

Similarly, "when a person has said,[16] 'this my slave is to such an one, and this my mansion is to such an one,' without using the word bequest, and there is no mention of bequests, nor of the words 'after my death,' the expressions constitute a gift, both by analogy and on a favourable construction, and if possession be taken during the life of the donor the gift is valid, but if possession is not taken of it till after his death, the gift is void."[18]

As regards witnesses it is laid down in the Koran, V., 106,—

> "Oh ye who believe! Let there be witnesses between you when death draweth nigh unto one of you, at the time of bequest—two witnesses, just men from among you, or two others from another tribe, in case ye are campaigning in the land and the calamity of death befall you ..."

Koran IV. 105, merely recommendatory.

This verse has evidently been interpreted as containing merely a recommendation, and not a rule of perfect obligation; for no mention is made of witnesses e.g. in the Fatawa Alamgiri or Hidaya, when the constituents of a will are discussed;[19] again the books on wasaia or wills in these works are divided into ten and eight chapters, respectively, and only the last of them make any mention of witnesses.[20] The following illustration occurs in the Fatawa Alamgiri: "And if out of two witnesses one says that the deceased made this one an executor on Thursday, and the other one gives evidence that the testator made him an executor on Friday, then such evidence will be accepted: this is contained in the Muhit";[21] this shows at any rate that the two witnesses need not be simultaneously present. As to Shia law there

[14] Bail. I. 623 (633); i.e. all that he can bequeath. Thus "1,000 *dirhams* from my 1/3," sufficiently indicates testamentary disposition: not so, if: "1,000 *dirhams* from my property," or "from the 1/2 gift": Bail. I. 623 (*ll.* 27-33) (635).

[15] Bail. I. 641 (par. 2) (651).

[16] (*Saiad*) *Kasum* v. *Shaista B.*, (1875) 7 N. W. 313. Cf. *n.* 5.

[17] *Mahomed Altaf A. K.* v. *Ahmed Buksh*, (1876) 25 W. R. 121 (P. C.).

[18] Bail. I. 623, *ll.* 12 ff. (633 *ll.* 3 ff); cf. *Edwards* v. *Jones*, (1836) 1 M. & Cr. 226 (when is transaction gift *in praesenti*, when *donatio mortis causa*? *per* Lord Cottenham).

[19] Cf. Bail. I. 613 (623), 614 (624).

[20] Entitled "on giving *evidence* as to wills," & "of *evidence* with respect to wills."

[21] *Fatawa Alamgiri, Wasaia*, ch. X., *ad med.*

may be room for doubt. For though when the essentials of a will are mentioned, no mention is made of witnesses,[22] yet it is also stated [23] that "wills or bequests are established in law by the testimony of two witnesses who are Muslims and just persons, or in case of necessity, when two just Muslim witnesses are not to be had, by that of two ziminis or infidel witnesses." [24] This, it seems, refers merely to the proof of a will, and not to its validity. For it applies to written no less than oral wills ; nor does there seem to be any distinction in Muhammadan law between an oral and a written will and it is recognized that no attesting witnesses are required when the will is in writing.[25] Further, in order to understand the effect of this passage it must be borne in mind that, unlike the Indian Evidence Act, s. 134, (which provides that "no particular number of witnesses shall in any case be required for the proof of any fact,") Muhammadan law specifies the number of witnesses required for the proof of different transactions : generally two witnesses for all civil cases.[25] So that the references in the Arabic texts to the evidence required for the proof of wills seem in fact to be re-statements of the general adjective law of proof, and not any part of substantive law,—whereas in the cases of marriage amongst the Hanafis, and divorce amongst the Shias, the authorities lay it down specifically that witnesses are necessary for rendering the said transactions legally valid, and not merely for proving them.[25]

SECTION 593.

Written and nuncupative wills not distinguished.

§ 5.—EFFECT AND INTERPRETATION OF WILL.

593 A. In construing wills the Courts [1] give effect as far as possible [2] to the intention of the testator ;[3] albeit indirectly.[4]

I. Testator's intention.

[22] Bail. II. 229, 231. [23] Bail. II. 242.

[24] Koran v. 106, contemplates ORAL WILLS : at the time most transactions were oral ; even in law of gift & *wakf*, in texts of far later date, documentary dispositions of property seldom referred to.

[25] Hed. 353 : "EVIDENCE required in a case of whoredom is that of FOUR MEN,... in other CRIMINAL cases of TWO MEN...in all other cases...of two men, or of ONE MAN & TWO WOMEN." Witnesses may lawfully depose under law of Islam only as to what they have seen except in regard to 4 specified matters. Bail. I. 424-425 (428) cited s. 10, com., p. 71, *n.* 73.

[1] *Balkrishna* v. *Vinayak*, (1931) 34 Bom. L. R. 113 (executor by proving will accepts the legacies in trust : if he accepts executorship he must do all he is directed to do as executor) ; *Mucklow* v. *Fuller*, (1871) Jac. 198, 201. Ind. Succ. Act, ss. 74 ff.

[2] E.g. *Appakoth K. Avulla* v. *Kottayi Matha*, (1934) 58 M. L. J. 289, following TAGORE CASE (1872) I. A., SUPP., 37 (property given for estate of inheritance subject to limitation in favour of heirs in LINE OF SUCCESSION NOT SANCTIONED BY LAW, disposition in favour of persons named, held to stand & invalid limitation of heirs to drop out) ; *Nisar Ali Khan* v. *Mohammed Ali Khan*, [1932] 59 I. A. 268. Cf. *Muhammad Ismail* v. *Md. Ishaq*, (1921) 43 All. 508.

[3] *Hunoomanprasad Panday* v. (*Mt.*) *Babooee*, (1855) 6 Moo. I. A. 393, 411 ("deeds & contracts of people of India" ought to be LIBERALLY CONSTRUED : FORM OF EXPRESSION, literal sense is not to be so much regarded as real meaning of parties which transaction discloses) ; *Nisar* v. *Md. Ali K.*, (1932) 59 I. A. 268, 278 (par. 3). Cf. Bail. II. 237—"because effect can be given to the will without encroachment on the rights of the heirs," "to PRESERVE THE INTENTION of a Muslim free from what is unlawful." *Raja Venkata N.* v. *Raja Parthasarathi*, (1914) 41 I. A. 51 (MAD.) (*per* Lord Moulton) ; *Rajendra* v. *Gopal* (1930) 57 I. A. 296 (fundamental rule to ascertain intention from words used : MORE EXTENDED or MORE RESTRICTED MEANING than literal, may be given in consideration of outlook & social customs & frequent use

SECTION 593A. " In all cases the Court must loyally carry out the will as properly construed, and this duty is universal, and is true alike of wills of every nationality and every religion or rank of life." [3] See also ss. 588-592.

Illustrations. (1) Part [4] of the testator's taluqdari estate was subject to the Oudh Settled Estates Act (II. of 1900, U. P.) which prohibits [5] a device (*a*) not carrying with it certain leasing powers, and (*b*) not making the devisee a fresh stock of descent. The testator devised a bare life interest shorn of the two incidents (*a*) and (*b*). " It would in the ordinary course, be the duty," said Lord Blanesburgh, " to inquire whether within the limits of the law the manifest intentions of the testator in favour of the appellant [the devisee] could not be given effect to, albeit indirectly. In the present case, the obvious way of giving them effect would be for the Court to say that the interest given to the appellant might be TREATED AS A GIFT TO HER FOR LIFE OF THE RENTS AND PROFITS of the estate, charged upon the estate in the hands of the first respondent, upon whom as the testator's heir at law, the estate had devolved, as an estate undisposed of during the life of the appellant. If not also prohibited by the Act, such a determination by a Court of construction or administration would in this case be quite in accordance with principle." [6]

Gift of rents and profits for life.

(3) In the will of a Cutchhi Memon a legacy to the widow was held to be with right of absolute disposition both over movable and immovables; as the will referred to heirs according to Muhammadan law, the intention was to attach to the bequest (so far as he could) the incidents engrafted on it by Muhammadan law and to clothe his wife with powers given by that law.[7]

II. Will speaks from death of testator.

594. Subject to the provisions contained in this chapter, and unless a different intention appears, a will is construed to speak as if it had been executed immediately before the death of the testator, and the bequests contained in it take effect accordingly.[8]

III. Ambiguous will to be interpreted by heirs who may avoid it.

595. The meaning of a testamentary disposition so ambiguous in its terms that the law affords no interpretation of it,

of loose & inaccurate language); *Muhammad Junaid* v. *Aulia B.*, (1920) 42 All. 497, 50; *Ramchandra* v. *Ramabai*, (1936) 39 Bom. L. R. 165, 170, 171.

[4] *Krishna Kumari* v. *Bhaiya Rajendra*, (1929) 56 I. A. 156 (OU.), pp. 160, 161 (intention on part of testator contrary to s. 594): Appeal from 2 Luck. 97.

[5] Oudh Sett. Estes. Act, s. 18(2) (set out by Lord Blanesburgh, 56 I. A. 156) contains proviso prohibiting bequests, except on condition (amongst others) that bequest be according to provisions of Act.

[6] *Krishna Kumari* v. *Bhaiya Rajendra*, (1929) 56 I. A. 156, 167 (devise could not be construed as gift of rents & profits charged on estate as that would have subjected estate & profits to demand charge or incumbrances unlawful under Act).

[7] *Hoorbai* v. *Sooleman*, (1901) 3 Bom. L. R. 790.

[8] So that " its validity with reference to the devise of any particular property thereby made must depend on the TESTATOR'S STATUTORY OR OTHER LAWFUL DISPOSING POWER OVER THAT PROPERTY at that time " : *Krishna Kumari* v. *Bhaiya Rajendra*, (1929) 56 I. A. 156, 160 (OU.); cf. Ind. Succ. Act, 1925, s. 90 (= Act X. of 1865, s. 77); Wills Act, 1837, (1 Vict. c. 26), s. 24; *In re Gillins, Inglis* v. *Gillins*, [1909] 1 Ch. 345; *Ramchandra* v. *Ramabai*, (1936) 39 Bom. L. R. 165, 174, 175.

will be left to the heirs to explain, as they may think proper.[9] SECTION 595.

(1) T says in his will "something, or some trifle, should be given to L," or "I leave some property to LA," or "a garment" or "a beast." The heirs may give to L or LA whatever they like or any garment, or any beast.[10] *Illustrations.*

(2) T says, "I bequeath a sahm (a technical name for an heir's portion) to L." Abu Hanifa is of opinion that the expression is uncertain and the heirs may interpret it as they please. But the author of the Mabsut says that L is entitled to the smallest share of the heirs, or, if there is no heir, to 1/2 of the property, the other 1/2 escheating.[11]

(5) T bequeaths the best of his three garments to L, the next in quality to LA, and the last to LB. If one of the garments is lost, and it cannot be ascertained to whom the remaining two garments were allotted by T, the heirs have the right to claim that the legacies are void, "since the parties entitled are unknown, and ignorance of this fact prevents the validity of any judgment that may be pronounced in the matter, and the attainment of the testator's object, unless the heirs will deliver up the remaining garments."[12] If they consent to the legacy being given effect to, then L will have two-thirds of the better of the two garments in existence, LA will have one-third of the better, and one-third of the worse, and LB the remaining two-thirds of the worse.[12]

596. Where a bequest of a limited estate in favour of an heir is followed by a bequest to another legatee of the reversion, and the other heirs do not consent to the prior bequest to the heir, so that it fails, in that case the bequest of the reversion does not necessarily fail, but may be accelerated, unless an intention is indicated that the reversioner shall not take till after the death of the prior legatee,[13] or unless such acceleration would wholly defeat the intention of the testator.[14] *Semble,* the same rule applies wherever the prior of two successive bequests fails. IV. Failure of prior bequest may (A) accelerate or (B) avoid later bequest.

(1) T bequeaths property[15] to L for his life, and "from and immediately *Illustrations.*

[9] Bail. I. 636 (647) ; II. 238, 239, 241 (par. 3, 4). See also s. 5c. *Adv.-Gen.* v. *Bai Jimbabai,* (1915) 41 Bom. 181, 284-288.

[10] Bail. I. 629 (639) ; II. 239 ; for Shia *Ismail law,* cf. passage from the *Daaimu'l-Islam* translated in s. 579 c, com., p. 789.

[11] Bail. I. 637 (*ll.* 8 ff.) (648). [12] Bail. I. 637 (648 f.).

[13] *Lainson* v. *Lainson,* (1854) 5 De G. M. & G. 754, followed by P. C. in Hindu case *Ajudhia Bukhsh* v. (*Mt.*) *Rukmin Kuar,* (1883) 11 I. A. 1. See also *In re Whitethorne, Whitethorne* v. *Best,* [1906] 2 Ch. 121 ; *In re McEacharn, Gambles* v. *McEacharn,* (1911) 103 L. T. 900 = 55 Sol. J. 204 = [1911] W. N. 23.

[14] *Fatimabibi* v. *Ariff Ismailjee Bham,* (1881) 9 C. L. R. 66 (Wilson, J.) ; cf. *Adv.-Gen.* v. *Jimbabai,* (1917) 41 Bom. 181, 284-286. Under Muslim terminology the proposed bequests would take form of grant of USUFRUCT to A for limited period & then to B : or B, (reversioner) would be granted substance or corpus of the property, subject, for period stated, to grant of usufruct in favour of A. Cf. *Ismail Mahomed* v. *Hurbai,* [1898] Printed Judgments (Bom.) 107 (Farran, C. J. & Candy, J.).

[15] Under Muslim terminology L should be given USUFRUCT for life ; & LA corpus.

SECTION 596.

after his decease," to LA. Prima facie, these words are to be understood as denoting the order of succession of the limitations, no intention is shown that LA is to take nothing till after the death of L; in such a case it makes no difference whether the previous estate is removed by death, or revocation. Consequently the estate of LA is accelerated in either case.[13]

(2) T purports to give the rents of more than 1/3 of his property to his heirs in proportions other than the legal proportions; and after the death of the last child, to charity. If the heirs do not consent to T's will, both the bequests must fail, because it would wholly defeat T's intentions if the heirs are ousted for the benefit of the charity.[14]

V. Subject of bequest described but not denoted.

597. Where a bequest is made of an article by description, without appropriating any specific article for the bequest, if the testator does not, at his death, own any such article, the bequest fails, unless an intention to bequeath the value of the article is indicated : in which case an article as described will be purchased out of the assets and given to the legatee.[16]

VI. Bequest of money or other commodity estimated by weight or measure of capacity.

598. Where a bequest is made of the whole, or a specified fraction of the testator's money, or other object or commodity estimated by weight or measure or capacity,—for the purpose of determining its amount, number or quantity, regard is had to the amount, number or quantity owned by the testator at the time when the bequest was made, and not at the time of his death.[17] Where the bequest does not consist of money or objects or commodity, of a homogenous nature, regard is had (for the said purpose) to the amount, number or quantity owned by the testator at the time of his death.[18]

Illustrations.

(1) T makes a will when he has 100 goats, each of the value of Rs. 5, and no other property. He bequeaths 1/2 of his goats to L then—

(*a*) if T dies a year after making the will, and his net estate at his death consists of 60 goats, and Rs. 1,000 in cash, L takes 50 goats ;

(*b*) if T leaves no other property except 60 goats, then, unless the heirs consent, L takes only 20 goats (the bequeathable 1/3) ;

(*c*) if instead of goats, there is a bequest of 1/2 of T's clothes, (which are of different kinds and values) and 2/3 of the clothes perish before the death of T, then L takes 1/2 of the clothes actually left by the deceased, (provided that there is either other property of at least twice the value of

[16] See *nn.* 13, 14 ; Ind. Succ. Act, 1925, ss. 142-145 = Act X. of 1865, ss. 129-136, 140, 141, bequest of property specified & distinguished from all other property = SPECIFIC LEGACY : bequest of certain sum of money or quantity of commodity referring to particular fund or stock so as to constitute same the primary fund out of which payment to be made = DEMONSTRATIVE LEGACY ; *distinction* : (i) specified property given, (ii) legacy directed to be paid out of specified property.

[17] Bail. I. 631 (642), 636 (647). [18] Bail. I. 636, (647). See s. 574.

the 1/2 of the clothes left by the deceased, or the heirs consent to the bequest in excess of 1/3).[18] SECTION 598.

(2) T makes a bequest of a 1/3 of his flocks, and,—

(*a*) all his flocks perish before his death,—the legacy is void, even though T should have purchased other flocks before his death.

(*b*) If T has no flocks at the time of the bequest, and subsequently purchases some,—the bequest will be valid as to a 1/3 of the flocks belonging to him at his death.[18]

(3) T has no sheep and bequeaths,—

(*a*) "a sheep from his property"; this means that a sheep or the value of one, has to be given to the legatee out of T's property;[19]

(*b*) "a sheep to L," then it is doubtful whether the bequest is specific, and so of no effect, or is to be interpreted as a bequest of the value of the sheep;[19]

(*c*) "a sheep out of his flocks"; this is a specific bequest, and so of no effect;[19]

(4) T says "I bequeath my roan Turkish horse" or "my blind horse to L." The bequest is specific, and refers to one that is in the possession of the testator at the time of his death.[19]

(5) T bequeaths to L his Turkish horse, without any qualification; the bequest is not specific, but includes property acquired by T subsequently.

(6) T directs by his will the emancipation of all his slaves: when he has no other property besides them, a third only of their number can be emancipated, and these are to be determined by lot.[20]

§ 6.—Revocation of Will.

599. (1) A testator may revoke[21] his will or any part of it either expressly or by implication.[22] Revocation express or implied.

(2) An act by which the testator extinguishes[23] or disposes of his right in the subject of the bequest, implies a revocation of the bequest to that extent. After the testator sells or makes a gift of the subject of bequest, if he repurchases it or revokes the gift,[24] the bequest does not revive. Revocation implied by alienation.

[19] Bail. I. 635-636 (646-647). See s. 5 c.

[20] Bail. II. 242-3. (i) If testator arranges slaves in any order for emancipation, that order fixes priority: (ii) casting lots is to be preferred to heirs exercising selection, as "the mode of determining by lot is recommended by its justice & is the most approved."

[21] Bail. I. 618 (628); *Minhaj*, 266 (Bk. 29, s. 6).

[22] (*Ahmonee*) *Shemail* v. *Ahmed Omer*, (1931) 33 Bom. L. R. 1056 (several testamentary writings found: their aggregate or net result constitutes will).

[23] Cf. Ind. Succ. Act, 1925, s. 152. *Abdul Karim* v. *Shofiannissa* (1906) 33 Cal. 833 (testamentary *wakf* set up: not proved: property mortgaged after alleged *wakf* set up: proved: property mortgaged after alleged *wakf*: decision on facts: rule in s. 599(2) might have been applicable but not referred to).

[24] Bail. I. 619 (629).

SECTION 599. Or addition.

(3) If the testator makes an addition to the subject of the bequest of such a nature that the subject of the bequest cannot be delivered without the addition, the bequest is revoked.[25]

But not necessarily subsequent bequest.

(4) If the same article is bequeathed successively to two persons, the second bequest does not operate as a revocation of the first, unless an intention to revoke the first is indicated ; if the legatee of the second bequest is dead when it is made, the second bequest is void, and the first bequest is not thereby revoked.[26]

Denial is not revocation.

(5) A denial by the testator of the validity of a bequest made by him,[27] or of the fact of his having made it,[28] does not operate as a revocation of it.

Illustrations.

(1) T bequeaths a house to L. Subsequently, T says : "The house that I gave to L, is for LA." This is an express revocation, unless LA is dead at the time of the second bequest, in which case the first bequest remains unaltered.[27]

(2) T bequeaths to L (*a*) a piece of cloth,—and then T cuts it up, and sews it ;[29] or (*b*) cotton,—and afterwards weaves it, or spins it into thread, or uses it for stuffing quilting, or lining a garment ; or (*c*) iron,—and afterwards makes a vessel, or sword of it ; or (*d*) fried barley,—and afterwards mixes it with butter ; or (*e*) a slave,—and afterwards pledges him. Each of these acts operates respectively as a revocation of the bequest.

(3) T bequeaths a piece of silver to L, and then fashions it into a ring. Abu Hanifa's view is that this is not a revocation, and this is stated in the Fatawa Alamgiri to be correct,[30] though it is opposed to Abu Yusuf's view, and apparently to that of Imam Muhammad's and to *ill.* (2).

(4) T bequeaths 1/3 of his property to L, and then makes a gift of a 1/3 of his property to R. The bequest to L is not revoked.[24]

(5) T bequeaths a mansion to L, and "largely bedaubs it with mud," or builds within it, or sells it, or makes a gift of it. The bequest is revoked, and is not revived by T repurchasing the mansion, or revoking the gift.[26] But if he puts plaster on the house, or pulls it down, it is not revoked.[31]

(6) T bequeaths land to L. If he sows it with vegetables, it is not revoked, but making a vine-yard or planting trees upon it, would revoke the bequest.[31]

[25] Bail. I. 618 (628).

[26] As the second legatee was dead when bequest to him made.

[27] Bail. I. 620 (630). Cf. s. 5 c, pp. 41 ff.

[28] Bail. I. 619 (629). There is a difference between the views of the two disciples on this point, but the *Hidaya* is clear in its preference for the view expressed above.

[29] Cf. Ind. Succ. Act, XXXIX. of 1925, s. 152 (= Act X. of 1805, s. 139).

[30] Bail. I. 618-620 (628-630); cf. *Minhaj*, 267 (Bk. 29, s. 6). Cf. s. 5 c, pp. 41 ff.

[31] Bail. I. 621 (631). See s. 5 c, pp. 41 ff.

§ 7.—Death-bed Dispositions of Property.

600. The restrictions in ss. 579 to 579C against bequests of more than the bequeathable 1|3, or so as to benefit heirs, affect also transactions, in so far as they are without consideration, which purport to be non-testamentary, but are made by a person while he is in marz-ul-maut (or death-illness).[1]

Death-bed transactions without consideration take effect as bequests.

(1) A GIFT [1] made in marz-ul-maut can take effect only as a bequest, viz. under systems other than the Shia Ithna Ashari, it takes effect to the extent of a bequeathable third, in so far as it is not in favour of the heirs,[2] provided that such a gift is not valid even to the said extent, unless possession has been taken by the donee.[3] Under the Shia Ithna Ashari law it takes effect to the extent of the bequeathable third, though it is in favour of heirs provided possession is transferred.

Illustrations.

(2) T owns a house worth Rs. 3,000, and has no other property. He purports to make a GIFT of it while in death-illness to L, who gives an IWAZ of Rs. 2,000 or more in value : the gift and iwaz are both valid as L benefits only to the extent of Rs. 1,000 or less, viz. within 1/3 of T's estate.[4] If the iwaz is less than Rs. 2,000 in value, then the heirs of T have a right to claim back the difference between Rs. 2,000 and the value of the iwaz, and the donor has the option of retaining the house, provided that he makes up the iwaz to Rs. 2,000 i.e. to 2/3 of the net estate.[5]

(3) *T*, a woman, while in death-illness, makes a GIFT of her MAHR to her husband, who predeceases her. She has no claim for her mahr as against his estate, because the validity of the release can only be questioned after her death [6] by her heirs.[7]

(4) The deceased during marz-ul-maul makes a MAHABAT (s. 442A) to his own disadvantage. In so far as the pretended seller or purchaser has

[1] See s. 359B, (gift : p. 373) s. 419, *ill.* (3) (4), (p. 464 : effect of RETURN) s. 579 (BEQUEST); Bail. II. 209, 256-267 ; *Minhaj* 262, (Bk. 29, s. 3). See also *Ibrahim Goolam Ariff* v. *Saiboo*, (1907) 35 Cal. 1 (P.C.) (GIFTS IN FAVOUR OF HEIRS upheld, as found that donor not on death-bed ; but assumed that otherwise gifts would have been invalid), *Fazle Ahmad* v. *Rahim B.*, (1917) 40 All. 238 (doctrine not applicable at all to sale).

[2] *Muhammad Sayeed* v. *Muhammad Ismail*, (1911) 33 All. 233 ; *Ibrahim Goolam Ariff* v. *Saiboo*, (1907) 34 I. A. 107 = 35 Cal. 1 ; *Wazir Jan* v. *Altaf Ali*, (1887) 9 All. 357 ; *Labbi B.* v. *Bibbun B.*, (1874) 6 N. W. 159 ; *Muhammad Gulshere K.* v. *Maryam B.*, (1881) 3 All. 731 , *Fatima B.* v. *Ashraf Ali*, (1903) 31 Cal. 319 ; *Ekin Bibi* v. *Ashruf Ali*, (1864) 1 W. R. 152 ; *Nazar Husain* v. *Rafeeq Husain*, (1911) 8 All. L. J. 1154 ; *Musi Imran* v. *Ibne Hasan*, [1933] AIR (ALL.) 340 = 31 All. L. J. 53.

[3] Bail. I. 542 (551). *Fazle Ahmad* v. *Rahim Bibi*, (1917) 40 All. 239.

[4] Bail. I. 535-536 (544-545).

[5] Bail. I. 542 (551). *Sadiq Ali* v. (*Mt.*) *Amman*, (1929) 5 Luck. 406 (gift of property worth Rs. 1,000 in lieu of *mahr* of Rs. 500 in *marz-ul-maut* upheld as irrevocable & non-testamentary : *mahabat* not referred to).

[6] Bail. I. 544 (553). The reason is that the illness cannot be known to be *marz-ul-maut* till after her death.

[7] *Muhammad Mashud H. K.* v. *Md. Anwar H. K.*, (1909) 6 All. L. J. 503 (release of *mahr* made on 18 July & wife died on 22 July. It seems to have been overlooked that her release would be valid to extent of bequeathable 1/3).

SECTION 600. been favoured by the deceased, the transaction can have effect only as against the bequeathable 1/3 ; but it has priority over a gift made in marz-ul-maut [8] and over all legacies.[9].

(5) If A in death-illness ACKNOWLEDGES himself to be indebted to an heir, and there is no other proof of the DEBT, it cannot (except under Shia Ithna Ashari law) take effect as against the other heirs, unless they consent to it.[10] Under Shia Ithna Ashari law it is valid to the extent of the bequeathable 1/3 without the consent of the heirs, but their consent is required for validating it so as to make it payable out of more than the 1/3.[11]

(6) THE RELEASE OF A DEBT during death-illness is valid only to the extent the bequeathable 1/3.[12]

(7) A WAKF made in death-illness is valid only to the extent of the bequeathable 1/3, unless the heirs consent.[13]

(8) Where a marriage is contracted in death-illness, and the MAHR is more than the mahr-ul-mithl (usual dower) the excess is void, unless the heirs consent.[14] But the case is different where mahr was due in respect of a marriage contracted before the death-illness : property transferred for the purpose of discharging the mahr debt is not transferred without consideration ; nor is such a transfer a gift, nor does the rule in s. 600 apply thereto.[15]

(9) T purports to BEQUEATH more than his bequeathable 1/3. H one of T's heirs, being in death-illness, assents to the bequest. H's assent operates as though he had left a legacy, and is valid only if H's share in the excess of T's bequest over the bequeathable 1/3 is less than a 1/3 of H's estate.[16]

(10) T makes a bequest to one of his heirs, L ; another heir H, while in marz-ul-maut, CONSENTS TO THE BEQUEST, and then dies, leaving as his heirs L, and HA. Under Shia law H's consent to T's bequest in favour of L, validates that legacy to the extent of 1/3 of H's estate. Under the Hanafi law it is not valid to any extent unless HA consents to the legacy, because L and HA are both heirs of H.[16]

(11) T dies leaving as his heirs his sons S, SA, SB and SC. T's estate

[8] Hed. 685 .

[9] Bail. I. 641 (650) ; II. 257-259. *Sahu* v. *Fazal*, (1933) 60 I. A. 116, 119 (ALL.) (death-bed gift, under CLOAK OF SALE, in favour of mother, set aside).

[10] Hed. 437.

[11] Hed. 437, 684. Under Hanafi texts acknowledgment of debt in favour of stranger (though there be no other evidence of it) establishes debt to extent of whole of estate, but debts that can be proved by other evidence, have priority over debts of which there is no proof other than acknowledgment ; s. 560, p. 731.

[12] Bail. II. 209. Cf. Bail. I. 112 (*ill.* 27-28); Fyzee, *Ismaili Law of Wills*, p. 26, (5). §§ 21, 22.

[13] Bail. I. 601, II. 212 ; *Ali Husain* v. *Fazal Husain K.*, (1914) 36 All. 431 (case under Shia law) ; cf. *Khajooroonissa* v. *Roushen Jehan*, (1876) 3 I. A. 291 = 2 Cal. 184 ; (bequest to heir under colour of charitable bequest held invalid) ; *Fazle Ahmad* v. *Rahim Bibi*, (1917) 40 All. 239.

[14] *Radd-ul-Muhtar*, *Kitab-ul-Iqrar*, Ch. on acknowledgments in death illness, *init.*

[15] Macn., *Mooh. L.*, 272 (case xxi). *Mustafa v. Hurmat*, (1880) 2 All. 854 ; *Abbas Ali* v. *Karim Baksh*, (1908) 13 Cal. W. N. 160 ; *Esahaq Chowdhry* v. *Abedunnissa*, (1914) 42 Cal. 361 ; see also (*Bibi*) *Janbi* v. *Hazarath Saib*, (1910) 21 Mad. L. J. 958 ; ss. 103 B, 347, pp. 181, 351.

[16] Bail. I. 616 (626). Cf. *Azizunnissa Bibi* v. *O. M. Chiene*, (1920) 42 All. 593.

is worth Rs. 6,000 but he purports to leave Rs. 5,000 to L. S CONSENTS to the LEGACY. If S's consent is given in health, the legacy takes effect to the extent not only of the bequeathable 1/3 (i.e. Rs. 2,000) but also as against S's share in T's estate (i.e. another Rs. 1,000 making up Rs. 3,000 in all). If S's consent is given by him on his death-bed, it is operative if S leaves estate worth Rs. 2,000 besides his share in T's estate (i.e. if S had testamentary power over Rs. 1,000 which was his share in T's estate); otherwise it will abate proportionately. SECTION 600.

(12) T directs his EXECUTOR E to sell certain portions of the estate, and purports to give to E a COMMISSION of 3 per cent. on the proceeds of the sale of the said properties. *Held*, that this is a mere bequest payable out of 1/3 of the estate, which passed by the will; it is not a debt.[17]

(13) A Shia makes, in death-illness, a GIFT and a MAHABAT transaction. The first in order of time (the gift) takes effect, and then the mahabat takes effect out of balance (if any) of the bequeathable 1/3.[18]

(14) W is in death-illness, and has grain of the value of 6 dinars (which is his whole estate). He purports to sell it (by way of MAHABAT) to L for grain of the value of 3 dinars: causing loss to the estate of 1/2 thereof, whereas in death-illness W had power to dispose of only 1/3 (or 2 dinars). L must return 1/3 of the grain purported to be sold to him, and the heirs must return 1/3 to L. The gain to L will then be of the value of 2 dinars.[19]

(15) "When a sick woman has given her DOWER to her husband, the gift is valid if she recovers from her illness; and even though she should die of that illness, yet if it were not death-illness the answer would be the same; but if it were a death-illness, the gift would not be valid, without sanction of the heirs."[20]

(16) A man pronounces an irrevocable TALAQ, or three talaqs in death-illness, and dies while the wife is in her iddat for divorce: she inherits from him under Hanafi and Shia (but not Shafii) law.[21]

[17] *Aga Mahomed Jaffar Bindanim* v. *Koolsom*, (1897) 24 I. A. 196 = 24 Cal. 9.

[18] Bail. II. 257.

[19] Bail. II. 257-258.

[20] Bail. I. 543 (ll. 11-16) (552).

[21] Bail. I. 277-278 (279-280), II. 122: abominable for sick man to divorce wife; see also ss. 154, ff. pp. 229 ff. *ill.* If he dies after her *iddat* for divorce expires, she does not inherit.

CHAPTER XIV.

INHERITANCE AND SUCCESSION.

PART I—GENERAL PRINCIPLES AND SCHEME OF THE LAW.

§ 1.—Dual Basis of Muslim Law of Succession.

(1) Amendments by Islam.

(2) Pre-Islamic customs.

601. The Muslim law [1] of inheritance consists primarily of (1) the rules relating thereto laid down in the Koran or inculcated by the Prophet in his teachings ; [2] and (2) the customs and usages prevailing amongst the Arab tribes near Mecca and Medina at the time of the Prophet, in so far as they have not been altered or abrogated by the said rules and teachings.[3]

1.—Muslim law : logical completeness.

The Muslim law of inheritance has always been admired for its completeness as well as the success with which it has achieved the ambitious aim of providing not merely for the selection of a single individual or homogeneous group of individuals, on whom the estate of the deceased should devolve by universal succession, but for adjusting the competitive claims of all the nearest relations.

As to the excellence of the system in a formal sense, Sir William Jones said : " I am strongly disposed to believe that no possible question could occur on the Muhammadan law of succession which might not be rapidly and correctly answered." [4]

2.—Law of inheritance : forms that the family assumes.

" All laws of inheritance," says Sir Henry Maine, " are made up of the debris of the various forms which the family has assumed." [5]

1 Muslim law governs estate of person who dies Muslim : see ss. 1, 9, 559, 577.

2 All amendments by Islam (ss. 603 f.) referred to hereafter as " Koranic," even though result of wide interpretation, or extension, of principles contained or indicated in Koran. See s. 605.

3 This two-fold basis of the law of Islam has been frequently alluded to in the chapters on family relations. Pre-Islamic customs & usages have no effect or force in themselves, but in law of succession most important to bear in mind : they have become incorporated in law of Islam by tacit approval of the Prophet, being taken as existing state of things which had to be amended as required ; & which stand unless altered. Though not necessarily preserved in texts as pre-Islamic usages, they form real substratum of much of law. See Ch. I., pp. 1-7.

4 Jones, *Works*, (1807) VIII. 204, 214, 218 ; (1799) III. 519, : " Learn the Laws of Inheritance & teach them to the people, for they are one half of useful knowledge." See list of Texts on Muslim Law, above p. 91, item 12.

5 *Early Instit.* 219. For early Arabs, TIE OF WAR, or rather OF JOINT PLUNDER or REVENGE, more important than FAMILY TIES. See R. Smith *Kinship & Marr., in Anc. Arab.* (1907) 67 ; 25-27, 41, 65, 69, 285.

In Muslim law, the pre-Islamic customary rules of succession have a similar importance. We have to turn to those customs for discovering the fundamental notions of kinship and proximity underlying the law. For the law of inheritance translates the basic notions of kinship, into rights to inherit portions of the estate. The notions of kinship were, before Islam, based on the blood-feud. The blood-feud seems, partially at least, to have given place to comradeship in arms, and that, in its turn, to agnatic male relation. Islam substituted for agnatic relation, blood relation in the widest sense, not restricted to agnatic relation : placing on a footing of equality therewith, the relation that marriage creates between husband and wife. The pre-Islamic customs alone can explain the reason why different classes of rights are given to the different classes of kin, and why some who might be supposed to be entitled to similar rights, are placed on different footings. Thus in the first (and in some respects the most important) group of heirs—the "sharers,"[6]—no place is given to sons, though daughters, daughters of sons, and even sisters are included in it. This might seem bewildering, unless it is realized that the sharers consist of those who (in the circumstances in which they are granted the right to take their respective shares) were not entitled to succeed under the customary law. As the son was always entitled to succeed under the customary law, he is never a sharer. Sect. 602 gives an outline of the customary law : s. 603 of the amendments by the Koran.

SECTION 601. Importance of pre-Islamic customs.

The debris of the customary law (to use Sir H. Maine's expression) will be encountered throughout the law of succession, and will often simplify its seeming complexity. A point or two may be noted here to illustrate this. The title to succession, previous to Islam, was that of comradeship in arms. It was on this basis that women and children who were unable to bear arms were disqualified in regard to inheritance.[7] The law was not amended on this point for the first two or three years during which the Prophet preached. Consequently the 'muhajirun' (or those who aided the Prophet in his earliest years) succeeded to each other when any of them fell in battle.[8] Later, this rule was abrogated by the Koran, and it was laid down that nothing could furnish so strong a claim to inheritance as blood relation. This was indeed only a part of the general scheme of the new religion to strengthen the family tie.[9] An instance of the survival of the pre-Islamic customary law is, that in Shia law, though the whole of the inheritance is taken by agnates and cognates, males and females alike, yet in regard to the 'diyat' or "price of blood," to be paid by one who killed another, the old rule prevails, and the 'diyat' is still to be divided amongst the 'asaba' or male agnates alone, the "mother's relations" having no share in it.[10]

3.—Blood-feud. Family tie amongst Arabs.

4.—Blood money still taken under Shia law by 'asaba.'

[6] See s. 610, p. 843.

[7] See s. 611, p. 846 ; cf. Smith, *Kins. & Marr.* 56-66, 60-61. In most expositions of Muhammadan law bearing of important historical fact stated in s. 601 is very inadequately conceived.

[8] See commentaries on verses of Koran dealing with the laws of inheritance, & *Mishcat-ul-Masabih*, XII. XIX. 1, 2, *et passim*, e.g. iase of Sa'ad ibn Rabii & his brother & widow & daughters.

[9] For other instances see e.g. ss. 92, 213, etc. [10] Bail. II. 267, (*third*), 370.

§ 2.—Koranic Alterations in Law : Its Principles

1.—Koran on law of succession.

The following are the most important verses of the Koran dealing with the law of succession : so arranged that the general principles come first, followed by the specific provisions. The abrogated verses indicating the development of the law are retained, the repealing verses being set out immediately after.

The Koran is cited first for convenience. But it must be remembered (as a necessary preliminary for understanding its provisions) that its function to be considered in the present context is the amendment of the existing customary law—under which females and cognates were entirely excluded, and husband and wife were not recognized as heirs : male agnates were given precedence in the right to inherit : of the male agnates, if any descendant survived, the nearest descendant succeeded to the exclusion of all others : failing descendants, the nearest ascendant, and failing ascendants, the nearest collateral succeeded.

Abrogated verse : succession amongst Muhajirun.

> Verily they who have believed and fled from their homes, and striven strenuously [bringing aid] with their wealth and their souls for the cause of God,[11] and they who gave shelter and help,[12]—these shall be awlia[13] (heirs or next of kin) the one unto the other. And as to those who have believed, but have not fled their homes, they shall have no claim of kindred[14] against you until they too fly (from their homes). Yet if in the matter of religion, they seek aid from you, then your aid unto them is due, except against a people between whom and you there is a treaty. And God seeth that which ye do.[15]
>
> And the infidels are next of kin one of them to the other.[16] Unless ye do the same, there will be discord in the land, and great corruption.
>
> Those who believe, and have fled (from their homes), and strove for the

[11] Viz. *muhajirun* = those who fled ; *hijra* which gives name to Muslim era, is from same root. *Muhajirun* were first converts to Islam, forming band of devoted followers of Prophet in days of persecution. Being cut off from their relations, same rule of succession was laid down for their succeeding to each other, as customary law by which companionship in arms gave title to succession.

[12] *Ansars* = helpers.

[13] *Awlia*, pl. of *wali* (its exact significance difficult to render) = "Friend, beloved. Lord, master. Benefactor, partner, companion. Heir. Tutor, guardian. Saint, (among Moslems)." J. G. Hava, *Alfaraid-ud-Durriya*, Catholic Press, Beirut, (1915), 895, col. ii. Note that (i) this title of inheritance between comrades in arms (borrowed from customary law) was available to those only who at the time were cut off from tie of blood relation ; (ii) it was abrogated when persons in question became reunited to their blood relations.

[14] Here occurs another expression cognate to *wali*, viz. *wilayat* = "right of succession to property of freed man ; Government management of a province. Supremacy, dominion. Blood-kindred. Giving help to another,"—*Alfaraid*. The phrase has been translated : "...shall have no right of kindred against with you." (Sale,/Rodwell). "Not yours is their guardianship" (Muhammad Ali). "Ye have nothing to do with their kinship at all," Abul Fadi). "Ye have no duty to protect them" (Pickthall).

[15] Verses 72, 74, 75 seem to refer to same matters. Probably not contemporaneously given : later verses supplement or explain earlier.

[16] Succession not mentioned here : assumed that succession follows this "kinship," (viz. of comradeship-in-arms), as it followed the "kinship" of blood-feuds : Smith, *Kinship & Marr. in Anc. Ar.*, 165-171. Institutions of (i) *maula* (= successor by contract, s. 634) & (ii) acknowledged kinsman (s. 635), however, must have made implication clear to Arabs : see *n.* 13.

cause of God, and gave an asylum and help : these are the believers in truth ; unto them forgiveness and generous provision.[15] SECTION 601.

And they who have believed, and left their homes afterwards, and have striven along with you, these are also of you : but those who are united by ties of blood are nearer to each other, by the book of God.[17] Verily God has knowledge of all things[16]—Koran VIII. 72-75. Blood relation replaces comradeship in war,—

Nearer to the believers is the Prophet than they are to their own selves, and his wives are (as) their mothers.[18] In the Book of God they who are related by blood, are nearer the one to the other than the (other) believers and those who fled,[19] but ye should show kindness to your kindred. This is written down in the Book.—XXXIII. 6. —as title to succession.

Such of you as are about to die and leave wives, should bequeath to their wives maintenance for a year[20] without throwing them out from their homes, but if they quit them [of their own accord] then no blame shall attach to you for any thing that they may do of themselves, in a fair way. God is mighty, wise ! (Abrogated verse) : A year's maintenance to WIDOWS.

For the divorced women, a provision in kindness : a duty for those that fear (God).[21]—II. 240, 241.

It is prescribed to you, when one of you is face to face with death, if he leave wealth, that he bequeath to his parents[22] and kindred in reason.[23] This is a duty on those who fear God.—II. 180. (Abrogated verse) : Legacy to PARENTS and kindred

Covet not that by which God hath graced some of you above others. For men there is a portion of what they earn, and for women a portion of what they earn. Of God, therefore, ask His grace ; verily, God has knowledge of all things. WOMEN also to inherit.

17 Though *ansars & muhajirum* were declared next of kin to each other, yet the blood-relation was nearer. Cf. Koran XXXIII. cited next.

18 The following tradition explains first sentence of Koran, XXXIII., 6 : DEBTS OF DECEASED PAID BY PROPHET : " Abu Hurairah said : ' The Apostle of God said : " It is fit for me to be more benevolent to Musalmans than they to each other, therefore, any Musalman dying in debt, and not leaving property to discharge it,—it rests with me, and he who leaves property, it is for his heirs," ' and in another tradition it is thus : ' He who hath left debt and children, let them come to me, I am their patron, I will discharge his debt, and befriend his children.' Later it is related from Aisha, ' Verily a freed man of the Prophet's died, and left some property, but left no child or relations to inherit ; and the Prophet said " Give his effects to a man of his village." ' " *Mishcat-ul-Masabih,* XII. xix, 1, 2.

19 *Muhajirun.* See p. 824, *n.* 25.

20 This was the earlier provision made in favour of widows : subsequently abrogated (Kor. IV. 14) by more definite & more extensive rights. II. 241 is included in list of 20 verses mentioned by Jalaluddin ibn Abdur Rehman ibn Abi Bakr Assuyuti (d. 911, A.H. or 1515 A.C.) in *Itqan* (commentary on Koran) as universally acknowledged to be abrogated,—that fact, not brought to notice of P.C. in *Aga Mohamed Jaffer Bindamin* v. *Koolsoom Beebee,* (1897) 24 I. A. 196 = 25 Cal. 9, 18, 19.

21 *Muttaqin* = " those who fear to do wrong or ward of evil."

22 II. 180 promulgated before IV. 12 : by latter verse parents first made competent to succeed even with descendants : state of law when verse II. 180 revealed, being that parents were excluded by descendants : hence II. 180 recommends that legacy be left to parents. Thus explained, it is not opposed to s. 579(*b*) that legacy cannot be left to any heir.

23 Not restricting it to *asaba* or male agnates, who alone were recognized by pre-Islamic customary law of Arabia.

SECTION 601. Kinship.

To every one have we appointed kindred,[24] as heirs of what parents leave, and what relatives, and those with whom ye have joined your right hand in covenant, leave.[25] Give, therefore, to each his portion. Verily, God is ever witness over all things.—IV. 32, 33.

WOMEN ought also to inherit.

Men ought to have a part of what their parents and kindred leave ; and women [26] a part of what their parents and kindred leave : whether it be little or much, let them have a determinate portion.

Orphans and poor.

And when they who are of kin and the orphans [27] and the needy are present at the division, bestow on them out of the heritage ; and with kindly speech speak to them.—IV. 7, 8.

DAUGHTERS.

Concerning the provision for your children, God chargeth you,—to the male the equivalent of the portion of two females,[28] and if there be women [only,] more than two,[29] then they shall have 2/3 of the inheritance : and if there be an only one, she shall have 1/2 ; and to his (deceased's) parents, each of them shall have 1/6 part of the inheritance, if he [30] has issue [31] (son); but if he [30] have no issue (son) [31] and his parents are his heirs, then to his mother shall be 1/3 : and if he [30] have brethren, to his mother must come 1/6, after any bequests he may have bequeathed, and [after payment of] his debts. Your parents

PARENTS.

PARENTS and CHILDREN equally near.

[24] Viz. new principles of reckoning kinship promulgated by Islam.

[25] Cf. s. 634. " A precept conformable to an old custom of the Arabs that when persons mutually entered into a strict friendship or confederacy, the surviving friend should have 1/6 part of the deceased's estate. But this was afterwards abrogated according to Zamakhshari at least as to infidels. The passage may likewise be understood of a private contract whereby the survivor is to inherit in a certain part of the substance of him that dies first " : Sale, citing Beizawi.

[26] " This law was given to abolish a custom of the pagan Arabs, who suffered not WOMEN or CHILDREN to have any part of their husband's or father's inheritance, on pretence that they only should inherit who were able to go to war," Sale, citing Beizawi. Complaints were first made to the Prophet against this custom by Um Kuha ; *Tafsir-i-Rauff*, cited Wherry, *Comm. on Koran*. See also *Michat-ul-Masabih*, XII. xix, 1, 2.

[27] Referring perhaps to descendants of pre-deceased sons, & other relations who are excluded : e.g. grandson is excluded by son.

[28] Provision here about DOUBLE PORTION TO MALE is not general, but refers to " provision *for your children*" : amongst descendants, males already recognized as heirs before Islam, & females are being introduced as new heirs by Koran. Chari, J., speaking of " spirit of Muhammadan law," *Mirza Hashim Mishkee* v. *Aga Husain B.*, (1927) 5 Rang. 252, 255 seems, (respectfully *submitted*) to have overlooked this important consideration, when he put forward proposition that it is one of fundamental principles of Hanafi law of inheritance, that males take twice as much as females. If such were the principle, no explanation forthcoming why cognates (like uterine brother & sister) & parents & grandparents (in circumstances in which Koran makes them sharers) take equal shares : real principle, as explained above, is that newly entitled heir, other things being equal, takes half as much as old established heir. Facts that (i) most of new heirs are women, & (ii) all old heirs are men,—frequently cause the principle explained above to bring about result that women take 1/2 share of men : but this result is only accidental : no such result follows where both male & female heirs are newly entitled—e.g. with cognates & with those male agnates who are (by Koran) given rights of inheritance in circumstances in which they were not entitled to inherit before Islam.

[29] I.e. only daughters without sons.

[30] I.e. the " propositus " : s. 605(1).

[31] Orig. *walad*, which translators render " son ; " *walad* seems to be equivalent of offspring. Before time of Koranic changes in law of succession, only male offspring being recognised, *walad*, was no doubt used as synonymous with son.

or your children : ye know not which of them is nearest to you in the benefit they bring. This is an ordinance from God. Verily, God it is who possesseth knowledge and wisdom. SECTION 601.

And unto you belongeth 1/2 of that which your wives leave, if they have no issue ; but if they have a child then to you 1/4 of what they shall leave, after paying the bequests they shall bequeath, and debts. And unto them (your wives) belongeth 1/4 part of that which ye leave, if ye have no issue : but if ye have issue, then they shall have an 1/8 part of what ye leave, after paying the bequests ye shall bequeath, and debts. And if a man or a woman be succeeded by a collateral relation [32] (having left neither a parent nor child) and the deceased have a [uterine] brother or a sister, then to each of them twain a 1/6 : and if they be more than two, then they shall be sharers in a 1/3, after payment of the bequests he bequeaths and of his debts—not injuring (the heirs, by willing away more than a third of the estate)—[this is] a commandment from God,—and God is the possessor of knowledge, indulgent, IV. 11-12. WIVES. HUSBANDS. SISTERS, BROTHERS.

They will consult thee. Say God hath pronounced for you concerning collateral kindred : [32] If a man die childless, and he have a sister,[33] 1/2 of the heritage shall be hers : and [34] he would have inherited from her if she died childless : and if there be two sisters, then theirs are 2/3 of the heritage : and if there be brethren, both males and females, the male shall have a portion the like of two females. God makes this manifest to you that ye err not : God knows of all things—IV. 177. SISTERS.

2.—SUNNI AND SHIA INTERPRETATIONS OF KORAN COMPARED.

The Koran did not (according to the interpretation of any school of law) sweep away the existing customs of succession, but made a great number of amendments. The explanation of the different interpretations given to the Koran, is that while the existence of a few common principles underlying the Koranic amendments is recognized by all, there has been much divergence of opinion as to what those principles were and what was implied in them. The principles underlying the Sunni and Shia interpretations (taking the

Characteristics : distinctions.

[32] *Kalala* in original = " a kinsman who is neither parent nor child," i.e. collateral ; *Kalalat* = remote relationship ; cousins ; from root word *Kal* ; *Kalala* = to be tired, weary, weak. To have only remote relations. J. G. Hava, *Alfaraid-ud-Durriyah*, 661 (Beirut, 1915). " Distant kindred " would be a misleading rendering, having acquired technical meaning in Hanafi law of inheritance : see ss. 605(13 A), 626. *Kalala* occurs in Koran twice, iv. 12 (15), iv. 177 (175) : from root word = to be weary, tired (said of man or animal); or to be dull (of sword); (hence) to have only remote relations. So *kalala* = any distant relation, agnate or cognate, not being son or father : *Qamus*, s. v. *k-l-l.*—Kalal = (i) he, whose estate is to be inherited (propositus); (ii) he who inherits (heir); (iii) relation, being neither parent nor child : al-Mutarrizi, *Mughrab*, (Hanafi lexicon) (Hydrbd. 1328 A.H.) *K-l-l* II. 159. See also Baizawi (Fleischer) I. 199, 5-13 ; Fakhru'l-din an Najafi ; *Majmau'l-Bahrayn* (Ithna Ashari Leg. Lexic.) *k-l-l.*

[33] This provision restricted in favour of sisters according to Hanafi interpretation : Shia interpretation takes it as indicating that all females may be sharers : in conjunction with previous verses, this verse is interpreted as placing FEMALES & COGNATES (in respect of competence to inherit,—which must be distinguished from quantum of interest that they take) on footing of EQUALITY with MALE AGNATES.

[34] The force here of *and* is : " for, remember that."

SECTION 601. Hanafi as representing the Sunnis, 'and the Ithna Ashari as the Shia) are summed up at the end of this Chapter. The most salient are indicated here, at the start.

I.—The Hanafis allow the frame-work or principles of the pre-Islamic customs to stand : they develop or alter those rules in the specific manner mentioned in the Koran, and by the Prophet.

II.—The Shias deduce certain principles, which they hold to underlie the amendments expressed in the Koran, and fuse the principles so deduced with the principles underlying the pre-existing customary law, and thus raise up a completely altered set of principles and rules derived from them.

3.—GENERAL PRINCIPLES : HANAFI INTERPRETATION.

The principles underlying the determination of the quantum of the rights taken by the several heirs under the Hanafi interpretation of the law, seem to be as follows : The cutomary heir is not bodily displaced : the Koranic innovations are not interpreted by the Hanafi texts so as to take away the rights of the customary heir, but, with as little disturbance as possible of the customary law, to provide for those (viz. females and cognates in the main) whose claims were disregarded by the customary law. Thus the basic principle of the customary law, (that agnates should be preferred to cognates) is not, under the Hanafi interpretation, disturbed by the Koran. Hence, agnates continue under that interpretation to have priority over cognates ; whilst, among agnates themselves, if there is a female related to the deceased through fewer links than the customary heir,[1] (i) her claims are allowed to be superior in respect of proximity ; but on the other hand (ii) the customary heir is recognized to have old-established rights, 'prior tempore'—and thus to that extent deemed 'portior jure'—so that the estate is divided equally between the customary heir[2] and the female who is nearer to him. Where, on the other hand, the newly entitled heir is in the same line as the customary heir,—(i) both claimants being equal in proximity and (ii) the latter being superior on the score of antiquity,—in that case he takes twice as much as the former.[3]

a.—Agnates continue to be preferred to cognates as no general statement in Koran altering that pre-Islamic rule.

b.—Males and females : relative shares.

[The principle is not that the male, as such, takes twice as much as the female : it is that the newly entitled heir is given half as much as the old-established. If the newly entitled heir is a male, he is in no better position than a female, and takes no larger share than her : e.g. the uterine brother and father as sharers take no more than the uterine sister and mother respectively.] The newly entitled heirs necessarily consisted[4] only of the classes ignored by the customary law, i.e. females and cognates, and all new rights necessarily encroached on the rights of the male agnates. So that the spirit of the innovations may be expressed in the formula : " Unto her that hath not, and unto the relations of

[1] If she is removed by greater number of links or degrees, she is, of course, remoter than customary heir, & no injustice done to her when, in such circumstances, she is excluded by one nearer than herself.

[2] Hence, daughter takes 1/2, leaving 1/2 to remoter customary heir (such as son's son) who is *prior tempore.*

[3] Hence, when (i) daughter & son, or (ii) brother & sister co-survive, the female heirs, being newly entitled, take half as much as the male heirs.

[4] Omitting, for the present, reference to the somewhat complicated provisions falling under s. 603(2), p. 830.

her, shall be given ; and from him that hath, shall be taken a little (or may be the whole) of what he seemeth [5] to retain." [6]

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4.—GENERAL PRINCIPLES OF SHIA INTERPRETATION.

It follows from what has been said, that from the historical point of view the basis of the Shia law of inheritance, as of the Hanafi law, is the customary law of the Arabs, as it prevailed near Mecca and Medina before the spread of Islam. Both systems alter the customary law in accordance with the Koran. But, whereas the Hanafis interpret the Koran strictly, keeping the substratum of the customary law intact, and superimposing thereon the provisions of the Koran, the Shias interpret the Koran in a wider sense : they interpret it as altering the old principles themselves, and as giving rise to a new set of principles. Each case mentioned in the Koran is taken by the Hanafis as a specific amendment of that particular incident of the customary law ; by the Shias it is interpreted as an illustration from which a total change of the principle involved may be deduced. The Shias interpret it as an instance, which has to be generalized and applied universally wherever the same or similar circumstances occur.[7]

Principles deduced from specific amendments.

This difference between the interpretations of the innovations introduced by the Prophet will become more evident when the general results of the Hanafi and Shia law are compared, and the variation of each system traced as a development of the customary law on the main questions with which the Koran deals. A more detailed comparison of the two systems is therefore reserved till the end of the chapter.[8]

5.—QUANTUM OF INTEREST TO HEIRS.

Principles of distribution.

1. In accordance with the Hanafi interpretation of the law, the estate is distributed amongst persons entitled to inherit (viz. those in whose favour an interest is created or recognized in the estate), in conformity with the following general principles :—

HANAFI LAW.

(*a*) The nearest male agnate (or customary heir)[9] is not disinherited,[10] but his rights are liable to be affected by the rights (or interests in the estate) created in favour of the heirs newly entitled by Islam which are referred to below. The newly entitled heir is never remoter than the customary heir. He (or she) may therefore :

a.—Male agnates.

(i) either be related to the deceased in exactly the same mode as the

b.—Female agnate as co-residuary with customary heir.

[5] In one instance he does not even *seem* to retain : cf. s. 621(4)(*b*), & *expl.*

[6] Matt. XXV. 29 ; Luke VIII. 18 : "Whosoever hath, to him shall be given ; & whosoever hath not, from him shall be taken even that which he seemeth to have."

[7] Significant *ill.* supplied by fact that, in Hanafi law, term *asaba* still finds place. This was pre-Islamic name for such blood relations as custom recognized : agnates. In Shia law that word is absolutely discarded & we may say discredited (cf. Bail. II. 400, *l.* 11 of par. 2), its place taken by such terms as *zu qarabat* = lit. one possessed of proximity or relation. Change of terms has not merely verbal significance. But it is important indication of similarities & distinctions of two systems of law ; rights taken by *asaba* & *zu qarabat* are so similar that most usual rendering of both terms in English is "residuary" (see Bail. II. 377). But *zu qurabat* includes entirely different body of persons. "The eyes now converted are, & look another way."

[8] See s. 648, com., last portion.

[9] Rights of customary heir or nearest agnate now consist in taking *residue* (viz. what is left after those whom Koran gives "shares" have taken their shares). The customary heir (nearest male agnate) is therefore called "residuary."

[10] One exception : s. 621(4)(*b*).

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customary heir[11] in which case the newly entitled heir takes by way of inheritance half as much as the customary heir. (As the newly entitled heirs are generally females, in most instances the males take twice as much as females).[12]

c.—New heir if nearer than customary.

(ii) or the newly entitled heir may be nearer than the customary heir,—in which case the estate is divided equally between the customary and the newly entitled heir.

d.—New heirs amongst themselves :

(*b*) as regards the rights of the newly entitled heirs amongst themselves,—if the newly entitled heirs of the same class differ from each other in their sexes they take equally : the males do not take more than the females.[13]

Illustrations.

i.—Daughter : 1/2 ; customary heir 1/2 (if remoter).

ii.—Parents : 1/3 ; leaving 2/3 to descendants.

iii.—Father & mother divide the parents' 1/3.

Thus, under the Hanafi law one daughter takes 1/2 of the estate, and two daughters take 2/3 on the principle of dividing the estate equally with the customary heir, when the latter is remoter than the daughter. The operation of the principle is no doubt greatly disturbed or altered by the existence of other heirs. But the present discussion is concerned merely with the general principles underlying the original allotment of shares : it does not deal with the ultimate result of all the rules, but only explains how the rules were framed in their existing form. To take another instance,—where there are both descendants and ascendants, the latter would have been excluded under the customary law. Hence the rights given to ascendants where there survive any descendants (viz. when the old customary law that ascendants are to take nothing when there are descendants, is altered in favour of ascendants) are new. They then take as newly entitled heirs : and we find that 1/3 of the estate is taken by the ancestors conjointly, leaving (ostensibly, though there may be other similar claimants) the rest (viz. 2/3) to the decendants, i.e. the newly entitled heirs take half as much as the old established. It will be noticed that the ascendants in this case are placed on a footing of equality (so far as the right to inheritance is concerned) with the descendants : they are not excluded by the descendants, nor do they exclude them. This placing of the ascendants and descendants on the same footing is in accordance with the important enunciation,—

> " Your parents, or your children, Ye know not which of them is nearest unto you, in the benefit they bring "—Koran IV. 11.

Had the parents been considered to be nearer than the children, the parents would have taken shares similar to that of the daughter, in competition with remoter customary heirs. Then again the parents divide the 1/3 allotted to

[11] I.e. Koranic co-residuary with customary heir, referred to as " residuary by another." Bail. I. 692 (702).

[12] This principle, however is not that *male as such* takes share of 2 females but that *newly entitled heir* should get 1/2 of what old established heir gets. All old established heirs are males : newly entitled heirs are generally (but not always) females, e.g. (i) uterine brother & (ii) all cognates, (iii) or grandfather when he co-exists with male descendants, are newly entitled heirs.

[13] E.g. uterine brother & sister are both of same class, they each take 1/6 of estate—so also father & mother, when they co-survive with descendants are both newly entitled to 1/6 & they also take 1/6 each.

them as above, equally ; for the father and mother are both newly entitled, and neither can claim superiority over the other either on the basis of (i) old established rights, or (ii) greater proximity, the male sex consequently gives no advantage to the father, he and the mother are both newly entitled : each therefore takes 1/6. SECTION 601.

II. The Shia interpretation of the law does away entirely with the priority of the agnates over the cognates, and makes the estate devolve (subject to the rights of the husband or wife) upon the nearest blood relations, who divide it amongst themselves per stirpes, allotting to females half the share allotted to males in each grade. SHIA LAW. Stirpital distribution : nearest relations.

§ 3.—Pre-Islamic Customary Rules of Succession in Arabia.

602. Under the pre-Islamic customary law in Arabia,— I. PRE-ISLAMIC CUSTOMARY LAW :

(1) the nearest male agnate or agnates[1] succeeded to the entire estate[2] of the deceased ; Nearest male agnate 1.—descendants, 2.—ascendants, 3.—collaterals.

(2) females and cognates[3] were excluded ;[4]

(3) descendants were preferred to ascendants and ascendants to collaterals ;[5]

(4) where more male agnates than one were equally distant to the deceased, (being nearer than any other male agnates) they together shared the estate ' per capita.' Per capita.

Unless in approaching the law, a beginning is made with the pre-Islamic customs as the foundation, no principle appears in the system, admirably though the whole set of rules may seem to fit in : and, unless the beginning is so made, the rules have to be memorized without any guide or clue.

602 A.[6] As a general rule rights of inheritance are newly conferred by Islam only on persons nearer than the customary heir.[7] Where the customary heir does not survive or is absent, II.—PERSONS NEWLY ENTITLED UNDER ISLAM. Nearer than customary heir.

[1] Agnates (= *asaba*, plural *asabat* = tribal heirs of pre-Islamic Arabia) however remote, entitled to take entire estate under custom. See s. 621, com., p. 860.

[2] Distinction in Hindu law between ANCESTRAL & SELF-ACQUIRED PROPERTY of no significance in Muslim law ; special incidents of Hindu joint undivided families not to be imported : see p. 256, (s. 213, com.).

[3] COGNATE : see s. 605(6), p. 834.

[4] See s. 611, pp. 846 ff., also commentaries on verses of Koran cited. For changes in position of women in Arabia under Islam, cf. e.g. Caussin de Perceval, *L'Histore des Arabes*, III. 302, 303, 336-337 ; *Mishcat-ul-Masabih*. XII. xix, 1, 2 ; Robertson Smith, *Kinship & Marr. in Arab.*

[5] See ss. 622, 627, : " RESIDUARIES BY THEMSELVES OR IN THEIR OWN RIGHTS." (Bail. I. 691 (761) = *asabat* = customary heirs ; priorities amongst them in Hanafi law regulated mainly by principles of customary law. Cf. ss. 61, 239.

[6] Sect. 602 A = s. 604(*f*) in the last edition.

[7] Only exceptions seem to be that (1) ancestors & descendants may succeed together, (2) certain female ancestors (termed true grandmothers) may, in circumstances which can only rarely occur, take as sharers 1/6 of estate though there may be a male agnate in nearer line.

SECTION 602A. persons who were by custom rendered incompetent to inherit are by the Koran made competent to inherit.

This principle is very important: It furnishes a clear and easy method of remembering and determining who the newly entitled heirs—especially the sharers—are.

(A) Husband wife, females, cognates can inherit.

(B) Ascendants on footing of equality as to right inherit.

603. The amendments in the law of succession made by Islam fall under two main heads.—

(1) the husband or wife, and females as well as cognates [8] are recognised as competent to inherit;

(2) parents and ascendants are given a right to inherit even where there are [male agnatic] descendants.

III.—NATURE OF RIGHTS TO NEWLY ENTITLED HEIRS.

604. The Hanafi interpretation of the Koran gives to the provisions in favour of the newly entitled heirs [9] the following forms :—

(A) Hanafi interpretation of Koran.

(*a*) Where the newly entitled heir is more nearly related to the deceased than the customary heir [10] (i.e., than the nearest male agnate) [11] (i) a SHARE of the estate consisting of a definite fraction thereof, is assigned to the newly entitled heir to be taken in priority to the customary heir; [12] (ii) the share may have to be split up so as to provide for different grades of nearer females: ss. 616, 617; (iii) in one special case the nearer female (viz. a sister) is made residuary to the exclusion of the customary heir: s. 621(4)(*b*).

A person entitled to such a fraction of the estate is called a "(Koranic) sharer." [13]

(1)(i) Koranic sharers having claims to fractions of estate in priority to customary heir.

(*b*) The newly entitled heir,—if she is a female and related to the deceased in the same manner [14] and degree of proximity

[8] Though (except uterine sisters & brothers & some grandmothers) all cognates are in Hanafi law classed as DISTANT KINDRED, & postponed to all agnates.

[9] See s. 605(14), p. 837.

[10] See s. 605(10), p. 836.

[11] Points to be kept in mind: that there is some relation of deceased: (i) whom custom disentitled, though (ii) he/she is really nearer to deceased than person designated heir by customary law; (iii) whom therefore Islam gives title to inherit. Such relations are mostly females or relations through females; see ss. 602 ff.

[12] E.g. if survivors are one daughter & one son's son,—latter is customary heir & daughter is newly entitled. Therefore, daughter (being nearer than son's son) takes as much as customary heir, viz. 1/2 of estate. If there were two daughters & one son's son, each of the three would take 1/3.

[13] Addition of epithet *Koranic* is an innovation by present author, introduced to draw attention to fact that the right arises under Koran. Arabic term for "sharer" is *zu farz*; *zu* = "possessor of," *farz* = "ordinance," 'contained in Koran,' referring in this connection to allotted shares.

[14] I.e. she must be agnate: customary heir may be descendant, ascendant or

as the customary heir; but owing to her sex, was disqualified under the customary law from inheriting—[15] SECTION 604.

(ii) Female agnates as co-residuaries (co-heirs) with customary heir.

(i) is made to rank equally with the customary heir in respect of the residue of the estate left after the prior claims of the "sharers" are satisfied, viz. the customary heir, and she both jointly take such residue ; but—

(ii) she takes as her portion 1|2 of the portion taken by the customary heir.[16]

A female so entitled is referred to as "a residuary by another," [17] or, in this work, as co-residuary or (in allusion to the origin or nature of her rights) 'Koranic residuary.'

(*c*) The provisions above referred to are restricted in their operation under Hanafi law (with a few exceptions)[18] to agnates. They are not extended to any collaterals remoter than sisters ; and their application to others than descendants is subject to exceptions and complications. (2) (i) Operation of Koranic innovations.

(*d*) The customary heir's rights to inherit in accordance with custom is generally [19] left intact, but the quantum taken by him is in many cases diminished, by (i) the prior claims created in favour of the (Koranic) sharers, and (ii) his having to divide, with the Koranic residuaries, the residue of the estate left over after the (Koranic) shares have been allotted. In some cases no residue is left for him. (ii) Right of male agnates (customary heirs) preserved.

(*e*) Subject to s. 603(2) no person who was entitled to inherit under the customary law has any new rights conferred on him by the Islamic amendments of the law.[20] (iii) How safeguarded.

collateral : the newly entitled female must likewise be descendant, ascendant or collateral respectively, as the customary heir in the case may be. See however s. 604(*c*).

[15] The description shows that she must be a female agnate & she must be in same degree of proximity as customary heir.

[16] E.g. if A dies leaving S, son, & *D*, daughter, then S is customary heir. *D* though related in same manner as S, would (under customary law) have been excluded because of her sex. *D* is, therefore, by Islam made co-heir with S, but she gets 1/2 as much as S, *i.e.* she takes 1/3 & he 2/3.

[17] Bail. I. 696 (706). "The RESIDUARY BY ANOTHER is every female who becomes, or is made a residuary by a male who is parallel to her."

[18] Exceptions refer to (*a*) certain female ancestors, (*b*) uterine brothers & sisters. See ss. 616, 618, pp. 854, 857.

[19] Only case of displacement or exclusion, *eo nomine*, of customary heir by newly entitled heir,—seems to be, where sister & female descendant co-surviving, sister excludes remoter customary heir. In other cases, rights of customary heir are encroached upon, but not openly disregarded or abrogated (though the encroachment may leave nothing for him). This applies only to Hanafi exposition of law.

[20] Thus sons have no new rights ; striking illustration furnished also by uterine

SECTION 604A.
(B) Shia law
Males, females, agnates, cognates on same footing.

604A. Under the Shia interpretation of the Koran—

(*a*) The distinction (in regard to the priority in the right to inherit) made in the customary law, between agnates and cognates, and males and females, is abrogated : so that the nearest relations whether male or female, and whether agnate or cognate, inherit.

(*b*) Within certain limits descendants become entitled to inherit with ascendants ; and ascendants with collaterals.

(*c*) The distribution of the estate amongst those entitled is not per capita, but per stirpes.

Per stirpes.

604B. Under all schools of Muslim law the question who shall be heirs, and who, as such, shall be entitled to take the estate, is determined by determining who are the nearest in accordance with the rules of proximity to the deceased : s. 605(1) ; after the heirs are so determined, the distribution of the estate amongst them is in Shia law per stirpes ; in Hanafi law it is in accordance with s. 604 (viz. generally per capita).

Representation.

The use of the expression "principle of representation" in the present context occasionally causes misconception. Speaking juristically, the heirs are the persons who may be said to represent the deceased and not any one else. However, in many systems, if A has two sons, S and SA, and one son, SA, predeceases A, leaving a son of his own, SS, then SS, (A's grandson) is taken (for competing with S) to represent his own pre-deceased father SA and to take his place so that S does not displace or disqualify SS, though the former is one degree removed, and SS two. The result is that S (A's son) does not exclude SS, A's grandson, whose father SA predeased A—for the grandson is reckoned for this purpose to represent the son. This rule (which may be spoken of as the rule of representation) is not recognized in any school of Muslim law. But under all schools, A's grandson SS, in the illustration given, would be excluded by A's son, S,—on the ground that the son is nearer than the grandson, and the nearer must exclude the remoter ; the son would be sole heir, and the grandson would be excluded from inheriting.[21]

& consanguine half brothers The uterines being cognates, were not recognized as heirs by customary law, but consanguines being agnates, ranked immediately after full brothers. Hence (i) uterine brothers (& sisters) are made Koranic sharers : & when they co-survive with full brothers, they succeed with them, but (ii) consanguine brothers & sisters are excluded by full brothers : viz. newly entitled uterine brothers succeed alike with full & consanguine brothers : but consanguine brothers are excluded by full brothers. See ss. 618, 622(4)(*c*), pp. 857, 862 ; & table of Sharers & Residuaries in this Chapter, p. 838/839. See also s. 604B, com., p. 832.

[21] "The *jus representationis* being absolutely foreign to the Muhammadan law of inheritance, the question of the devolution of inheritance rests entirely upon the exact point of time when the person through whom the heir claims, died—the order

§ 4.—Explanation of Terms : Inheritance.

605. In this chapter, unless it is otherwise indicated,—

(1) "The deceased" or "propositus" means the person whose relatives are to be determined for the purpose of distributing his estate in accordance with the law of intestate succession.[1] Deceased or propositus.

(2) "Kinship" is the connexion or relation of persons descended from the same stock, or common ancestor.[2] Kinship.

(3) "Lineal relation" is that which subsists between two persons one of whom is descended in a direct line from the other.[3] Every generation constitutes a degree, either ascending or descending.[4] The persons through whom lineal relation is traced are said to form "links," and are called intermediate ancestors.[5] Lineal relation.

(4) "Collateral"[6] means a person having a common ancestor with the deceased (either on the side of the father or mother, and through male, or female links); but who is neither a descendant nor an ancestor of the deceased. Collateral.

(4A) Claimants related through the father, (viz. the full and consanguine brothers and sisters, or their descendants together with the father's parents, or their ascendants) are Paternal side : maternal side.

of deaths being the sole guide in such cases : " *Jafri Begam* v. *Amir Md. K.*, (1885) 7 All. 822, 834. *Moolla Casim* v. *Moola A. R.*, (1905) 32 I. A. 177, 179 (par. 2) (Burm.). See p. 898, *n.* 11.

[1] See ss. 1, 559. The personal law of deceased at his death governs succession of his estate. PROPOSITUS = " the person proposed : the person from whom a descent is traced. Also the name by which a testator is referred to on propounding his will in the Probate Division in England : " Wharton, *Law Lexicon*. " The one whose relations are sought to be ascertained by a genealogical table " : Webster, *Dict.*

[2] Cf. Bail. I. 684 (694); Ind. Succ. Act, (1925), s. 24 (= Act X. of 1865, s. 20).

[3] Ind. Succ. Act, (1925), s. 25 (= Act X. of 1865, s. 21) : " As between a man & his father, grandfather, & great grandfather, & so upwards, in the direct ascending line ; or between a man, his son, grandson, great grandson, & so downwards, in the direct descending line." Cf. Blackst, *Comm.* II., 203

[4] Ib., " A man's father is related to him in the first degree, & so likewise is his son ; his grandfather & grandson in the second degree ; his great grandfather & great grandson in the third." DEGREE = " a step " in direct line of descent ; in *pl.* the number of such steps, upward or downward, or both upward to a common ancestor & downward from him, determined the proximity of blood of collateral descendants " —Oxford Dict. s. v.

[5] See s. 629 (intermediate ancestors). LINKS in sense of those who make up a connected chain of all descendants from one ancestor.

[6] E.g. a brother, sister, nephew, niece, uncle, grand uncle & cousin, are collaterals. It will be observed that COLLATERALS consist of (I) (*a*) deceased's brother or sister, (*b*) descendants of deceased's brother or sister ; (II) (*a*) deceased's father's or mother's brothers or sisters, (*b*) descendants of deceased's father's or mother's brothers or sisters ; (III) (*a*) deceased's grand-father's or grand-mother's brothers or sisters, (*b*) descendants of deceased's grand-father or grand-mother ; and so on. All these series may be described as (I) parents' descendants (with exclusion of lineal descendants of deceased himself); (II) grand-parents' descendants (with similar exclusion); (III) great grand-parents' descendants (with similar exclusion); &c.

SECTION 605. collectively called "the paternal side." Claimants related through the mother (viz. the uterine brothers and sisters, or their descendants, together with the mother's parents, or their ascendants), are collectively called "the maternal side."[7]

Agnate. (5) "Agnate" means a person whose relation to the deceased can be traced without the intervention of female links.[8]

Cognate. (6) "Cognate" means a person related to the deceased through one or more female links (whether or not there are also male links intervening).[9]

True, false grandfather. (6A) "True grandfather"[10] is the agnatic grand-father, viz. the father's father, or father's father's father, &c.—between whom and the deceased no female link intervenes. "False grandfather" is a grandfather between whom and the deceased one or more female links intervene.

True, false grandmother. (6B) "True grandmother" is a female ancestor between whom and the deceased no false grandfather intervenes.[11] A

[7] Cf. Bail. II. 391 (par. 2). "Mother's descendants" = uterine brothers & sisters. "father's descendants" = the full or consanguine brothers or sisters. Full brothers do not rank under both classes for this purpose (see s. 645). Mother's ascendants are maternal grandfather & grandmother, & their ancestors. Similarly paternal ascendants are father's ancestors: see s. 645, proviso (2). Thus there are COLLATERALS ON PATERNAL & MATERNAL SIDE: viz. descendants of deceased's father or mother, or the descendants of the father's father or father's mother, or mother's father, etc. *Quaere*: (1) are collaterals on paternal side of deceased's mother to be deemed collaterals of deceased on his paternal side, or maternal side? (2) are collaterals on maternal side of deceased's father to be considered collaterals of deceased on his paternal or maternal side? In other words is the side to be called paternal or maternal, irrespective of intermediate links amongst the ancestors being male or female, or is that consideration to be taken into account, & if so how? If sex of intermediate links is to be considered, obviously (i) the agnatic paternal grandfather's brother & sister would represent paternal side. Would (ii) all others be maternal side? But the class marked (i) represents agnates so far as the brother's children are concerned; & agnates would be residuaries, & not be included in the distant kindred amongst whom question as to paternal & maternal side becomes relevant under Hanafi law. Under Shia law the side is very important as Shia law does not give any preference to agnates, nor to males any preference over females in respect of right to inherit. *Semble*, therefore that collaterals are deemed to belong to paternal or material side only according as they trace their relation through descent from brother or sister of ancestor who himself or herself is ancestor of mother or father of deceased.

[8] E.g.: (i) a son's daughter; (ii) son's son; (iii) father; & (iv) father's mother, are agnates. *True* & *false* are misleading renderings: "recognized (by customary law)," & "unrecognized (by customary law)" might have been better.

[9] I.e. at least one of links must be female; if all links are male, the person is agnate. E.g. (i) daughter's son; (ii) daughter's daughter; (iii) son's daughter's son; (iv) daughter's son's son; (f) mother's father; (vi) mother's mother's father; & aunt's son, are cognates.

[10] See s. 614 (true grandfather).

[11] A.—Bail. I. 688 (699): "every one into whose line of relationship to the deceased a mother enters between two fathers is a FALSE GRAND-MOTHER." B.—The TRUE GRAND-MOTHER'S relation to deceased consists of either: (i) an unbroken line of females; or (ii) first one or more males (without intervention of females),

grandmother other than " true " viz. a female ancestor between whom and the deceased a false grandfather intervenes,[11] is referred to as a " false grandmother." SECTION 605.

(7) The children of the same father, but by different mothers are referred to as " consanguine (half) sisters and brothers." The " consanguine relations " consist of the (i) consanguine sisters and brothers of the deceased, or (ii) of an ancestor of the deceased, and (iii) the descendants of such sisters and brothers.[12] Consanguine relations.

(8) The children of the same mother but by different fathers are referred to as " uterine (half) sisters and brothers." Uterine relations.

followed by unbroken line of females. These really represent the mother's mother howsoever high & the father's mother howsoever high. Bail. I. 688 (699). Pre-Islamic custom made notion familiar that unbroken series of male links were eliminable : then arose novel situation requiring proximity of female ancestors to be reckoned & worked out : it seemed reasonable (in case of females) to grant to series of unbroken female links, position analogous to that granted (in case of males) to series of unbroken male links ; viz. to deem female series also eliminable. C.—Thus THREE GROUPS OF FEMALE ANCESTORS become entitled under name " true grandmothers " : (i) agnatic grandmothers of deceased, viz. paternal grandmothers, e.g. *FM* or *FFM* or *FFFM*—agnatic relation being alone recognized by customary law : s. 602 ; (ii) grandmothers of the deceased related entirely through female links, e.g. *MM* or *MMM*,—the counterpart of first group,—(i) being pure agnates, (ii) pure cognates. This is the first time that in course of this chapter even in regard to rights so obviously new as those of Koranic sharers, customary notion of kinship & proximity is departed from, & cognates are mixed up with agnates. Rights of female ancestors under Koran so novel & various that not surprising that guidance for interpreting Koran not sought consciously from pre-Islamic rules which gave such special privilege to agnates. Unconscious influence, however, of ideas taken from those rules distinctly traceable. *Sirajia* refers, e.g. to case, where a paternal grandmother said to Khalif Umar : " My claim to the deceased's property is superior to that of the mother's mother, because if she dies, her grandson does not inherit (from her) ; whereas if I die, my grandson would inherit." " But he said ' Take this 1/6, & if both of you are living, still the same (must be divided) between you, and if there is but one of you two, 1/6 is for her.' " Though the old lady did not carry her point with the Khalif, yet her argument illustrates ineradicable nature of pre-Islamic notions of kinship, & also explains recognition of third group of true grandmothers : ss. 602, 613, 614. (iii) Grandmothers of father or of true grandfather of deceased, related to said father or grandfather, as case may be, entirely through female links, form the third class of true grandmothers. E.g. *FMM* or *FFM* or *FFFMMM* : relation here begins with male links (agnates), & continues through female links—the process cannot be reversed : so that *MFM*, or *MMFFMM* is not true but " false " grandmother. Class (iii) illustrates strength of old mode of reckoning kinship : male agnatic ancestors (FF, FFF) are considered to take place of deceased so entirely, that all intermediate links are considered capable of being eliminated : Thus F, or FF is considered so exactly to take the place, of propositus, that *FMM* or *FFMM* rank, as regards competence, with *MM*, i.e. maternal grandmother of paternal ancestor of deceased ranked (as regards competence) with maternal grandmother of deceased himself. Intervention of true grandfather is not taken into account, because under customary notions of kinship, true grandfather stands in place of the propositus : but false grandmother does not do so. Male links can be eliminated : not female links (except in one case as above explained) : intervention of male links does not interfere with proximity : intervention of female links does.

[12] F = full, C = consanguine, U = uterine. Thus if cB & cBA are consanguine brothers, & c*Si* is their consanguine sister, then,—(*a*) cB is (i) consanguine paternal uncle of cBA's children, & (ii) consanguine maternal uncle c*Si*'s children ; & (*b*) sons & daughters of cB & cBA are respectively consanguine paternal cousins of each other. Consanguine relations are agnates. See s. 627, p. 882, table.

SECTION 605. The "uterine relations" consist of the (i) uterine sisters and brothers of the deceased, or (ii) of an ancestor of the deceased, and (iii) the descendants of such sisters and brothers.[13]

Estate. (9) "The estate" means all the heritable property, of whatever description, owned by the deceased at the time of his death, after his funeral expenses have been defrayed, his debts discharged, and the legacies validly bequeathed by him paid out.[14]

Customary law. (10) "The customary law" or "the pre-Islamic law" means the rules of intestate succession prevailing in Arabia immediately before the promulgation of Islam, in so far as those rules can be ascertained.[15] "Customary heir" (or asaba)[16] means the person entitled to succeed in accordance with the customary law, i.e. the nearest male agnate.[17]

Customary heir or nearest male agnate.

(Koranic) sharers. (11) "Sharer," or "Koranic sharer,"[18] means a person who takes a definite fraction of the estate, under the provisions contained in the Koran.[19]

Residue. (12) "Residue" means that portion of the estate (if any)

[13] Cf. *n.* 12 *mutatis mutandis* : uterine relations are cognates.

[14] Bail. I. 683 (par. 2) (693), 684 (694).

[15] It is assumed in this chapter that Islamic law of succession consists of pre-Islamic customary law, as varied by Koran, or precepts of Prophet. Hence if a rule cannot be traced to Islam, its origin is attributed to pre-Islamic custom. Cf. Smith, *Kins. Marr. in Anc. Arab., passim*, e.g. 71.

[16] ASABA (*Asabat*) originally = nerve or ligament, then relationship ; only agnates being recognized as relations, the two terms apparently used synonymously & in Muhammadan law, *asaba*, for practical purposes = agnates. The tie earliest to be recognized in Arabia was not blood relationship, but blood-feud. Cf. "*Asaba* a word which primarily means those who go to battle together, i.e. have common blood-feud. Similarly, in the old law of Medina women were excluded from inheritance on the ground that none can be heirs who do not take part in battle, derive booty & protect property" (Beiz. Sur. IV. 8, *Kamil*, 678, *ib.* 679), Smith, *Kins. & Marr. in Anc. Arab.*, 65, 66. "The key to all divisions & aggregations of Arab groups lies in the action & reaction of two principles : that the only effective bond is a bond of blood, & that the purpose of society is to unite men for offence & defence," *ibid.* 69. See also *ibid.* 2, 25-27, 66, 67, 71.

[17] Bail. I. 691 (700), where they are also referred to as "RESIDUARIES BY THEMSELVES," or "IN THEIR OWN RIGHT."

[18] In Arabic *sahib-ul-arz*, of *zaviluruz*, i.e. masters of shares SHARER & RESIDUARY refer primarily to nature of the rights of heirs, viz. whether they take "share" or residue. A treatment or law of succession based on this distinction is apt to obscure scheme underlying principles of succession. What portion any person is entitled to take is no doubt an important question, but it is result of general scheme of law, & should be placed in due subordination to general scheme.

[19] SHARERS enumerated, in s. 610, p. 844 : "SHARERS are all those for whom shares have been appointed or ordained in the sacred text (Koran) the traditions, or with general assent."—Bail. I. 686 (696). They owe their rights not to customary law, but to Islam. The term does not include any customary heir, i.e. nearest male agnate can never be sharer. No male agnates (whether near or remote), except father & grandfather, are sharers. These become sharers in circumstances in which they would not have been customary heirs, i.e. when they are not nearest agnates, viz. when descendants exist.

which is left over after the (Koranic) sharers have received the shares to which they are respectively entitled ; and a " residuary " means a person entitled to take the " residue," or any part thereof.[20] SECTION 605.

(13) A " Koranic residuary " or " co-residuary " is a female agnate who (under the customary law was disqualified by her sex from inheriting, but who) under the law of Islam inherits a part of the residue, of the estate.[21] Koranic residuary.

(13A) By " distant kindred " or zawil arham [22] are meant those blood relations who are not competent to be either sharers or " residuaries." Distant kindred or zawil arham.

(14) By " newly entitled heir " is meant a person who under the customary law, would not (in the circumstances that are under consideration) have been entitled to inherit any part Newly entitled heir.

[20] Cf. " there are three different kinds of heirs—SHARERS, AGNATES & UTERINE RELATIONS." [the expression " uterine relations " being used in sense in which I use " cognates "]. Sir William Jones in his translation of the *Sirajiyyah* calls AGNATES, RESIDUARIES & UTERINE RELATIONS, DISTANT KINDRED. These names indicate (though vaguely) position in priority of right. But *distant kindred* is certainly misleading term. Bail. I. 685 (par. 2 & *n.* 2) (695). Cf. Bail. I. 691 (701). Under Hanafi law the nearest male agnate (who was customary heir) is, as a rule, not ousted from his pre-Islamic right to inherit , but he takes the estate, (i) subject to rights of sharers, & (ii) divides residue with female agnates : see ss. 604, 610 Residuaries, therefore, belong to one of two classes of heirs : (*a*) those who would have been customary heirs according to pre-Islamic law ; (*b*) those who are made heirs by law of Islam, succeeding (i) either as co-residuaries *with* customary heir, or (ii) in lieu of him, as sole Koranic residuaries. Sister is only female that inherits as sole Koranic residuary : see s. 604(*d*), p. 831, *n.* (19).

[21] " RESIDUARY *by* ANOTHER," so called in Bail. I. 691 (701), 692 (702) since Koranic residuaries (generally) inherit with customary heirs : In one case sister takes residue even though there is no brother with her. She cannot then be called co-residuary with brother : s. 621(4), & is then referred to in Bail. I. 691 (701), 693 (703), as " RESIDUARY *with* ANOTHER," because sister becomes residuary in such circumstances only in case daughter (or son's daughter) also exists : cf. s. 604(*a*)(ii). The words *by* & *with*, therefore, serve to distinguish rules based on two entirely different principles ; (i) RESIDUARY *by* ANOTHER = a female made residuary by the customary heir : in this sense that, the customary heir already being heir by custom, the female was before Islam disqualified merely because she was a female : this disqualification was removed by Islam ; the females thus came in under a principle already recognized by custom : only that principle was required (by Islam) to be applied to females as well as males ; thus the females in question were so to say made residuaries by the customary heir, i.e. by the custom on which customary heir depended for his claim : the daughter, son's daughter, full sister and consanguine sister come under this head ; (ii) RESIDUARIES *with* ANOTHER = (" every female who becomes a residuary with another female "): Bail. I. 693 (703): here both persons are females : both are newly entitled by Islam, Koran IV. 7, 32. The new principle operates that if the females who are nearer than the customary heir consist not only of female agnatic descendants, but also female agnatic collaterals, then the female descendants are made Koranic sharers, & the female collaterals are made residuaries. This rule can come into operation only if there is a female descendant *with* a female collateral (both being agnates); (iii) these considerations make it clear why the nearest male agnate (customary heir) is called " RESIDUARY BY HIMSELF or IN HIS OWN RIGHT." Bail I. 691 (701).

[22] Possession of relationship : more fully explained in s. 626, p. 878, *n.* (6). *Abdul Serang* v. *Putee Bibi*, (1902) 29 Cal. 738.

SECTION 605. Claimants.

of the estate, but who is given rights of inheritance by Islam.[23]

(15) By "claimants" are meant all such relations of the deceased, as are, or might be supposed to be, either themselves entitled to inherit any part of his estate, or whose existence affects the rights of those who are entitled to inherit.

Relation always traced from deceased.

(16) Where a term of relation is used without any qualifying words, it must be understood as referring to a person bearing that relation to the deceased (or the propositus).[24]

Aul or increase.

(17) By "aul"[25] or "increase" is meant the process of abating the shares claimable by (Koranic) sharers.[26]

Radd or return.

(18) In cases where there is no residuary to take the residue, the process by which the surplus left over reverts to Koranic sharers (other than the husband or wife) in proportion to their legal sharers, is referred to as radd or "return."[27]

A common system of referring to the various relations by initial letters has throughout this chapter been adopted, italics indicating females.[28]

PART II.—HANAFI LAW OF INHERITANCE

§ 1.—COMPETENCE TO INHERIT.

I. EXCLUSION FROM INHERITANCE. 1.—Child before birth.

606.[1] (1) A child in the womb of its mother is competent to inherit, provided that it is born alive.[2] A still-born child

[23] Thus (i) Koranic sharers, & (ii) Koranic residuaries are newly entitled : In (i) are included e.g. not only daughter (who was not competent to inherit under customary law) but also father when he co-exists with (male agnatic) descendants. Father was excluded under pre-Islamic customs if any descendants existed, but in Islam he is made Koranic sharer under the said circumstances,—he is, therefore, a newly entitled heir in his capacity as sharer.

[24] (i) Thus "the son" = "the son of the deceased." (ii) The expression CO-SURVIVOR will it is hoped be tolerated for its convenience.

[25] AUL (= increase) & RADD (= return) are converse of each other ; Bail I. 715 (725), in former case all sharers cannot be given their dues : in latter case the sharers due do not exhaust estate.

[26] Such abatement is necessary when in any particular case heirs entitled to succeed are such that sum total of their Koranic shares exceeds unity : process of abatement is carried out, by reducing share allotted to each heir by law to a common denomination & then increasing common denominator to sum total of numerators & thus *decreasing* shares proportionately. See s. 610(1) proviso, p. 843.

[27] See s. 610(2), p. 843 ; Bail. I. 715 (725).

[28] In referring hereinafter to (i) DESCENDANTS,—S = "son"/"son's" ; *D* = "daughter"/"daughter's": Thus *DD* = "daughter's daughter" ; *DSD* = daughter's son's daughter ; (ii) ANCESTORS,—F = "father"/"father's" *M* = "mother"/"mother's." Thus *FMMF* = "father's mother's mother's father. (iii) COLLATERALS, —B = "brother"/"brother's," *Si* = "sister"/"sister's," U = "uncle"/"uncle's" ; *A* = "aunt"/"aunt's." (iv) FULL BLOOD & HALF BLOOD RELATIONS.—The letters F, C, U, prefixed indicate "full blood," "consanguine half blood" & "uterine half blood" relations respectively. Thus FB :—"full brother"/"full brother's" ; P & M when prefixed = "paternal" & "maternal," e.g. *PA* = "paternal aunt"/"paternal aunt's" FMU = "full maternal uncle"/"full maternal uncle's." *Italics* = females.

[1] As to Shia law, see ss. 638 A, 639, 639 A, pp. 899 ff.

[2] Bail. I. 702 (712), instances having reference to establishment of paternity.

is reckoned as having been born alive,[3] if its mother was treated with violence and in consequence thereof gave premature birth to it. SECTION 606.

(2) An illegitimate child[4] and its father are not related in law, nor competent to inherit from each other,[5] but under Hanafi law the mother and its illegitimate offspring are competent so to do.[6] The same rules apply to relations through the illegitimate father and mother, respectively.[7] 2.—Illegitimate children.

(2A) A stepfather and stepmother bear no relation in law[8] to their stepchildren, and do not inherit from each other. Step-children.

(2B) Insanity is no impediment to succession.[9] Insanity.

(2C) Want of chastity in a widow or daughter is no ground for exclusion from inheritance.[10] Unchastity.

(3) Under Hanafi law one who has unlawfully killed the deceased, whether intentionally or unintentionally has no right to inherit any portion of the deceased's estate.[11] 3.—One who has killed the deceased excluded.

(4) Under Hanafi texts a non-Muslim does not inherit from a Muslim, but in India rights of property or of inherit- 4.—Non-Muslim.

3 Bail. I. 703 (713).

4 *Mohammad Hayat* v. *Mohammad Nawaz*, (1925) 17 Lah. 48 (marriage contracted during *iddat* only irregular, *fasid*, not *batil*, & children legitimate).

5 *Boodhun* v. *Jan Khan*, (1870) 13 W. R. 265.

6 Bail. I. 693 (703); *Mischcatu'l-Masabih*, XII, xiv, 2. Cf. s. 214, p. 257. Where, however, child brought up as Christian, law of Islam does not apply, & illegitimate mother not entitled to succeed: *Nancy* alias *Zuhoorun* v. *Burgees*, (1864) 1 W. R. 272.

7 For Shia law, cf. s. 639, p. 899.

8 I.e. STEP-PARENTS & STEP-CHILDREN considered no relations for purposes of legal rights & liabilities. *Budday Sait* v. *Zoonoo Bee*, (1853) Mad. S. D. A. 199 ("there being between the two no tie of consanguinity"); *Mt. Begam* v. *Jalal Din*, (1917) 52 Punj. Rec. 182 (No. 60). STEP-SON = son of husband by another wife, or of wife by another husband; cf. s. 286(1)(c), p. 312; a STEP-FATHER = a man who has married one's mother after one's father's death or on mother being divorced; STEP-MOTHER, *vice versa*; p. 99, Prec. Inh. XXI.

9 Macn. *Prec. Inh.* case X., p. 89; *Mir Mahar Ali* v. *Amani*, (1869) 2 Beng. L. R. (A. C.) 306, 312 = *Khyratun* v. *Amanee*, 11 W. R. 212 (MENTAL DERANGEMENT no impediment to succession); *Muhammad Kalu K.* v. *Saifulla K.* (1887) 22 Punj. Rec. 193 (No. 91) (INSANITY no impediment to inheritance).

10 *Muhammad Bakhsh* v. *Hayat Khan*, (1888) 23 Punj. Rec. (No. 37) 98, 100 (wife elopes: lives in adultery: entitled to inherit unless divorced); *Noronarain Roy* v. *Neemaee Chand Neogy*, (1866) 6 W. R. 303, (col. ii, par. 4, unchaste daughter).

11 See s. 587, p. 804. Bail. I. 697 (707); e.g. "by rolling over him in sleep, or by falling on him from the roof of a house, or by treading on him with a beast on which the slayer is riding." But if A digs well, & B falls into it, or A places stone on road, & B stumbles against it, A does not lose his right. Whenever *diyat* or blood money due from killer, he loses his right to inherit—pre-Islamic origin of rule thus disclosed. Cf. s. 587: principle underlying s. 606(3); ss. 601, 639(1); *Kenchava* v. *Girimallappa*, (1924) 51 I. A. 368 (BOM.): Hindu law to same effect, on ground of justice, equity & good conscience; *Beresford* v. *Royal Insurance Co.*, (1938) A. C. 586 (provision in insurance policy—that representatives of assured shall be paid sum insured, in case he commits SUICIDE,—against PUBLIC POLICY & unenforceable).

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ance are not forfeited, or impaired or affected by reason of any person renouncing or having been excluded from the communion of any religion, or being deprived of caste.[12]

Nemo est haeres viventis.

(5) Rights of inheritance arise only after the death of the propositus ; no person is the heir of a living Muslim.[13]

Acknowledgment of kinship affects only acknowledger.

(6) An acknowledgment by one person that another bears a relation to him or her other than that of a parent or child or husband or wife,[14] is of no effect as against those who deny the relation so acknowledged (provided that their own relation to the deceased is established) ; but it is valid and effective (unless subsequently retracted) against the person making it.[15] There is no such rule in the Shafii school.[16] *Semble,* these rules[17] are merely of evidence, and as such of no effect in India.

Excluded person does not exclude others.

(7) A person incompetent to inherit, does not, except in so far as it is expressly so provided, exclude another or cause him to take a smaller share.[18]

[12] Act XXI. of 1850 (s. 1 A, pp. 32 f.) in terms protects only actual person who either renounces his religion or has been excluded from communion of any religion or has been deprived of caste : *Mitar Sen S.* v. *Maqbul Hasan K.*, (1930) 57 I. A. 313 (see above p. 33, *n.* 24); *Neelawa* v. *Gurshiddappa*, (1936) 39 Bom. L. R. 211 (EXCOMMUNICATION : see p. 63, *n.* 29); Slavery & difference of country prevent right of inheritance under Muslim texts : Bail. I. 698 (708), 700 (710); cf. s. 5 D.

[13] Cf. Bail. I. 583 (*ll.* 7-8), 574 (par. 3); s. 285(ii); s. 371, *ill.* (1); *Hasan Ali* v. *Nazo*, (1889) 11 All. 456, following dictum in *Abdul Wahid K.* v. *Nuran B.*, (1885) 12 I. A. 91 = 11 Cal. 597 ; Macn. Prec. Inh. case xi, Dig. No. 74 = (*Mt.*) *Khanum Jan* v. (*Mt.*) *Jan Bebee*, (1827) 4 S. D. (Beng. Rep.) 210 ; *C. V. N. C. T. Chedambaram Chettyar* v. *Ma Nyein Me*, (1928) 6 Rang. 243 (Hindu turned Muslim : his marriage with his Hindu wife consequently cancelled : she was held not entitled to inherit). Law of succession applicable, will be law governing deceased at his death : see s. 1. Living persons have only PRESUMPTIVE HEIRS : p. 309, s. 285(11).

[14] ACKNOWLEDGMENTS relating to parentage & marriage have special rules applying to them : ss. 81, 222 (pp. 158 ff., 264 ff.).

[15] Bail. I. 406 (409): thus if A acknowledges B to be his (A's) brother, & A dies leaving other heirs to himself, who deny that A & B are brothers,—then B does not, merely on strength of acknowledgment, inherit with other heirs, nor from A's father F (if F denies his parentage of B). But B would have been entitled (i) to maintenance from A during A's life life (s. 303); (ii) if A leaves no heirs [whose right can be proved by evidence, other than A's mere acknowledgment] then B would be entitled to inherit "because the acknowldgment comprehends two things—descent, & a right to the acknowledger's property after his death, & though the first cannot be heard, as it affects another party, the second is not liable to the same objection, because it is only against himself, & a man has the power of disposing of the whole of his property when he has no creditor nor heir." (Bail. I. 406 (409), s. 579); (iii) if F is dead, & F's son, A, acknowledges B to be his (A's) brother, B would be entitled to share with A, as A's brother in the estate of F (though F's parentage of B would not be established): Bail. I. 406 (409) citing *Inayah*, III. 612.

[16] *Minhaj* : 92.

[17] I.e. that mere acknowledgment has no effect as proof of relation against others than acknowledger : but against him it is conclusive.

[18] *Aminabi Mahmulla* v. *Abasaheb Mirasaheb*, (1930) 55 Bom. 401 (by statute daughter excluded under Hereditary Offices Act = Watan Act = Bom. Act, III. of 1874, in favour of male agnate : held existence of daughter did not reduce widow's share from 1/4 to 1/8); *Sirajiyyah* : Sir Wm. Jones, *Works*, VIII. 226 = III. 526 = Rums. 27 f.

SECTION 606. Law governing the estate.

The question as to which system of law must be applied to the property of a deceased person has already been dealt with[19] pp. 730, 52-57.

Release of right to inherit.

The point in s. 606(5), has been before alluded to, mainly with reference to the renunciation of presumptive rights of inheritance : s. 371, p. 393. A man renounced all his claims to the estate of his mother, by a registered document, executed in consideration of Rs. 150 paid to him : he was held not entitled to inherit from her.[20]

Slavery, difference of country or nationality.

Under Muslim law slavery and difference of country or nationality also disqualify from inheritance.[21] The rules relating to slavery can have no effect in India.[22] Questions affected by the nationality must be governed by principles of international law, which differ as regards movable and immovables.[23]

II. UNBORN PERSON AS HEIR.

607.[24] Where any heir of a deceased person is unborn, but competent to inherit under s. 606(1), the estate must be divided amongst the other heirs reserving for the longest possible period of gestation such a portion of the estate as will ensure that the said unborn person or persons may, when born, receive his or their full shares.[25]

Reserving share.

III. MISSING PERSON AS HEIR.

608.[24] When the question is whether a man is alive or dead, and it is shown that he was alive within thirty years, the burden of proving that he is dead is on the person who affirms it : provided that if the man has not been heard of for seven years by those who would naturally have heard of him if he had been alive, the burden of proving that he is alive is shifted to the person who affirms it.[26]

" A person incapable of inheriting doth not exclude any one, at least in our opinion," cited 55 Bom. p. 407 : *Sharifiyya*, com. on *Sirajia*, Jones VIII. 296 : " It is admitted that by universal assent if A leaves a father who is either a slave or an infidel & a paternal grand-father who is both free & a believer, the father is considered as dead in law to all purposes & the grand-father is heir to A."

[19] See ss. 559, 7, 9, comm. *Hayat-un-Nissa* v. *Muhammad Ali Khan*, (1890) 17 I. A. 73 = 12 All. 290 ; *Nancy* alias *Zuhoorun* v. *Burgess*, (1864) 1 W. R. 272.

[20] *Kunhi Mamad* v. *Kunhi Moidin*, (1896) 19 Mad. 176 ; see *Sumsuddin* v. *Abdul Husain*, (1906) 31 Bom. 165 = s. 371, *ill.* (1), p. 394 ; though *Mufti* attached to Zilla Court of Shahabad pronounced in favour of validity of such renunciation : Macn. Prec. Inh. case xi. p. 90, *n.*

[21] Bail. I. 698 (708), 700 (710); Jones, *Siraj*, VIII. 213, 295. 296 = Rums. 14.

[22] See s. 5 E.

[23] Cf. Dicey, *Conflict of Laws*, 2nd ed. (1908) 504, 664, 678.

[24] Shia law is similar : see s. 639 A.

[25] Bail. I. 702-703 ; *Minhaj*, 254 (Bk. 28, s. 9). In modern times the whole distribution would no doubt be delayed till the heir is born.

[26] Ind. Ev. Act 1872, ss. 107 f.—(i) *Mazhar Ali* v. *Budh Singh*, (1884) 7 All. 297 (rule of Muhammadan law that missing person must be regarded as alive, till lapse of 90 years from his birth, displaced) ; (ii) *Moolla Cassim* v. *Moolla Abdul Rahim*, (1905) 32 I. A. 177 = 33 Cal. 173 (person CLAIMING AS HEIR THROUGH MISSING PERSON must prove (*a*) that missing person survived propositus, so as to become propositus's heir ; (*b*) that missing person has since died, after surviving deceased :

SECTION 608. *Illustration.*

(1) In 1905 X disappeared and continued to be missing. X's sister died in 1907, leaving as her heirs, her husband and her brothers (viz. X and two other brothers). Her estate was distributed, the husband taking 1/2 and the two brothers who were present, 1/6 each : another 1/6 was kept in suspense, in case X appeared. In 1916 (nothing having been heard of X since 1905) X's wife and daughter, in spite of opposition from the second brother, obtained mutation in their names as heirs of X in respect of the said 1/6 etc. Thereupon the 2nd brother brought a suit claiming that under Muhammadan law X must be taken to have died in 1905 when he disappeared, so that he must be presumed to have predeceased his sister, and not to be one of her heirs. This view was rejected by the trial Court but allowed in appeal, and again rejected by the High Court holding that under the Indian Evidence Act it was for the plaintiff, the 2nd brother to show that X had predeceased his sister. He failed to do and his suit was dismissed.[27]

Reservation of share of missing person.

609. So long as a missing person is presumed to be alive, his property cannot lawfully be divided amongst his presumptive heirs : the portion of the deceased's estate that a missing person is entitled to inherit must be kept apart for him until he comes and claims it, or until such time as he is presumed to be dead.[27]

& so plaintiffs entitled to succeed as heirs of missing person); but see also (iii) *Mairaj Fatima* v. *Abdul Wahid*, (1921) 43 All. 673 (= s. 608, *ill*); (iv) *Azizul Hasan* v. *Mohammad Faruq*, (1933) 9 Luck. 401 ; cf. s. 5 B, pp. 39 ff. ; (v) *Imdad Ali* v. *Ghulam Jilani*, (1892) 27 Punj. Rec. 156 (No. 42) (Muhammadan law refusing to raise presumption of death until 90 years from date of birth abrogated by Ind. Evid. Act); (vi) *Imam Ali* v. *Abdool Ali K.*, (1867) 2 N. W. 28 (citing Macn. Prec. XIII., p. 92, *n.* : lady owns property : her husband missing : lady dies : her missing husband's heirs not allowed shares in estate : *held* husband could not inherit from his wife during period of his absence : so no share devolved on him which his heirs could inherit); (vii) *Fatawa Alamgiri* states that person who is missing must be accounted dead so far as property of others concerned, but alive as regards his own property, until such time has elapsed that it is inconceivable that he should be still alive, or until his contemporaries are dead = Bail. I. 703 (713); (viii) *Hosseini Khanum* v. *Tijun Lall*, (1870) 14 W. R. 293 (view alluded to that at least 90 years must, under Muhammadan law, elapse before missing person's property may be dealt with by his presumptive heirs,--but plaintiff was stranger, & question could not be decided in the case); (ix) (*Mt.*) *Mani Bibi* v. (*Mt.*) *Sahibzadi*, (1831) 5 S. D. A. (CAL.) 108 = 1 Morl. 218 (20); (x) *Durvesh* v. *Shekhun*, (1820) 2 Borr. 24 = 1 Morl. 445 (8) (Ibrahim aged 50, missing for 30 years. Moulvis said property not to be given away, until (*a*) his death ascertained, or (*b*) lapse of such time as would make his age 90 : his son & daughter not given property as heirs, but appointed managers thereof); (xi) (*Mt.*) *Rakhi Bibi* v. (*Mt.*) *Rahut B.*, (1875) 7 N. W. 191 ; (xii) *Kalee Khan* v. (*Mt.*) *Jadee*, (1873) 5 N. W. 62 (suit by sisters of person missing for 25 years, to obtain possession as managers & trustees of 2/3 of his property from nephews of missing person, dismissed—*sed quaere* ; cf. s. 608, *ill.*); *Girdhari Lall* v. *Lado*, [1882] 1 All. W. N. 105 (missing person's share to be retained until determined under Evid. Act whether he is alive or dead); (xiv) *Dowlut Khatoon* v. *Khaja Ali Jan*, (1867) 2 Agra 59 (person having no title got into possession : such possession not protected against nephew of missing person : the nephew would be heir of missing person whether he survived till late or died early); (xv) *Yusuf Ali B.* v. *Ayub B.*, [1913] 11 All. L. J. 355 (Ev. Act, s. 108, applicable : not presumption under Muhammadan law).

[27] *Mairaj Fatima* v. *Abdul Wahid*, (1921) 43 All. 673.

§ 2.—Heirs : Three Classes · Modes of Inheritance.

610. Under Hanafi law the estate of a deceased person devolves by inheritance in the following manner : [1]

SCHEME OF HANAFI INHERITANCE.

(1) The (Koranic) sharers are first allotted the shares (or fractions of the estate) to which they become entitled ; provided that where the fractions of the estate to which the sharers are respectively entitled, when added together, exceed unity,[2] (so that all their shares cannot be paid out to each of them in full) the share of each abates rateably by a process referred to as ' aul ' or " increase." [3]

Stages of distribution.

I. 1.—Shares.

' Aul ' or increase.

(2) The residue of the estate which is left over after the said shares have been so allotted, is divided,—

2.—Residue to—

(*a*) amongst (i) the residuaries, i.e. the nearest male agnates,[4] and (ii) subject to s. 604(*c*), the female agnates in the same line as the nearest male agnates,

a.—customary and Koranic heirs, or

(*b*) in the absence of residuaries, the (Koranic) sharers (other than husband or wife) take the residue in porportion to their shares by ' radd ' " return." [5]

b.—sharers.

" Return."

(3) In the absence of sharers and residuaries the estate is divisible amongst the other blood relations of the deceased, whether cognates or female agnates, who are collectively referred to as the " distant kindred." [6]

II. " Distant kindred," take whole, failing sharers and residuaries.

There are only two alternative modes of distribution :

Hanafi law.

I. If there is any sharer or residuary—

1.—SCHEME OF DISTRIBUTION.

1. the sharers (if any) take their shares, and thereafter—
2. the residue is taken by—
   (*a*) the residuaries, if any ; or failing them,—
   (*b*) the sharers.

Two alternatives.

II. If there are no sharers or residuaries the whole estate is taken by the other blood relations (distant kindred).

[1] Bail. I. 685 ; *Gujadhur Pershad* v. *Shaikh Abdoollah*, (1869) 11 W. R. 220.

[2] E.g. if husband & 2 sisters exist, they are entitled to 1/2 & 2/3 respectively : they cannot all get their full shares.

[3] Bail. I. 713 (723) ; see s. 605(17). To speak if it as *increase* is misleading : it ought to be DECREASE or ABATEMENT. Process of abatement, called in Arabic AUL = " INCREASE " because common denominator INCREASED to make rateable reduction. E.g. if lady dies leaving 2 daughters, both parents, & husband, shares are 2/3 + 1/6 + 1/6+ 1/4 = 15/12. Common denominator has to be increased from 12 to 15 in each case : & they take 8/15, 2/15, 2/15 & 3/15 respectively, instead of 8/12, etc. See s. 620, com. & s. 623, *ill.* (14)—(18).

[4] In only one case is title of nearest male agnate taken away—when he is remoter than a brother & the sister is living : see s. 621, p. 860.

[5] See s. 605(18). Bail. I. 715 (725), 717 (727).

[6] " DISTANT KINDRED," is very misleading translation of Arabic term : e.g.

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2.—SHARERS ENUMERATED : CONSIDERED—

The sharers are twelve : 1. Husband. 2. Wife. 3. Daughter. 4. Daughter of son howsoever low.[7] 5. Father. 6. Paternal grandfather, (referred to as true[8] grandfather). 7. Mother. 8. True[8] grandmother.[9] 9. Full sister. 10. Consanguine half sister. 11 Uterine sister. 12. Uterine brother.

—who could not succeed under custom being (i) held incompetent, or (ii) excluded by prior claimants.

It will be noticed that, of these, only the father and true grandfather were accorded any recognition in the customary law of inheritance. The Koran remedied the entire omission of the husband and wife, and of females and uterine relations,[9] by specially providing for them. As for the male ancestors, they were in certain circumstances (viz. when no descendants survived) heirs under the customary law. The changes introduced by Islam in regard to the ancestors will be more fully explained later, but the bases of the changes were : (1) female ancestors were also given a portion of the estate ; (2) even in competition with descendants, the ancestors (female as well as male) were allowed a share in the estate.[9]

3.—SCHEME ON WHICH SHARERS SELECTED.

The list of sharers seems at first sight to be heterogeneous, and indicative of no principle by which their number and identity can be kept in memory. The principle[9] of selection mentioned below will, however, enable them to be enumerated without any strain on the memory.

Principle on which right given.

The reader may, for this purpose, draw in his mind a circle including within its circumference the group of persons recognized in pre-Islamic times as being of kin, and having title to succeed—a group, consisting only of male agnates. He will find that all those who are immediately outside the circle,—contiguous to the imaginary circumference—are included amongst the sharers and that no others are included.

i.—Husband.
ii.—Wife.

Thus immediately outside the imaginary circle of male agnates, are the husband and wife. These are the first two sharers. Secondly, in the direction of the descendants the imaginary circle allowed entry only to the son and the son's son howsoever low. In the same line with these, and yet outside the imaginary circle, will be found the next group of sharers : the daughter and the daughter of the son or son's son howsoever low, (though not the daughter's daughter, who, as a cognate, is one category remoter than the sons and son's sons). Thirdly, we cast our eyes in the direction of the ascendants, and we find included amongst the sharers, the mother and a restricted class of grandmothers (viz. the paternal grandmother). These again touch the limits of the circle : they are the nearest to the agnatic ascendants who were recognized as customary heirs. Fourthly, amongst the collaterals, the full and consanguine sister, the uterine brother as well as uterine sister, are all now

iii.—Daughter.
iv.—Son's daughter.

v.—Mother.
vi.—Paternal grandmother.
vii.—Full, and
viii.—Consanguine sisters.

daughter's son classed amongst them but agnatic male cousin ten degrees removed is residuary, not " distant kindred." See s. 626. Cf. " our son's sons are our sons, but the sons of our daughters are sons of foreigners,"—*Hamasa* 260, 3,—Smith, *Kins. & Marr.* 184. See ss. 605(13 A), 626, pp. 837, 878.

[7] I.e. agnatic female descendants.

[8] *Sahih*, in Arabic. True grandfather = agnatic male ascendant ; true grandmother not so easily described : see s. 616.

[9] Though, according to Hanafi interpretation of law, only uterine brother & sister succeed as long as there is any male agnate ; all remoter uterine relations being postponed to male agnates.

privileged to stand shoulder to shoulder with the full and consanguine brothers, who alone had, under custom, entry into the sacred precincts of the imaginary circle. Finally, we find that (*a*) the father and paternal grandfather and (*b*) the true grandmothers other than the paternal grandmother have obtained recognition as sharers. (*a*) The father and grandfather are made sharers on occasions in which[10] by admitting new comers into the circle, these male ancestors are crowded out of the original places within the circle; in such junctures space has to be found for them in the extension of the circle made for accommodating the newly entitled heirs as "sharers"; (*b*) the true grandmothers other than the paternal grandmothers find recognition as sharers, because (as more fully explained in s. 616, com.) the whole set of true grandmothers stood alike disconsolate huddled together, and the custodians standing at the gates of the circle did not find it in their hearts to push away one old woman out of this set, while receiving the others, the less so as the burden had to fall on the share allotted to the old women themselves, and did not affect the interests of the others within the circle. As for the women themselves, they were all old, and none of them so strong-minded or so powerful in safeguarding their own newly acquired interests, as to resist the easy benevolence which added another claimant to the 1/6 allotted to grand-mothers. There is also a tradition that the second Khalif was unable to resist the logic or importunity or the utter helplessness and urgency for assistance brought into action by an old woman, upon whose case he had to adjudicate.

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ix.—Uterine sisters, and
x.—Brothers.
xi.—Father.
xii—Grand-mother.

True grand-mothers.

I. The KORANIC SHARERS thus consist of those relations who (under the customary law) were excluded in favour of the customary heir, but whose claims on the score of proximity are not inferior to his. They may be grouped under the following heads:

4.—CLASSIFICATION SHOWING PRINCIPLES OF KORANIC RIGHTS.

I.—Koranic sharers :—

(1) husband/wife,
(2) female agnatic descendants (provided they are nearer than the customary heir).
(3) such ancestors as are not customary heirs, *viz.*, (*a*) male agnatic ancestors, when the customary heir (or the nearest agnate) is a descendant;[11] (*b*) female ancestors.[12]
(4) collaterals: these are, however, restricted (so far as the right to a Koranic share[13] is concerned) to,—(*a*) amongst agnates, only the full and consanguine sisters in circumstances referred to in s. 623, com., and (*b*) amongst cognates, only the uterine sisters and brothers.

1.—Husband or wife.
2.—Daughter or son's daughter.
3.—Male ancestors when there survive. descendants.
4.—Female ancestors.
5.—Sisters and uterine brothers.

[10] Viz. when either (i) the customary heir is descendant, or (ii) when the newly entitled claimants are so numerous that no residue is left.

[11] Only in that case was it necessary for them to be given rights by Islam: In absence of male descendants, ascendants were customary heirs. Such simultaneous succession is new principle introduced in law. For, previous to Islam, it seems that only one class of heirs succeeded at a time, viz. nearest or next of kin. The Koranic basis for this principle is the verse, "Ye know not whether your children are nearer to you or your parents," Koran IV. 11 cited s. 601, com., pp. 824 f.

[12] These had no rights at all under customary law of succession.

[13] Rest of female collaterals come in with cognates, being classed as "DISTANT KINDRED": see s. 626, p. 878.

SECTION 610. Shares taken only by those nearer than customary heir.

The effect of the conditions on which the twelve sharers are entitled to share is that no person remoter than the residuary (the customary heir) inherits as a sharer.[14] There is only one exception to this : the anomalous case of some female ascendants.[15]

II.—Koranic right.

i.—(of females) to be residuaries.

II. The KORANIC (OR NEWLY INTRODUCED) RESIDUARIES are females related to the deceased in exactly the same way as the customary heir, but who were excluded owing to their sex. Under the Hanafi exposition of the law, however (i) descendants and sisters are the only females to take as residuaries (ii) The rights of the female ancestors to become residuaries is either obscured or merged in other rights. And (iii) collaterals remoter than the sisters are entirely cut off from rights of this class. The principle of these rights is, however, clear when we consider the case of the son and daughter as co-survivors : the son would have been the sole heir, excluding the daughter under the customary law : he is allowed to remain heir, but the daughter is added as (Koranic) residuary, and the two take the estate jointly though in unequal proportions. (The principle of this proposition is explained later : see s. 612, *nn.*)

ii.—Koranic rights of zu-rahm or distant kindred.

III. Finally, OTHER BLOOD RELATIONS not falling within the descriptions above referred to, (viz. of sharers and residuaries) are called zawil arham (plural of zu-rahm[16]), literally meaning "masters of blood relationship,"—misnamed "distant kindred" in English. "Other relations" might have better expressed the sense. These consist mainly of cognates and female agnates remoter than sisters. They succeed in the absence of sharers and residuaries.

§ 3.—SHARERS : FIRST MODE OF INHERITING : HANAFI LAW.

I. RELATIONS BY AFFINITY : HUSBAND/WIFE.

611. (1) The husband[17] takes 1|4 of the estate of his deceased wife, if she leaves any agnatic descendant surviving her, and 1|2 if she dies leaving no such descendant.

(2) The wife[17] takes 1|8 of the estate of her deceased husband, if he leaves any agnatic descendant surviving[18] him,

[14] E.g. daughter becomes sharer only if customary heir is son's son, or some remoter agnate ; sister only when customary heir is neither descendant nor ascendant : sister, being collateral, is remoter than all descendants & ascendants.

[15] Exception only holds in regard to such female ascendants as are cognates. See s. 616, p. 854, s. 605(6B), p. 834.

[16] *Rahm* = uterus or womb ; *zu rahm* strictly = related through females ; cognates.

[17] I.e. regularly married husband & wife : nor if married irregularly, nor if by *muta* : Bail. I. 684 (par. 3) (694), 700 (710), citing (*n.* 2) *Durru'l-Mukhtar*, 852 : "From which it appears that with regard to the effect of an invalid (i.e. irregular) marriage, there is no difference of opinion between Abu Hanifa & his two disciples." *Mohammad Shafi* v. *Raunaq*, [1928] AIR (OU.) 231 (irregularly married husband inherits from wife) seems opposed to this. The case is mentioned in *Mohammad Hayat* v. *Mohammad Nawaz*, (1935) 17 Lah. 48, 50, 51 as "being on all fours" ; but in fact the two cases decided quite different points : (i) 17 Lah. 48 on legitimacy of children : (ii) [1928] AIR (OU.) 23 : on husband inheriting from wife). As to IRREGULAR MARRIAGE : see s. 83, pp. 162 ff. ; cf. *Mulka Jehan Sahiba* v. *Mahomed Ushkurree Khan*, (1873) I. A. (SUPP. VOL.) 192 = 26 W. R. 26. As to *muta* see s. 25, & s. 215, com., pp. 120, 257 ff.

[18] Existence of persons who survive, but are excluded from inheritance by Statute, may be ignored for reckoning shares of husband/wife : *Aminabi Mahmulla* v.

and 1|4 if he dies leaving[19] no such descendant. If there are more wives than one, they divide the 1|8 or 1|4 equally amongst themselves.[19] SECTION 611.

[If there survives any blood relation howsoever remote, male or female, agnate or cognate : ss. 625, 633,—the husband/wife does not take any portion of the estate beyond his/her Koranic share ; the husband is entitled to take the residue in priority to the State: see s. 647.][20] Their other rights.

It is convenient to deal with the husband/wife first, because their rights are of a simple nature, and they always succeed—and only as sharers.

The husband and wife are the only heirs by affinity recognized in the law.[21] They took no recognized interest in each other's estate under the pre-Islamic customary law. The widow was liable to be considered a part of her husband's estate, and to devolve like other heritable objects on the heirs.[22] The Koran prohibited this, and enjoined at first that she should be allowed to live in the house of the deceased, as of right, for a year.[23] Later, this injunction was replaced by a law that the widow should get a definite portion of the estate as "legacy" or "share."[24] Widow's position before Islam.

The development of the law, in the case of the parents was parallel. It was at first recommended (without being a rule of positive law) that a legacy should be left to parents. Later this recommendation of a legacy was altered into a rule that they should take a definite share of the estate. If the expression "Koranic legacy" could be allowed, it would well indicate the nature and origin of the "Koranic share." Right to "share" : recommendation develops to legacy.

Chastity is not a condition precedent to the widow inheriting : s. 606(2 c). The Muslim husband is dominant in matters matrimonial. He may divorce his wife, and further safeguard is unnecessary.[25] Chastity.

Abasaheb Mirasaheb, (1930) 55 Bom. 401 (carefully reasoned judgment : "REASON OF RULE REDUCING SHARE of widow from 1/4 to 1/8 is to make provision for her children : & not intended to benefit residuary other than son or daughter : p. 406. If only child is daughter, who can take nothing (because of statute), reason for reduction of wife's share disappears." "When statute intervenes & provides that daughters shall take no share until all male heirs are exhausted, the Muhammadan law cannot be strictly applied. We must look to the spirit & not the letter of it & decide according to justice, equity & good conscience ..rules of EQUITY : NOT FOREIGN to the Muhammadan system but are in fact often referred to & invoked in the adjudication of cases : " *Hamira B.* v. *Zubaida B.,* (1916) 43 I. A. 294 : s. 12, p. 88).

[19] Bail. I. 689 (699); *Siraj* III. 519, 520, VIII. 217, 218 : Rums. 17, 18 : *Minhaj,* 247 ; (*Sheikh*) *Musseeollah* v. (*Mt. Beebee*) *Sherifun,* (1864) 1 W. R. 122. For curious position in which 8 widows inherit, cf. s. 157, p. 231, *ill.* (9); Bail. II. 124.

[20] Par. in [ ] added for convenience of ready reference with regard to rights of husband & wife. *Sirajiyya* & commentary on it *Sharifiyya* are translated by Sir Wm. Jones & printed in Vol. VIII. of collected works, 1807, & Vol. III. of 1799. *Siraj.* ed. by Rumsey, 2nd ed. 1890, Thacker Spinck. Husband & wife's rights in other respects treated in due order : ss. 625, 633, pp. 875, 894.

[21] Cf. *Ekin Bebee* v. *Ashruf Ali,* (1864) 1 W. R. 152.

[22] See Smith, *Kins. Marr. Anc. Arab.* 117, cited p. 848, s. 611, com.

[23] Koran II. 241, cited s. 601, p. 823.

[24] Koran IV. 11-12, pp. 824 ff. Sects. 299, 641, pp. 321, 906.

[25] Sect. 88, p. 166 : *Abdul Rahiman* v. *Aminabibi,* (1934) 59 Bom. 426. Sect. 606(2 c) : *Muhammad Bakhsh* v. *Hayat Khan,* [1888] 23 Punj. Rec. 98, 100 (No. 37).

SECTION 611.
POSITION OF WOMEN IN ARABIA PREVIOUS TO ISLAM.

"At Medina," says Professor Smith, "as we are told by the commentators on Sura 4, women could not inherit [before Islam]. So far as the widow of the deceased is concerned, this is almost self-evident; she could not inherit because she was, herself—not indeed absolutely, but 'quâ' wife—part of her husband's estate, whose freedom and hand were at the disposal of the heir, if he chose to claim them, while if he did not do so, she was thrown back on her own people. But further, there is an explicit statement, confirmed by the words of the Sura (verse 126) that the men of Medina protested against the new rule, introduced by the Prophet, which gave a share of inheritance to a sister or a daughter. We have seen above, that this was based on the broad principle that none should inherit save warriors, and that this principle was applied in the most absolute way, is made plain by the story of Cais ibn al Khatim who when he went forth to avenge his father's death provided for his mother, by handing over to one of his kinsmen a palm garden near Medina, which was to be his if Cais fell in his enterprise, subject to the condition that he would 'nourish this old woman from it all his life.' Where the mother of a man of substance could only be provided for in this round-about way the incapacity of women not only to inherit but to hold property—at least lands—must have been absolute ('Aghani' 2. 160.)" [26]

Without right to inherit or hold land.

Widows (before Islam) inheritable as assets of deceased.

That the wife could herself be inherited is thus commented on by Professor Smith: "The Koran (IV. 23) forbids men 'to inherit women against their will,' and verse 26 forbids them to have their step-mothers in marriage, 'except what has passed'; i.e. marriages of this kind had been allowed before, and existing unions of this kind are not cancelled, but the thing is not to be done any more. Both passages, according to the commentators, refer to the same practice, and their explanation is certainly authentic, for they support it by numerous historical examples. From the mass of traditional accounts of the matter, I select, as full and clear, one of those preserved in Tabari's great commentary (MS. of the Viceregal Library in Cairo). 'In the jahiliya when a man's father or brother or son died, and left a widow, the dead man's heir, if he came at once threw his garment over her, had the right to marry her under the dowry (mahr) of [i.e., already paid by] her [deceased] lord (sahib) or to give her in marriage, and take her dowry. But if she anticipated him and went off to her own people, then the disposal of her hand belonged to herself.' The symbolical act here spoken of is the same as that we find in the book of Ruth (III. 9) where the young widow asks her husband's kinsman Boaz 'to spread his skirt over his handmaid,' and so claim her as his wife." [27]

II. RELATIONS BY BLOOD AS (KORANIC) SHARERS.

612. Where the deceased dies leaving one or more daughters, but no son or sons,[1]

[26] Smith, *Kins. Marr.*, 117; ib. 294, citing *Kamil*, pp. 679, 678, 15.

[27] Ib. 104, 105.

[1] Bail. I. 687 (690), 697 (700). In order that daughter may be sharer, there must be no sons surviving deceased. If any son survives then he, as nearest male agnate, is customary heir, and daughter is not nearer but in same line: she therefore cannot, in that case, get prior claim to estate (as Koranic sharer), but can only rank as co-residuary with him & this she does: see s. 621(2)(*a*).

SECTION 612. (A) Descendants : female agnates.

(1) if there is a single daughter she takes 1|2 of the estate as Koranic sharer ;[2]

(2) if there are two or more daughters they take collectively 2|3 of the estate dividing it equally amongst themselves.[3]

(1) Daughters : female agnatic descendants in first line.

Other rights of DAUGHTER.

[The daughter(s) inherit(s) as sharer(s) if there is no son. If son(s) and daughter(s) co-exist, they both become residuaries, and the daughter(s) do not then either need or take any Koranic share. Similarly the son's daughter(s) become(s) sharers if there is no son, and no son's son. But if the son's daughter(s) co-exist with a son's son(s) then the daughter(s) become(s) co-residuaries with him ; provided that they are not both excluded by the existence of a son : s. 621 (2). The daughter or son's daughter is also entitled to take the residue by " return " proportionately with the other sharers, should there be no male agnate(s) : s. 625. The daughter's son(s) and daughter's daughter(s) and other descendants of the daughter are cognates, and as such are excluded from all participation in the estate if there exists any sharer other than a husband or wife, or there exists any male agnate however remote : see s. 626].[4]

The rights of daughters are summarized under s. 623, cf. table of shares and residuaries.

Conditions for title to share.

The daughters constitute the first [5] of those sharers who are blood relations. It will be observed that they do not become sharers in every case, but under the condition that there are no sons of the deceased. Conditions of a similar nature are annexed to the rights of all the sharers. These conditions may now be examined.

Principles underlying conditions.

1. The nearest male agnate (or customary heir) is given no right to take a Koranic share: he is already heir, and there is no necessity for giving him any rights. [This rule does not affect the daughter who is not a male agnate.] *Exception* :—The father or true grandfather is customary heir when there are no male agnatic descendants ; still he takes a Koranic share for reasons explained in s. 614, com.

2. As a rule, no person is entitled to be a sharer who is remoter than the

[2] Koran IV. 11 ; cited s. 604, com ; Bail. I. 687, 690 ; *Minhaj* 247. Being nearer than nearest male agnate, her claims superior to his on ground of proximity ; but this counterbalanced by his rights being more ancient (based as they are on pre-Islamic custom), giving him priority in point of time. Hence daughter takes 1/2 estate, leaving 1/2 to male agnate or customary heir. Mosaic law : Numbers, XXVII : daughter inherited in absence of son, but not with him.

[3] *Mubarak-un-nissa B.* v. *Muhammad Raza K.*, (1924) 46 All. 377. Two daughters take 1/3 each, leaving 1/3 to customary heir. According to Hanafi interpretation of law, this principle of division not followed where more daughters than two exist, so that 3 or 4 daughters take no more than 2/3. Explanation (no doubt) that encroachments on customary heir's rights had to be restricted within certain limits : prevalence of female infanticide in pre-Islamic times probably rendered it unusual for a man to have more than two daughters, in those times.

[4] Paragraph in [ ] is added for ready reference. See s. 611, *n.* 4.

[5] Being descendants, & in first line, they would according to recognized principles of kinship be first considered.

SECTION 612. nearest male agnate (or customary heir);[6] proximity being reckoned in accordance with s. 622;[6] [this rule can never disqualify the daughter as she is in the first line of descent, i.e. the nearest possible relation; but it does apply to son's daughters—who get neither a Koranic share nor inherit in any other manner, if any nearer male agnatic descendant survives.]

Modifications and exceptions. (i) Ascendants cannot in Islam be considered to be necessarily remoter than descendants (Koran iv. 11, pp. 824 f.); (ii) nor all cognates necessarily remoter than all agnates;[7] (iii) a true grandmother may succeed though she is remoter[8] than the nearest male agnate.

Most sharers are agnates.

Since no person remoter than the nearest male agnate is to be a sharer, and since cognates are (normally) considered remoter than all agnates, (with the exception of the anomalous cases of the grandmother and uterine brother and sister) it follows that the sharers must generally[7] be agnates—and female agnates, because males would in most cases be excluded under rule 1 or 2.

(2) Daughter of son or of lower male agnatic descendant. —when sharer.

613. Where the deceased leaves neither a daughter[9] nor a son[10] surviving him,—

(1) The daughters (if any) of his predeceased sons[11] become Koranic sharers, taking 1|2 of the estate if there is one such grand-daughter of the deceased, and 2|3 if there are two or more; provided that there is no son's son co-existing with them.[12]

(2) If the deceased leaves a daughter and a son's daughter surviving him, but no son, nor son's son, [the daughter takes 1|2 of the estate and] the son's daughter takes 1|6[13] of the

[6] As regards descendants no person can succeed as sharer unless she is *nearer* than customary heir; for those in same degree of proximity become co-residuaries, not sharers; cf. s. 621(2)(*a*).

[7] In two cases under Hanafi law, cognates allowed to share or compete with agnates: (*a*) uterine brother(s) & sister(s) share(s) with full or consanguine sister(s); (*b*) amongst true grandmothers—cognates & agnates compete against, & if necessary, share with, each other. These exceptional cases explained: ss. 616, 618.

[8] I.e. removed by greater number of links.

[9] Bail. I. 687 (697), 690 (700); *Minhaj*, 247. If there is any daughter, she becomes sharer.

[10] If there is son, he is nearer than son's daughter & latter becomes disqualified, on ground of being remoter than customary heir: see s. 612, com., *n.* 2.

[11] Not daughter of daughter, since only agnatic female descendants entitled to be sharers: term "daughters" of "female descendants" being referred, like all terms of kinship, to agnatic relation; e.g. son's daughter; son's son's daughter; son's son's son's daughter, etc. tracing descent always through male links. The cognates come much lower in the Hanafi system of inheritance, in which (cf. ss. 604, 610) customary law is preserved in so far as it gave priority to agnates,—though the sharers named in Koran, viz. nearer female agnates (including sister), come in at early stage; see s. 612, com., pp. 849 f.

[12] If there is any son's son, then son's daughter(s) become(s) co-residuaries with him; s. 621; Macn., Prec. Inh. XVI., XXXIII., pp. 94, 110.

[13] Bail. I. 687 (697); *Minhaj*, 248. This gives effect to s. 612,—daughter's rights cannot, on principle, be affected by person remoter than herself—though her right may be indirectly affected by doctrine of abatement ("increase"); see ss. 610, 620.

estate as (Koranic) sharer. The said 1|6 is divided equally amongst the daughters of sons if there are together with a single daughter, two or more such sons' daughters surviving.[14] SECTION 613. Female agnates lower than son's daughter.

(3) In the absence of the daughter and the son's daughter, the nearest agnatic female descendant(s) take the said share of 1|2 or 2|3 in the manner above referred to (provided that there is no agnatic male descendant in the same line as themselves, or a higher line) : if there is only one in the first degree, those in the next degree take 1|6.

Daughters and female agnatic descendants inherit sometimes as sharers and sometimes as residuaries. Their rights in both these capacities will be found stated in ss. 623, 610 (table), and " Table of Sharers and Residuaries."

The 1/6 here mentioned may be called the remnant of the daughters' shares. It is arrived at as follows : 2 daughters would have taken 2/3, viz. the share of two or more female descendants (when they are nearer than the customary heir) consists of 2/3 of the estate. This 2/3 is divided between the daughter and granddaughter, but so that the daughter (being the nearest) gets her full 1/2, leaving 1/6 for the granddaughter.

614. To (*a*) the father,[15] and (*b*) in the absence of the father, to the nearest agnatic[16] (or paternal) grandfather, (called the " true[17] grandfather ")[18] is allotted, as a Koranic share where there is any agnatic descendant surviving,[19] 1|6 of the estate. A " false grandfather,"[20] is not competent to take as a sharer[21] : s. 605(6A). (B) Ascendants as sharers. (1) Male agnates : father and true or paternal grandfather.

If there survived no son, nor son's son, nor other male agnatic descendant, the father was the pre-Islamic customary heir, and was entitled to take the whole estate ; but if any male agnatic descendant survived, he was not entitled to take any part of the estate. He takes, under the Koran, 1/6 of the estate as sharer in every case, retaining his rights as residuary in the circumstances in which he became entitled to inherit by custom (viz. in the absence of agnatic " False grandfather." Father's and paternal ancestors' other rights.

[14] It makes no difference whether they are all daughters of one son, or of different sons.

[15] Bail. I. 686 (696), 696 (707). See com. & Macn., *Prec. Inh.* LXIII., p. 132.

[16] Only agnates entitled to this share. Here customary notions about kinship not altered, because agnatic ancestors were already recognized, & there was no crying need for reform.

[17] *Sahih* (in Arabic) referring to grandfather whose kinship was recognized without question, i.e. from pre-Islamic times, when only agnatic relation counted.

[18] See s. 605(6A), p. 834. Bail. I. 686 (696), 690 (700) ; *Minhaj*, 247.

[19] When no agnatic descendants survive, then father is customary heir (residuary) & needs no share.

[20] Ib. The Arabic expression has no such disagreeable connotation as " false " has.

[21] Nor is false grandfather competent to inherit as residuary : he can succeed only as one of the " distant kindred."

SECTION 614. FATHER AND GRANDFATHER INHERIT IN ONE OF THREE WAYS : as 1.— customary heir ; 2.— no share required unless there are female descendants ; 3.—whenever there is any male agnatic descendant, share necessary.

descendants, i.e. son, or son's son, etc. : ss. 621, 622(2). The reason for giving him a share in the circumstances in which he is already customary heir, is that the quantum taken by him in Islam is diminished by the introduction of other persons (viz. daughter or son's daughter, mother or true grandmother and husband/wife) entitled to take Koranic shares, when they co-survive with him. The true grandfather was also recognized by the pre-Islamic law as being competent to inherit, and his rights in Islam are similar to those of the father. The false grandfather however does not become entitled to any part of the estate except as one of the "distant kindred," viz. when there survive no Koranic sharers (except the husband/wife) and no male agnates : ss. 626, 627. The share of the father or (in his absence) of the true grandfather, may abate under s. 610(1), under the doctrine misleadingly called "increase."

Father's and grandfather's rights compared.

The grandfather takes interests in the estate similar to the father, with the necessary changes, viz. (1) The grandfather does not (like the father) reduce the mother's share from 1/3 of the estate to 1/3 of the residue. The reason of this is obvious. The mother is in the same line as the father and her rights are analogous to those of a co-residuary with the father, but she is nearer than the grandfather, and takes her share, in priority to him. (2) The true grandmother cannot be excluded by the grandfather, but must be like a co-residuary with him. (3) The father is clearly nearer than the brothers and sisters ; but in the case of the grandfather there is room for doubt and different opinions are expressed on the point. See ss. 615, 616, 629 and 624. See table of true grandparents, in s. 616.[22]

(2) Mother takes 1/6 or 1/3 of whole

615. (1) The mother is entitled (*a*) to 1|6 of the estate as sharer if there is any agnatic descendant surviving ;[23] (*b*) if there is no such descendant[24] surviving, she is entitled to 1|3 of the estate, except as provided in this section.

or 1/3 of residue.

(2) Where with the mother there are surviving (i) the father[25] and also (ii) the husband|wife, and there are no other heirs,[26] then subject to s. 615(3) the mother takes 1|3 not of the whole estate, but of the residue after the husband|wife has

[22] ARAB FAMILY BEFORE ISLAM. Cf. "At the time of the Prophet there was inside the Arab tribal system a family system in which the centre of the family was a paterfamilias not a Roman father with despotic authority over his wife & children 'in manu,' but still a male head who by contract or capture had the right to have all his wives' children as his own sons." R. Smith, *Marr. Kin. Anc. Arab.* 203.

[23] Thus mother gets same Koranic share as father, viz. 1/6 : male is not given double share of female, inasmuch as both are equal in proximity & father when he inherits as sharer no less newly entitled than mother. Cf. s. 601, com. (4th head) I. (*b*), p. 828. "The spirit of Muhammadan law" (*submitted*) not very correctly appreciated in *Mirza Hashim Mishkee* v. *Aga Abdul Husain B.*, (1927) 5 Rang. 252, 255.

[24] Cf. *Amnabi Mahmulla* v. *Abasaheb Mirasaheb*, (1930) 55 Bom. 401 (if statutory law excludes daughter from inheritance, her existence does not reduce widow's share from 1/4 to 1/8).

[25] Not grandfather—though *Sirajia*, mentions that Abu Yusuf placed grandfather in same position as father in this regard.

[26] I.e. there are no agnatic descendants—who are the only other heirs that can inherit with the father. If there are agnatic descendants then s. 615(1)(*a*) applies.

taken his or her Koranic share, (the father taking the remaining 2|3 of the residue). SECTION 615.

(3) Where there are two or more brothers or sisters (full, consanguine, or uterine) co-existing with the mother, she takes only 1|6 of the estate, notwithstanding that there may be no agnatic descendants.[27] Two brothers or sisters reduce her share.

Illustration.

CLAIMANTS :—		
	Two widows	1/8 each.
	Mother	1/3
	Paternal uncle (*residue*)[28]	5/12

a. Mother's other rights.

[The mother may take by return under s. 625, if there are no residuaries, but otherwise she does not take a larger portion of the estate than the 1/6 or 1/3 mentioned in s. 615. Her share may abate under s. 610(1).][29]

b. History.

The mother, as a female, did not inherit under the customary law. She had, therefore, to be entitled to inherit either as a Koranic sharer, or residuary. It is generally stated that her rights are those of a sharer only, and that she is never a residuary. But it will be observed that under s. 615(2), she is to all intents and purposes, a Koranic co-residuary with the father. For, when the claimants are : mother, father and the husband/wife (there being no descendants),—the father is the customary heir (being the nearest male agnate), the husband/wife first takes his or her share ; and then, out of the residue, the mother takes 1/3 : leaving to the father 2/3. In other words, she shares the residue with the father in the proportion of a double share to a male, the estate devolving exactly as if there had been a daughter and son, instead of the father and mother. Still, the mother's rights cannot accurately be styled those of a Koranic residuary . s. 615(3) affects the mother's rights in a manner that has no parallel in the rules relating to Koranic residuaries.

c. The mother's right to take 1/3 compared --

(i) to that of a (Koranic) residuary.

(ii) to that of other Koranic sharers.

In the case of the mother's 1/3 share[30] the rule fixing the share of the female agnatic descendants (when they are nearer than the 'asaba or nearest male agnate) is not followed. Thus a daughter or sister (in the said circumstances) takes 1/2 of the estate, whereas the mother takes 1/3. But the mother's 1/3 is always taken by a single individual, whereas the daughters or sisters may be several, and each may take 1/3 or less. Moreover the rules relating to ascendants could not be exactly similar to those relating to collaterals : the rights of the ascendants overlap those of the descendants. They have besides less occasion to be developed fully as they come into operation less often.

d. Reason why brothers and sisters reduce mother's share.

The rule by which the mother's share is reduced to 1/6 when the mother co-exists with the (i) father, and (ii) brothers or sisters, is anomalous, and

[27] Bail I. 688 (698), 690 (700), 695 (705), *Minhaj*, 247 ; Macn. *Prec. Inh.* cases 23, 24, 41, 51 ; *Sirajia* (with *Sharifia*) Sir Wm. Jones, transl. par. 10, 15 *Works*, VIII. 220, 225 = III. 522, 525 = Rumsey's ed. 22, 27.

[28] *Sahu* v. *Fazal*, (1933) 60 I. A. 116, 119 (ALL.).

[29] Paragraph in [ ] is for reference ; it should be omitted when (if ever) chapter is read in its proper sequence as a whole.

[30] I.e. where no descendants nor father amongst survivors.

SECTION 615. must be considered, as a special case ; "no general rule can be based upon it."[31] Where, however, it is the (i) grandfather (and not the father) who co-exists with the (ii) mother, and (iii) brothers or sisters, some authorities [32] hold that the grandfather does not exclude the brothers and sisters, but that they all inherit as sharers or residuaries : and the mother's share may, in that case, have been necessarily reduced ; and it may have been considered that if the mother's share is reduced to 1/6 when she co-exists with the grandfather (and brothers and sisters), much more should her share be so reduced when she co-exists with the father (and brothers and sisters). The principles are liable to be blurred here owing to the differences of opinion referring to the rights of the brothers and sisters ; and in all cases of doubt the position of the newly entitled heirs gravitates towards the position under the customary law: there is a tendency to reduce the shares of the newly-entitled heirs.

(3) True grandmothers take place of mother.

616. (1) In the absence of the mother 1|6 of the estate is, subject to s. 616(4), allotted as a (Koranic) share to the nearest (i.e. those who are related to the deceased through the fewest links) from amongst the three groups of female ancestresses called "true [1] grandmothers" : s. 605(6B).

Exclusion by—

(i) intermediate male agnates.

(ii) excluded grandmother.

(2) A true grandmother who is related to the deceased through one or more male ancestors [2] is excluded if any of the said ancestors [3] survives the deceased.

(3) A true grandmother is also excluded who is remoter than one who is excluded under s. 616(2).[4]

[31] *Aminabai Mahmulla* v. *Abasaheb Mirasaheb*, (1930) 55 Bom. 401, 408. The Father's prestige as male, as agnate, as paterfamilias (p. 852, *n.* 22) enabled him to strike down competing mother with any argument at hand, however, feeble.

[32] Bail. I. 687 (697).

[1] *Sahih* in Arabic ; see s. 614, *mn.* ; Bail. I. 688 (698), 690 (700). Devolution of father's 1/6 share restricted to one line of agnatic grandfathers, mother's 1/6 may be taken by female ascendant in one of 3 lines—so that far more female ancestors have chance of succeeding as Koranic sharers than male ancestors. As female ancestors were absolutely excluded under old law, rights under new law of all female ancestors could develop more easily than rights of male ancestors, some of whom (i.e. agnates) were recognized in old law, & whose prestige gave them advantage over others, preventing those others from acquiring any rights when they came into competition with agnates. A similar result occurs amongst brothers & sisters. Uterine brother & sister, who were absolutely excluded by customary law, succeed with full brothers & sisters, as well as with the consanguine brothers & sisters, whereas conanguines do not succeed where there are any of full blood in their own line. See ss. 618, 622(4)(*c*).

[2] E.g. F*M*, or FF*M*.

[3] E.g. F*M* is excluded by existence of F, & FF*M* by existence of F, or FF. The explanation of this seeming anomaly seems to be that the male ancestor would be customary heir : & the idea that no one remoter than the customary heir can succeed, keeps springing up & asserting itself.

[4] This rule may also be stated as follows : "No female ancestor can take any share of estate if any link (whether male or female) between herself & deceased is surviving." The link, if consisting of female, will represent nearer true grandmother —if male, it will represent male agnate (or possible customary heir). E.g. if F*M* & *MMM* co-exist with F, then *MMM* is excluded by F*M*, because latter is nearer, but F*M* is herself excluded by F. REASON : F is customary heir : & no relation remoter than customary line as rule inherits : s. 610, com. Explanation of why F does not

(4) If, in the nearest degree of proximity, more true grandmothers than one survive, they take the 1|6 share collectively ; dividing it (Abu Yusuf holds, and apparently also Abu Hanifa)[5] amongst themselves equally, notwithstanding that one of them may bear the relation of true grandmother to the deceased in only one way and another in more ways than one ;[6] but Imam Muhammad holds that each grandmother may claim a proportionate part of the 1|6 Koranic share, in respect of each such relation that she bears.[6]

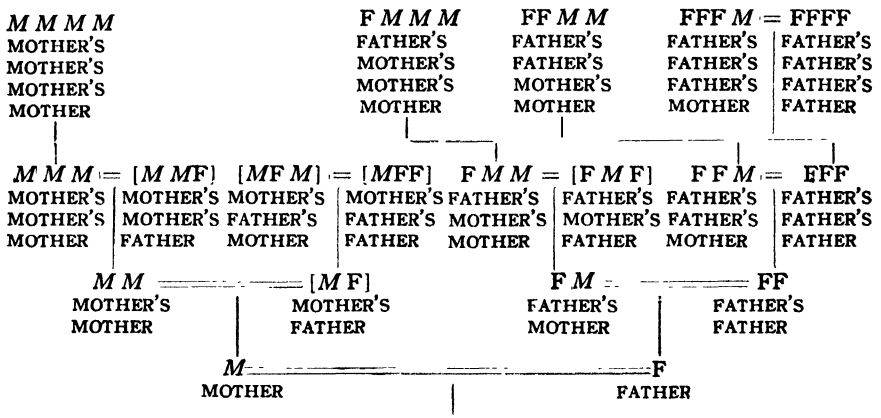
SECTION 616. Distribution amongst true grandmothers.

Equal.

Except by Imam Muhammad.

TABLE ILLUSTRATING "TRUE" GRANDPARENTS.

N.B. { The symbols referring to the "false" grandparents are enclosed in [ ]. In the highest generation only the "true" grandparents are given.



THE DECEASED.

[The true grandmother may take by return under s. 625 if there are no residuaries ; but otherwise she does not take a larger portion of the estate than that mentioned in s. 616. Her share may abate under s. 610(1).]

1.—The grandmother's other rights.

Under s. 616 (4), (5), a paternal grandmother may be excluded by the

2.—How true grandmother may be excluded by a male.

exclude *MM* unless *FM* is also living seems to be that though existing rules about kinship provided means for compairing relative proximity of F and *FM*, there seemed no means for comparing relative proximity of male agnate and female cognate,—rules for comparing agnates with cognates amongst grandmothers being still of too novel description to find place in general law or to be applied except *pro hac vice* ; while at same time, customary law which preferred all agnates to cognates could furnish no criterion when comparison had to be made as amongst ancestors, in whose case it was evident that cognate might be considered nearer than agnate.

[5] Bail. I. 688 : Abu Yusuf's opinion alone referred to with the remark : "There is one report to the same effect from Abu Hanifa."

[6] This may happen (*Sharifiya* : Jones, *Works*, VIII. 289) if a lady, *X*, has son & daughter, FF & *MM*, who have respectively son & daughter, F & *M* who (being cousins) are married to each other, & give birth to propositus ; then *X* will be *MMM* & also FF*M* of propositus, i.e. she will be true grandmother in two ways. If, then, there is surviving another true grandmother, F*MM*, who is related to deceased in only one such way, then according to Imam Muhammad, *X* who is both *MMM*, & FF*M*, will take 2/3 of the 1/6 ; & F*MM* will take 1/3 of the 1/6 ; but according to Abu Yusuf they will take equally. *Siraj.* : Jones, VIII. 221 = III. 522 = Rums. 22.

SECTION 616. existence of a male ancestor through whom she is related to the deceased ; and a maternal grandmother may then be excluded by the existence of the said paternal grandmother, so that neither can succeed, notwithstanding that if the said paternal grandmother had not been surviving, and if the maternal grandmother had alone survived with the male ancestor, the said maternal grandmother would not have been excluded.[7]

Reason for exclusion by male link.

The exclusion of a grandmother by a male ancestor (who does not himself take the grandmother's 1/6 share) is apt to be considered as an anomaly. Its explanation however is that in the first instance no one inherits who is remoter than the customary heir (*i.e.*, the nearest male agnate). The only male ancestor through whom a true grandmother can be related to the deceased is a true grandfather, who, being a male agnate, is either himself the customary heir (as the nearest male agnate), or there is some male agnate nearer than him. In either case a true grandmother related through him is remoter than the customary heir ; the Koranic alterations in the law under Hanafi interpretation do not provide for relations remoter than the customary heir, subject to the principle that "Ye know not whether your parents be nearer to you in the benefit they bring, or your children." IV. 11, (p. 824).

(4) COLLATERALS as Koranic sharers.

(i) Agnates : full and consanguine sisters.

(ii) Sister as sharer when no male agnatic descendant or ascendant.

617. (1) Subject to ss. 617(2) and 624, where there is neither a male agnatic descendant[8] nor such ascendant[9] co-surviving,[10] the full and|or consanguine sister(s) share(s) as follows :—

(*a*) if there is only one full sister surviving, 1|2 of the estate is allotted to her as a share ; if two or more survive, they are allotted 2|3 of the estate as their collective share ;[11]

(*b*) where there is no full sister, the said share of 1|2 or 2|3

[7] E.g. if F, F*M*, *MMM* are surviving, *MMM* is excluded by F*M*, for latter is nearer : & F*M* is herself excluded by F, because she is related through him. If however there had been only F & *MMM*, latter could not have been excluded by F. Reasons seem that (i) relative proximity of F and F*M* could be compared according to existing criteria, & also of F*M* & *MMM*, but not *MMM* & F. (ii) Father's prestige, pre-Islamic & otherwise : see s. 615, *n.* 31. Cf. "A person incapable of inheriting doth not exclude any one, *at least* in our opinion ; but according to Ibn Masuud (may God be gracious to him !) he excludes imperfectly ; as an infidel, a murderer & a slave. A person excluded may, as all the learned agree, exclude *others* ; as if there be two brothers or sisters or more, on whichever side they are, they do not inherit with the father of the deceased, yet they drive the mother from 1/3 to 1/6." *Siraj.* par. 16, Sir W. Jones, *Works* VIII. 225-226, Rums. 27. Note distinction between (i) incompetence to inherit & (ii) exclusion from inheritance in particular circumstances.

[8] I.e. son or son's son howsoever low = S, SS, SSS, SSSS.

[9] I.e. father or father's father howsoever high = F, FF or FFF, etc.

[10] (Cf. s. 606). I.e. neither S, SS, SSS, etc. nor F, FF, FFF, etc. must be surviving. It is only when none of these are surviving that collateral (e.g. brother) would be nearest male agnate or customary heir ; & only in that case that collateral (e.g. sister) could be given any right to inherit, consistently with the general principle that no relation remoter than customary heir (or nearest male agnate) inherits : ss. 604, 604 A. In accordance therefore with theory generally accepted by Hanafis that true grandfather is nearer than brother, no collateral can succeed if any true grandfather is living.

[11] Bail. I. 688 (698), 600 (700); *Minhaj*, 247.

respectively is similarly allotted to the surviving consanguine sister or sisters (if any); SECTION 617.

(iii) Full sister.

(*c*) where there is a single full sister, she takes 1|2 ; and the consanguine sister(s) take(s) 1|6, to be divided equally amongst themselves if more than one.[12] (iv) Consanguine sister. (v) Single full sister.

(2) The full or consanguine sister is not allotted a Koranic share when she co-exists with any,— (vi) Sisters when not sharers (but residuaries)

(*a*) full or consanguine brother respectively,[13] or any

(*b*) female agnatic descendant.[14]

Illustration. One Muhammad Baksh died leaving a widow Zainab, a son Khadim Husain, a daughter (name not disclosed), and a posthumous daughter Amat-ul-Habib and two daughters by a predeceased wife. Zainab's elder daughter died after her father. The estate was divisible in this way : On Muhammad Baksh's death Zainab took 1/8, her son 7/24, and the three daughters 7/48 each. Then on the death of Zainab's daughter, deceased's 7/48 was divisible thus : 1/6 of 7/48 to her mother, Zainab ; and her full brother Khadim and sister Amat took respectively the residue (5/6 of 7/48) in the proportion of 2 : 1 ; i.e. $5/6 \times 7/48 \times 2/3$ and $5/6 \times 7/48 \times 1/3$. Amat therefore took 7/48 as heir to her father, plus $5/6 \times 7/48 \times 1/3$ as heir to her sister : ultimate share 161/864.[15] Abdul Karim *v.* Amat-ul-H. 3 Lah. 397.

Other rights of sisters.

[The full/consanguine sister, being an agnate, takes a Koranic share, unless the customary heir is nearer than herself, i.e. unless there is a nearer male agnate surviving the deceased.[16] Her share may abate under s. 610(1). She also becomes a co-residuary with the brother when the latter is the nearest male agnate and as such entitled to be residuary : see s. 621 (2). The rights of the sisters are fully stated under s. 623, *q.v.* ; cf. Koran, IV. 11, 175.]

(vii) Cognates : uterine sisters and brothers as sharers.

618. Where neither a male or female agnatic descendant, nor a male agnatic ascendant survives, 1|6 of the estate is allotted to the uterine sister or brother as a Koranic share, if

[12] Bail. I. 689 (*l.* 1) (699); Macn. *Prec. Inh.* cases 33, 46, 72(1), 81(2); cf. case of daughter & son's daughter : s. 613. (i) When there are two or more full sisters, consanguine sisters do not get any share : they can then only be residuaries—which they are, provided consanguine brother is nearest male agnate. But (ii) if nearest male agnate is remoter than consanguine sister, latter does not become co-residuary : Bail. I. 689 (699).

[13] I.e. (i) when full sister & full brother co-exist, full sister becomes not Koranic sharer, but co-residuary with brother (who is customary heir). [Cf. case of daughter & son co-existing]. (ii) When full sister & consanguine brother co-exist, full sister is nearer than consanguine brother, hence, she becomes sharer, & consanguine sister becomes co-residuary with consanguine brother. (iii) If full sister & female agnatic descendant co-survive, then full sister (pp. 878 (top), 831, *n.* 19) becomes residuary, excluding consanguine brother.

[14] Bail. I. 688 (698); *Minhaj*, 247. When she co-exists with female agnatic descendant, she become (Koranic) residuary, ousting male agnate remoter than herself as in *Meherjan* v. *Shajadi*, (1899) 24 Bom. 12 = s. 623, *ill.* (3); see s. 621(4)(*b*).

[15] *Abdul Karim* v. *Amat-ul-Habib*, (1922) 3 Lah. 397.

[16] *Ashraf B.* v. *Muhammad Abdul Raoof*, (1927) 50 All. 404.

SECTION 618. only one such brother or sister survives ; if two or more survive, they are collectively allotted 1|3 of the estate as a Koranic share, which they divide amongst themselves, males and females sharing in equal proportion.[17]

Other rights of uterine brother and sister.

[The uterine sister and brother being cognates, were not recognized by the customary law ; they succeed only as sharers and not as residuaries ; but they may take by return, s. 625. Their shares may abate : s. 610(1). Their children can share only as "distant kindred" : s. 626.] See p. 853, *n.* 29.

Reason why uterine brother and sister share equally.

The uterine sister and brother share in equal proportions because they are both newly entitled : the uterine brother is not an agnate : the uterine brother's rights are not older than the uterine sister's : neither was, in any circumstances, eligible for succession under the customary law : and he cannot, therefore, claim a larger share, on the ground of priority in respect of time, as does a male agnate, when a female agnate is placed on a footing of equality with him (by her being made a co-resiudary). The uterines being introduced for the first time by the Koran, they divide the Koranic shares allotted to them equally : in accordance with the principle that the difference (when any) between the quantum taken by males and females has reference not to their sex, but to the fact that the males had old established rights, and the females were newly introduced.[18]

1. Neither the uterine brother nor sister takes any portion of the estate if the customary heir is an ascendant or descendant, or if there are any agnatic descendants : this is in accordance with the general principle that no person remoter than the customary heir is allotted a Koranic share.

2. If the customary heir is a collateral, then (provided that there are no female descendants) the uterine brothers and sisters become Koranic sharers, and (*a*) if there is only one of them, he or she takes 1/6 of the estate ; (*b*) if there are two or more, they divide 1/3 of the estate amongst themselves equally irrespective of their sex.[19]

(viii) No collateral remoter than sister is a sharer.

619. Under Hanafi law no female collateral,[20] remoter than a sister or brother, inherits as a sharer.[21]

[17] Bail. I. 689 (699), 690 (700); Macn. *Inh. Prec.*, case 73. Uterine relations cannot succeed unless they are nearer than customary heir, or nearest male agnate, i.e. there must be no male agnate amongst either descendants or ascendants. They are also excluded by female agnatic descendants apparently because then share allotted to females nearer than customary heir is taken up by the female descendants, and not left for uterine sister & brother, so where there was daughter & uterine sister, latter excluded : *Mothooranath Mazoomdar* v. *Eusuff Ali K.*, (1870) 14 W. R. 356.

[18] See s. 601, com., (*b*) on p. 828.

[19] *Sirajiya*, Jones, VIII. 219, 279, Rumsey, 16 : HALF BLOOD originally not competent to inherit in England, but under Inheritance Act, (1833) 3 & 4 Will. IV. c. 106, s. 9 "any person from whom descent is to be traced by the half blood shall be capable of being his heir," Goodeve, *Real Property*, (1897, 4th ed.) 149.

[20] No male collateral except uterine brother is sharer. Nor are any male agnates sharers—they have right to be residuaries—with sole exception of father & true grandfather, who retain rights as residuaries & still are sharers when they are not nearest agnates (or customary heirs), i.e. where they co-exist with descendants.

[21] Nor do they become co-residuaries with nearest male agnate (or customary heir).

Such remote females can inherit only in the character of "distant kindred," and only in the absence of all such blood relations as are competent to be sharers or residuaries.[22] Thus a niece, or any other female relation remoter than a niece, or any uterine relation remoter than a uterine brother or sister, is excluded from inheritance if there is any male agnate howsoever remote. In this regard, however, the niece, female cousin, etc., are on the same footing as the nearest male cognate, e.g. the son of a daughter, who is similarly excluded.

SECTION 619.
1.—Sister remotest sharer.
2.—Niece not sharer nor residuary.

PRIORITIES AMONGST FEMALES FOR BEING SHARERS.

The rules for priority as Koranic sharers are similar in the case of female agnatic descendants and sisters; the mother and other female ascendants are placed in a category of their own:

(1) DAUGHTER—viz. the nearest female agnate; if there survives no son, she is entitled to a share of 1/2; two or more taking 2/3.
(2) SON'S DAUGHTER[23]—rights liable to be reduced to 1/6 by presence of (1).
(3) SON'S SON'S DAUGHTER[23]—bears same relation to (2), as (2) bears to (1).
(4) MOTHER—share liable to be reduced by existence (*a*) of (1), (2), or (3), or—(*b*) of two or more of (5), (6), or (7).
(5) FULL SISTER[23]—becomes residuary if (1), (2), or (3) exists.
(6) CONSANGUINE SISTER,—bears same relation to (5), as (2) bears to (1).
(7) UTERINE SISTER AND UTERINE BROTHER,[23]—their rights depend on (1), (2), (3).

The female descendants, ascendants and collaterals, are thus seen to form one series. Their rights depend on each other's, though the rules relating to the female ascendants and collaterals do not follow exactly the analogy of those relating to descendants.

Rights of female descendants and collaterals interdependent.

(ix) Anomalous or exceptional cases.

620. The grandmother and the sisters and brothers in certain circumstances (s. 624) inherit neither as pure sharers nor as pure residuaries.[24]

Grandmother, brothers and sisters:

Each sharer is entitled to take first his/her respective fraction of the estate. If all the fractions added together exceed unity, and therefore cannot be satisfied in full, the fraction to which each sharer is entitled must abate rateably: s. 610(1): this process is called "increase" or "aul" in Arabic.[25]

INCREASE OR AUL.

[22] Sharers & residuaries together include (*a*) all male agnates, (*b*) female agnates not remoter than sister, (*c*) some cognates, viz. (i) some of true grandmothers, (ii) uterine sisters & brothers.

[23] They become sharers if nearest male agnate (or customary heir) is remoter than themselves: & it is assumed in these cases that he is remoter.

[24] These cases referred to in detail: s. 623, *ill.* (22) (case of *Himariyya*), p. 867; see s. 624, pp. 872 ff.

[25] Bail. I. (723); s. 610(1), p. 843.

SECTION 620. Sections 621 to 625 deal with cases where not only do the shares not exceed unity, but where after satisfying the sharers in full, some residue is left, or where there are no sharers at all.

§ 4.—RESIDUARIES : SECOND MODE OF INHERITING.

I. PERSONS WHO INHERIT AS RESIDUARIES.

621. The residue of the estate (if any) left after the Koranic sharers have received their shares, devolves upon the following persons,—

A.—Male agnates.

(1) The nearest[1] male agnate or agnates,[2] subject to s. 621(4)(*b*);

B.—Female agnates,—

(2) such female agnatic descendants as are—

(1) descendants,

(*a*) in the same line as the nearest male agnate, or

(*b*) intermediate between the nearest male agnate, and the nearest female agnates, provided that the nearest male agnate is a descendant;

(2) ascendants,

(3) [the mother to the extent referred to in s. 615];[3]

(3) collaterals.

(4) full or consanguine sisters when either—

C.—Sister as residuary.

(*a*) the brother (full or consanguine respectively) is the nearest male agnate, or

(*b*) the nearest male agnate is remoter than the full or consanguine brother (as the case may be), and there co-survive(s) with the sister any female agnatic descendant(s).[4]

Remote male agnates.

A male agnate, however remote, is competent to inherit as residuary.[5] He may, however, be excluded in one of two ways : (1) If a male agnate nearer

[1] See s. 622, as to the order of priority.

[2] Male agnate = *asaba* (pl. *asabat* =) customary heir, (e.g. paternal uncle's son) is residuary, but not maternal half uncle : *Syed Ali* v. *Nyaz Ali*, [1885] 5 All. W. N. 277. As only nearest succeed, pre-deceased son's son excluded by son : (*Moolla*) *Casim* v. (*Moolla*) *Abdul Rahim*, (1905) 32 I. A. 177 = 33 Cal. 173.

[3] MOTHER not strictly residuary. She is included here to complete the three divisions of relations - descendants, ascendants & collaterals. Law completely developed only in case of descendants. Sect. 615, com.

[4] *Mehrjan Begam* v. (*Nawab Mir*) *Nurudin*, (1899) 24 Bom. 112. This is the only situation in which customary heir (i.e. nearest male agnate) is deprived of right to succeed to (residue of) estate, in order that he might make room for another relation. In all other cases he is allowed to remain (nominal) residuary, though there may be little or no residue left. Sect. 604(*d*), (p. 831), s. 610, p. 843, *n.* 4, p. 834, *n.* 19.

[5] *Rahim Baksh* v. *Muhammad Hasan*, (1888) 11 All. 1 (father's paternal cousin); *Abdur Samad S.* v. *Chinnathambi S.*, (1918) 37 M. L. J. 509 (great grand-father's great grand-father's descendant, viz. of ascendant in 7th generation is residuary); *Shah Ilahi Buksh* v. *Shah Karim Ali*, (1905) S. D. A. Rep. (BENG) Sel. Rep. 131; *Mohidin Ahmid K.* v. *Muhammad*, (1862) 1 Mad. H. C. R. 92 = 1 Ind. Jur. (*O. S.*) 132 (agnatic descendant of paternal great grandfather); *Syud Showkut Ali* v. *Ahmud Ali*, (1867) 8 W. R. 39 (descendants of paternal grandfather's brother are residuaries, & exclude such granddaughters as are cognates); *Mahomed Haneef* v. *Mahomed*, (1874) 21 W. R. 371. List of male agnates see s. 622, p. 863.

than himself, survives the deceased, the nearer will exclude the remoter ; (2) if (even though he is the nearest male agnate to survive, yet) his relation to the deceased is remoter than that of a brother, and if his co-survivors include both a sister and a daughter, (or son's daughter) then the sister becomes residuary and the remoter male agnate is excluded : s. 621(4), (6). Female agnatic descendants and the full and consanguine sisters are competent to be residuaries, but no females remoter than the sisters are so competent. SECTION 621.

Absence of sharers.

The whole estate is taken by the residuaries if there is no sharer.

With reference to s. 621(4)(*b*), it should be borne in mind that the sister must, on principle, be given some portion of the inheritance in cases where the customary heir (or the nearest male agnate) is remoter than herself.[6] For the principle underlying the Koranic amendments of the customary law is to provide for those who are nearer than the customary heir : such provision might have taken one of three forms : Sister when residuary.

(1) the sister might have been given a Koranic share : in which case she would have ranked 'pari passu' with the descendants, and might have been the means of abating the daughter's share by 'aul' :

(2) she might on the analogy of the son's daughter's case have been made co-residuary with the customary heir, notwithstanding that the latter is remoter than herself,[7] but the rights of the male descendants were probably considered too important and well established to be ousted ; [8] whereas a collateral could be excluded more easily, to make room for a nearer claimant : or She may have been made co-residuary with remoter agnate.

(3) she might have taken the place of the customary heir, excluding him from the residue.

The harmonious development of the law relating to collaterals is less likely than of the law relating to descendants. The latter succeed in the far greater number of cases. At the same time when collaterals succeed, the necessity for providing for a larger number of claimants—since there may be claimants amongst both descendants and ascendants to be provided for—must also necessitate new modes of succession. See p. 864, heads 2 and 3.

622. Under Hanafi law, for the purposes of inheriting as a residuary, priority amongst male[9] agnates is computed in accordance with the folowing rules : [10] II. PRIORITIES AMONGST THE RESIDUARIES.

(1) Descendants are preferred to both ascendants and collaterals.[11] A.—Descendants.

[6] See s. 604, com., head II. thereto.

[7] Nearer female descendants become co-residuaries with remoter female descendants : s. 623, com., p. 864, 2, 3.

[8] Hanafi interpretation of law is here referred to ; in Shia law nearer female, whether agnate or cognate, excludes remoter male, agnate or cognate : pp. 901 f.

[9] As regards females, see com.

[10] Cf. Bail. I. 686, (*ll.* 4-5) (696), 695 (705), 696 (706) ; *Minhaj*, 248 (Bk. 28, s. 3).

[11] E.g. a son, *or* grandson *or* great grandson is preferred to & excludes, father (& *a fortiori*, grandfather) from residue.

SECTION 622.
B.—Ascendants.
C.—Collaterals.

(2) Ascendants are (subject to s. 624, below), preferred to collaterals.[12]

(3) Amongst descendants and ascendants respectively those between whom and the deceased the fewest degrees intervene are preferred to the others.[13]

(4) Amongst collaterals,—

Descendant—
i—of nearest common ancestor preferred,
ii—of same common ancestor if links fewest.
iii—full blood preferred to consanguine in same line.

(*a*) The descendant howsoever low of a nearer common ancestor[14] is preferred to the nearest descendant of a remoter ascendant.[15]

(*b*) Where two or more collateral relations of the deceased are descended from the same common ancestor, he is preferred who is nearest to the said common ancestor.[16]

(*c*) The full blood relations are preferred to the consanguine relations in the same line,[17] viz. where two or more collateral relations of the deceased are descended from the same common ancestor, and are removed by the same number of degrees from the said common ancestor,[18] and one of them has both the male and the female ancestors in common with the deceased, while another has only the male ancestor in common with the deceased,—then the former is preferred.[19]

Predeceased not represented by heir or successor.

In every case the nearer excludes the more remote, so that the son excludes a predeceased son's son (*i.e.*, grandson of the propositus), and the father excludes the grandfather, the brother excludes the nephew, or uncle, p. 832.

[12] E.g. great grandfather preferred to brother. On this point there may have been some divergence between pre-Islamic customs prevailing in different places or amongst different tribes. According to some customs, brother (as son of grandfather) was, it seems preferred to great grandfather.

[13] E.g. son preferred to grandson ; & father to grandfather.

[14] "Common ancestor" = nearest paternal ancestor of propositus from whom claimant can also trace descent.

[15] E.g. F, father of propositus, is common ancestor of (1) propositus, (2) B, his brother, and (3) of all descendants of B, as, for instance, of B's son's son (BSS). On other hand, ancestor who is common to propositus & his uncle, is grandfather of propositus (FF). So BSS is preferred to uncle. See Macn., 84, 101, 108, 111, 153 = *Prec. Inh.* cases 2, 26, 29, 35, 83.

[16] E.g. brother preferred to nephew, as brother one degree from father (common ancestor); and nephew is two degrees from him, being father's son's son, Macn. 101 = *Prec. Inh.*, case 26.

[17] *Karamatali* v. *Sa'adat Ali*, (1932) 8 Luck. 228 (uncle of half-blood preferred to cousin of half-blood).

[18] I.e. if claimants are, all of them, either sons, or grandsons, or great grandsons, etc., of common ancestor, (1817) East's Notes, Case 65, SUPREME COURT, CAL.; Macn., 448 = *Dig. Inh.*, No. 5.

[19] I.e. (i) descendant of full brother of deceased, preferred to descendant of consanguine half brother of deceased (descendants of both being in same line), (ii) descendant of full brother of an ancestor of deceased, preferred to descendant of consanguine brother of same ancestor of deceased (both being in the same line). E.g., full brother preferred to consanguine half brother ; cf. s. 61. One who has only female ancestor in common is not agnate & cannot compete with agnates.

The RESIDUARIES may be enumerated in their order of PRIORITY,[20] as follows :— SECTION 622.

RESIDUARIES IN THEIR OWN RIGHT.[21]	*RESIDUARIES BY OR WITH ANOTHER.*[22]	RESIDUARIES.
1. SONS.	Daughters.	Descendants.
2. SONS' SONS.	Sons' daughters. [Son's daughter may be residuary though there is no son's son,—provided there co-survives a male agnate in a lower generation.].[23]	
3. SONS' SONS' *and male agnatic descendants.*	Sons' sons' daughters. [*As above, mutatis mutandis.*]	
4. FATHER.	[Mother.][24]	Ascendants.
5. FATHER'S FATHER.		
6. FATHER'S FATHER'S FATHER *and other under male agnatic ascendants.*		
7. FULL BROTHERS.	Full sisters. [Full sister may be residuary though there is no full brother.]	Collaterals. (i) Descendants of father : brothers and their descendants.
8. CONSANGUINE HALF BROTHERS	Consanguine sister. [*As above, mutatis mutandis.*]	
9. FULL BROTHERS' SONS.		
10. CONSANGUINE HALF BROTHERS' SONS.		
11. FULL BROTHERS' SONS' SONS.		
12. CONSANGUINE BROTHERS' SONS *and so on howsoever low.*		
13. FATHER'S FULL BROTHERS.[25]		
14. FATHER'S CONSANGUINE BROTHERS.		(ii) Descendants of grandfather : uncles and their descendants.
15. FATHER'S FULL BROTHERS' SONS.		
16. FATHER'S CONSANGUINE BROTHERS' SONS.		
17. FATHER'S FULL BROTHERS' SONS' SONS.		
18. FATHER'S CONSANGUINE BROTHERS' SONS' SONS, ETC.		
19. FATHER'S FATHER'S FULL BROTHERS.		(iii) Descendants of great grandfather.
20. FATHER'S FATHER'S CONSANGUINE BROTHERS.		
21. FATHER'S FATHER'S FULL BROTHERS' SONS.		
22. FATHER'S FATHER'S CONSANGUINE BROTHERS' SONS, ETC.		

The list given above will be found to agree with the list in columns A and B of the large table of sharers and residuaries, given in the chapter, from which will also appear who are the possible sharers entitled to take Koranic shares, in priority to each of the abovementioned residuaries.[26]

[20] Bail. I. 691 (701).

[21] These are all male agnates, i.e. *asaba,* who were customary heirs. Cf. s. 61, com., p. 151.

[22] I.e. female agnates, are co-residuaries with the male agnates, mentioned in first column of list ; they are sometimes referred to (in this work) as Koranic residuaries, to show that their rights arise under Koran.

[23] Bail. I. 687 (697). See p. 838, *n.* 24(ii).

[24] Mother not a residuary ; but she occupies anomalous position ; see s. 615, com.

[25] See *Sahu* v. *Fazal,* (1933) 60 I. A. 116, 118 = s. 615, *ill.* (referring to paternal uncle as residuary).

[26] Thus (*a*) SONS get residue subject to shares of *husband* or *wife, father* (or

SECTION 622. The rules of priority in s. 622 are restricted, it will be observed, to the relative claims of male agnates. When female agnates come into competition with each other as regards the residue, their rights depend not upon a comparison of their proximity with each other, but upon their respective positions relative to the customary heir, or nearest male agnate.[27] This will appear from the following statement of the conditions on which female agnates succeed as residuaries :

No female (agnate[28]) inherits as a residuary except—

1. When she is in the same line with the nearest male agnate (she is then a residuary,[29]) or
2. When being a descendant, she is in a nearer line than the nearest male agnate, provided (i) that the said nearest male agnate is a descendant,[30] and (ii) that there are other female descendants who are nearer than the claimant and who are Koranic sharers.[31]
3. The full (or failing her, the consanguine) sister may be residuary by herself, provided that there is a female descendant and no male agnate as near as, or nearer than, herself.

Hence there are no rules referring to the relative priorities of females as residuaries.

III. DISTRIBUTION AMONGST RESIDUARIES : 'Per capita' : males double share.

623. The residue of the estate (left after the Koranic sharers have taken their respective shares) is divided amongst the nearest residuaries (s. 622) per capita (and not per stirpes)[1] equally, but so that each male receives twice as large a portion of the residue as each female.[2]

true grandfather) & *mother* (or *true grandmother*); (*b*) SONS' SONS subject to said shares & to that of *daughter*; (*c*) SON' SONS' SONS & FATHER or GRANDFATHER, subject to said shares, & to that of *sons' daughters*; (*d*) FULL BROTHERS subject to said shares, & to that of *uterine brothers or sisters*,—but see case of *Himariya*, s. 623, p. 867, *ill.* (22); (*e*) CONSANGUINE BROTHERS & all later agnates take subject to all those shares & to that of *full sister*.

27 Thus, (*a*) if there survives DAUGHTER, *D*, & SON'S DAUGHTER, S*D*, right of either of them to succeed as residuary does not depend on her respective proximity to deceased, but on question whether nearest male agnate (or customary heir) is in same line with *D*, or S*D*, or some one else. (*b*) So with *D* and S*D*, if there survives FATHER, father becomes residuary; (*c*) if there survive BROTHER & SISTER with *D*, S*D* (& no other claimant) then sister would be residuary.

28 Cognates (whether male or female) do not inherit as *residuaries* in any case. They take, *either* (*a*) by "return," & this can occur when those alone exist who are sharers, [viz. (i) true grandmothers, & (ii) uterine brothers & sisters], *or* (*b*) they (cognates) inherit as distant kindred, see s. 626.

29 Except in the one case in s. 621(4)(*b*).

30 If nearest male agnate is other than descendant, female descendants are sharers, but cannot be residuaries.

31 If no female descendants in higher line co-survive, the female agnate may be (*a*) co-residuary with male agnatic descendant, in her own line (provided he is nearest male agnate), or (*b*) sharer, provided male agnate is remoter than herself, whether or not he is descendant.

1 As, e.g. if (1) there is son of one brother, & ten sons of another, *or* (2) son of one paternal uncle, ten sons of another,—then each takes 1/11.—Bail. I. 692 (702). Here customary rule seems to be left unaltered.

2 Bail. I. 687 (par. 2) (697); *Minhaj*, 248, 249. Females take only 1/2 as much as the males, since (i) on ground of proximity both are alike, (ii) on ground of

N.B. { The claimants being those named in each illustration, the estate will be divided as stated :— SECTION 623.

(1)	2 daughters	*joint share*		2/3
	son's son	*residue* 1/3		1/9
	daughter of a son[3]			2/9
(2)	Widow	*share*		1/8
	son	*residue* 7/8		14/24
	daughter			7/24
	2 brothers[4]	*excluded.*		
(3)	Husband	*share*		1/4
	2 daughters	*joint share*		2/3
	sister	*residue*		1/12
	son of father's uncle[5]	*excluded.*		
(4)	Widow	*share*		1/4
	6 full brothers	*residue*	12/15 of 3/4 = 3/5, i.e. 1/10 each	
	3 full sisters[6]		3/15 of 3/4 = 3/20, i.e. 1/20 each.	
(5)	Full sister	*share*		1/2
	uterine brother	*share*		1/6
	uterine sister	*share*		1/6
	consanguine brother	*residue* 1/6		1/9
	consanguine sister			1/18.
(6)	3 paternal uncles	*residue*		1/3
	3 daughters[6]	*joint share*		2/3.
(7)	5 grandmothers	*joint share*	1/6, i.e. 1/30 each	
	5 full sisters	*joint share*	2/3, i.e. 2/15 each	
	paternal uncle[7]	*residue*		1/6.
(8)	Daughter	*share*		1/2
	6 grandmothers	*joint share*	1/6, i.e. 1/36 each	
	4 daughters of son	*joint share*	1/6, i.e. 1/24 each	
	paternal uncle[7]	*residue*		1/6.
(9)	4 wives	*joint share*	1/4, i.e. 1/16 each	
	3 grandmothers	*joint share*	1/6, i.e. 1/18 each	
	12 paternal uncles[7]	*residue*	7/12 i e. 7/144 each.	
(10)	6 grandmothers	*joint share*	1/6, i.e. 1/36 each	
	9 daughters	*joint share*	2/3, i.e. 2/27 each	
	15 paternal uncles[7]	*residue*	1/6, i.e. 1/90 each.	

Illustrations.

priority of time & old-established rights, male is *potior jure*. Macn., 112, 161 = *Prec. Inh.* cases 37, 86 ; *Ali Buksh Khan* v. *Kaeem Beebee*, (1804) 1 S. D. A. (BENG.) 83.

[3] Macn., *Prec. Inh.*, case 53 ; see further *ill.* s. 623, com. first head, p. 868.

[4] *Bhanoo Beebee* v. *Imam Buksh*, (1803) 1 S. D. A. (BENG.) 68 (Macn. *Dig. Inh.* 21) If there were no son, daughters would take 1/2 & residue (3/8) would go to brothers : *Musa* v. *Kadar*, (1928) 55 I. A. 171.

[5] *Meherjan* v. *Shajadi*, (1899) 1 Bom. L. R. 549. Court with super-abundant caution left undecided what part of estate sister took as residuary : but *submitted* that question admits of no doubt.

[6] Bail. I. 709 (719). [7] Bail. I. 710 (720).

SECTION 623. DINARIYA.

(11) Wife[8] — *share* — 1/8
grandmother — *share* — 1/6
2 daughters — *joint share* — 2/3
12 brothers, full sister — *residue* 1/24 — 24/600, i.e. 2/600 each; 1/600.

The estate consisting of 600 dinars, the wife takes 75, the grandmother 100, the two daughters 400, and each brother 2 and the sister I dinar.[9]

IMTIHAN.

(12) 4 wives[10] — *joint share* — 1/4, i.e. 1/6 each
5 grandmothers — *joint share* — 1/6, i.e. 1/30 each
7 daughters — *joint share* — 2/3, i.e. 2/21 each
9 consanguine sisters[10] — *residue* — 1/24

(13) Father — *share* — 1/6
mother — *share* — 1/6
2 daughters — *joint share* — 2/3
son's son, son's daughter — *residue* — There being no residue these take nothing.

MERWANIYA.

(14)	6 full sisters	*original share*	2/3	*Total of original share* =	7/6	*abated share of each*	4/7
	9 uterine sisters		1/3				2/7
	6 Grandmothers		1/6				1/7
(15)	Husband[10]		1/2		8/6		3/8
	2 full sisters		2/3				4/8
	mother		1/6				1/8
(16)	Grandmother[11]		1/6		7/6		3/7
	full sister		1/2				1/7
	2 uterine sisters		1/3				3/7
	consanguine sister		1/6				1/7
(17)	Husband[11]		1/2		8/6		3/8
	mother[12]		1/6				1/8
	2 full sisters		2/3				4/3
(18)	Husband		1/2		9/6		3/9
	mother		1/6				1/9
	full sister		1/2				3/9
	consanguine sister		1/6				1/9
	uterine sister		1/6				1/9
(19)	Husband[13]		1/2		8/6		8/9
	2 full sisters		2/3				4/9
	2 consanguine sisters		*excluded*				*excluded*
	2 uterine sisters		1/3				2/9

[8] Bail. I. 724 (734): This case is called *Dinariya*, from single *dinar* taken by sister: also *Da'udia* from Da'ud-ut-Taj, who decided it.

[9] Bail. I. 725 (735): This case is called *Imtihan* or examination.

[10] Bail. I. 713 (723). [11] Bail. I. 714 (724).

[12] Mother takes 1/6, and not 1/3 there being two sisters.

[13] Bail. I. 724 (734) case called MERWANIYAH, having occurred in time of Merwan.

(19A)	Widow[14]	1/8				3/27	SECTION 623.
	2 daughters	2/3		27/24		16/27	
	father[14]	1/6				4/27	MIMBARIYA.
	mother	1/6				4/27.	

(20) The following case is called the "HAMZIYA" from Hamza, "who being questioned regarding it, gave these answers" : [15] HAMZIYA.

SURVIVING CLAIMANTS.	ACCORDING TO ABU BAKR AND IBN ABBAS.	ACCORDING TO ALI.	ACCORDING TO ZAID.
3 grandmothers	*joint share* 1/6	*joint share* 1/6	*joint share* 1/6
grandfather	*residue* 5/6	*residue* 1/6	*joint share* 5/6
full sister	*excluded*	*share* 1/2	
consanguine sister	*excluded*	*share* 1/6	*excluded*
uterine sister	*excluded*	*excluded*	*excluded*

(21) The deceased X dies leaving father, F (who takes 1/6); mother, *M* who takes 1/6; and (iii, iv) two daughters, *D*, and *D*A each taking 1/3. One of the daughters *D*A dies leaving the three F, M, and *D* as claimants. The subsidiary division of the estate of *D*A depends upon whether the deceased X was a male or a female—viz.— MAMUNIYA.

(*a*) if X was a male, his father F would be the true grandfather of *D*A and would (i) according to Abu Bakr exclude *D*A's sister, *D*, from the estate; (ii) according to Zaid, *M* the grandmother would take 1/6 and the residue be divided between the grandfather, F, and the sister, *D*, in the proportion of 2 : 1.

(*b*) if X was a female, then F would be a false grandfather of *D*A, and he would be excluded by *M* and *D* (viz. by *D*A's true grandmother and sister, respectively, who would take first 1/6 and 1/2, respectively, and again the 1/3 residue by "return").[16]

(22) If a woman dies leaving her surviving,—husband, [1/2] mother [1/6], uterine brothers, uterine sisters [1/3], full brothers and full sisters— HIMARIYA OR MASHRAQA.

[14] This case (called MIMBARIYA) was "answered at once by the Khalif Ali while he was haranguing the people in the *mimbar* or pulpit at Cufa. "It is recorded that when the person who consulted Ali, was much dissatisfied with his answer & asked 'whether the widow was not legally entitled to 1/8,' the Khalif said rapidly 'it is become 1/9' & proceeded in his harangue with his usual eloquence." Jones, *Works* VIII. 299 from *Al Sharifiya*, which contains vivid accounts of early decisions & a criticism of another case by "the son of Abbas, whose opinions were always rather ingenious than solid," "if an arithmeticain could number the sands, yet he could never make two halves & a third equal to a whole."—but says the commentator, "his opinion has never been adopted"—*ib.* 297, 298.

[15] Bail. I. 724 (734), (HAMZIYAH): Zaid's view: "The grandmothers should have 1/6; the remainder to be divided between the grandfather, the full sister and the half sister by the father." Unlikely that such strange conjunction of heirs should present itself for the harassment of Courts of India.

[16] Bail. I. 725-726 (735-736), *Ill.* (20) = MAMUNIYA. Khalif Mamun (when selecting judge for Basra) put it to Yahya Ibn Aktum, having low opinion of him. But Yahya enquired sex of X. thus showing that he knew the law, & was selected. Facts of case stated very cryptically in *Fatawa Alamgiri*: "This was a case of two parents & two daughters, but one of them died, & left whom she did leave," etc.

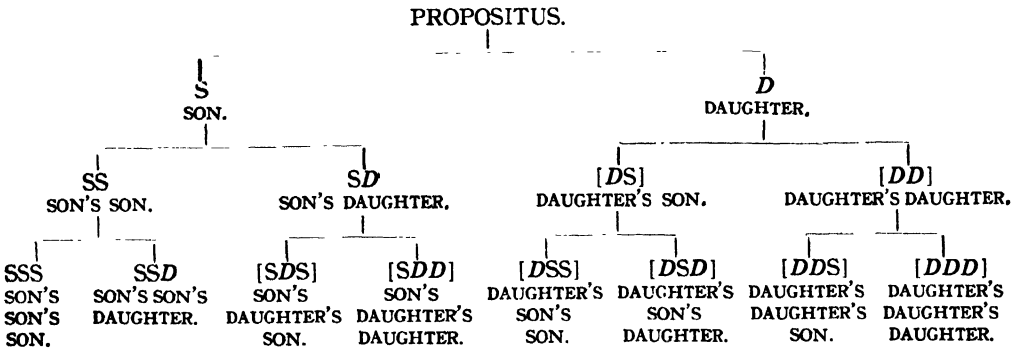
SECTION 623. [no residue is left for the brothers and sisters] : Abu Bakr, Ibn Abbas and the Hanafi authorities apparently hold that the full brothers and sisters take nothing.[17] But Ibn Mas'ud, Zaid ibn Thabit, Umar and Shafii[18] hold that the full and uterine brothers and sisters should all participate in the 1/3 of the estate after the husband and mother have taken their shares.[19]

KHARQA. (23) A person dies leaving (i) mother (ii) grandfather (iii) sister : the opinions as to the inheritance of the estate are greatly divided,—

(*a*) Abu Bakr : mother 1/3, grandfather 2/3 (excluding sister).
(*b*) Zaid : mother 1/3, grandfather 4/9, sister 2/9.
(*c*) Ali : mother 1/3, sister 1/2, grandfather 1/6.
(*d*) Ibn Abbas (i) : mother 1/3, sister 1/2, grandfather 1/6.
(*e*) Ibn Abbas (ii): mother 1/3, sister 1/3, grandfather 1/3.
(*f*) Umar agreed with Ibn Abbas(i) = (*d*) above.[19]

TABLE OF DISTANT KINDRED : DESCENDANTS

N.B.— { (i) Symbols relating to the "distant kindred" enclosed in [ ]. (ii) The rest are sharers or residuaries. (iii) *Italics* refer to females.



Sects. 612, 613, 617 and 618 have already stated the rights of female descendants, and of the sisters, as Koranic shares. Their rights as (Koranic) residuaries are included in the present section, viz.—

1.—RIGHTS OF DAUGHTERS AND FEMALE AGNATIC DESCENDANTS. 1. Female descendants[20] in the same line as the nearest male agnate or customary heir (which implies that the customary heir is a descendant),

[17] Bail. I. 723 (733); *Minhaj*, 250 (Bk. 28, s. 6). Case called MASHRAQA (from *sharq* participation), or HIMARIYYA, from *himar* = ass, because full brothers in arguing that they should be entitled to succeed with (not be excluded by) their uterine brothers & sisters, said to Umar : "Oh Commander of the Faithful, grant that our father was an ass, still we had one mother."

[18] *Minhaj*, (Shafiite authority) 250, (Bk. 28, s. 6) : "In this particular case, the whole brother participates along with the two uterine brothers or sisters, in the third assigned to them by the Koran ; but, if in these circumstances, it is the case of a half brother on the father's side and not a whole brother, the half brother inherits nothing."

[19] Bail. I. 724 (734). Owing to the difference of opinions this case referred to as KHARQA = unsettled point.

[20] Only agnates are referred to.

always become Koranic co-residuaries with him, taking the residue (if any) [21] in such proportions that the males get twice as much as the females ; SECTION 623.

(2) The rights of female descendants [20] who are nearer than the customary heir—there may be such nearer female descendants when the customary heir is either (i) a lower descendant, or (ii) an ancestor, or (iii) a collateral (there being, in cases (ii) and (iii), no male agnatic descendants), are as follows : Shares of daughters and female agnatic descendants.

(*a*) The female descendant(s) [22] in the generation nearest to the deceased [23] become(s) Koranic sharer(s) (taking 1/2 or 2/3 of the estate according as there is only one or more than one).

(*b*) If there are such female descendants in more grades than one— When share of daughters exhausted—

(i) those in the generation nearest to the deceased take the Koranic share 1/2, if one ; they take 2/3, if more ;

(ii) if there is only one in the first grade then she takes 1/2, leaving 1/6 to those in the generation next in proximity to the deceased ;

(iii) if there is any in a grade intermediate between the grade of those who are entitled to the Koranic share and of the customary heir,—then she becomes Koranic co-heir with the customary heir ; provided that the customary heir is a descendant.[24]

The rules may be re-stated in the following terms— In which case she becomes co-residuary with a lower male agnatic descendant.

1. The nearest female descendant(s) [25] become(s) Koranic sharer(s); provided that they are nearer than the customary heir.

2. Those female descendants [25] who are in the same generation as the customary heir, become not sharers, but co-residuaries with him.

3. Female descendants [25] intermediate between the two classes above referred to, become co-residuaries with the nearest male agnate, provided that he is a descendant.[26]

These rules will become clear through illustrations : *Illustrations.*

Thus if P dies leaving—

1. S [27] and *D* [28]— 1.—Daughter and son.

S is the customary heir, and *D*, (being in same line as S) will be (Koranic heir, or) residuary with S, *D* taking 1/3 and S, 2/3.

[21] There may be no residue left ; e.g. where there is any residuary surviving in *ill.* (13)-(18), p. 866, there is nothing left for him to take.

[22] Only agnates are referred to.

[23] I.e. (i) daughter, (ii) failing her, the daughter of a son, then (iii) the daughter of a son's son, and (iv) so on.

[24] It is only when nearest male agnate (or customary heir) is descendant, that intermediate position of the female agnatic descendant becomes clear. If, e.g. there are two daughters, *D* & *Da*, with S*D* & SSS, then *D* & *Da* take their 2/3 ; & SSS takes residue, making S*D* (who is clearly nearer than himself & ought to inherit as much as he) co-residuary with himself. But if instead of SSS there were F, father, or even B, brother,—intermediate position of S*D* is lost sight of, & she does not inherit.

[25] Only agnates are referred to. [26] Bail. I. 687 (697).

[27] S stands for "son" or "son's" : thus, SS means son's son or son's son's. *D* stands for "daughter" or "daughter's" e.g. *DD* means daughter's daughter, *D*S daughter's son, *DD*SS daughter's daughter's son's son.

[28] Subject, of course, to Koran, IV. 11.

SECTION 623.

2.—Daughter and son's son.

2. If there survive *D* and SS,[27]—

D is nearer than SS, the customary heir, and will consequently take 1/2 as Koranic sharer, leaving 1/2 to SS as residuary.

3.—Daughter, son's son and son's daughter.

3. If there survive *D*, SS and S*D*,—

D will take 1/2, and SS and S*D* will take the other half in the proportion of a double share to a male and a single share to a female ; *i.e.*, SS will take 1/3, S*D*, 1/6.

4.—Two daughters, son's son and son's daughter.

4. If SS, *D*, *D*A and S*D* survive,—

D and *D*A will take 2/3 between them (1/3 each) leaving 1/3 to be divided by SS and S*D* (i.e. S will take 2/9 and S*D* 1/9).

5.—Daughter, son's daughter, son's son's son.

5. *D*, S*D* and SSS,—

D takes 1/2 as Koranic sharer, leaving 1/6 as the Koranic share to S*D*, and the residue of 1/3 to SSS.

6.—The same with son's son's daughter.

6. *D*, S*D*, SSS, SS*D*, SS*D*A, SS*D*B,—

D and S*D* will take 2/3 between them (*i.e.*, *D* 1/2 and S*D* 1/6) and the residual 1/3 will be divided amongst SSS, SS*D*, SS*D*A and SSS*D*B ; SSS taking 2/15, the other three 1/15 each.

7.—Daughter, son's daughter, son's son's daughter, son's son's son and his sister.

7. *D*, S*D*, SS*D*, SSSS, and SSS*D*,—

SSS*D* becomes Koranic co-heir with SSSS : the two take the residue *D* and S*D* take their Koranic shares aggregating to 2/3 ; but there is no Koranic share for SS*D* in the third generation, though SSS*D* in the fourth generation succeeds as residuary (Koranic co-heir). To remedy the exclusion of SS*D*, she is made Koranic residuary (co-heir) with SSSS who is not in the same line, but in a lower grade than herself.

8.—Two daughters, and the same.

8. *D*, *D*A, S*D*, SS*D*, SSSS, SSS*D*, then,—

D and *D*A take the 2/3, SSSS is the customary heir with whom not only SSS*D* (who is in the same grade as himself) but also S*D* and SS*D* in the higher grade, become residuaries or Koranic heirs.

i—Principle that females nearer than customary heir should be provided for.

These rules are based on the paramount fact that the proximity that the claimants bear to the deceased, is greater than that borne by the customary heir. The customary heir (or the nearest male agnate) being recognized as having the right to inherit, it is obvious that those who are nearer than the customary heir ought to inherit a portion,—viz. *all* those female descendants who are nearer than the customary heir ought to inherit, notwithstanding that some of them may be nearer than others. On the same principle when a daughter, mother and sister co-survive with a brother or remoter male agnate, all the three females are entitled to succeed although the daughter is nearer than the mother,[28] and they are both nearer than the sister. Here the realities of the situation have triumphed over verbal and formal difficulties : law seems to have moulded itself for man instead of man having to submit to law. An exception to the principle so stated may, no doubt, be found in the case of the mother and true grandmother, only the nearest of whom can be the sharer, and the remoter does not participate in the estate in any form.[29] The case must, however, be extremely rare where a deceased person dies leaving

[29] See also HIMARIYAH = s. 623, *ill.* (22), pp. 867 f.

him surviving such a combination of ancestors as would require a comparison of their relative priorities, and it is not to such unusual cases that we must turn for discovering the principles of the law. In the case of the female descendants, the law is most frequently called into operation, and is most likely to be developed in accordance with principle. SECTION 623.

ii—Anomaly of excluding females who are nearer than the customary heir.

When the whole scheme of the Koranic reform is considered—which is to provide for those who, owing to the adoption of an extremely crude notion of kinship were excluded by the customary law—then the anomaly seems to lie not in that portion of the interpretation of the Koran which provides that female descendants who are nearer than the nearest male agnate should succeed with him, but the anomaly seems to be that there is no such provision in the case of female ancestors and collaterals, and that this provision is restricted (even in the case of female descendants) to cases where the nearest male agnate is a descendant. In these respects the Shia authorities have taken a wider and more liberal view.

iii—Explanation suggested.

The explanation of the restriction last referred to seems to be, that though when the claimant and the customary heir are both descendants, the greater or less relative proximity to the deceased of each claimant can be perceived immediately, yet it is no longer easy to say that a female descendant is nearer than an ancestor ; and if the relative proximity of a female descendant and an ancestor is subject to doubt, the same doubt seems to be present when a female descendant has to compete with a collateral for whom a share has been ordained in the Koran.[30]

II.—SUMMARY OF FULL SISTER'S RIGHTS.

When the nearest male agnate is nearer than the sister (viz. where the nearest male agnate is a descendant or collateral) it need hardly be repeated that the (full) sister cannot succeed : s. 602. She can succeed only if there is no male agnate nearer than the (full) brother.

1.—As co-residuaries.

1. When the nearest male agnate is a brother, the sister becomes co-residuary with him.[31]

2.—As sharers.

2. When he is remoter than the brother, then the sisters become entitled to succeed as sharers, provided that there are no daughters or other female agnatic descendants who have a prior claim to take the share allotted for the nearer female agnates,[32] so that the sister cannot claim the Koranic share if the daughter is present; but—

3.—Residuaries without brother.

3. The sister becomes residuary (by herself, in case there is no brother surviving) when she co-survives[33] with female descendants.

4.—Priorities between full and consanguine sisters.

4. As regards the Koranic share taken by the sisters (when the customary heir is remoter than a brother, and there are no female descendants) there are

[30] Cf. Koran IV. 11, penult. sent. : cited at pp. 824 f. ; extensive rights of ancestors, both male & female, show that old simple priorities (of descendants over ascendants) can no more be guiding principle. It might be argued that this applies as between descendants & ascendants alone, & that where there is competition between descendant & collateral, greater proximity of descendant is clear : but old system of reckoning proximity seems to be assumed to have been altogether discarded.

[31] When collaterals succeed, husband/wife, daughter, mother all take shares.

[32] I.e. such as are nearer than customary heir.

[33] It is hoped that this harsh expression will be tolerated for its convenience.

SECTION 623. priorities similar to those amongst the female descendants. The full sister, if there is only one, takes her 1/2 share, and leaves 1/6 to the consanguine sister, whereas the uterine sister takes her share with the full sister as well as with the consanguine sister.

III.—SUMMARY OF THE CONSANGUINE SISTER'S RIGHTS.

As to the consanguine sister—1. She takes no part of the estate if the customary heir (or nearest male agnate) is nearer than herself, i.e., is a descendant or ascendant or a full brother, or if the full sister or sisters are residuaries by themselves ; ss. 621, 622.

1.—Excluded if nearest male agnate nearer than herself.

2. The consanguine sister becomes Koranic co-residuary when the consanguine brother is the nearest agnate, and when he is not excluded from the residue by the full sister in the manner above referred to.

2.—As residuary.

3. When the customary heir is remoter than the consanguine sister,—

(*a*) she becomes Koranic sharer provided that there is no female descendant nor full sister, and—(i) a single consanguine sister takes 1/2 of the estate, or (ii) two or more consanguine sisters take 2/3 of the estate in equal shares ;

(*b*) if there is no female descendant and there is one full sister—the sisters become Koranic sharers, and—(i) the full sister takes 1/2 as sharer, and (ii) the consanguine sister(s) take(s) 1/6 of the estate as Koranic sharer(s), and if there are two or more of them they divide it equally amongst themselves.

(*c*) if there are female descendants but no full sisters, the consanguine sister(s) become (Koranic) residuaries by themselves, in which case they take the residue excluding the sons of full brothers, and all remoter agnates (who would have been customary heirs) from any participation in the estate.[34]

IV.—SPECIAL RULES : GRANDFATHER, BROTHERS OR SISTERS : CO-SURVIVING.

624. Under the Shafii and Maliki [1] law,[2] the true grandfather, when he co-exists with agnatic [3] sister(s)[4] or brother(s), does not exclude the agnatic [3] sister(s) or brother(s) from inheritance,[5] but he may elect at his option,—

[34] *Siraj*, par. 8, II. 522, VIII. 219, Rums. 21, Macn. *Prec. Inh.*, 73 ; *Ameerun* v. *Ruheemun*, (1857) 2 Agra, 362.

[1] *Minhaj*, 252, (Bk. 28, s. 8). Abu Yusuf's & Imam Muhammad's view of Hanafi law seems to accord with s. 624, but Abu Hanifa's view prevails—according to which grandfather excludes brothers & sisters.

[2] See comment. In s. 624, take note of the distinction between *estate*, *residue*, *portion*, *aggregate*.

[3] Agnatic sister or brother = full or consanguine sister or brother.

[4] Sister excluded by the grandfather unless she co-exists with brother, except in case referred to in s. 624(4) (*Aqdaria*) which thus prefaced by *Sirajia* : "Know that Zaid the son of Thabit (on whom be God's grace) has not placed the sister full or consanguine as entitled to a share (*farz*) with the grandfather except in the case named *Aqdaria*," viz. s. 624, *ill.* (8), p. 874.

[5] Uterine sisters or brothers, who can be only sharers, are always excluded from their share by grandfather, "according to Abu Hanifa," Bail. I. 689 (699) *l.* 13. *Fat. Al.* gives only Abu Hanifa's view except that *Aqdaria* case is stated and explained. It is stated, however, in *Sirajia* : "The mother's children are excluded by the grandfather, as all the learned agree."

SECTION 624.

(1) to take 1|6 of the estate as Koranic sharer (leaving the residue to the sisters and brothers) ; or — 1.—To be pure sharer.

(2) to take 1|3 of the residue (leaving 2|3 of the residue to the sisters and brothers) ; or — 2.—To take 1/2 of residue.

(3) he may elect to divide [6] the residue with the sisters and brothers in the following manner, viz.,— — 3.—To participate in residue with brothers and sisters in which case—

(*a*) notionally the estate is apportioned amongst the grandfather and the sisters and brothers (full as well as consanguine),[7] so that each male is allotted twice as large a portion as each female ; and the grandfather takes the portion thus allotted to himself, but—

(*b*) the portions so allotted to the sisters and brothers, are consolidated into an aggregate, which is divided amongst the full sisters and brothers alone (to the exclusion of the consanguine sisters and brothers), provided that— — *a.*—First allotment as between grandfather and collaterals.

(*c*) in such a case if the said aggregate exceeds 1|2 of the estate,[8] and there survives only one full sister with one or more consanguine sisters, but no full brother, —then the full sister takes out of the said aggregate only 1|2 of the estate, and the consanguine sisters and brothers take the excess, dividing it amongst themselves so that each male gets twice as much as each female,[9] — *b.*—Then collaterals distribute amongst themselves.

(4) where there co-survives with the grandfather only one agnatic sister,[10] (and neither a brother [11] nor a daughter, nor other female agnatic descendant),[12]—the grandfather has another option, viz. of having 1|6 share allotted to himself, and 1|2 to the sister, and having the two shares consolidated — 4.—To participate in Koranic share of single sister. (Aqdariya).

[6] The division = *muqasimat*.

[7] It being considered that brothers (consanguine as well as full) are not excluded by grandfather, consanguine brothers inherit as against grandfather, though not as against full brothers.

[8] Full sister's Koranic share = 1/2.

[9] *Sirajia*, par. 25 III. 534 f., VIII. 238-239, Rums. 40-42. This proviso follows analogy of consanguine sister getting 1/6 of estate as sharer where there is only one full sister., See s. 617(1)(*c*), p. 857.

[10] Either full or consanguine.

[11] Full, if sister is full : consanguine, if she is consanguine.

[12] Sister may be residuary (but not sharer) if brother or female descendant survive together with her.

SECTION 624. (aggregating to 2|3 of the estate), and then taking 2|3 of the said aggregate, and giving 1|3 thereof to the sister.[13]

GRANDFATHERS, BROTHERS AND SISTERS.

Illustrations.

	CLAIMANTS,[14] surviving the deceased :		SHARES—[14] preliminary division :	final division :
(1)	Full brother	*residue*	1/3	2/3
	Consanguine brother		1/3	*nil*
	Father's father		1/3	1/3
(2)	Full sister		1/5	1/2
	Consanguine sister		1/5	1/20
	Second consanguine sister		1/5	1/20
	Father's father		2/5	2/5
(3)	Full sister		1/4	1/2
	Consanguine sister		1/4	*nil*
	Father's father		1/2	1/2
(4)	Husband	*share*	1/2	1/2
	Brother	*residue*	1/2	1/4
	Father's father			1/4
(5)	Brother	*residue*	2/3 of 5/6 = 5/9	2/9
	Second brother			2/9
	Sister			1/9
	Father's father	*residue*	1/3 of 5/6 = 5/18	5/18
	Father's mother	*share*	1/6	1/6
(6)	Brother	*residue*	1/6	1/12
	Second Brother			1/12
	Father's father	*residue*	1/6	1/6
	Father's mother	*share*	1/6	1/6
	Daughter[15]		1/2	1/2
(7)	Husband		1/4 = 3/12	3/13
	Mother		1/6 = 2/12 *reduced by aul to*	2/13
	Daughter		1/2 = 6/12	6/13
	Full consanguine sister	*residue*	*nil*	*nil*
	Father's father	*share*	1/6 = 2/12 *reduced by aul to*	2/13
(8)	Husband[16]		1/2 = 3/6	3/9
	Mother		1/3 = 2/6 *reduced by aul to*	2/9
	Full or consanguine sister		1/2 = 3/6	3/9 4/9
	Father's father		1/6	1/9

AQDARIA.

[13] This course is species of *muqasimat*, beneficial to true grandfather only in AQDARIA = s. 624, *ill.* (8).

[14] ILLUSTRATIONS.—*Siraj*, pargr. 25 = Jones, VIII. 237-240 = Rums. 40-43. Division of paternal grandfather. A connecting bracket indicates that the shares are to be *either* taken jointly *or* consolidated to an aggregate for the purpose of final division.

[15] Here father's mother & daughter being necessarily only sharers, residue = 1/3 ; if grandfather chose to be residuary he would take 1/3 of 1/3 (= 1/9) having also two brothers as residuaries ; by electing to be Koranic sharer he can get 1/6.

[16] This case called *Aqdaria* : as it occurred on death of woman belonging to tribe of *Aqdar*. It is very special : (*a*) if there were no husband, residue would be 2/3 ;

Sect. 624 exemplifies the difficulty encountered in adjusting the relative priorities between collaterals and ancestors remoter than the father. The law of succession is not the only subject where this difficulty arises.[17]

SECTION 624. Difficulty in adjusting rights of collaterals and ancestors.

The main principle underlying s. 624 is that the grandfather does not exclude the brother (and sister), but they all share simultaneously. This view is not generally adopted under Hanafi law : Abu Bakr, the first Khalif being opposed to their sharing simultaneously, though it is supported by the two disciples of Abu Hanifa. The simultaneous succession by the grandfather and brothers prevails also in the Shia system. It seems based on the Koran, IV. 11.[18]

Principle of s. 624.

§ 5.—Return : Residue Taken by Sharers.

625. In the absence of residuaries[19] the residue is divided amongst such blood relations[20] of the deceased as are entitled to be (Koranic) sharers, in the proportion of their respective (Koranic) shares.[21] The right of the sharers so to take the

In absence of residuaries residue "returns" to sharers other than husband or wife.

& it would be more beneficial to grandfather to elect the option in s. 624(3) or 624(4) i.e. to take 2/3 of residue(= 4/9); (*b*) again, "if instead of the sister there be a brother or two sisters, there is no increase, nor is that case an *Aqdaria*," *Siraj*, (VIII. 240, Rums. 42); for (i) if there be brother (instead of, or with sister) he would be residuary, & husband & mother having taken 1/2 & 1/3 respectively would leave only 1/6 as residue : so it would be better for grandfather to claim such 1/6 in his own right as sharer, than to participate in residual 1/6 with brother. But if (ii) there are two sisters (instead of one) they are entitled to share of 2/3, so that by "increase," common denominator of each share would have to be raised from 6 to 9 & (under *muqasimat*) aggregated share of a grandfather & sisters would be 4/9 + 1/9 = 5/9;—of which grandfather would take 1/2 = 5/18 of estate, & this would be better for him than any other alternative. [Note that presence of two sisters reduces mother's claim from 1/3 to 1/6]. *Siraj*. III. 535 = VIII. 240 = Rums. 42, however excludes applicability of *Aqdaria* ruling where more sisters than one.

17 Cf. e.g. ss. 324 f., p. 331.

18 Koran disturbed rigid priority of descendants over ancestors : Bearing of IV. 11 on priority between brother & grandfather : grandfather of deceased stands in same relation to brother of deceased as father of deceased, to son of deceased : Analogy of rule by which F, father of propositus succeeds simultaneously with S, (= son of propositus) : F is grandfather of S. So that grandfather & grandson succeed together. Similarly, (all except Abu Hanifa & Abu Bakr) held that FF (= grandfather of propositus) succeeds with his own grandson, B, (= brother of propositus)—FF being grandfather of B, just as F is grandfather of S.

19 Since remotest male agnate is competent to succeed as residuary, there must always exist some person entitled to succeed as residuary ; but he may be unknown, or unable to trace or establish his claim.

20 Hence husband & wife do not take by return under s. 625 (but see s. 633): *Gujadhar Pershad* v. (*Shaikh*) *Abdoolah*, (1869) 11 W. R. 220 ; (*Sheik*) *Musseeoollah* v. (*Mt. Beebee*) *Sherifun*, (1864) 1 W. R. 122 (widow not entitled to return); (*Moonshee*) *Mahomed Noor Bukhsh* v. (*Moulvie*) *Mahomed Hameedool Huq*, (1866) 5 W. R. 23 ; *Koonari Bibi* v. *Dalim Bibi*, (1884) 11 Cal. 14.

21 Koranic SHARERS have precedence over "DISTANT KINDRED" as to residue : because title of latter based on general statements in the Koran (iv. 32 ; viii. 75 ; xxxiii. 6), that blood relation of any degree gives right to succession,—whereas sharers specifically mentioned in Koran ; husband or wife, not being blood relations, cannot come within general statements, but they succeed under this head (if at all) on an analogical extension from those statements—hence they are postponed to sharers, to residuaries & to distant kindred. This is Hanafi interpretation of Koran : Shias interpret it so as to place (as regards priority) cognates & agnates on same footing. See ss. 638-640, pp. 896 ff.

SECTION 625. residue (in the absence of the residuaries) is referred to as the right to take by "return." [22]

Illustrations.

	CLAIMANTS.	ORIGINAL SHARES.		RETURN.	ULTIMATE SHARES.
(1)	Husband	1/4			1/4
	3 daughter [23]	2/3	+	1/12	3/4 (1/4 each)
(2)	Wife	1/4			1/4
	Grandmother	1/6	+	3/12 × 1/3	1/4
	2 uterine sisters	1/3	+	3/12 × 2/3	1/2 (1/4 each)
(3)	4 wives	1/8			1/8
	9 daughters	2/3	+	1/24 × 4/5	28/40
	6 grandmothers [15]	1/6	+	1/26 × 1/5	7/40
(4)	Grandmother	1/6	+	2/3 × 1/2	1/2
	uterine sister [23]	1/6	+	2/3 × 1/2	1/2
(5)	Grandmother	1/6	+	1/2 × 1/3	1/3
	2 uterine sisters [15]	1/3	+	1/2 × 2/3	2/3
(6)	Daughter	1/2	+	1/3 × 3/4	3/4
	mother [15]	1/6	+	1/3 × 1/4	1/4
(7)	Mother	1/6	+	1/6 × 1/5	1/5
	4 daughters [24]	2/3	+	1/6 × 4/5	4/5
(8)	Mother	1/6	+	5/24 × 1/4	21/96
	daughter	1/2	+	5/24 × 3/4	463/96
	wife [25]	1/8			17/16

OPERATION OF RETURN

I. RETURN : EFFECT OF RULES.

1. Where no male agnate (customary heir) is surviving *and*
2. the two following are not co-existing [26] viz.—
   (*a*) daughter or other female agnatic descendant, *and*
   (*b*) full or consanguine sisters [23]—

then the estate is divided amongst ,[25]

1.—Mother or true grandmother shares with

2.—daughters or sisters.

mother (*or* true grandmother), } *and* { (i) the daughter, *or* other the (ii) nearest female agnatic descendant, *or* the (iii) full sister, *or* the } together { uterine sister (iv) consanguine sister } with the } or brother,

Husband, wife, father, grand-father.

in other words, (1) the mother (*or* grandmother) *and* (2) the daughter (*or* son's daughter) *or* the sister take the residue on failure of male agnates.

This, it will be seen, includes all the 12 sharers, except the (1) husband, (2) wife, (3) father, and (4) grandfather. The husband and wife are excluded from the return, as they are not blood relations, and father and grandfather

[22] RETURN (= *radd*) is converse of INCREASE (= *aul*). See s. 610(1), p. 843.
[23] Bail. I. 716 (726); cf. *Rahimkhan* v. *Fatu Bibi*, (1895) 21 Bom. 118.
[24] Bail. I. 717 (727). [25] Bail. I. 715 (725).
[26] If they both survive, the sister becomes residuary.

do not take the return because they are competent to be residuaries, and when either of them exists, he takes the residue, and there is nothing to "return." SECTION 625.

This brings to a close the rules relating to the first alternative mode of succession : viz., succession by the sharers and residuaries. The sharers and residuaries may succeed— How sharers and residuaries succeed.

(1) jointly or

(2) only the sharers may succeed, either (i) because their shares exhaust the estate, or (ii) because there are no residuaries, and the sharers take by return, or 1.—Sharers and residuaries or 2.—Sharers alone or

(3) only the residuaries may succeed, because there are no sharers : the existence of some relations who are themselves only residuaries, prevents other relations from being sharers, either excluding them altogether (if they are remoter), or rendering them co-residuaries with themselves, if they are in the same line. 3.—Residuaries alone.

SUMMARY OF LAW SO FAR STATED

A. The husband takes 1/4, or the wife 1/8, of the estate if there are agnatic descendants, and twice as much if there are none, and the nearest male agnate takes the residue (if any) unless otherwise stated below : SUMMARY.

B. Subject to the husband's or wife's rights— TWO ALTERNATIVE GROUPS OF HEIRS SUCCEEDING SIMULTANEOUSLY.

I. If the nearest male agnate (or the customary heir) is a descendant,— Arrangement if any sharers or residuaries.

(1) The nearest female agnatic descendant (provided she is nearer than the customary heir) takes 1/2 ; or if there are more than one, they take 2/3,

(2) female agnatic descendants in the same line as the nearest male agnate, take the residue with him, in the proportion of 1 to 2, I. Male agnatic descendants succeed with female agnatic descendants in same and higher lines.

(3) the intermediate female agnatic descendants (i.e., those who are between the nearest female descendants and the customary heir) for whom no portion of the 2/3 Koranic share is left, take the residue of the estate with the customary heir,

(4) the father and mother take 1/6 each as Koranic sharers ; in their absence true grandfathers and true grandmothers take 1/6 respectively. Father : Mother.

II. If the nearest male agnate is an ascendant (i.e. there is no male agnatic descendant),— II. Male agnatic ascendants with female descendants and ascendants.

(1) the female agnatic descendants take 1/2 if one, and 2/3 if more than one :

(2) the mother takes 1|6 or 1|3 of the estate, or of the residue : s. 615 ; failing the mother, the true grandmother takes 1/6 of the estate ;

III. If the nearest male agnate is a collateral (viz. if there is no male agnatic descendant or ascendant),— III. Male agnatic collaterals with female agnatic descendants and ascendants and sisters.

(1) female agnatic descendants take 1/2 if one, and 2/3 if more than one ;

(2) the mother takes 1/6 or 1/3 of the estate, and failing the mother, the grandmother takes 1/6 of the estate ;

SECTION 625.

Unless the male collateral excluded by sister.

(3) the sister (*a*) becomes co-residuary with the brother if the sister and brother are co-survivors and he is the nearest male agnate ; as to the sister (*b*) in the absence of the brother,—

(i) if there is any female descendant, the sister becomes by herself the sole residuary, ousting a remoter male agnate (who would have been the customary heir),—

(ii) if there are no female descendants, one sister takes 1/2 of the estate, and more than one take 2/3 [leaving the residue, if any, to the remoter male agnate].

IV. Failing male agnates : return to sharers.

IV. In the absence of male agnates the estate is inherited by the sharers (the rules as to return coming into operation in the manner referred to at the beginning of this comment) and failing sharers,—

V. "Distant kindred."

V. Finally the distant kindred inherit as explained in ss. 626-632.

§ 6.—DISTANT KINDRED : THIRD CLASS OF HEIRS.

I. PERSONS CLASSED AS DISTANT KINDRED

succeed in absence of sharers and residuaries.

626. The nearest[1] of the distant kindred[2] succeed to the whole of the estate in the absence of such sharers and residuaries[3] as are blood relations.[4]

Those blood relations who are not competent to be either sharers[5] or residuaries are called "distant kindred," or zavil-arham.[6] They bear a relation to the deceased which is not necessarily distant. The distant kindred, it will be seen, include—

I. All cognates except (i) such cognates as are true grandmothers, and except (ii) uterine sisters and brothers.

II. Female agnates remoter than the sisters : [7]

They may be classified in detail as follows :[8]

1. of the descendants, all cognates, and no others,[9]

1 For relative proximities amongst distant kindred, see s. 627.

2 For definition, see s. 626, com. 3 Bail. I. 705 (715).

4 I.e. they succeed *with* husband or wife, taking what is left over, after husband or wife has taken his or her share.—But term "residuary" is never applied to "distant kindred."

5 See s. 605(13 A), p. 837.

6 = possessors of relationship. *Arham* is plural of *rahm* which = "womb," & represents blood relation. Cf. "The bonds of kinship are expressed alike in Arabic & Hebrew by the words *rehem, rahim*, the womb ; Amos I. 11 ... does not mean 'he cast off all pity,' but 'he burst the bonds of kinship'"—Smith, *Kin. & Mar.*, 32. Distant kindred consist of cognates & females. The remotest relations inherit under this head, e.g. *Abdul Serang* v. *Putee Bibi*, (1902) 29 Cal. 738 (grandfather's brother's granddaughter's son).

7 Koranic provisions in favour of collaterals are interpreted by Sunnis as being restricted to persons named, i.e. full, consanguine, & uterine sisters, & uterine brothers ; Shias interpret those provisions as instances representing general principles, & give similar rights to nieces, & remoter female agnates & uterine relations who are not named in Koran.

8 Bail. I 705 (715).

9 E.g. (taking *D* = daughter, S = son) the following are distant kindred amongst descendants : *DS, DSS, DDS, SDS, SSDS, SSDD.*

2. of the ascendants, all false grandfathers, i.e. all male ascendants who are cognates), and all false grandmothers,[10] SECTION 626.
3. of the collaterals,—
   (*a*) all cognates except the uterine brother and sister,
   (*b*) all female agnates except the sisters.

As to the place of the distant kindred in the table of priorities, see s. 610 (4), and s. 625 comm.

II. DISTANT KINDRED : PRIORITIES :

(A) Descendants.

(B) Ascendants.

(C) Collaterals.

627. (1) Amongst distant kindred, descendants are preferred to both ascendants and collaterals, and ascendants are preferred to collaterals. Amongst descendants and ascendants respectively (subject to the rules given below) the one who is related to the deceased through the fewest degrees is preferred.

(1) Descendants : child of sharer or residuary preferred.

(2) Amongst descendants in the same generation, the children of female [11] agnates [12] are preferred to the children of cognates.[13]

(2) Parents of true grandparents preferred.

(3) Amongst ascendants in the same generation, the parents of true grandmothers [14] are, according to the Sirajia, preferred to the parents of false grandparents : but according to the Fatawa Alamgiri there is no such preference.[15]

(3) Collaterals : general rules.

(4) Amongst collaterals,[16] the priorities are as follows—

(i) Nearest common ancestor.

(*a*) the descendant of a nearer common ancestor is preferred to the descendant of a remoter common ancestor ;

[10] I.e. all COGNATE GRANDPARENTS are DISTANT KINDRED except (*a*) *MM*, or *MMM* or *MMMM* and (*b*) *FM*, or FFF*M*, or FF*M*, F*MM*, or F*MMM*, FF*MM*, FFF*MMM*, etc.

[11] Children of male agnates would of course be themselves agnates, & would be either sharers or residuaries.

[12] Bail. I. 705-707 (715-717). Cf. ss. 622, 61, pp. 861, 149.

[13] Agnates are throughout preferred by Hanafi law to cognates. Female agnates being Koranic sharers or residuaries, there is additional reason for this preference. E.g. S*DD* would be preferred to *DD*S. Bail. I. 706 (716) words rule in s. 627(2) as follows :—" When there is an equality in degree, i.e. in proximity to the deceased, the child of an heir, whether sharer or residuary, is preferred."

[14] The parents of true grandfathers are themselves true grandparents, & as such sharers.

[15] *Fatawa Alamgiri, Faraiz*, Ch. VII. where the point is thus illustrated : *MM*F, (mother's mother's father), and *M*FF (mother's father's father) will (according to the *Alamgiri*) both succeed. According to the *Sirajia*, *MM*F (being the father of *MM* a true grandmother) will have preference over *M*FF, (the father of a false grandfather).

[16] Only those contemplated who fall within description of DISTANT KINDRED : FB, & cB of F or true grandfather of deceased, would be male agnates, & be classed as residuaries, & would exclude all distant kindred. See s. 626, com. Amongst collaterals (i) sisters & uterine brothers alone are sharers, & (ii) residuaries include all male agnates on paternal & maternal side : see s. 605(4A), p. 833.

SECTION 627.
(ii) Fewest links.

(*b*) amongst the descendants of the same, or of equally distant common ancestors, the one who is nearer to the common ancestor is preferred to the one who is remoter, there being no preference between paternal and maternal relations nor, subject to s. 625(5), between full-blood and half-blood.

(4) Descendants brothers and sisters.

(5) Amongst claimants in the same generation and the same side viz. the paternal or maternal side, (s. 605 (4A).) respectively, the priorities are as follows—

(i) Full.

(*a*) the descendant of the full brother or sister is preferred to the descendant of the consanguine brother or sister,

(ii) Child of sharer or residuary.

(*b*) amongst claimants descended from full and consanguine relations respectively—the child of a sharer or residuary [17] is preferred to one who is not the child of a sharer or residuary.[18]

(5) Descendants full : consanguine : uterine.

(6) Where some claimants are descendants of full or consanguine brothers or sisters and others descendants of uterine brothers or sisters, there is a difference of opinion as to their priorities, viz.,—

(i) Uterine rank with full or consanguine.

(*a*) Imam Muhammad, makes the descendants of the uterine brothers and sisters rank with either the full-blood or the half-blood consanguine relations (as the case may be) in the same generation, neither excluding, nor being excluded by, either of them,[19]

[17] *Siraj.* III. 545, VIII. 253, Rums. 55 ; see Table of Dist. Kind., p. 881, & s. 631, *ill.* (5), p. 890.

[18] *Fatawa Alamgiri, Faraiz,* Ch. VII. : Thus (i) BS*D* will exclude B*DD* as BS*D* is daughter of BS a residuary, but B*D* is neither residuary nor sharer ; *Siraj.* VIII. 252 = III. 544 (= Rumsey 54 ; (ii) FB*D* will exclude CB*D* & also UB*D*, "by the unanimous opinion of the learned, since she is the child of a residuary & has also the strength of consanguinity," *Siraj.* VIII. 254, 346, Rumsey 57 : thus (i) F Pat Au S (full paternal aunt's son) will be excluded by F Pat Un *D* (= full paternal uncle's daughter) & (ii) C Pat Au S (= consanguine paternal aunt's son) will be excluded by C Pat Un *D* (= consanguine paternal uncle's daughter); but (iii) F Pat Au S (= full paternal aunt's son) will exclude C Pat Un *D* (= consanguine paternal uncle's daughter). See com.

[19] I.e. the descendants of UB or U*Si* of deceased (or of ancestor of deceased) rank equally with descendants of either FB or CB of deceased, (or of said ancestor of deceased, as the case may be). E.g. a UB*D* will rank with FB*D* or CB*D* & will not be excluded by either, though FB*D* will exclude CB*D*. This is result of fact that under customary law full blood relations excluded consanguine relations, but both were competent to inherit ; so no new rights were given to CB, he being left in possession of his original rights. On other hand, UB was entirely incompetent to inherit—his existence had been ignored he had therefore to be given rights altogether new. According to Abu Yusuf he is postponed to CB & takes third place : but Imam Muhammad follows analogy of FB, CB & UB ; *FSi*, C*Si*, U*Si* in regard to rights

(*b*) Abu Yusuf makes the full-blood relations [in each line of descent] exclude the consanguine, and the consanguine exclude the uterine.[20]

SECTION 627. (ii) Full : consanguine : uterine.

TABLE : DISTANT KINDRED IN ORDER OF PRIORITY.

N. B. { *D* = "daughter" or "daughter's." S = "son" or "son's"[21]
M = "mother" or "mother's." F = "father" or "father's."[21]

1. *DS*, and *DD*, ... i.e. daughter's children.
2. S*DD*, and S*DS*,[22] i.e. son's daughter's children.
3. *DSS*, *DSD*, and *DDD*,[22] i.e. grand-children of daughters.
4. SS*DS*, and SS*DD*,[22] i.e. son's son's daughter's children.
5. *DSSS*, *DSSD*, *DSDS*, *DSDD*, *DDDS*, *DDDD*, *DDSS*, *DDSD*, S*DSS*, S*DSD*, S*DDS*, S*DDD*,[22] i.e. daughter's great grand-children, and son's daughter's grandchildren.

Other descendants in the same order.

6. *MF*, i.e. mother's father.
7. F*MF*, *MMF*,[23] i.e. parents' maternal grandfathers.
8. *MFF*, *MFM*,[24] i.e. mother's[24] paternal grandparents.

Other ascendants in the same order.

9. FB*D* full brothers' daughters,[25] *and* FS*i*S & FS*iD* full sisters' children,[26]
10. CB*D* consanguine brothers' daughters,[25] *and* consanguine sisters' children,

with { UBS UB*D* uterine brothers' and sisters' children.[27]

11. FBS*D* full brothers' sons' daughters,[28]
12. CBS*D* consanguine brothers' sons' daughters,[28]

respectively of their descendants & does not allow full or consanguine to exclude uterine relations in same line.

[20] *Siraj* VIII. 251 = III. 543 = Rums. 53. See s. 631, p. 890, *ill.* (4). On paternal & maternal sides, respectively, full-blood relations are, subject to s. 627(4), preferred to consanguine [& according to Abu Yusuf consanguine to uterine] ; but full-blood on either side have no preference over half-blood on other side. I.e. nearest, on whichever side he be, succeeds, but if two are equally near, & one of them is on the paternal side & other on maternal side, then though one of them is of full-blood, & other of half-blood, that does not give to former any preference.

[21] See s. 605, com., p. 838, *n.* 28 for explanations of symbolical letters, *D*, *M*, S, F, &c.

[22] Though 2 & 3 are in same generation, still 2 have priority, being children of female agnates. Similarly as regards 4 & 5.

[23] Though 7 & 8 are in same generation, 7 have priority, being parents of true grandparents ; 8 are postponed as being parents of false grandparents.

[24] Father's paternal grandparents would be true grandfather & true grandmother, & thus would be sharers.

[25] FBS (full brother's sons) are residuaries.

[26] (*Moonshi*) *Mahomed Noor Buksh* v. *Mahomed Hameedool Huq*, (1866) 5 W. R. 23.

[27] This is Imam Muhammad's opinion. Abu Yusuf makes UB's & US*i*'s children follow 10, & precede 11, whereas Imam Muhammad makes them succeed concurrently with 9 *or* 10. See s. 631, *ill.* (4), p. 890.

[28] 11 & 12 are children of residuaries hence preferred to 13 & 14, respectively.

SECTION 627.

13. Full brothers' daughters' children, *and* full sisters' grandchildren,
14. Consanguine brothers' daughters' children, *and* consanguine sisters' grandchildren,

} *with* { uterine brothers' and sisters' grandchildren.[29]

Lower descendants of brothers and of sisters in the same order.

15. Father's full sister,[30] *and* mother's full brother *and* sister.
16. Father's consanguine sister,[30] *and* mother's consanguine brother *and* sister.
17. Uterine brothers *and* sisters of father *and* mother.[31]

See the table of half-blood relations, below : only the brothers and sisters of the propositus are mentioned in the table, but it can be made applicable to the paternal uncles and aunts, by supposing P to be the father of the propositus; and to maternal uncles and aunts by supposing P to be the mother of the propositus; and adding the words " of the father " or " of the mother," as the case may be, in each place : e.g., P = " mother of propositus " ; FB = " full brother of mother of propositus " ; UB = " uterine brother of mother of propositus."

TABLE ILLUSTRATING HALF-BLOOD RELATION.

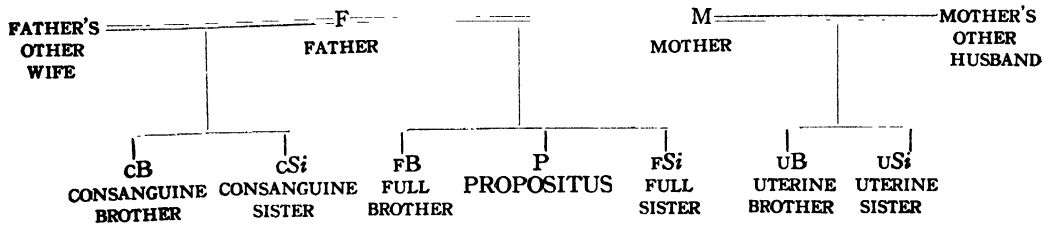


TABLE : PRIORITIES BETWEEN DISTANT KINDRED : UNCLES AND AUNTS.

Distribution according to Abu Yusuf.

In the first generation the distribution of the shares according to Abu Yusuf (see s. 631) is also indicated in the table on p. 883. With reference to the later generations the same principle is followed, viz., (1) within the same generation no claimant on the paternal side excludes any claimant on the maternal side, nor vice versa, but (2) the groups of persons (see the table on p. 883) within each rectangle (divided from each other by dotted

[29] Abu Yusuf makes uterine brother's & sister's grand-children follow 14 ; Imam Muhammad makes them share concurrently with 13, *or* 14.

[30] Father's brothers FFS are residuaries.

[31] Here uterine relations do not succeed *with* full or consanguine, but follow them. See s. 627(6)(*b*), p. 881 ; cf. " The fourth sort (of distant kindred) are descended from the two grandfathers, & two grandmothers of the deceased & they are (I) paternal aunts, & (II) [paternal] uncles by the same mother only, & (III) maternal uncles & aunts ... & when there are several, then the strongest of them in consanguinity is preferred, by general assent ; I mean they who are related by father & mother are preferred to those who are related by the father only, & they who are related by the father are preferred to those who are related by the mother only, whether they be males or females ; & if there be males & females & their relation be equal, then male has allotment of two females."—*Siraj*, par. 27, 33, Jones, *Works* III. 537, 545 = VIII. 243, 253 = Rums. 46, 55.

lines), have priority in the order in which they precede each other, below : when there is no priority they are bracketed together. See ss. 628 ff., pp. 884 ff. SECTION 627.

Paternal side : 2/3		Maternal side : 1/3		
AGGREGATE SHARE 2/3	Share taken by each	AGGREGATE SHARE 1/3	Share taken by each	
1. Father's full sister	2/3	1. Mother's full brother	2/3 of 1/3	1st Generation.
		" " sister	1/3 of 1/3	
2. Father's Consanguine sister	2/3	2. Mother's consanguine brother	2/3 of 1/3	
		" " sister	1/3 of 1/3	
3. Father's Uterine sister	1/3 of 2/3	3. Mother's uterine brother [32]	2/3 of 1/3	
" " brother	2/3 of 2/3	" sister	1/3 of 1/3	
1. Father's full brother's daughter [33]		1. Mother's full brother's children		2nd Generation.
2. " " sister's children		" " sister's "		
3. Father's consanguine brother's [33] daughter		2. Mother's consanguine brother's and sister's children		
4. " " sister's children				
5. Father's uterine brother's children		3. Mother's uterine brother's and sister's children.		
" " sister's "				

(A) Abu Yusuf' system.

1.—Distant kindred : distribution amongst collaterals.

The same process is followed when the claimants belong to more distant generations. After the division has already been made between the paternal and maternal sides, respectively, the share of each side is divided amongst the claimants on that side in the same manner as the whole estate is divided amongst the descendants : So that Abu Yusuf distributes it with reference merely to the sex of the claimant, and Imam Muhammad in the manner referred to in s. 629, pp. 884 f.

2.—Descendants of brothers and sisters.

In the case of descendants of the brothers and sisters of the grandparents of the deceased, the two columns given above would have to be redivided each into two, for a fresh division of the 2/3 on the father's and mother's side : as is indicated in the table on the next page.

[32] Though these are children of sharer, viz. of *MM* who is true grandmother, they have no priority over those who are not children of sharers, viz. cB's children ; for the tie of blood is first to be considered ; if within full, consanguine & uterine group, one is child of sharer & another not, former has priority.

[33] Being child of residuary, she has priority over *cSiS* & *cSiD* (i.e. *cSi*'s children) who are not children of a residuary.

SECTION 627.

PATERNAL SIDE 2/3		MATERNAL SIDE 1/3	
Father's father's side 2/3 of 2/3	Father's mother's side 1/3 of 2/3	Mother's father's side 2/3 of 1/3	Mother's mother's side 1/3 of 1/3

and, similarly, the columns have to be redivided for each higher generation in which the common ancestor is. Then after the common ancestors on both sides have been reached, the portions allotted to them are redivided amongst their descendants respectively.[34]

III. DISTRIBUTION OF ESTATE AMONGST DISTANT KINDRED.

(A) Where claimants are DESCENDANTS.

(1) Abu Yusuf's system.

(2) Imam Muhammad's system.

628. Abu Yusuf holds that where the nearest surviving distant kindred consist of descendants, the estate is divided amongst the survivors equally but so that (subject to s. 632) each male gets twice as large a portion as each female, the distribution being per capita, not per stirpes.[35]

629. Imam Muhammad holds that, subject to s. 632,—

(1) the estate is divided as provided in s. 628, only in those cases in which the intermediate [1] ancestors of each claimant are, in each generation, of the same sex as the intermediate ancestors (in the corresponding generation) of every other claimant ; [2] but,—

(2) where in any generation the intermediate ancestor of a claimant is not of the same sex as the intermediate ancestor (in the corresponding generation) of every other claimant, the ultimate share of each claimant has to be determined by following the three processes mentioned in the next four subsections, viz.[3]

(3) the estate is, in the first instance, (notionally) divided as though the said intermediate ancestors of the claimants (in the generation in which they differ in their sex from each

[34] *Siraj.* III. 545 = VIII. 253 = Rums. 55.

[35] Bail. I. 706 (716); e.g. deceased has children by two predeceased daughters *D*, *D*A ; one of them, *D*, leaves 3 sons & 5 daughters & the other, *D*A leaves one son & one daughter : there are 4 grandsons & 6 granddaughters : estate will according to Abu Yusuf be divided into 14 parts, each granddaughter taking 1/14 & each grandson 1/7. As *D* & *D*A, intermediate ancestors of claimants (s. 629, *n.* 1), are both females, Imam Muhammad will distribute in same proportion as Abu Yusuf. See on distribution according to Abu Yusuf, pp. 882 f.

[1] Intermediate ancestor = one intervening between claimant & propositus : s. 605(3), p. 833.

[2] See s. 628, *n.* 35 (on this page).

[3] E.g. if claimants are *DSD* & *DD*S, intermediate ancestors in first generation are females in case of both, but in next generation *DSD* has male ancestor, & *DD*S female ancestress.

other) were the actual claimants,[4] but so that, (*a*) each such ancestor as is a male is allotted a double portion on behalf of each of the claimants[5] who is descended from him,[5] and (*b*) each such ancestress as is a female is allotted a single portion on behalf of each of the claimants who is descended from her ;[6] SECTION 629.

(4) secondly, the portions allotted under s. 629(3), to each of the said male intermediate ancestors are aggregated ; and the aggregate is distributed amongst the descendants of the said male intermediate ancestors in such proportions as to give (out of the said aggregate) to each male twice as large a portion as to each female ; Shares of male and female intermediate ancestors respectively aggregated and divided amongst their respective descendants.

(5) thirdly, the portions so allotted to each of the (female) intermediate ancestresses is similarly aggregated, and similarly[7] distributed amongst her own descendants.

(6) Where the intermediate ancestors of the claimants differ in sex from each other in more generations than one, the process above referred to, is repeated in each generation. This process repeated at each stage.

N.B.—*D* = "daughter" or "daughter's." S = "son" or "son's." *Illustrations.*

(1) CLAIMANTS : *DSD* and *DDD*,—

(*a*) Abu Yusuf : they will both take equally, being both females ;

(*b*) Imam Muhammad : *DSD* will take 2/3 and *DDD* 1/3, as there will be a division in the second generation (i.e. between *D*S and *DD*) and the double share allotted in that division to *D*S (as a male from whose descendants there is a single one surviving) will devolve on his daughter *DSD*.[8]

(2) CLAIMANTS : *DSS*, *DSD*, *DD*S and *DDD*,—

(*a*) Abu Yusuf : the estate will be divided according to the sexes of the claimants thus : *DSS* : 2/6 ; *DSD* : 1/6 ; *DD*S : 2/6 ; *DDD* : 1/6.

(*b*) Imam Muhammad : the estate will be divided—

(i) in the second generation, i.e. between *D*S, *DD* ; and *D*S will be allotted 4/6, and *DD*, 2/6. For *D*S will get two shares for each of *his* descendants, viz. 4 shares in all ; and *DD* will get one share for each of *her* descendants, viz. 2 shares in all ;

[4] Thus when claimants are *DSD* & *DD*S, estate has to be first divided as *D*S & *DD* were claimants.

[5] Whether descendant's own sex be male or female.

[6] E.g. suppose claimants are *DSD* & *DD*S,—the person through whom *DSD* traces her relation to propositus is *D*S, her father, who being a male has double share allotted to him & *DD* being female—gets single share allotted to herself, although claimant descended from herself is male : Hence *D*S is allotted 2/3 & *DD*S takes 1/3 though latter is male. See s. 629, *ill.*

[7] I.e. so that each male gets twice as much as each female.

[8] *Fatawa Alamgiri*, Book on *Faraiz*, Ch. VII. on *Zavil Arham* (= distant kindred).

SECTION 629. (ii) then the 4/6 (or 2/3) of *DS* will be divided between *DSS* and *DSD*, so that *DSS* gets 4/9, and *DSD* 2/9, (males taking double shares) and

(iii) the share of *DD* (viz. 1/3) will similarly be divided between *DDS* and *DDD*, the former getting 2/9 and the latter 1/9.

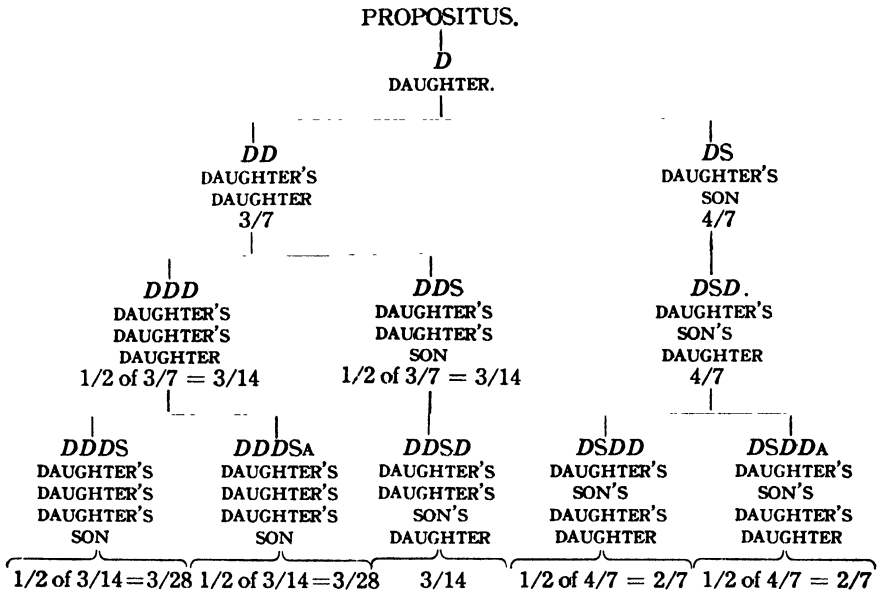
(3) CLAIMANTS : *DSD*, *DSD*A and *DDS*.

According to Imam Muhammad,—

(i) the estate will be first divided in the second generation (i.e. between *DS*, and *DD*) so that *DS* is allotted a double share for each of his two daughters (viz., for *DSD* and *DSD*A) and *DD* is allotted a single share for her son, viz., *DS* will be allotted 4/5 and *DD* 1/5.

(ii) Then *DS*'s 4/5 will be divided equally between *DSD* and *DSD*A each taking 2/5, and *DDS* will get his mother's 1/5.

(4) CLAIMANTS : *DDDS*, *DDDS*A, *DDSD*, *DSDD*, *DSDD*A.



(*a*) According to Abu Yusuf the estate will be divided into 7 parts, allotting to them 2, 2, 1, 1, 1, of such parts, respectively.

(*b*) according to Imam Muhammad :

(i) in the second generation the first division will take place, i.e. between *DD* and *DS*,—*DD* getting 3/7 and *DS* 4/7 i.e. the former getting a single share in respect of each of her three descendants who are claimants, and *DS* a double share in respect of each of his two surviving descendants ;

(ii) the 4/7 share of *DS* will be divided between *DSDD* and *DSDD*A, equally, each getting 2/7;

(iii) then the 3/7 of *DD* will be re-divided at the next generation, *i.e.* between *DDD* and *DDS*; and, as *DDD* has two descendants (amongst the

claimants), she will be allotted a single share in respect of each of them, and *DD*S has one descendant who will be allotted one double share, *i.e.*, the 3/7 will be divided equally between *DDD* and *DD*S, each getting 3/14; SECTION 629.

(iv) *DDD*'s 3/14 will be divided equally between *DDD*S and *DDD*SA, *i.e.*, each taking 3/28, and *DDSD* will take 3/14 from her father.

Imam Muhammad's complicated system of distribution amongst the distant kindred is an attempt to give priority to males and agnates [9] over females and cognates, without adopting a stirpital division. Until the distant kindred are reached there are only the agnates to be dealt with, and the intermediate ancestors are all males.[10] Scheme of Imam Muhammad.

629 A. Abu Hanifa's opinion appears to have been in favour of Imam Muhammad's system which has been followed in India.[11] (3) Abu Hanifa's scheme of distribution.

Cf. "Be it known (i) that there are two reports about Abu Hanifa's view as regards this, and of the two the better known report is that as regards all the rights of the 'zavil arham' (distant kindred) he agrees with Imam Muhammad, and the 'fatwa' is upon the same view, but (ii) Shaikh Asbijabi has said in the 'Mabsut' that the view of Imam Abu Yusuf is more correct, inasmuch as it is more easy of application and (iii) the author of the 'Muhit' states that the Shaikhs of Bukhara have adopted in such questions the opinion of Imam Abu Yusuf." [12]

630. Where the distant kindred who are entitled to inherit are ascendants, some being ancestors of the father of the deceased, and others of his mother, 2|3 of the estate is first allotted to the ancestors of the father, and 1|3 to the ancestors of the mother, the said ancestors dividing the said 2|3 and 1|3, respectively, amongst themselves : in such proportions, that, according to Abu Yusuf, each male receives twice as large a portion as each female ; and, according to Imam Muhammad in the same manner as the estate would be divided in accordance with s. 629, if the relation of the claimants were at each step in the descending, instead of the ascending line.[13] (B) When claimants are ASCENDANTS : father's side 2/3, mother's : 1/3.

[9] Or rather partial agnates, if the expression may be allowed.

[10] Except that true grandmothers & uterine brothers & sisters are cognates. In case of latter there is no difficulty about intermediate ancestors differing in sex, as they are both descendants from mother of deceased. In case of grandmother, intermediate ancestors may occasionally differ in sex, but claimants are always females.

[11] *Akbar Ali* v. *Adar B.*, (1930) 58 Cal. 366 (pointed out that Imam Muhammad's opinion has been preferred in India : case concerned with distribution between (1) FSi's (full sister's) children, (2) cBD (consanguine brother's daughters). *Siraj.* par. 29 = III. 541 = VIII. 247 = Rums. 50.

[12] *Fatawa Alamgiri*, Book on *Faraiz*, Ch. VII. on *Zavil Arham*.

[13] *Siraj.* VIII. 219 = III. 521 = Rums. 19 f.

SECTION 630. *Illustration.* F = "Father" or "father's." *M* = "Mother" or "mother's."

The claimants being,—

(*a*) FF*M*F, (*b*) F*M*FF } father's ancestors { (*c*) *MFMF*, (*d*) *MMFF* } mother's ancestors,—

the estate will be first divided so that the father's ancestors get 2/3 and the mother's 1/3 : thus (*a*) and (*b*) will each take 1/3 ; and (*c*) and (*d*) 1/6 each.[13]

(i) Preference to nearest in degree.

1. "The degrees in this case are either equal or unequal—
   (*a*) "if unequal, the nearer is preferred ;
   (*b*) "if equal, the preference is given to the person claiming through a sharer.

(ii) Distribution : paternal side, maternal side.

2. "If there be an equality in that respect, the sides must be the same or different—
   (*a*) "if different, the distribution must be made in thirds, the paternal side having a double share,
   (*b*) "if the same, the sexes of the roots or ancestors[14] must agree, or not—
      (i) "if they agree, the estate must be distributed according to the persons of the branches or claimants ;
      (ii) "if not, according to the first rank that differs, as in the preceding class.[15]

(c) Where claimants are COLLATERALS.

631. (1) Where the claimants are descendants of the brothers or sisters of the deceased,[16] the distribution subject to s. 632 is as follows :—

(1) Descendants of brothers and sisters.

(*a*) Abu Yusuf holds that they divide the estate per capita so that each male gets twice as large a portion as each female ;

(*b*) according to Imam Muhammad,[17]—

(i) ABU YUSUF : Division per capita.

(ii) IMAM MUHAMMAD : Allotment to sisters and brothers.

(i) the estate is, in the first instance, allotted as though the brother or sister of the deceased[18] through whom the claimants are respectively descended, were the actual claimant : but so that if there are two or more claimants descended from the same brother or sister, that brother or sister is allotted the share of two or more, as the case may be,[19]

[14] I.e. of intermediate ancestors.

[15] *Al Sharifia*—Jones, *Works*, VIII. 312. The numbers are mine. Here too presumably there is same difference of view between Abu Yusuf & Imam Muhammad about clause (*b*)(ii) as there is about descendants.

[16] See illustration. Brothers & sisters themselves are residuaries or sharers & so not distant kindred.

[17] East's Notes SUP. COURT, CAL. Case 113 (15th Feb. 1820) seems to have been decided according to Imam Muhammad's opinion.

[18] Collaterals, it is evident, are either (1) descendants of brothers & sisters of deceased, or (2) of uncles & aunts of deceased ; see s. 605(4), *n.* 6, p. 833.

[19] Thus share of F*Si* or c*Si* = 1/2 of estate, but of two sisters or more = 2/3 ; so,

(ii) secondly, the portions so allotted to the full brothers and sisters are aggregated, and the aggregate is re-divided amongst their descendants in the manner provided in s. 629, SECTION 631. Full brother or sister.

(iii) thirdly, the portions so allotted to the consanguine brothers and sisters[20] are similarly aggregated and re-divided, Consanguine brother or sister.

(iv) fourthly, the portion so allotted to the uterine brothers or sisters[21] is divided amongst the claimants descended from them per capita so that males and females take equal portions. Uterine brother or sister.

(2) Where the claimants are the uncles and aunts of the deceased or their descendants, i.e. when they are the brothers or sisters of the parents or grandparents of the deceased, or the descendants of such brothers or sisters,—the estate is according to both Abu Yusuf and Imam Muhammad first divided into three parts ; two of such parts being allotted to those who are related to the deceased on the paternal side, and one part to those who are related to the deceased on the maternal side ; and the said 2|3 and 1|3 are then distributed amongst the claimants on their respective sides in the manner stated in s. 631 (1) (*a*) or (*b*). (2) Distribution : uncles and aunts of deceased : descendants of uncles and aunts.

N.B. { S = "son(s)" ; *D* = "daughter(s)" ; *B* = "brother(s)" ; *Si* = "sister(s)" ; *Au* = aunt ; Un = uncle ; F, C or U = full, consanguine or uterine. *Illustrations.*

CLAIMANTS	DIVISION ACCORDING TO ABU YUSUF	DIVISION ACCORDING TO IMAM MUHAMAD	
		PRIMARY	FINAL
(1) B*DD*	1/4	2/5	1/3 × 4/5
B*D*S	1/2	2/5 = 4/5	2/3 × 4/5
Si DD	1/4	1/5	
(2) UBS*D*	1/3 son to get twice share of daughter	share like their parents	1/2
U*Si*DS	2/3		1/2

if there are two descendants of same sister, they get 2/3, not merely 1/2. Similarly one uterine brother or sister gets 1/6, & two or more 1/3, but if there are two children of one U*Si*, share allotted to them is 1/3 not 1/6. For purposes of this first allotment, it will be observed that share of two is same as that of any greater number ; conversely if there were originally two sisters & only one of them has one claimant descended from her, that sister will be allotted only 1/2 & not 2/3.

[20] Consanguine brother or sister is excluded by full ; besides there may be no portion left for him, but if there is only one claimant descended from full sister then claimant descended from consanguine sister will get 1/6.

[21] Portion allotted to uterines can only be either 1/6 or 1/3.

SECTION 631.

CLAIMANTS	DIVISION ACCORDING TO ABU YUSUF	DIVISION ACCORDING TO IMAM MUHAMMAD	
		PRIMARY	FINAL
(3) F *Si D D*	gets whole	share like their parents.[23]	1/2
c B *D* S	excluded		1/2
(4) F *Si D D*	gets whole	1/2	1/2
c *Si D* S	excluded	1/6 do.	1/6
u *Si D* S	excluded	1/3	1/6
u *Si D D*	excluded	1/3	1/6
(5) u *Si D*	1/6	1/6 + (1/6 × 1/5)	1/5
c *Si* S	2/3 + 1/6	2/3 + (1/6 × 4/5)[24]	8/15
c *Si D*	2/3 + 1/6	2/3 + (1/6 × 4/5)[24]	4/15
F *Si* SS	excluded being in third generation, others in second.		
(6) F PAT *A*	(full paternal aunt)	the full aunt does not exclude the half blood aunt : as they are on different sides : father's and mother's : they take 2/3 and 1/3 (father's and mother's shares) respectively.[15]	
U MAT *A*	(uterine maternal aunt)		

(7) Similarly, the c PAT *A*, will not be excluded by the F MAT *A* but the former will take 2/3, and the latter 1/3.[25]

(8) The CLAIMANTS being—

F B *D* *i.e.*, full brother's daughter, c B *D* consanguine brother's daughter,
F *Si D* ,, sister's ,, c *Si D* ,, sister's ,,
F *Si S* ,, ,, son, c *Si S* ,, ,, son,
u B *D* uterine brother's daughter,
u *Si D* ,, sister's ,,
u *Si S* ,, ,, son,—

ABU YUSUF : the full blood will exclude the consanguine relations, and the consanguine will exclude the uterine. In each case the male will take 1/2, and the females 1/4 each.[26]

IMAM MUHAMMAD : the full blood will exclude the consanguine, but not the uterine : (i) the uterines will take 1/3 of the estate,[27] and then this 1/3 will be divided equally amongst the uterines, i.e., u*BD*, u*SiD* and u*SiS* will each take 1/9. (ii) The rest, i.e. 2/3 of the estate will be divided amongst the full blood

22 Who would have taken unequal shares : s. 618, *Fatawa Alamgiri, Faraiz*, Ch. VII. ; same *ill.* is given in *Sirajia*, VIII. 249 f., III. 542, Rums. 51 f.

23 *Siraj.*, VIII. 250 f. III. 542 f., Rums. 53. Cf. s. 617.

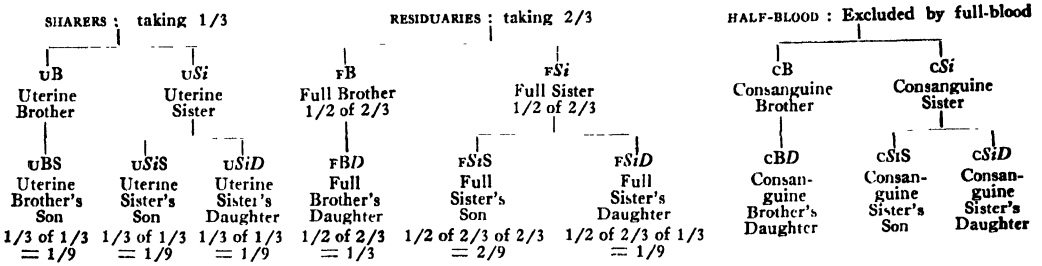
24 According to Im. Muhammad : (A) u*Si* as single uterine is allotted 1/6 ; (B) c*Si* allotted share of 2 c*Si*'s (= 2/3) as two claimants descended from her survive ; (C) there is resid. of 1/6 which "returns"—of course there would be no return if one of ancestors of claimants were residuary, e.g. consanguine brother ; (D) this return of 1/6 allotted to u*Si* & c*Si* in proportion of 1/6 to 2/3 (= 1 : 4) ; (E) their shares with return added thereto (= 1/5, & 4/5 ; (F) 1/5 allotted to u*Si* is taken by u*SiD* ; (G) 4/5 allotted to c*Si* is taken by children of c*Si* in proportion of 2 to 1.

25 *Siraj.* VIII. 253, III. 545, Rums. 55. Similarly if (i) FPAT*A* with UMAT*A* or (ii) UPAT*A* with FMAT*A*,—in either case PAT aunt gets 2/3, & MAT aunt gets 1/3.

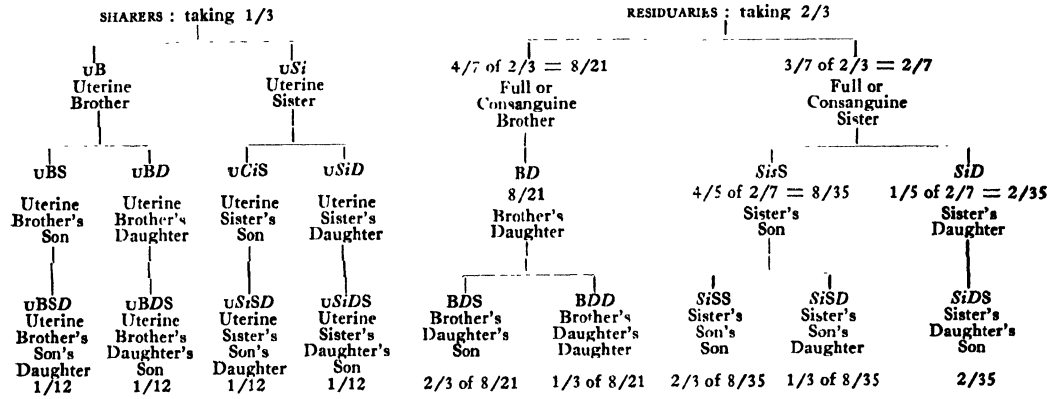
26 *Siraj*, VIII. 251. III. 543, Rums. 54.

27 Two or more uterine sisters or brothers take 1/3 of estate when they co-survive with full or consanguine brothers or sisters, see s. 618, p. 857.

relations, i.e. FB*D*, F*Si*D, and F*Si*S, but so that out of this 2/3 (*a*) in the first instance, FB will be (notionally) allotted one double share,[28] (*b*) F*Si* will be allotted two single shares,[29] i.e. the 2/3 will be so allotted that FB and F*Si* will each be allotted 1/3 of it ; then (*c*) the 1/3 allotted to FB will be taken by his daughter FB*D* ; and (*d*) the 1/3 allotted to F*Si* will be divided between F*Si*D and F*Si*S in the proportion of 1 : 2 ; i.e. the former will take 1/9 and the latter 2/9. The distribution according to Imam Muhammad appears from the following table : SECTION 631,



(9) If the claimants include two or more grandchildren of uB or u*Si* (*a*) they take 1/3, dividing it equally amongst themselves ; then (*b*) the grandchildren of FB (or failing them of cB or c*Si*) take (in the aggregate) the 2/3 ; (*c*) as to this 2/3 if there was one pre-deceased FB or cB through whom two claimants are descended, and one pre-deceased F*Si* or c*Si* through whom three claimants are descended (i) The brother is according to Imam Muhammad first allotted a double share for each descendant of his that survives, (i.e. in the illustration, 4 shares) and (ii) the sister a single share for each claimant through her (i.e. the brother is allotted 4/7 of 2/3 = 8/21 ; and the sister 3/7 of 2/3 = 6/21). (*d*) Finally, the 8/21 and 6/21 are divided respectively amongst the grandchildren of the brother and sister in the proportion of 2 : 1. This may be tabulated as follows :—



[28] One share, because he has one claimant descended from him ; & double share, because he is himself male (though claimant descended from him is female).

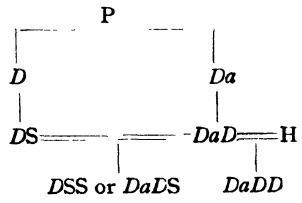
[29] Two shares, since there are two claimants, & single shares since she is herself female (though one of claimants descended from her is male, & other female).

SECTION 632.
IV. PORTIONS OF CLAIMANTS RELATED IN MORE WAYS THAN ONE.

632. A claimant related to the deceased in more ways than one [1] inherits in respect of each such relation *except* that Abu Yusuf [2] holds that a grandmother inherits in only one way, notwithstanding that she be related to the deceased in more ways than one.[3]

Illustrations.

(1) If the deceased, P, has two daughters *D*, *Da*,—the former having a son *D*S, and the latter a daughter *DaD*, who intermarry and give birth to a son,—that son traces his relation to the deceased in two ways, and may therefore be styled *D*SS or *DaD*S. If afterwards *DaD* marries another husband H, and gives birth to a daughter *DaDD*, then on the death of all the other persons mentioned above, *D*SS (who is also *DaD*S) and *DaDD* will be heirs. (*a*) According to Abu Yusuf, *D*SS, being a male, and being related to the deceased in two ways, will take the share of two males, i.e. a quadruple share, and *DaDD* being a female, and related to the deceased in only one way, will take a single share, i.e. *D*SS will take 4/5 and *DaDD* 1/5. (*b*) According to Imam Muhammad the first distribution will be in the generation of *D*S and *DaD* where the intermediate ancestors differ in sex, *D*S will be allotted one double share, i.e. 2/3 and *DaD* one single share, i.e. 1/3.[4] The 2/3 of *D*S will come to *D*SS and the 1/3 of *DaD* will be divided equally between *DaD*S and *DaDD*, i.e. last will get only 1/6 and *D*SS or *DaD*S will take 5/6.



Relation in more ways than one.

(2) P dies leaving the c*Si* of his father (CPAT*Au*) and the uB of his mother (UMATUn). If the former is also his UMAT*Au*,[5] then P's estate will first be divided into 2/3 for the PAT side, and 1/3 for the MAT ; PAT*Au* will take the whole 2/3 of the PAT side. Then the 1/3 for the MAT side will again be divided so that the Un gets 2/9 out of it and the *Au* 1/9, so that the *Au* will get in all 2/3 + 1/9 = 7/9.[6]

(3) The grandchildren of the Un's and *Au*'s of the deceased being the claimants, as shown in the table on p. 900, viz.—

[1] Provided, of course, that each relationship would have entitled him, by itself to inherit.

[2] Imam Muhammad does not agree with Abu Yusuf on this point.

[3] Bail. I. 707 (717).

[4] *Sic* in Bail. I. 707 (717) : *sed quaere* whether *DaD* should not be allotted two single shares,—inasmuch as there are two claimants descended from her, viz. *DaD*S & *DaDD* ; *ill.* (1) is taken from *Fatawa Alamgiri ;* & it seems hardly possible that there should be error in it, but present author unable to think of any other explanation of this instance, except error in copy.

[5] If a man, F, has two wives, *W* & *Wa*, & son (S) of F & *W* marries daughter (*D*) of *Wa* (by husband other than F), & child P born to S & *D* ; then *Da* daughter of F & *Wa* will be both consanguine sister of S & uterine sister of *D*, i.e. both consanguine sister of P's father & uterine sister of P's mother.

[6] *Siraj. Sharif.* Jones, VIII. 253, 255, 313 f. = III. 596 = Rums. 55 f.

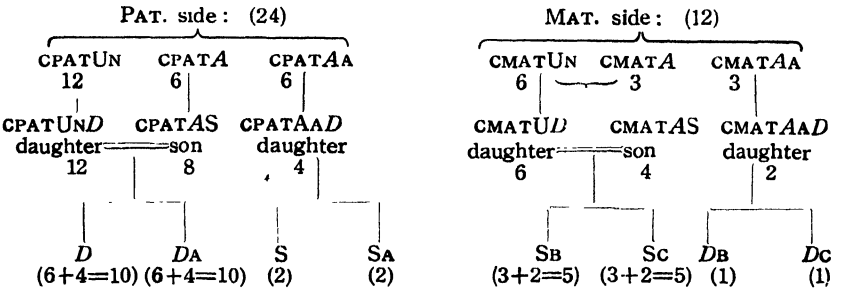
SECTION 632.

CPATUn (consang. pat. uncle). CMATUn (consang. mat. uncle).
CPAT*Au* „ „ aunt). CMAT*Au* „ „ aunt).
CPAT*Au*A „ „ aunt). CMAT*Au*A „ „ aunt).

then CPATUn's *D* marries CAPT*Au*'s S, and two daughters are born to them *D*, *D*A ; there are also two sons of CPAT*Au*A's daughter, viz. S, SA ; then CMATUn's daughter marries CMAT*Au*'s son and has two sons SB, SC, finally CMAT*Au*A's daughter has two daughters DB, DC :—

(*a*) Abu Yusuf would divide the estate into 30 parts,—of the 30 the paternal side will take 20, and the maternal 10 ; of the 20 *D*, *D*A, S and SA will each take 5 (because *D* and *D*A have a double relation) and S, SA, are males ; and the 10 on the maternal side will be divided, so that SB and SC take 4 each and DB and DC, 1 each.

(*b*) Imam Muhammad, however would divide the estate into 36 parts (i) giving (2/3 =) 24 to the PAT side, and (1/3 =) 12 to the MAT ; (ii) the 24 would be re-divided in the first instance between CPATUn on the one hand, and his two sisters CPAT*Au* and CPAT*Au*A, on the other : CPATUn counts as two males, having 2 claimants descended from him ; CPAT*Au* and CPAT*Au*A as 2 females each, i.e. they take it in the proportion of 4 : 2 : 2 ; hence CPATUn gets 12 shares, CPAT*Au* 6 and CPAT*Au*A 6, making up the 24 on the PAT side ; (iii) the 12 shares of CPATUn are inherited by the claimants descended through him, viz. *D*, *D*A, who, as his grandchildren take 6 each ; (iv) the 6 shares of CPAT*Ru*, and 6 of CPAT*Au*A, 122 in all, are aggregated, and re-divided in the next generation (since they have a son and a daughter, i.e. the intermediate ancestors of the claimants through them differ in sex) : CPAT*Au*'s son counts as 2 males, and CPAT*Au*A's daughter as 2 females, (each having two claimants descended from him and her viz. *D*, *D*A, and S, SA) so that CPAT*Au*'s descendants have 8 out of the 12 allotted to them, and CPAT*Au*'s descendants have 4 allotted to them. (v) Then CPAT*Au*'s descendants take 4 each out of the said 8 ; they have already taken 6 each through CPATUn ; and (vi) CPAT*Au*A's sons, S, SA, take 2 each out of the 4 allotted to their mother in division (iv) Similarly the 12 shares allotted to the MAT side are divided and redivided six times giving ultimately to SB and SC 3 each from CMATUn and 2 each from CMAT*Au* ; and to *D*B and *D*C, 1 each from CMAT*Au*A.[7] The figures in the following table represent the apportionment according to Imam Muhammad—



[7] *Siraj. Sharif.* Jones, VIII. 256, 314-316 = III. 586 f. = Rums. 56-57.

§ 7.—Husband or Wife Inheriting Whole.

Return, to husband or wife if no distant kindred nor residuaries nor (other) sharers.

633. Where[8] no blood relation of the deceased of any description whatever can establish his claim to inherit, the husband or wife (if either is surviving) will take the whole of the estate,[9] subject however to any testamentary disposition by the deceased, which, where the deceased is a male and has no heir except his widow, may validly affect 5|6 of the estate ; and where the deceased is a female, and has no heir except her husband, may affect 2|3 of the estate.[10]

Reason.

The husband and wife are postponed to all the blood relations, apparently because the Koran specially mentions that every person related (by blood) to the deceased should inherit, without restricting their rights to any special mode of succession, whereas the husband and wife are mentioned merely as being entitled to inherit their Koranic share. "There can be no doubt," said Kemp, J., "that the more ancient authorities did hold that the widow and the husband were not entitled to the radd or return, under the Muhammadan law ; but more modern authorities have ruled that in the absence of the bait-ul-mal, the widow and the husband, are entitled to the return."[11]

§ 8.—Maula or Successor by Contract.

Maula succeeds if no blood relations nor husband or wife.

634. (1) In default of all blood relations the estate devolves (subject to the rights of the husband or wife) under Hanafi, but not Shafii, law[12] upon the maula, or successor by contract as defined below.[13]

Maula defined.

(2) If a person of unknown descent agrees to pay any fine to which the propositus may be liable, and in consideration thereof the propositus (having attained majority and being of sound mind) makes a declaration, that if he (the propositus)

[8] Cf. s. 647, p. 924, for Shia law.

[9] *Mahomed Arshad* v. *Sajida B.*, (1878) 3 Cal. 702, following (*Mt.*) *Soobhanee Bhetun*, (1811) 1 S. D. A. (CAL.) 346. Sircar, *Muhamm. Law*, II. 233-234 referred to for modern authorities ; *Bafatun* v. *Bilaiti K.*, (1903) 30 Cal. 683 ; cf. (*Mt.*) *Hurmutool-Nissa B.* v. *Allahdin K.*, (1871) 17 W. R. 108 (P. C.) ; *Mir Isub* v. *Isab*, (1920) 44 Bom. 947 ; cf. *Abdul Hamid Khan* v. *Piare Mirza*, (1934) 10 Luck. 550.

[10] Explanation of these fractions : testamentary powers in circumstances cover all that husband/wife is not entitled to inherit as of right. Ordinarily testamentary right takes away 1/3 of estate from heirs (if the testator so desires). Therefore widower, if sole heir, is entitled as of right to 1/2 of 2/3, i.e. to 1/3, leaving to his deceased wife testamentary powers over 2/3 of estate : the widow, if sole heir is entitled as of right to inherit 1/4 of 2/3, i.e. to 1/6, leaving to her husband, testamentary powers over 5/6 of estate. See s. 579 B, p. 785 which refers to & explains testamentary powers where only survivor is husband/wife.

[11] *Mahomed Arshad* v. *Sajida Banoo*, (1878) 3 Cal. 702.

[12] The *Minhaj* is silent as to the "successor by contract." *Siraj.* par. 1, VIII. 214, III. 518, Rums. 13 ; *Sharifiyyah*, Jones, *Works*, VIII. 271.

[13] Cf. Koran IV. 32, 33 *n.* ; cited pp. 823 f. There may be a mutual contract for succession between two persons, so that each may be the *maula* of the other.

should die leaving no blood relations surviving him as his heirs, the said person of unknown descent, shall (subject to the rights of the propositus's husband or wife, if any) inherit the propositus's estate, such an agreement is called mawalat,[14] and the said person (of unknown descent) is called the maula of the propositus or his successor by contract. SECTION 634.

This rule of law, like so many others, is a relic of pre-Islamic customs in Arabia.[15] It can have little applicability in India. The consideration cannot be recognized : the fine contemplated by the text-writers is the diyat, payable as compensation for criminal acts.

§ 9.—Acknowledged Kinsman.

635. In default of (i) all blood relations, (ii) the husband or wife, and (iii) the successor by contract, the estate devolves upon the "acknowledged kinsman," i.e. a person of unknown descent whom the deceased has declared[16] to be descended from a kinsman of himself.[17] Acknowledged kinsman comes next.

A person whose claim is based on a mere acknowledgment, is postponed to those who have other proof to establish their rights.

§ 10.—Universal Legatee as Successor.

636. In default of all those who are referred to in s. 635, a Muslim has the right to make a testamentary disposition of the whole of his estate.[18] Testamentary power enhanced if there are no heirs,

The case where only the husband or wife survives the deceased, is referred to in s. 633. The above testamentary powers of the deceased are restricted so as to operate to the extent of only 1/3 of the estate as against the husband or wife's interest in the estate (as Quranic sharer), but are unrestricted as against the rest of the property.[18] —or only husband or wife.

§ 11.—Escheat to Government.

637. In default of all the persons[19] referred to in s. 635, Escheat to Government if no one can establish his claim

[14] Bail. I. 387 (398), 388 (390), 634 (645 f). Cf. the much shorter definition in s. 646 : but I have adhered to the texts in each case.

[15] Cf. Smith, *Kins. & Marr. in Anc. Arab*, 55 ; Koran IV. 33, cited, p. 824.

[16] A declaration of this nature may be retracted, & if retracted, is of no effect, s. 222 f., p. 264.

[17] Such acknowledgment does not refer to descent from deceased himself. If it does so refer, it may take effect so as to establish parentage,—in which case acknowledged person would succeed as if he were descended from deceased : whereas acknowledgment under s. 635 gives rights postponed to all other relations. Cf. Bail. I. 406 (409) (*ll.* 1-4); Smith, *Kins. & Marr. in Anc. Arab.*, 15. See also *Sahebzadi Begam* v. (*Mirza*) *Himmat*, (1869) 12 W. R. 512.

[18] Bail. I. 634 (645-646). See ss. 579 B, 633, pp. 784 f., 894.

[19] *Sheikh Abdur Rahman* v. *Sheikh Wali Mohammad*, (1922) 2 Pat. 75, 81 (husband's nephew seems to have been preferred to Crown).

SECTION 637. the estate, or such portion of it as is not disposed of by the will of the deceased, escheats to the Government.

Private ownership not existing, the State must be owner as ultimate lord,[20] though the Crown is not entitled as of right, either by virtue of its prerogative, or under any statute, to take possession of the property of a subject without paying compensation.[21] The case of Muslims, who have ordinarily testamentary power only over the bequeathable third, does, on equitable grounds, seem to be somewhat special. An old case states that where the widow of the deceased is the only surviving heir, the residual 3/4 of the estate also reverts to the widow—it being ruled by fatawa that there is in modern times no baitul-mal or public treasury, regularly established.[22]

PART III.—SHIA LAW OF INHERITANCE.

§ 1.—SCHEME OF SHIA LAW OF INHERITANCE.

SHIA LAW. The nearest (male or female agnate) or cognate succeed.

638. The scheme of the Shia law is as follows,—

(1) The husband or wife, together with the nearest blood relations, male or female, agnate or cognate,[1] succeed to the estate : proximity being reckoned as provided in s. 640 : in no case (except under s. 640 E) does a person remoter than the said nearest blood relations inherit any portion of the said estate.[2] Hereinafter, unless otherwise indicated, the expression " heirs " includes the husband or wife and the said nearest blood relations, but no others.

Distribution first to sharers.

(2) The estate is divided amongst the heirs, by (i) first allotting (subject to s. 638(3).), their respective shares to those heirs who are entitled to Koranic shares ;[3] (ii) and the residue[3] is then divided amongst the rest of the heirs per stirpes, and not per capita ;[3] (iii) if the heirs comprise only

[20] Knight-Bruce, L. J. in *Collr., Masulipatam* v. *Cavaly Vencata,* (1860) 8 Moo. I. A. 500, 525 (all property not dedicated to certain religious trusts must have some legal owner : there can be legally speaking no un-owned property : the law of escheat intervenes & prevails, & is adopted generally in all the Courts of the country alike).

[21] *Att.-Gen.* v. *De Keysers Royal Hotel Ltd.,* [1920] A. C. 508.

[22] (*Mt.*) *Soodhanee* v. *Bhetum* alias *Shah Azamali,* (1811) 1 S. D. A. (CAL.) 346, 348, cited with approval by Kemp, J., in *Mahomed Arshad* v. *Sajida,* (1878) 3 Cal. 702.

[1] Cf. Bail. II. 274 (par. 2).

[2] Bail. II. 270. Insomuch that there is no inheritance for a son's son, when there is only a daughter. Bail. II. 363 (par. 2). Sect. 640 E is sole exception.

[3] Bail. II. 262 (par. 2), 274. Principle of allotting males twice as large a portion as females is applied to (*a*) descendants, (*b*) agnates—not applied to ascendants or to cognates, or uterine collaterals : s. 643 C. Cf. Bail. II. 303 (*ll.* 17-18); see also Bail. II. 400 ; " I was directed to ask the Imam Jaffer Sadiq, on whom be peace, to whom does the property of a person deceased of right appertain ? to his own nearest relation, or to his Asbat ? He replied :—' Verily it belongs to the nearest relation, and as to the Asbat or more distant male kindred, " Dust in their jaws." ' "

(Koranic) sharers, then they divide amongst themselves the residue as stated in s. 638(4). SECTION 638. Per stirpes.

*(3) Where the sum total of the Koranic shares exceeds unity,[4] the shares do not all abate rateably,[5] but the deficit is borne either by the daughters or sisters, as mentioned in ss. 642, and 643.[6] No rateable abatement or aul.

(4) Where the heirs do not include a residuary, and the total of the (Koranic) shares of the heirs does not equal unity or exhaust the whole estate,[7] the residue is divided amongst them in the proportion of their respective shares. "Return" to sharers.

Explanation.—Under Shia law the distinction between the (Koranic) sharers and residuaries arises only in the distribution of the estate : it does not affect the question as to who are entitled to succeed : the sharers do not take in priority to the residuaries. Effect of distinction between sharer and residuary.

The sharer or zu farz refers in Shia, as in Sunni law to a kinsman specifically named or mentioned in the Koran.[8] Those heirs for whom shares are not allotted in the Koran are referred to as zu qarabat[9] by the Shia authorities.[8] The latter are referred to in Baillie as residuaries. The same heir may in some circumstances be a sharer, and in others a residuary. SHARERS IN SHIA LAW.

The sharers in Shia law are (subject to s. 640)— Enumerated.

(1) husband : in all circumstances a sharer (taking 1/2 or 1/4);

(2) widow : in all circumstances a sharer (taking 1/4 or 1/8);

(3) daughter : when there is no son (one taking 1/2, two or more 2/3);

(4) father : when there are any descendants (taking 1/6);

(5) mother : in all circumstances (taking 1/3 or 1/6);

[4] Under operation of Shia rules of succession in every case in which there survives a pure residuary (viz. a person entitled to inherit under Shia law but who is not given a Koranic share) some residue is available.

[5] The abatement is referred to as *aul* or "increase," & prevails in Sunni law. "The *aul* is null, or not recognized with us," i.e. in Shia law,—Bail. II. 274 ; "the nullity of the doctrine of *aul*," *ib.* 273 ; "innumerable traditions... expressly annul & prohibit this practice," *ib.* 397.

[6] See ss. 642(2)(*c*), 643, pp. 911, 915. Deficit always falls either upon (*a*) daughters, or (*b*) full or consanguine sisters. Only when either of these present, that there can be a deficit.—Bail. II. 395 (par. 3), 396-397 ; 263, 273, 274, 336. It has seemed best to denominate (in this work) the position of full sisters as that of residuaries inasmuch as they take whole or residue & bear deficit (if any) caused by existence of shares : s. 643A(3), p. 916.

[7] Viz. when the fractions of shares are added together, their aggregate sum is less than unity.

[8] Bail. II. 377, 278. See s. 601, com., p. 827 : "Quantum of interest taken by heirs." *Zu* = master of ; *farz* = ordinance, hence special rules of Koran relating to shares in inheritance are called *faraiz* (sing. *farz*); the share itself is then referred to as *farz* ; and *faraiz* is term used for law of inheritance.

[9] *Qarabat* = kinship : cf. "*Zoo Kurabat*, or a residuary" : Bail. II. 377 (last line).

SECTION 638.

(6) full or consanguine sister : where there is no brother or grandfather[10] (sharing in a manner similar to daughters);

(7) uterine brothers and sisters (taking 1/6 or 1/3).

Of these the daughters, the father and sisters are occasionally residuaries; viz., daughter where there is a son; father, where there are no descendants; sister, where there is a brother or grandfather.[8]

Hanafis include more persons amongst sharers as individuals entitled in their own rights.

Observe that the following, not classed as Koranic sharers by the Shias, are so classed by the Hanafis, viz. (i) the son's daughter, (ii) true grandfather, (iii) true grandfather. The reason is that the Shias adopt—after the nearest relations are determined in accordance with s. 638(1)—a species of representation[11] and a stirpital distribution throughout, so that (to take an example) in Shia law the son's daughter takes the share not of a daughter, but a son, and it is the daughter's child (whether male or female) who takes the share of the daughter—not the son's daughter. At the same time, the principle which according to the Shia interpretation of the Koran underlies the doctrine of the "shares," is extended in all directions, and through all generations to the remotest kinsmen.[12] In other words, the Shias interpret the specific provisions in the Koran about inheritance, as indicating a scheme by which the respective rights of the relations in the first degree immediately surrounding the deceased, are adjusted and defined—as an orientation of the relative positions of such kinsmen in regard to each other, with reference both to their title to inherit, and the proportion or ratio of their respective interests, when they compete one with the other : and the same principles are adopted, where the surviving claimants are more distant, but as amongst themselves their relations with reference to the deceased correspond to the relations borne by the nearer claimants specified in the Koran.

Shias include fewer individuals but extend principle to all kinsmen related through those individuals.

Thus the provisions in the Quran in favour of the immediate relations of a person—(i) the spouse, (ii) descendants, (iii) parents, (iv) sister or brother,—according to the Shias lay down not only in what proportions they themselves inherit, but also fix the position that each kinsman holds with respect to the propositus, by reason of the particular relation existing between the two; and, as a consequence, determines the relative importance or significance (in the law of succession) of their respective relations.

The portions that the more distant heirs take are always the counterpart of the portions given by the Quran to the primary heirs.

Sunni and Shia principles compared.

With reference to the residuaries, the Hanafi interpretation of the law makes the male agnates alone residuaries in their own right, female agnates

[10] The grandfather takes same interest as brother when he co-exists with brother or sister; s. 643 B, p. 916.

[11] Merely as regards the quantum of estate taken,– not as regards the right to inherit : with reference to the latter, except under s. 640 E, (p. 902) the nearest rigorously excludes the remoter : s. 638(1) (p. 896); & a predeceased relation's descendants do not represent him in regard to the right to inherit. See p. 832.

[12] E.g. *uSi*'s share is not restricted to her, but her children take it in her absence, —unless of course, there are relations in a nearer generation,—for under Shia law in no case does a more distant kinsman succeed with a nearer one, except in the anomalous case in s. 640 E (p. 902).

being residuaries only when they co-exist with male agnates in the same line, whereas the Shias extend to the most distant, the principles laid down for the immediate, relations. Radical changes have to be introduced for adapting those rules. As a daughter or a full or consanguine sister is a residuary in certain circumstances, so are also the descendants of the daughter, or those connected with the deceased through the full or consanguine sister. See table of priority, pp. 904 f. s. 640 E. SECTION 638.

§ 2.—COMPETENCE TO INHERIT : EXCLUSION.

638 A. A child in the womb of its mother is competent to inherit, provided that it is born alive.[13] (A) Child in womb.

639. (1) Under Shia law[14] a person who has wilfully and unjustly caused the death of another is disqualified to be the heir of the person so killed ;[15] but not one who has accidentally or rightfully done so. (B) Rules of exclusion. Causing death accidental does not exclude from inheritance.

(2) There is no legal relation between a person who has disclaimed the paternity of a child by lian under s. 218, and the child ; and neither can inherit from the other ; provided that, if the said person subsequently withdraws the lian, the child may inherit from him, but he does not inherit from the child ;[16] nor do any rights of inheritance arise between the child and the relations of the said person.[17] (C) Child of parents who have made lian.

(3) Subject to s. 639(4), an illegitimate child[18] bears no relation in Shia law either to his[19] mother,[20] or his father ; (D) Illegitimate child.

[13] Bail. II. 269-70. See s. 606(1), p. 838, for Hanafi law. Cf. "If born six months from the death of its father, the right of inheritance is established ; or even if born at nine months, if its mother has not married again."

[14] Bail. II. 14, 90, 373. Cf. s. 606(3), (p. 839) ; s. 587, com., (p. 804), gives principle underlying rule disqualifying murderer.

[15] Bail. II. 266 : "Though *Mofeed* has, apparently with some propriety, excluded from the operation of this rule the *deeut* or fine to be paid in expiation of the deed, which the slayer is prevented from inheriting." Impediment to succession arising from causing death is personal to killer,—not transmitted to those who claim through him : others may succeed through killer. E.g. if K kills P. & K's son would be entitled in absence of K, then K's son may become P's heir : Bail. II. 267 (par. 1). Similarly slave is excluded, but not son of slave (*ib.* last par.). Cf. also Bail. II. 369 (par. 2, 3) 370 (*third*).

[16] Bail. II. 269, 303, 304 (*ll.* 9-11 ; *first*), 305 (par. 4), 372 (*first*). Except descendants of bastard child, all his other relations must be through the mother, i.e. cognates, hence they inherit males & females in equal portions : s. 643c, p. 916.

[17] Bail. II. 304 (*ll.* 12-19). [18] Bail. II. 306 (*ll.* 16-19).

[19] Masculine includes feminine in s. 639(3). Instead of "wife" read "husband" where the deceased is female.

[20] Under Shia law illegitimate mother is incompetent to inherit : *Sahebzadi Begum* v. *Mirza Himmat Bahadur*, (1869) 4 Beng. L. R. (A. C.) 103=12 W. R. 512 ; *affirmed* on review : (1870) 14 W. R. 125 ; *Koonari Bibi* v. *Dalim Bibi*, (1884) 11 Cal. 14 ; *Bafatun* v. *Bilaiti Khanum*, (1903) 30 Cal. 683.

SECTION 639. so that rights of inheritance do not arise between him [19] and any of his ascendants or collaterals,[21] but only between him and his wife [22] and his own children.

(E) Children of persons mistakenly considering themselves married.

(4) The parentage of a child given birth to by persons believing themselves in good faith to be lawfully married,[23] is established in the said persons [24] : if only one of the parents is under such mistaken belief, the parentage of that one alone is established.[23]

Illustration.

"If a husband disavows the parentage of a 'fœtus' or embryo in the womb of his wife, and 'the li'an' or mutual imprecation takes place, after which she produces twins, they are both heirs to each other as brothers by the mother's side, but not by the father's." [25]

(F) Unborn and missing persons.

639 A. The rules relating to unborn and missing persons in ss. 607, 608 and 609 are applicable also to Shias.

The following opinions have been expressed as to the procedure in case a person missing,[26] viz., (1) to wait until there is no probability of the missing person being alive, (2) until the expiration of 10 years, (3) "some doctors have prescribed 4 years," (4) to divide the estate "amongst his heirs if they are in opulent circumstances, to be restored to him if he should return," [5] (5) "others have denied the legality of the distribution altogether, directing that the property should be entrusted to the keeping of an heir in opulent circumstances. But the first opinion is to be preferred as best founded in reason and justice." [26]

§ 3.—PRIORITIES AMONG BLOOD RELATIONS : THREE CLASSES.

Three classes of heirs mutually excluding each other.

640. Priority amongst blood relations [1] for purposes of succession is reckoned in Shia law on the following basis : All

21 Bail. II. 306, (par. 3), where another Shia report is alluded to, according to which illegitimate mother & child inherit from each other, (which would agree with Sunni law) "but this report is now rejected."

22 Or "husband," if deceased is female.

23 Bail. II. 374 (par. 1)—though their mistaken belief does not entitle them to inherit from one another as husband & wife. See s. 641, p. 906.

24 In converse case (where persons are really husband & wife, but consider themselves, to be committing adultery) offspring lawful : Bail. II. 374 (par. 2).

25 Bail. II. 305 (*third*).

26 Bail. II. 269 (*second*), 372 (*second*), 307 (para. 4) : (1) is opinion in *Khilaf*, (2) in *Mofeed* "on the ground of a report of *Aly bin Muhriar*, as having been so decided by *Aboo Jafar* ... with respect to the sale of small part of a mansion, but a general inference from a decision of this nature seems to be unreasonable," (3) is opinion of the *Sheikh*, (4) stated in *Sumaut* (on report of *Asman bin Essa*) as having been so decided by *Aboo Abdoolah* : "but this report is weak, or not sufficiently authenticated ;" (5) accords with report by *Ishak Bin Omar* of decision by *Aboo Abdoollah*. "But there are some doubts as to" *Ishak's* "fidelity & though the report is maintained by *Suhul bin Zuad*, it is still considered weak."

1 The husband or wife stands on a different basis altogether & neither excludes nor is excluded by any blood-relation. See s. 641, p. 906.

SECTION 640.

the blood relations [1] are divided into the three classes [2] mentioned in ss. 640A, 640B and 640C : the existence of any member of the first class excludes all members of the second and third classes, and any member of the second class excludes all members of the third class : [3] the members of each class, have amongst themselves priority as mentioned in s. 640D.[2]

Sections 640A—640C give the main divisions of heirs into three classes : s. 640D explains the priorities within each class.

I. FIRST CLASS : Descendants and parents.

640A. The first class of heirs [1] consists of—

(*a*) all descendants,[4] together with

(*b*) the father and mother of the deceased :

these are preferred to all grandparents and collaterals.[5]

II. SECOND CLASS : (i) Grandparents, (ii) brothers and sisters, (iii) descendants of (ii).

640B. The second class of heirs consists of—

(*a*) all the ascendants,[4] howsoever high, of the father and mother of the deceased, together with

(*b*) the descendants, howsoever low, of his father and mother : [6]

these are preferred to those collaterals who are descended from a grandparent or other higher ancestor of the deceased.[7]

III. THIRD CLASS : Uncles and aunts : their descendants.

640C. The third class of heirs consists of all other blood relations [1] of the deceased, viz. the uncles and aunts of the deceased, or of an ancestor [4] of the deceased, and the descendants [7] of such uncles or aunts.[8]

Priorities within the three classes amongst— 1.—descendants. 2.—ascendants.

640D. (1) Within each of the three classes of heirs mentioned in ss. 640A—640C, priority (as between one descendant and another descendant, or one ascendant and another ascendant) is given to the claimant between whom and the deceased the fewest links (whether male or female) intervene : but (in the first class, s. 640A) no descendant excludes or is excluded by the father or mother ; and (in the third class, s. 640C) no ascendant excludes or is excluded by a collateral.[9]

[2] *Tabaqa* in Arabic : Baillie renders it "class," & I have adhered to it, though "group" or "series" would have been preferable.

[3] Bail. II. 323.

[4] Male or female, agnate or cognate ; cf. Bail. II. 271 (par. 5), 324 (*ll.* 14-17).

[5] Bail. II. 270-271, 276, 324-325, 364 (par. 1).

[6] I.e. all (*a*) grandparents, howsoever high, together with (*b*) brothers & sisters (full consanguine or uterine) & their descendants, howsoever low, form SECOND CLASS.

[7] Bail. 271, 280, 326-328, 364.

[8] Bail. II. 271 (par. 2), 285, 328-331, 364 (par. 3). [9] Bail. II. 324-325.

SECTION 640D. 3.—Collaterals.

(2) Priority as between one collateral and another collateral (within the second or third classes of heirs : ss. 640B and 640C) is given in accordance with the following rules,—

(*a*) Descendant of nearest common ancestor preferred.

(*a*) the descendant, howsoever low, (and whether full, consanguine or uterine) of a nearer common ancestor [10] has priority over all the descendants of a remoter common ancestor ; [11]

(*b*) amongst claimants descended from the same common ancestor,—

(i) the claimant between whom and the common ancestor fewer links intervene, has (subject to s. 640E) priority over a claimant with more links intervening ;

(*b*) Full blood preferred to consanguine but uterine not excluded by full or consanguine.

(ii) where the number of intervening links is the same, full blood relations and their descendants, have priority over consanguine relations and their descendants, respectively ; [12] but the uterine relations and their descendants rank with, and do not exclude, nor are they excluded by, the full blood, or the consanguine relations, or their descendants respectively.

(*c*) Competition between,—
(i) paternal, maternal sides.
(ii) full-blood, consanguine.

(3) Amongst claimants of the third class of heirs, the uncles and aunts on the paternal as well as the maternal side are considered to be relations of the same description, and the nearest of them on either side excludes a claimant in a lower line, even though the latter belongs to the other side : but so that the full blood relation excludes a consanguine relation if the latter is on the same side and in the same (or a lower) line, but does not exclude a consanguine relation in the same line on the other side.[13]

4.—*Exceptional case.* Son of full paternal uncle excludes consanguine uncle.

640E. As an exceptional case, the son of the full paternal uncle (provided there is no maternal uncle) is given preference over the consanguine paternal uncle, notwithstanding that the latter is nearer, being in a higher generation.[14]

[10] "Common ancestor" = nearest ancestor, agnate or cognate of deceased from whom claimant can also trace descent : cf. s. 605(2), (4), p. 833.

[11] Bail. II. 280 (par. 3), 287 (*first*), 329, 331 (par. 4), 332 (par. 1); *Nijabat Ali* v. *Wazir A.*, [1908] All. W. N. 149 (maternal uncle as son of maternal grandfather excludes great-great-grandfather's great-grandson).

[12] Bail. II. 271 (par. 3), 280 (par. 4).

[13] Viz. claimant on one side does not exclude claimant on other side, merely on ground of former being full blood relation, & latter consanguine, but only if former is in nearer line than latter. See s. 640E, com., p. 903.

[14] Bail. II. 285 (par. 3). This case is entirely *sui generis* ; nephew preferred to uncle,—"while the case remains exactly so ; but if it is changed [even] by the addition of a maternal uncle, the son of the paternal uncle is excluded,"—*ib.* 329.

1.—PRINCIPLES OF PRIORITY : SHIA LAW.

SECTION 640E.

1.—Nearest always preferred.

2.—Parents and children equally near.

3.—Full blood preferred to consanguine but not to uterine.

The nearest in every case (except in the anomalous case in s. 640E) excludes the remoter,[15] i.e. the claimant in the generation nearest to the deceased is always preferred ; this, however, is subject to the gloss that the parents of the deceased are considered to be neither remoter nor nearer than his descendants ;[16] similarly the parents[17] of the father, or mother of the deceased are on the same footing as the descendants of the father or mother of the deceased. When two or more claimants are in the same generation, and on the same side but some are full blood, and others half blood, then the uterine relations always succeed,[18] but the consanguine relations are excluded by the full blood.[19] See table of priority, pp. 904 f.

The same may be stated in the following form,—

The three classes mutually exclusive.

I. The three classes are each in turn exclusive of the other (so that if any member of the 1st class, male or female, agnate or cognate, ascendant or descendant, exists, none of the 2nd or 3rd class can succeed, and similarly the 2nd class excludes the 3rd.[20]

II. As to those included in each of the three classes,—

FIRST CLASS.

Two sub-groups.

(1) The 1st class consists of two sub-groups,—

(*a*) the father and mother,

(*b*) descendants.

Amongst descendants nearer exclude remoter.

members of neither of these sub-groups marked (*a*) and (*b*) compete with members of the other sub-group, i.e. the existence of no member of either sub-group has the effect of excluding any member of the other sub-group.[21]—

"The SON OF A PATERNAL FULL UNCLE, [viz. son of uncle who was full brother to deceased's father, being by the same father and mother FPATUnS] excludes a PATERNAL HALF UNCLE only of the deceased, [UPATUn *or* CPATUn], & takes the whole inheritance preferably to the latter, although nearer in degree, if the succession should be limited to these two ; & it is in virtue of this exception, that had the Prophet of God, on whom & his posterity be blessing & peace, left no issue at the period of his dissolution, his whole succession must by law have developed on the Commander of the Faithful, *Aly*, on whom be the blessing of God, in preference, and complete exclusion of, *Abbass* ; for *Aboo Talib* was the full brother of *Abdoolla*, both by father's & mother's side, & consequently his son, the Commander of the Faithful, although more remote in degree, must have excluded *Abbass*, half uncle of the Prophet, as being brother to *Abdoolla* by the father's side only .. *Imam Jafer Sadik* .. observed, ... 'Verily, *Abdoolla*, father to the Prophet of God, was full brother of *Aboo Talib* by the same father and mother, whence the Commander of the Faithful, as son of *Aboo Talib*, had no issue of the Prophet remained, would have excluded *Abbass*, his uncle by the same father only from inheritance.' And hereupon a question has arisen whether the exception is by law restricted to the particular instance before us, without application to any other, or may be also legally extended to all similar cases. The most common and prevalent doctrine has restricted its influence to this particular case alone, & the author of the *Shuraya* has expressly declared that if with these two persons, viz. the son of a paternal full uncle & paternal uncle of the half blood, any other heir, even a maternal uncle, should exist, the decision of law would be completely altered & the title of the uncle's son entirely cut off."—Bail. II. 329-331.

15 Bail. II. 363 (par. 2).

16 See Koran IV. 11 ; cited p. 824 f.

17 Not only the parents but any ascendant howsoever high. This is anomalous : on principle uncle should rank *with* (& not be excluded by) great grandfather. But chances of such ancestors surviving are so slight that it is no wonder law has not developed harmoniously regarding them.

18 Bail. II. 333.

19 Bail. II. 362 (par. 2).

20 Bail. II. 323 (par. 2).

21 Bail. II. 324-325.

SECTION 640E. But no competition between the two sub-groups.

Of the descendants only the nearest succeed (so that a son or daughter excludes a grandchild, whether male or female, agnate or cognate; (e.g. a daughter's daughter will exclude a son's son's son). But howsoever remote the nearest descendant may be, he or she will succeed conjointly with the father and mother, and will neither exclude the parents nor be excluded by them (e.g., the children's children's children will succeed with the father and mother; provided that there are no children nor grandchildren.)[22]

SECOND CLASS. Two sub-groups: in each, nearer excludes remoter; but no competition between sub-groups.

(2) The 2nd class also consists of the two sub-groups,—

(*a*) grand-parents (howsoever high),

(*b*) brothers and sisters, and their descendants howsoever low—

members of which two groups do not compete against each other,[23]—

In each of these sub-groups there is competition 'inter se,' viz. competition only amongst the members of that group (e.g. the mother's mother will exclude the father's father's father; and the brother's son is excluded by the sister, but the grandfather will not exclude a sister's daughter's daughter).

THIRD CLASS. Not divided into sub-groups.

(3) The 3rd class includes (*a*) the brothers and sisters of the father and mother of the deceased, and (*b*) their descendants, and (*c*) the brothers and sisters of all other ancestors (male or female agnate or cognate of the deceased). This class though divided off as (a) (b) (c) is derived only from "one general description of heirs, because their title to succession is derived from the general relation to the deceased, viz., that of brotherhood or sisterhood to his parents."[24] Hence the nearest of them all succeeds, and any member of the third class competes against all other members: differing in this respect from the first two classes, each of which consists of two watertight compartments. (E.g. (i) a paternal uncle or aunt in the third class excludes a paternal uncle or aunt's son, (ii) a maternal aunt[25] excludes a paternal uncle's son. (iii) the great grandson of the brother of the father[26] excludes the brother of the grandfather.)

2.—HEIRS UNDER SHIA LAW : TABLE OF PRIORITY.

PRIORITY.

N.B.—The husband or wife[1] always succeeds, whoever be the surviving blood relations. Those mentioned in groups marked I. II. and III. succeed simultaneously, unless otherwise stated.[27]

FIRST CLASS OF HEIRS.

I. FIRST CLASS.—(*a*) The nearest descendants,[28] (*b*) father *and/or* mother. The members of group I. (*a*) have priority in the following order, each heir excluding all those below,—

1. son(s) *and/or* daughter(s).
2. son's children *and/or* daughter's children.
3. great grandchildren.

—and so on.

[22] Bail. II. 324-325.
[23] Bail. II. 326-327.
[24] Bail. II. 329.
[25] Full, consanguine or uterine.
[26] So any other descendant, howsoever low, of the father's B will exclude the grandfather's B, just as any descendant of propositus will exclude descendants of B.
[27] See also table on p. 925.
[28] No matter how distant they are, so long as there survives none nearer than themselves.

II. SECOND CLASS.—(*a*) The nearest grandparents, (*b*) brothers *and/or* sisters, and, failing them, their nearest descendants how low soever.[5] SECTION 640E. SECOND CLASS OF HEIRS.

Amongst members of group II. (*a*) i.e. amongst grandparents, priority is given in the following order, each set of claimants excluding the sets that follow (F = father or father's ; *M* = mother or mother's ; B = brother ; *Si* = sister).

1. FF, F*M*, M*F*, *and/or* *MM*.
2. FFF, FF*M*, F*MF*, F*MM*, *MFF*, *MFM*, *MMF*, *and/or* *MMM*,—

and so on.

Amongst the members of group II. (*b*), i.e. sisters and brothers and their descendants, priority is given in the following order : each set numbered 1, 2, 3, respectively, below, excluding the sets following it : with relative priorities amongst those within the same set : as appears below :—

1. full brothers,[29] *and failing them,*— consanguine brothers,[29] *together with* uterine brothers.[29]
2. full brother's[29] children, *and failing them,*— consanguine brother's[29] children, *together with* uterine brother's[29] children.
3. full brother's[29] grandchildren, *and failing them,* consanguine brother's[29] grandchildren. *together with* uterine brother's[29] grandchildren.

and so on.

III. THIRD CLASS.—The uncles[30] of the deceased ; *and, failing them,* the uncles[30] of the father and mother of the deceased ; *and failing them,* the uncles[30] of the grandparents of the deceased, and so on. The priorities in each group under class III ; each set numbered 1, 2, 3, 4, etc. below, excludes the sets following, with the priorities amongst within the same set as stated. THIRD CLASS OF HEIRS.

	Father's side :			*Mother's side* :	
1.	(*a*) full brothers[29] of father, *and failing them,*— (*b*) consanguine brothers[29] of father,[31]	*together with*	uterine brothers[29] of father,	uterine brothers[29] of mother,	*together with* (*a*) full brothers[29] of mother *and failing them,*— (*b*) consanguine brothers[29] of mother.
	failing all the above,—				
2	(*a*) children of full brothers[29] of father, *and failing them,*— (*b*) children of consanguine brothers[29] of father,	*together with*	children of uterine brothers[29] of father,	children of uterine brothers[29] of mother,	*together with* (*a*) children of full brothers[29] of mother *and failing them,*— (*b*) children of consanguine brothers[29] of mother.

and failing all the above,—

3. the children of each of those included in group 2 above, *and failing them*—

[29] The word "brother" includes "*and/or* sister," singular includes plural.
[30] The word "uncle" includes "*and/or* aunt," singular includes plural.
[31] This is subject to anomalous case in s. 640B. p. 902.

SECTION 640E. 4. the brothers[29] of the grandparents in the order indicated in *ill.* (32) and (33) to s. 644.

§ 4.—DISTRIBUTION OF ESTATE AMONGST SURVIVORS.

I. THE HUSBAND OR WIFE A SHARER.

641. (1) The husband takes 1|4 of the estate if the deceased has left any descendant,[1] and 1|2 if she has not left any.[2]

Husband's share : wife's.

(2) The widow takes 1|8 of the estate if the deceased has left[3] any descendant, and 1|4 if he has not left any ; provided that where the widow has no child by the deceased, she takes no part of the land left by him, but she takes her share of the value of the household effects and buildings.[4] Where there are two or more widows they take such 1|4 or 1|8 of the estate in equal portions.[5]

Illustrations.

(1) A has four wives. He divorces one of them, and marries another, *W*A, and then dies, leaving no children. If there is a doubt as to which of the four was divorced, then *W*A (whose right is undisputed) takes 1/4 of 1/4 = 1/16, and the first four wives take 1/4 of 3/16 each.[6]

(2) H purports to marry *W*, a relative within the prohibited degrees, or *W*A, the mother of a woman with whom H has had illicit intercourse ; there is

[1] Male or female, agnate or cognate.

[2] Bail. II. 273, 338 ; 303-304, 365 (*ll.* 6-30), 381 (par. 3). Of course the marriage must be valid, *ib.* 373 (par. 4) ; cf. s. 611, & com., p. 847. As to *mula* see s. 25(9) & s. 215, com., pp. 121, 261.

[3] Cf. *Aminabi Mahmulla* v. *Abasaheb*, (1930) 55 Bom. 401 (where daughter deprived by statute of right to inherit her existence does not diminish share of widow).

[4] Bail. II. 295 ; s. 641, com. *Durga Das* v. *Nawab Ali Khan*, (1926) 48 All. 557 (childless Shia widow not entitled to share in land ; but entitled to 1/4 value of building + 1/4 of debts due to deceased husband, including usufructuary mortgages) ; (*Syed*) *Zamin Ali* v. (*Syed*) *Muhammad A. K.*, (1928) 7 Pat. 426, 462 (childless Shia widow gets 1/4 of movables, including household effects & value of buildings & trees) ; *Muzaffar A. K.* v. *Parbati*, (1907) 29 All. 640, 645 ; *vice versa* (1912) 34 All. 289 (P. C.) (ALL.) (point alluded to but unnecessary to decide) ; (*Mir Alli Husain* v. *Sajuda Begum*, (1897) 21 Mad. 27 ; *Umardaraz Ali* v. *Wilayat Ali*, (1896) 19 All. 169 ; (*Mt.*) *Toonan* v. (*Mt.*) *Mehndee B.*, (1868) 3 Agra 13 ; (*Mt.*) *Asloo* v. (*Mt.*) *Umdutoonnissa*, (1873) 20 W. R. 297 ; *Husain K.* v. *Umedi B.*, [1889] All. W. N. 192. Cf. *Aga Mahomed Jaffer Bindaneem* v. *Kulsoom Bibee*, (1887) 24 I. A. 196, 204 = 25 Cal. 9, 19 (no share in land, only in value of building). *Abdul Hamid K.* v. *Piare Mirza*, (1934) 10 Luck. 550 childless widow in absence of all other heirs entitled to take not only 1/4 of movables but remainder of estate by "return"). By Lex Papia (Roman law) the childless "lost half of all their inheritance & legacies," Gai. II. 286. Lex Julia "forbade the unmarried to take inheritance & legacies," *ib.*

[5] See s. 641, *ill.* (1) ; Bail. II. 215 (*ll.* 21-27) ; 382 (par. 2). Husband/wife occupies this peculiar position that he/she alone inherits with claimants who may belong to any of the three classes of heirs mentioned in s. 640. Other claimants being blood relations inherit only with claimants of their own class. The existence of any one belonging to higher class excludes blood relations of a lower class : husband/wife being *sui juris* neither competes with another, nor fears another's competition.

[6] Bail. II. 294 (*third*).

no valid marriage between H and *W or* W[illegible]A ; and neither of them can succeed from H nor H from either ;—though H may not have known of the illegality of the marriage. [7] SECTION 641.

(3) "If a sick man contract marriage with a woman, whether his distemper be dangerous or otherwise, and die of that distemper, without intervenient recovery or convalescence, previous also to consummation of his nuptials, such contract of marriage is thereby null, or in other words, is not considered to be established in law, until consummation or recovery of the husband from that disease with which he was afflicted at the time." [8]

(4) An umm-i-walad or female slave who has borne a child to her master has nevertheless no claim to his inheritance.[9]

1.—HISTORY of widow's rights.

For the history of the wife's claim on the estate of the husband see ss. 299, 611, comm., s. 157, *ill.* (1)-(9), (pp. 321, 846 ff., 230 f.).

2.—Husband's/ wife's shares vary little.

Under Shia law the husband never gets less than 1/4 or 1/2, as the case may be. He can take more than 1/2 only where there is no blood relation of the deceased at all. The wife never takes less than 1/8 nor more than 1/4. This is expressed by saying that the estate never "returns" or "reverts" to the wife, and to the husband only where there are no blood relations. See s. 647. The shares of the husband or wife never abate by (aul) "increase." [10]

3.—Wife does not take by return.

The blood relations take the residue of the estate after giving to the husband or wife his or her Koranic share. In denying to the widow the "return" or "surplus" the Shia law is less favourable to her than the Sunni law ; cf. ss. 633, 647, pp. 894, 924.

4.—CHILDLESS WIDOW AND IMMOVABLE PROPERTY.

In debarring the childless widow from a share in the land of her husband, the Shia law differs from the Sunni law. The rule furnishes one of the few instances in which Muhammadan law has made a distinction between lands and other property. Baillie thus translates from the 'Sharai'ul-Islam [11] : "When the wife has had a child by the deceased, she inherits out of all that he has left ; and if there was no child, she takes nothing out of the deceased's land, but her share of the value of the household effects and buildings is to be given to her. It has been said, however, that she is to be excluded from nothing except the mansions and dwellings ; while Moortuza (may God be pleased with him) has expressed a third opinion to the effect

a.—Is widow with pre-deceased child considered childless.

[7] Bail. II. 311 (*second*).

[8] Bail. II. 340 ; "It follows that in this case there can be no title of inheritance between the parties, no dower even incumbent on the husband & that the woman is not bound to observe an *Iddat*, or term of probation. This law of annulment of contract entered into by parties legally qualified to contract, without divorce or voluntary dissolution, may certainly at first sight appear irreconcilable, but all objection & doubt is removed necessarily by a reference to those authentic proofs of their nullity, already detailed in the Book of marriage." Baillie adds. "This Book, which was probably added to Digest compiled under superintendence of Sir William Jones, by the translator, was never published, & has not been found among his papers which have come to my hands—Ed." Cf. pp. 178, 180 ; *Bismillah Begum* v. *Shahr Banoo*, (1914) 16 Oudh Cas. 325 = 18 Ind. Law Journ. 179 = 22 Ind. Cas. 529.

[9] Bail. II. 371 (par. 4).

[10] See s. 638(3), *nn.* ; Bail. II. 271-272, 273, (last *l.*), 338, 339, 365 (*ll.* 6-30).

[11] Bail. II. 295 ; cf. s. 603, p. 830.

SECTION 641. that the lands should be valued, and her share of the value assigned to her. But the first opinion is that which appears to be best founded on traditional authority."[11] This passage indicates a conflict of opinion. If the translation is accurate the rule is limited to cases where the widow *has had* no child by the deceased. But the Allahabad High Court has followed[12] Syed Ameer Ali's dictum that "when she *has* no child, or when a child was born but died before the decease of her husband, then she is entitled to 1/4 share in the personal estate only, including household effects, trees, buildings etc.; she takes no interest in the landed property."[13] On referring to the mere wording of the Sharaiu'l-Islam in the original Arabic, it seems that the point may not be without some doubt; and there is little to throw light on it even in the very exhaustive commentary, the Jawahir-ul-Kalam. The general principle is that in matters relating to inheritance, deceased persons do not affect the rights of the living, under which, unless the widow has a child surviving her deceased husband, she must rank as childless (s. 611 *n.*). The strict rule seems however, to have been varied in several parts of India by custom or desuetude : as in many cases the widow is allowed to share in all the property of the deceased. Moreover under the Ithna Ashari law the husband may make a will in favour of his wife without the consent of the other heirs. Though the decisions are numerous, —s. 641, *nn.*— none of them seem to have had to deal with this point.

b.—General principle.

II. DISTRIBUTION AMONGST BLOOD RELATIONS : (A) HEIRS OF FIRST CLASS.

641 A. (1) The father and mother belong to the first class of heirs, and when either of them survives, no one else except a descendant is eligible to inherit.

(2) If the deceased leaves (*a*) any descendant, and (*b*) the father and|or mother, then each parent takes 1|6 of the estate as a Koranic share.

(3) If there is no descendant[14] then (A) the father (if he survives) takes the residue after giving the shares due to the husband|wife and|or mother, (if any of them survives); (B) the mother[15] takes 1|3 of the estate,[15] *except* that where there survive with the mother—

(1) Mother's share when restricted to 1/6 without right to residue.

(i) the father of the deceased and also either—

[12] *Muzuffar A. K.* v. *Parbati*, (1907) 29 All. 640, 644-645 ; *Parbati* v. *Muzaffar A. K.* (1912) 34 All. 289, 292 (*ll.* 10-51), 293 (last 5 *ll.*) (P. C.).

[13] *Mahommedan Law*, 2nd ed. II. 118, 78, (3rd ed. II. 148), 4th ed. II. 152, 5th ed. 123. The decision was given on 13 June, 1907. In 1908 third ed. of Syed Ameer Ali's learned book came out, & the passage is reproduced also in the 4th & 5th edd. citing decided cases & referring generally to the *Jamiush Shittat*. The present writer has not been able to discover any passage in the *Jamiush Shittat* that can directly settle the point.

[14] Where there are descendants, mother takes only 1/6 : s. 641 A(2).

[15] Under Hanafi law where both parents co-exist with husband/wife, mother takes 1/3 of *residue* after husband/wife has taken his/her share (viz. 1/2, or 1/4). In Shia law mother takes 1/3 of *whole estate.*

(ii) (*a*) two or more full or consanguine brothers, or (*b*) one such brother with two or more such sisters, or (*c*) four or more such sisters,— SECTION 641A.

then though there be no descendant, the mother takes only 1|6 of the estate [and no part of the residue].[16] A child en ventre sa mere, infidels, slaves, and (according to the most prevalent doctrine) murderers, are not taken into consideration for reducing the mother's share to 1|6 ; nor do children of deceased brothers and|or sisters take the place of brothers and|or sisters for reducing the mother's share.[17]

The mother takes either 1/6 or 1/3 of the estate with or without the right to take a portion of the residue :

(1) She takes 1/6 of the estate :

(*a*) where there is any descendant ; *or*

(*b*) where the surviving relations are : (i) mother, (ii) father *and* (iii) two or more full or consanguine brothers ; *or* one such brother and two or more such sisters ; *or* four or more such sisters.

(2) In other cases she takes 1/3 of the estate.

(3) She is entitled to partake of the residue except where the surviving relations are those mentioned in clause (1) (*b*), above.

642. (1) Where the survivors entitled to succeed under s. 640, belong to the first class,—(A) the husband or wife, and the parents take their Koranic shares[17] mentioned in ss. 441 and 641 A ; and (B) the residue[18] is (subject to s. 645) divided amongst the descendants as follows :— (2) Son or (descendant of son) is residuary with daughter.

(*a*) If there is surviving a son or the descendant of a son, then the residue is divided amongst the descendants of the deceased, per stirpes, in such proportions that in each generation each male takes twice as large a portion as each female ;[19]

[16] Bail. II. 272, 273 (*ll.* 12-22), 276 (par. 2), 365-366. Where there is no father, mother takes whole residue, though there may be two or more brothers or sisters, as there are no descendants—husband or wife being postponed in the right of taking residue to all blood relations : see s. 647.

[17] Bail. II. 261, 276, 365, 381. See s. 642, *ill.* (1), (3), (8), p. 911.

[18] There is necessarily some residue left.

[19] " In the distinction of inheritance to children of the deceased, if amongst them there should be a son, the male has always a portion equal to that of 2 females."—Bail. II. 284, (par. 3). " In the division of a daughter's share among her children, a male takes the portion of two females. But it has been said that a daughter's children share her portion equally. This opinion, however, is now abandoned."—Bail. II. 279 (*second*), 387 (*ll.* 27 ff). " The son of *Aboo Auja* having expressed his ignorance & doubt of the cause WHY A FEMALE, the weakest & most helpless of the two, SHOULD ENJOY ONLY HALF the portion OF inheritance bestowed upon a MALE.

SECTION 642. the eldest son of the deceased being nevertheless entitled (in addition to his share in the residue), to the body clothes, ring, sword and Koran of the deceased ; provided, (i) that the eldest son is neither a prodigal [20] nor deficient in understanding ; (ii) that the deceased has left some other property besides the body clothes, ring, sword and Koran ; and (iii) that the said son is liable for the payment and fulfilment of the unperformed fasts and prayers of the deceased.[21]

(3) If no son but daughter,—she bears deficit, but shares surplus with father (and mother).

(*b*) If no descendant, nor descendant of a son survives ; but

(i) there survives a single daughter or the descendants of a single daughter, she or they, subject to clause (iii) below take(s) 1|2 of the estate ; [22]

(ii) if there survive two or more daughters, or the descendants of two or more daughters, then, subject to clause (iii) below, they take 2|3 as sharers ; [22]

(i) Abatement of daughter's share.

(iii) if, after the husband or wife and the parents (if any) take the said Koranic shares (mentioned in ss. 641 and 641A), the residue is less than the 1|2 or 2|3 allotted in the last two clauses to the daughters or their descendants,[23] then the said 1|2 or 2|3 alone abates, and the husband or wife, and parents take their said full shares ; [24]

(ii) Return of surplus or residue.

(iv) if, after the husband or wife, parent(s) and daughter(s) or their descendant(s) take their full shares, any residue is left, then no part thereof is taken by the husband or wife, but it is divided amongst (A) the parent(s), and (B) the daughter(s) (or their

Female's half share explained.

some of our companions stated this matter to the *Imam Jafer Sadik*, on whom be peace ; he replied, a FEMALE IS EXCUSED from the performance of many DUTIES imposed by law upon a male, such as service in the Holy Wars, maintenance or support of relations, & payment of expiatory fines, & for this reason her share of inheritance has been justly limited to half the portion of a male."—Bail. II. 385.

[20] Presumably a "prodigal under inhibition"—Cf. Hed. Book xxxv.

[21] Bail. II. 279 (*third*). *Semble*, words in [ ] refer to religious not legal liability.

[22] See s. 642, *ill.* (4), (5), (8), p. 911.

[23] Or to express it in another way : "if the sum total of the shares to which they are entitled exceeds unity." Under Shia law this can happen only in case husband or wife of deceased, co-exists with (*a*) daughter(s) (or their descendants) : or (*b*) sister(s) (or their descendants) : Bail. II. 395, 396. Case where heirs include daughters or daughters' descendants refers to the FIRST CLASS OF HEIRS ; sisters are included in the SECOND CLASS OF HEIRS. The deficiency has, in first case, to be borne by daughters (or their descendants) & in second by sisters (or their descendants) : Bail. II. 316, 317. Under HANAFI LAW deficiency has to be borne by all sharers together by proportionate abatement (*aul* or increase of the common denominator).

[24] Bail. II. 316 (par. 2); see s. 642, *ill.* (13), p. 912.

descendant(s)[25] (or such of them as survive),[26] in the proportions of their respective shares ;[27] provided that the mother may be prevented from taking more than 1|6 of the estate : s. 641 (A) (3),—in which case the residue is taken by (i) the father, and (ii) the daughter or her descendants, in proportion to their respective shares. SECTION 642.

(*c*) If no descendant survives, the residue[28] is taken by the father,—but the mother's share then increases from 1|6 to 1|3 :[29] s. 641 A(3). (4) If no descendants : only parents and spouse.

N.B. —The claimants are mentioned at the beginning of each illustration, below, and unless otherwise indicated, the fractions by their side represent the portion of the estate taken by each,— *Illustrations.*

(1) Son's sons, 2/3 ; children of a daughter, 1/3.

(IA) Children (or a single daughter) or a son's son, 2/3 ; the children (or a single daughter) of a daughter's daughter, 1/3.[30]

(2) Daughter's son's children, 1/3 ; son's daughter's daughter, 2/3.[30]

(3) One daughter's son's children, 1/2 ; daughter's daughter's daughters, 1/2.[30]

(4) Daughter or daughter's daughter whole; full sister or brother excluded.[31]

(5) Father whole estate ; paternal uncle, excluded grandfather excluded.[32]

(6) Husband, 1/2; mother 1/3; father, 1/6.[33]

(7) Wife, 1/4; mother, 1/3; father, 5/12.[33]

(8) Husband, 1/4 ; mother (or father), 1/6 ; sons and daughters or their descendants take the residual 5/12 dividing it stirpitally, males taking twice the share of females.[34]

(9) Wife, 1/8; mother (or father) 1/6 + 1/4 of 5/24; daughter 1/2 +

[25] Husband or wife does not take any part of residue or surplus so long as there are any blood relations ; cf. s. 647.

[26] Where all survive, there is no residue left.

[27] See s. 642, *ill.* (9), (10), (12), (14), pp. 911, 912.

[28] There is always residue & never deficit, in this case.

[29] Bail. II. 278 (*ll.* 8-11); 383 (par. 3).

[30] Bail. II. 386. Under HANAFI LAW in *ill.* (1) son's son would alone succeed, excluding daughter's children, who would be classed as distant kindred, & postponed to all male agnates & sharers. All claimants in *ill.* (2), (3), are also cognates.

[31] Bail. II. 328 (*ll.* 4-8). Under HANAFI LAW in *ill.* (4) daughter's daughter, being cognate, would be classed amongst distant kindred, & would be excluded by sister or brother : if daughter & sister co-existed they would each take 1/2.

[32] Bail. II. 325 (*ll.* 23-28). Under HANAFI LAW same result follows.

[33] Bail. II. 383 (par. 3), 384 (par. 1, 2), 394 (*ll.* 27-35)—unless there are two or more full or consanguine brothers or sisters reducing mother's share to 1/6. Under HANAFI LAW in *ill.* (6), (7) mother would take respectively 1/3 of 1/2 (=1/6) & 1/3 of 3/4 (= 1/4) leaving 2/3 of 1/2 (= 1/3) & 2/3 of 3/4 (= 1/2) to father.

[34] Bail. II. 395 (*ll.* 5-9).

SECTION 642. *Illustrations.*

3/4 of 5/24. The residue is 5/24 : the first fractions are taken as shares ; the second fractions, following the + symbol, as return.[35]

(10) (*a*) Wife, 1/8 ; father, 1/6 + 1/5 of 1/24 ; mother, 1/6 + 1/5 of 1/24 ; daughter, 1/2 + 3/5 of 1/24. (*b*) Husband, 1/4 ; father, 1/6 + 1/4 of 1/12 ; daughter, 1/2+3/4 of 1/12. The residue being 1/24 and 1/12 respectively is taken by the blood relations alone in the proportion to their respective shares.[36]

(11) Father, 1/6 ; mother, 1/6 ; two or more daughters,[37] or the children of two or more daughters,[38] 2/3.

(12) Father, mother, one daughter. The original shares are, 1/6, 1/6, 1/2 respectively ; the surplus of 1/6 reverts to them all proportionately,[37] unless the mother is excluded from the residue by the presence of 2 or more full or consanguine brothers and sisters : see s. 641 A(3)(B), exception : pp. 908 f.

(13) Husband, father, mother, 2 daughters ; the full shares would be 1/4, 1/6, 1/6, 2/3=15/12. The first three are paid out in full, and the daughters bear the deficit, *i.e.*, they take 5/12 instead of 8/12.[37]

If there were only one daughter, there would still be a deficit, and she would take 5/12 instead of 1/2.[37] If there survived a son instead of the daughter, the residue would be the same, and, if both survive, it would be divided between the son and daughter, in the proportion of 2 : 1. Similarly, if there survive the children of daughters or sons respectively.[38]

(14) Mother, daughter, brother (or paternal uncle). Mother, 1/6, daughter, 1/2, and the residue is taken by the mother and daughter in the same proportion, the brother or paternal uncle is excluded.[39]

FIVE GENERAL RULES :

1.—Father pure residuary if no descendants.

2.—Descendants : per stirpes male portion double.

Five "general rules," are mentioned by Baillie from Sir W. Jones's Digest: (1) The Father, in the absence of descendants, is a pure residuary: he does not take any share, but takes whatever residue is left after the sharers (husband or wife and mother) have taken their shares.[40] (2) Amongst descendants the estate is always distributed (*a*) per stirpes, and (*b*) in such manner that at each stage, each male is allotted twice as large a portion as each female.[41] (3) The division is always per stirpes, so that,—(*a*) a claimant related to the deceased through one who would have been a sharer, takes the share of that sharer; and (*b*) a claimant related through a residuary takes the

[35] Bail. II. 401 (last 6 *ll.*). Under HANAFI LAW the father or any other male agnate would exclude any mere sharer from taking any part of the residue.

[36] Bail. II. 402 (par. 1). Under HANAFI LAW the father would alone take the whole of the residue in addition to the 1/6, i.e. in (*a*) 1/2 + 1/6 & in (*b*) 1/12 + 1/6. Similarly in *ill.* (12).

[37] Bail. II. 263 (par. 2), 277 (*ll.* 6-9), 313 (*ll.* 11-12, 23-33), 314 (par. 1), 317 (*ll.* 16-27), 318 (*ll.* 1-9), 395 (*ll.* 19-23), 396 (*ll.* 16-29).

[38] Bail. II. 385 (par. 3). In HANAFI LAW, if there is no son, the shares of all the sharers (& not merely the daughter) would abate proportionately.

[39] Bail. II. 274 (*ll.* 21-22, 27, 28), 383 (par. 3), 398 (par. 2), 401 ; (*Rajah*) *Deedar Hossein* v. (*Ranee*) *Zuhoor-oon-Nissa*, (1841) 2 Moo. I. A. 441. In HANAFI LAW the residual 1/3 would be taken entirely by the brother or paternal uncle.

[40] Bail. II. 383 (par. 3). Sect. 641 A(3), p. 908, s. 642, *ill.* (5), p. 911.

[41] Bail. II. 384 (par. 3). See s. 642, *ill.* (1), (8), p. 911.

residue,[42] this is subject to the claimant having been himself specifically mentioned as a sharer in the Koran, and also to the fifth rule below ; (*c*) in the secondary distribution amongst full blood and consanguine relations on the father's side, males take double the portion of females, but on the maternal side and amongst uterines on the paternal side, the males and females share alike.[43] (4) When some of the claimants are of the full blood or consanguine, and others uterine, the latter take 1/6 if only one, or 1/3 if two or more (to be divided equally amongst them), and the former the residue (to be divided in the proportion of a double share to males).[44] (5) If grandparents and brothers or sisters co-exist, then paternal grandparents rank like full (or consanguine) brothers and sisters; and maternal grandparents like uterine brothers and sisters; but if there are only grandparents and no brother or sisters ; then the paternal grandparents take the father's 2/3 and the maternal grandparents take the mother's 1/3.[45]

SECTION 642.

3.—Relations through shares rank like shares.

4.—Uterines take 1/6, or 1/3.

5.—Grandparent like brother and sisters. Paternal side : 2/3 ; maternal 1/3.

INCREASE AND RETURN : THEIR COUNTERPARTS IN SHIA LAW

Under Shia law—

I. Where the sum total of the fractions of the estate to which the sharers are (primarily) entitled exceeds unity (and the surviving sharers cannot all be given the full shares allotted to them in the Koran) the share of each is not proportionately abated but the deficit is borne solely by the daughter(s), or the full or consanguine sister(s).[46]

Deficit borne by daughters or sisters.

II. Where, after the shares are allotted, there is a residue or surplus left, "it is to be returned to the sharers excepting (*a*) the husband, (*b*) the wife, and (*c*) the mother when there are brothers;"[47] but if there are both full blood relations and uterine relations, then the former alone take the surplus[48] provided that they are equal as regards the priority of their rights to inherit.[49]

Residue or surplus taken by full or consanguines only.

Examples :

1. Where there is only one heir entitled to succeed under s. 640, he or she takes the whole estate: whether the heir is agnate or cognate, full blood, consanguine, or uterine, or by contract (under s. 647), or whether he is the

1. If only one heir : he takes whole.

[42] Bail. II. 385 (par. 3), e.g. (i) children of one daughter take 1/2 of estate as share & have right to residue or surplus together with father & mother just as daughter herself would have had ; (ii) children of two daughters take 2/3 ; (iii) children of son merely residuaries ; (iv) children of one full (or consanguine) sister take 1/2 ; (v) of two or more 2/3 ; (vi) of one uterine sister or brother 1/6 ; (vii) of two or more 2/3 ; (viii) maternal grandfather (or maternal grand-mother) takes share of mother, i.e. 1/3 ; (ix) paternal uncles & aunts receive shares of father & mother respectively ; (x) children of uncles get shares of their parents.

[43] So that uterine brothers & sisters share equally, also all cognate grandparents, & children of uterine paternal uncles, & of all maternal uncles ; but full & consanguine brothers, agnatic grandparents, & the children of full & consanguine paternal uncles (& aunts) share in proportion of double share to male.

[44] Bail. II. 388 (par. 2). See s. 644, *ill.* pp. 918 ff.

[45] Bail. II. 391 (par. 2). See s. 644, *ill.*, pp. 918 ff.

[46] Bail. II. 263, 273, 274-275, 336, 396-397.

[47] See s. 641 A(3).

[48] Bail. II. 317, (*ll.* 31 ff.), 335 (par. 2).

[49] E.g. full paternal uncle does not exclude uterine sister "either from her residuary title, or her appointed share, by reason of their disparity in degree"—Bail. II. 335 (*ll.* 12-15). In every case nearest alone succeed : rules as to distribution apply merely as between the nearest survivors who alone are entitled to inherit.

SECTION 642. husband. (As regards the wife see ss. 641, 647).[50] If such heir is a pure residuary, he or she takes the estate as such; if a Koranic sharer, his or her specific fraction of the estate is taken as such sharer, and the residue by return.[51]

2.—Residuary surviving : he takes :

(2) If there are two or more heirs, then they must include *either*—

i.—Residue after sharers if any.

(*a*) sharers as well as residuaries,—in which case the sharers take their appointed shares, and the residuaries take whatever is left,[52] 'per stirpes,' either equally (if they are of the same sex), or males taking double the portion of females ; *or*

(*b*) only residuaries—in which case they take the whole estate ; *or*

(*c*) only sharers—in which case the sum total of the shares *either*

ii.—If no residuary.

(i) exactly equals unity,—and accordingly each heir is given his share, and nothing more has to be done, *or*

(ii) the sum total of the shares exceeds unity,—and this can happen only where there survives the husband/wife amongst the sharers, *and* with him/her there co-survive(s) also *either*—

(*a*) one or more daughters *or*

(*b*) one or more (full or consanguine) sisters—

and in either case, the daughter(s), or sister(s), as the case may be, bear(s) the deficit,[53] *or*

(iii) the sum total of the shares falls short of unity,[54] (i.e. after the shares have been allotted and taken, a surplus or residue is left), in which case the surplus is taken in the proportion of their respective shares by,—

(*a*) the full blood or the consanguine relations alone, and failing them,—

(*b*) the uterine relations, and failing them,—

(*c*) by the husband (not the wife) taking the whole.

3.—RETURN—

The rules relating to the "return" are not uniform. (1) In the FIRST CLASS of heirs though the daughter alone suffers the loss, she does not get the "return" exclusively, but shares it with the father and mother. (2) In the SECOND CLASS (see s. 643) (*a*) the FULL SISTER takes the whole surplus by return, just as she

i.—Daughter alone bears deficit : but divides surplus with parents.

ii.—Full sister alone bears deficit and

[50] Bail. II. 395, 398. See *ill.* to ss. 642, 644, pp. 918 ff.

[51] Bail. II. 392 (par. 2).

[52] Bail. II. 393-394 ; under Shia law whenever there survives any pure residuary in any combination of heirs, there is always some residue left ; the division into three classes of heirs prevents sharers from being very numerous.

[53] Bail. II. 395, 396.

[54] If this happens (*a*) where heirs are of 1ST CLASS : father, mother & daughter or their descendants take residue, for *ex hypothesi*, (i) son is absent (since he is pure residuary & present point is concerned with occasions when sharers alone survive), (ii) there must also be daughters surviving, for otherwise father would be pure residuary, (mother is excluded from residue when there survive two or more brothers or sisters) ; (*b*) where survivors are heirs of 2ND CLASS, full or, failing them, consanguine sisters alone take residue : *ex hypothesi* there are no grandfathers, or brothers who are pure residuaries : cf. s. 644, *ill.* (14); (*c*) where heirs are of 3RD CLASS, there is primary division of estate into 2/3 for paternal side, & 1/3 for maternal side & surplus on each side taken by full or consanguine, failing them, by uterine relations. If either side fails entirely, other side takes share of that side also. In every case first point to settle is : who are entitled to succeed, as nearest under s. 640, pp. 900 ff.

bears the whole deficit. But (*b*) the CONSANGUINE SISTER's position is not quite settled : (i) some authorities place her (in competition with the uterine sister) in the same position as the daughter is in competition with parents, (i.e. that the consanguine sister alone bears the deficit, but shares the surplus with the uterine sisters and brothers ; this view is favoured by the Sharai'ul-Islam : (ii) other authorities place the consanguine sister in the same position as the full sister. See s. 643 A(3), p. 916, s. 644, *ill.* (14), p. 919, table of heirs, p. 925.

SECTION 642. alone takes surplus. iii—Consanguine sister's rights in doubt.

643. In the absence of any heirs of the first class,[1] the estate (subject to the husband or wife, if any, taking 1|2 or 1|4 thereof : s. 641) devolves upon heirs of the second class,[2] (viz. the nearest grandparents with the sisters or brothers or their nearest descendants) : and is distributed amongst them in accordance with ss. 643 A-D, and 645.

(B) DISTRIBUTION : HEIRS OF SECOND CLASS. (1) Grandparents. (2) Brothers, sisters : their descendants.

643 A. (1) Where the survivor(s) on the maternal side[3] consist(s) of a single uterine brother or sister, or the descendant(s) of a single uterine brother or sister (there being no maternal grandparents), the side is, subject to s. 643 A(3), primarily allotted 1|6.[4] Otherwise the maternal side is allotted 1|3 of the estate.[4]

(3) Husband or wife. (4) Maternal side's portion. (5) Uterine brother's, sister's :

(2) The survivors on the paternal side[3] are, subject to s. 643 A(3), primarily allotted the residue, (i.e. so much of the estate as is left over after deducting the share of the husband or wife, if any, and also deducting the 1|3 or 1|6 allotted to the maternal side as stated above).[5]

(6) Maternal grandparent's.

[1] I.e. where there survives neither any descendant (male or female, agnate or cognate), nor father nor mother of deceased ; see s. 640.

[2] I.e. nearest grandfathers that survive (howsoever high they be), with brothers & sisters, full, consanguine or uterine, or failing brothers or sisters, their nearest descendants (howsoever low they be), *or* (to give another description of same relations), nearest ascendants of father & mother co-inherit with sisters or brothers, or nearest descendants of sisters/brothers : Bail. I. 326 (328).

[3] See s. 605(4 A), p. 833, for explanation of "paternal side," "maternal side."

[4] See s. 644, *ill.* (2), (3), p. 918. Apparently if there exists only a single maternal grandparent, & no uterine brother or sister, & on paternal side there are full or consanguine brothers & sisters,—then maternal grandparent takes 1/3 & not only 1/6. As between grandparents (without brothers & sisters), maternal side clearly takes 1/3 though consisting of single individual—Bail. II. 391 (par. 2) : cf. s. 644, *ill.* (11), (12), (13), (15), pp. 919 f.

[5] Residue will therefore be 2/3 or 5/6 minus share of husband or wife. PATERNAL SIDE takes residue, bearing whole of deficit by survival of husband or wife, as well as taking whole of benefit if husband/wife does not survive. (A) As to FULL SISTER there is no difference of opinion : Bail. II. 282 (*ll.* 16-12) : s. 644, *ill.* (3), (14), p. 917. Full sister, when no brothers co-survive, ranks in first instance as sharer, (one taking 1/2 two or more 2/3) but since full sister takes residue if any is left, & bears deficit if husband/wife survives, she is practically residuary, & it has seemed best not to encumber s. 643 with unnecessary distinctions : see s. 644, *ill.* (2), (17), pp. 917, 920. (B) Consanguine sister's & her descendants' position as to residue is subject to difference of opinion : see s. 643 A(3), p. 916, also p. 915, *ll.* 1-7.

SECTION 643A. Maternal and paternal sides : (7) division.

(3) Where the survivor(§) on the paternal side do not include any paternal grandfather,[6] nor any full blood relation (viz. full sister(s) or her|their descendants) but consist only of consanguine sister(s) or her|their descendants(s),

(A) the better opinion [7] is that the residue (if any)[8] is taken by the paternal half blood (consanguine) just as stated in s. 643A(2) ; but

(B) others [8] hold that the residue (if any)[7] is then divided among the survivors on both the paternal and maternal sides in the proportion of their respective shares.[9]

(8) Distribution within the groups.

643B. The portions primarily allotted under s. 643A are divided amongst the members of the paternal and maternal sides respectively per stirpes but so that,—

(i) Ancestors. (ii) Brothers or sisters.

(1) Where either side comprises both ancestors and brothers and sisters (or the descendants of brothers and sisters), then the maternal grandfathers and grandmothers share on the same footing as uterine brothers and sisters ; and the paternal grandfathers and grandmothers share on the same footing as full or consanguine brothers and sisters.

(iii) Descendants of brothers or sisters.

(2) Where either side comprises both (1) the ancestors of grandparents, and (ii) the descendants of sisters and brothers, the former take the share that would have been allotted respectively to the grandparents and the latter the shares of the brothers or sisters through whom they are related to the deceased.

(iv) Males and females.

643C. In the distribution of any portion of the estate allotted to a group of persons, (1) the cognates (i.e. maternal grandparents, uncles and aunts, and uterine brothers and sisters or their descendants), in each generation,[10] share males

[6] Rule does not apply where there are also paternal ancestors : doctrine of shares applied only to sisters : ancestors rank as pure residuaries. The distinction between full blood & half-blood can apply only to collaterals, it is meaningless with reference to ancestors & descendants.

[7] This opinion is preferred by author of *Sharaiu'l-Islam*, Bail. Il. 282 (par. 2, last 2 *ll.*) ; & Bail. II. 386, (par. 2) (apparently from *Kafee* cf. *ib.* p. xxvii, see p. 919, *ill.* (14).) does not refer to the other opinion at all.

[8] There cannot be surplus or residue if there is husband or wife.

[9] Shares referred to are : (*a*) for uterine side 1/6 if only one : 1/3 if two or more ; (*b*) for consanguine side 1/2 if only one, or 2/3 if two or more.

[10] I.e. (F = father, or father's ; and *M* = mother or mother's ; B = brother ; *Si* = sister;) first divisions are (*a*) maternal side's portion allotted to *MF*, *MM* co-inheriting with uB & u*Si* (even though *MF*, *MM* be dead, & actual claimants be ascendants of *MF* & *MM*—& similarly though uB & u*Si* be dead, & actual claimants

and females alike ; [11] and (2) the agnatic [12] grandparents and full or consanguine brothers and sisters or their descendant(s) and the full and consanguine relations on the paternal side share so that, in each generation, each male gets twice as large a portion as each female. SECTION 643c.

The principles of division in the second and third classes are similar : illustrations relating to both follow s. 644, pp. 918 ff. *Illustrations* (1)-(8) refer to the second class of heirs. See also table of heirs, p. 925.

(c) DISTRIBUTION : HEIRS OF THIRD CLASS.

644. In the absence of all blood relations of the first or second class,[13] the estate devolves upon the nearest relations of the third class, i.e. upon the nearest (*a*) uncles or aunts of the deceased, or (*b*) their descendants, or (*c*) the uncles or aunts of an ancestor of the deceased, or (*d*) the descendants of such uncles or aunts,—and is distributed amongst them, after giving to the husband or wife his or her share under s. 641, (and subject to 645) in accordance with the following principles of division,—

(1) Uncles : aunts : descendants.

(2) Paternal side : maternal side.

(1) In the first instance 1|3 of the whole estate is allotted to the uncles and aunts on the maternal side, or their decendants, and the residue (consisting of 2|3 of the whole estate, minus the share of the husband or wife, if any) to the uncles or aunts on the paternal side, or their descendants.[14]

(i) Maternal side and uterines take equally.

(ii) Paternal side : division : males double share.

(2) Secondly, the said 1|3 and the residue, respectively, allotted to the maternal and paternal sides are then apportioned as follows,—

(iii) Cognate grandparents take equally.

(*a*) The uterine relations on each side take, out of the portion allotted to that side, shares mentioned below, viz.—

(iv) Uterines.

(i) if there is only one uterine relation on any side, he or she takes 1|6 of that side's portion, (ii) if there are two or more,

be their descendants); (*b*) paternal side's portion divided amongst FF & F*M* coinheriting with FB & F*Si* or cB & c*Si*.

[11] Bail. II. 387, 388, (par. 2). See s. 644, *ill.* (3), p. 918. Rule that as soon as relationship becomes cognate (i.e. female link intervenes between claimant & propositus), males & females share in like portions, prevails amongst ancestors & collaterals ; some texts extend it also to descendants : Bail. II. 387, 389.

[12] Bail. II. 386-387 ; so that, as soon as a female intervenes between the deceased and a grandparent, the males and females in that generation take equal portions. This will be clear by referring to *ill.* (12) to s. 644, where it will be observed that F, *M*, FF, F*M*, FFF & FF*M* are agnates & the distribution amongst them is unequal at each stage ; but all the rest including F*MF*, & F*MM* are cognates, & so share equally at each stage.

[13] *I.e.*, where there is neither any descendant nor ascendant, nor brother nor sister, nor the descendants of any brother or sister.

[14] Maternal side taking share of mother : paternal side, of father.

SECTION 644. (the descendants of one uterine relation being for this purpose reckoned as a single claimant) they take 1|3 of that side's portion ;

(v) Full blood and consanguine.

(*b*) The full blood, or in their absence, the consanguine relations on the maternal and paternal sides respectively, take the residue of the portion allotted to their own side, after the uterine relations on their own side have taken, as the case may be, their 1|6 or 1|3 referred to in clause (*a*) above ; and

(vi) Division within sub-group.

(*c*) the said 1|6 or 1|3 referred to in clause (*a*) and the residue referred to in clause (*b*) are divided respectively amongst the members of the respective groups per stirpes, in accordance with s. 643 C.[15]

N.B.—The claimants (being as stated below) take the portion indicated in fractions. F = full ; C = consanguine ; U = uterine ; B = brother ; *Si* = sister.

Illustrations. HEIRS OF SECOND CLASS.

(1) One F (or C) B, and no other claimant : he takes the estate by himself. Two or more divide it equally. F*Si* or C*Si* and B : the estate is so divided amongst them, that each male gets twice as large a portion as each female.[16]

(2) A single F*Si* or C*Si*[17] : 1/2 of the estate as her share : the other 1/2 reverts to her.[18] Two or more (with no other claimants surviving) take 2/3 as sharers and the 1/3 reverts to them.[19]

(3) One UB : 1/6 as share ; one F*Si* or C*Si*[20] : 1/2 as share ; and the residue or surplus (i.e. 1/3) reverts to her (and ultimately she takes 5/6).[21]

(3A) Two or more UB's or U*Si*'s or a UB and a U*Si* : 1/3 as share (dividing it equally amongst themselves, males and females sharing alike); F*Si* or C*Si* :[20] 1/2 as sharer, and the residual 1/6 reverts to her.

(3B) Two or more F*Si*'s or C*Si*'s[20] : 2/3 as sharers, and then 1/6 reverts to them[18] and they divide the portion amongst themselves equally being all females.[21]

(4) 3 U*Si*'s : 1/3 ; 3 CB's : 2/3 ; i.e. each *Si* takes 1/9, and each B, 2/9.[22]

(5) 2 UB's or or *Si*'s : 1/3 ; 2 F*Si*'s or C*Si*'s[20] : 2/3.[23]

[15] I.e. in case of heirs of THIRD CLASS, distribution is without distinction of sex, except as amongst full blood & consanguine relations on paternal side ; in case of uterine relations on paternal side, & of all relations on maternal side, distribution is such that males & females share equally in each generation.

[16] Bail. II. 280, 392-393.

[17] But see p. 919, *ill.* (14), with reference to rights of consanguine sister.

[18] Distinction between what they take as sharers, & what reverts to them as residue, may be of significance where there are other sharers like husband or wife, & grand parents : grand parents being entitled to share in residue.

[19] Bail. II. 280, 392-393.

[20] But see p. 919, *ill.* (14).

[21] Bail. II. 280 (par. 2), 314 (*ll.* 35-39), 315 (*ll.* 7-15, 31-39), 318 (*ll.* 9-16), 335 (*ll.* 16-33). Under HANAFI LAW F*Si* & similarly C*Si* would take only 1/2, leaving other 1/2 to male agnates, unless there co-survives a daughter or daughters.

[22] Bail. II. 254 (*ll.* 1-7), 388 (last 4 *ll.*) 389, (*ll.* 1-11).

[23] Bail. II. 263 (par. 2), 395 (*ll.* 24-30).

SECTION 644. *Illustrations.*

(6) Husband : 1/2 ; cS*i* : 1/2.[23]

(7) Husband : 1/2 ; uB(s) and uS*i*(s) : 1/3 ; fB or cB or fS*i* or cS*i* : residual, 1/6. If there is only uB or uS*i*, he or she takes 1/6, leaving 1/3 for the fB or cB or fS*i* or cS*i*.[24]

(8) Husband : 1/2 ; grandfather : 1/2.[25]

(9) Husband : 1/2 ; two fS*i*'s or cS*i*'s[20] : 1/2 ; the full share of the latter is 2/3, but the whole deficit falls on them and there is only 1/2 left for them.[26] HEIRS OF THIRD CLASS.

(10) Husband : 1/2 ; uS*i* : 1/6 ; fS*i* or cS*i* : 1/3.[27]

(11)

*M*F[28]	1/3	1/2 of 1/3 = 1/6	F F	2/3	2/3 of 2/3 = 4/9
M M		1/2 of 1/3 = 1/6	F *M*[28]		1/3 of 2/3 = 2/9

(12)

*M*F[28]	1/3	1/3 of 1/3 = 1/9	F F	2/3	1/2 of 2/3 = 1/3
uB		1/3 of 1/3 = 1/9	F *M*		1/4 of 2/3 = 1/6
uS		1/3 of 1/3 = 1/9	F *Si*[15]		1/4 of 2/3 = 1/6

(13)

Only one of the following—		One or more of the following—		
*M*F or	1/6	FF	2/3 + 1/6 = 5/6	1/3 of 5/6 = 5/18
MM or		F*M*		1/6 of 5/6 = 5/36
uB or		F*Si*		1/6 of 5/6 = 5/36
uS*i*[28]		FB		1/3 of 5/6 = 5/18

Here, (i) the maternal side takes 1/6 and the paternal side 2/3 : there is a surplus (residue) of 1/6 ; (ii) the residue is taken by FF and the others on the paternal side in the proportion of 2: 1; so that ultimately 1/6 is taken by the single claimant on the mother's side, and 5/6 by the claimants on the father's side.[29]

(14) Husband : 1/2 ; uS*i* (or uB) : 1/6 ; fS*i* (or cS*i*) : 1/2, reduced to residual 1/3. Here fS*i*'s (or cS*i*'s) share alone bears the deficit, and instead of being 1/2, it becomes 1/3.[30] Conversely, if there were no husband, fS*i* would take 5/6 ; there are two opinions as to whether the cS*i* would, in the absence of the husband, (*a*) take the whole 5/6, or whether (*b*) the residual 1/3 (viz. 1 minus 1/6 minus 1/2) would be divided between cS*i* and uS*i* in the proportion of 1/6 to 1/2, (i.e. 1 to 3). Opinion (*b*) is preferred in Sharaiu'l-Islam.[31] But opinion, (*a*) is supported in Kafi.

[24] Bail. II. 244 (*ll.* 23-25), 390 (par. 2). [25] Bail. II. 388 (*ll.* 18-20).

[26] Bail. II. 396 (*ll.* 5-10, 33-36). [27] Bail. II. 396 (*ll.* 12-16, 36-39).

[28] F = "father" or "father's" ; *M* = "mother" or "mother's." Bail. II. 281 (par. 3). Mother's parents divide their 1/3 equally : whereas father's parents divide their 2/3 in proportion of double share to male : s. 643 c, p. 916. In HANAFI LAW F*M* & *MM* (as true grandmothers) would take 1/6 between them, i.e. 1/12 each ; & FF would take residual 5/6, (*M*F being excluded as false grandfather).

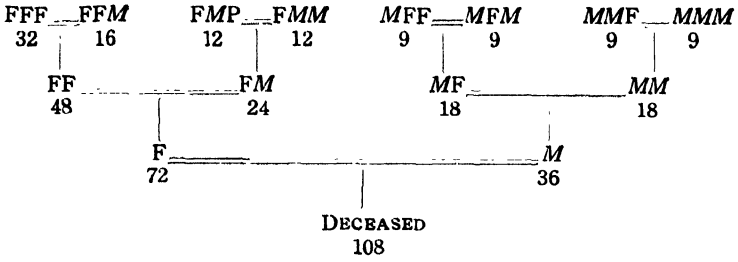
[29] Bail. II. 281 (par. 4). Under HANAFI LAW *M*F excluded, being false grandfather ; uB & uS*i* excluded by true grandfather ; F*M* & *MM* take 1/6 jointly ; fS*i*'s rights subject to operation of s. 620, p. 859. See s. 605(4 A), p. 833.

[30] Bail. II. 282. Under HANAFI LAW : fS*i* does not alone bear deficit, but deficit is borne proportionately by all sharers : residue taken by nearest male agnate : failing him, divided proportionately amongst all sharers except husband.

[31] Bail. II. 336 : person related only by father's side (consanguine) supplies place

SECTION 644. *Illustrations.*

(15) All the 8 grandparents are living, and there are no other claimants :



the claimants are shown in the table. If the estate consists of 108, the shares and the mode of division at each stage are indicated by figures.[32]

(16) If, in *ill.* (15), there are also (*a*) FB's or CB's or FS*i*'s or CS*i*'s (or their descendants), they participate in the 72 allotted to the PATERNAL side (viz. F = 72) which would be first divided as though the claimants were not only FF, and F*M* but also FB's or CB's or FS*i*'s or CS*i*'s—males taking a double share ; (*b*) similarly, if there were on the MATERNAL side (viz. *M* = 36) also UB's or US*i*'s (or their descendants), *M*'s 36 would be divided amongst them all, including *M*F and *MM* : but in this case males and females would take equally. So that suppose in *ill.* (15) there were also one FB (or his descendants), then F's 72 would be divided in the following manner, viz. FF : 144/5 ; F*M* : 72/5 ; FB : 144/5 (viz. double share to males). If there were a FS*i*, then F's 72 would be divided as follows FF : 36 ; F*M* : 18 ; FS*i* : 18.

(17) Children[33] of UB's and US*i*'s : 1/3 ; children of FB's and and FS*i*'s : 2/3 ; (children of CB's and CS*i*'s being excluded by the children of FB or FS*i*). If there is a husband (H) or wife (*W*) with these, FB's and FS*i*'s children's total portion diminishes to the extent of the share of H or *W* (i.e. it becomes 2/3 minus 1/2, if there is H; and 2/3 minus 1/4, if *W*); and if there is only one UB's or one US*i*'s child or children, then the share of the F or C is enhanced by 1/6 (because the U side takes only 1/6).[34] If there are grandparents, they rank equally with B's and S*i*'s : the maternal grandparents ranking like the UB's and US*i*'s or their children ; and the paternal grandparents like the FB's or CB's and FS*i*'s, CS*i*'s or their children.[35]

of full kinsman, upon failure of latter in all cases, & therefore excludes those related by mother's side from residue. This is agreeable to doctrine of *Sudook*, & most of Shia texts : since the full & consanguine suffer when there are many sharers, " they ought in justice to have a similar exclusive title to the residue or surplus. Besides there is a positive judgment to this effect of the *Imam Mohummud Bakir.*"

[32] Bail. II. 283 (*second*). Under HANAFI LAW, FFF would take 5/6, i.e. 90 ; & 1/6 i.e. 18 would be divided equally by true grandfathers, i.e. FF*M*, F*MM*, *MMM*.

[33] The UB excludes FB's son, former being nearer : Bail. II. 283 (*third*). Similarly any claimant in higher generation excludes any claimant in lower generation.

[34] Bail. II. 284.

[35] Bail, II. 285. Under HANAFI LAW if there is any son of F or CB, he takes whole as male agnate. Similarly a " true grandfather " or a " true grandmother " would, after taking her 1/6, take residue by return, unless there survived a male agnate to compete with her.

SECTION 644. *Illustrations.*

(18) H (= husband) : 1/2 ; 2 uB's or u*Si*'s : 1/3 ; 2 c*Si* (or F*Si*'s) : 1/6. The full shares are 1/2, 1/3, 2/3 ; the first two take their full shares, and the c*Si*'s or F*Si*'s take the 1/6 which is the residue (instead of 2/3).[36]

(19) *P* dies leaving H, 2 uB's, 2 cB's. Before partition H dies, leaving a son and 2 daughters. If the estate consists of 24, H takes (half or) 12, the two uB's (1/3 =) 4 each, and the cB's (the residue =) 2 each. H's 12 are then re-divided between his son and daughter who take 8 and 4 respectively.[37]

(20) H (= husband) ; 2 uB's or 2 u*Si*'s and one cB being the heirs, H dies before partition, leaving 2 sons and a daughter. If the estate consists of 30, H originally takes 15 ; the 2 uB's (or 2 u*Si*'s) : 5 each, and the cB the residue : 5 ; H's 15 is then re-divided amongst his children so that each son gets 6 ; and the daughter, 3.

(21) Brother's son : 1/2 ; grandfather : 1/2.[38]

(22) Six brothers and one grandfather (supposing them all to be on the paternal or maternal side respectively) : each takes : 1/7.[39]

(23) One *Si*'s daughter : 1/3 ; grandfather : 2/3. This "decision obviously proceeds on the supposition that both sister and grandfather were related by the same side [*read* "paternal side" : s. 643 c, p. 916] whence the distinction of male and female would have bestowed a double portion on the latter."[40]

(24) One UPATUn or UPAT*Au* : 1/6 ; if two or more : 1/3, sharing it equally, males and females alike ; the FPATUn or CPATUn or *Au*[41] takes the residue.[42]

(25) PAT*Au* : 2/3 ; MAT*Au* : 1/3.[43]

(26) MAT*Au* (or MATUn) : takes whole ; PATUn's son excluded.[44]

(27) PATUn : 2/3 ; PAT*Au* : 1/3.[45]

(28) PATUn's son : 2/3 ; MAT*Au*'s son : 1/3.[45]

(29) FMAT*Au* : 1/3 ; CPATUn : 2/3.

(30) CMATUn : 1/3 ; FPATUn : 2/3.[46]

(31) Husband (H) : 1/2 ; MATUn : 1/3 ; PATUn : 1/6. "The MATUn being also a sharer, receives his 1/3, and only the residue or 1/6, goes to the PATUn."[47] Similarly if there were, with H, the children of the MATUn's and PATUn's.[47]

[36] Bail. II. 275 ; 317 (*ll.*5-12). Under HANAFI LAW abatement would have to be borne by all shares proportionately : s. 610(1), p. 843.

[37] Bail. II. 319 (*first*). [38] Bail. II. 328 (*ll.* 1-2).

[39] Bail. II. 391 (par. 3) ; as to HANAFI LAW see s. 620.

[40] Bail. II. 392 (par. 1). Under HANAFI LAW grandfather would take whole.

[41] PAT = paternal ; MAT = maternal ; Un = Uncle ; *Au* = Aunt. See s. 605(7), (8), pp. 835 f., p. 838, *n.* 28 : (i) brother of deceased's father is deceased's FPATUn or CPATUn or UPATUn, respectively ; (ii) by substituting "sister" for "brother," the Aunts will be described ; & (iii) by altering PAT into MAT the maternal side. Similarly with reference to his father's *Si*'s, to relations of the mother, & of parents of father & mother & other grandparents.

[42] Bail. II. 285 (par. 2). [43] Bail. II. 330 (*ll.* 12-15).

[44] Bail. II. 330 (*ll.* 28-34). Under HANAFI LAW, PATUn's *son* as agnate would exclude MAT*Au* or MATUn who are cognates (hence classed as DISTANT KINDRED).

[45] Bail. II. 330 (last 6 *ll*), 338 (*ll.* 26-28). [46] Bail. II. 334 (par. 2).

[47] Bail. II. 394 (*ll.* 9-14, 15-19), 395 (*ll.* 1-6).

SECTION 644. (32) Division between Un's and *Au*'s PAT and MAT, F (or C) and U : [48]

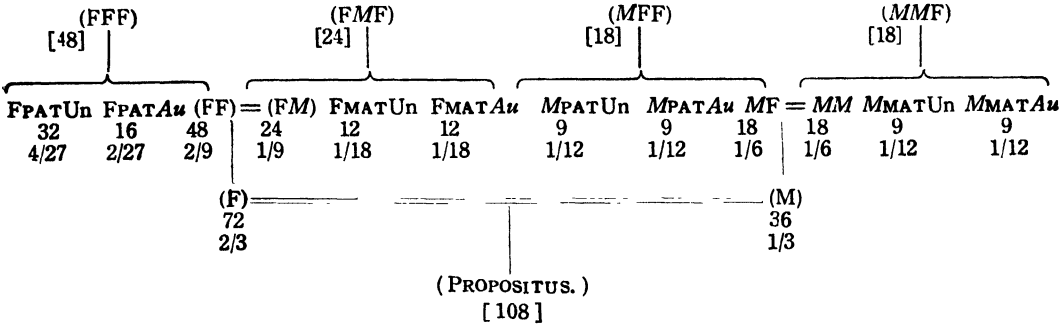
MATUn's & MAT*Au*'s: 1/3[49]		PATUn's & PAT*Au*'s: 2/3[50]	
U: 1/3 of 1/3.	F or (failing them) C: 2/3 of 1/3.	U: 1/3 of 2/3, dividing equally.	F or (failing them) C: 2/3 of 2/3, each male taking twice as much as each female.[50]
Males and females sharing equally.			
If there are no U the F (or C) take the whole 1/3 of the MAT side, & *vice versa*		If there are no U the F or C take the whole 2/3 of the PAT side, & *vice versa*.	

If there are none on the MAT side, the PAT side takes the whole, and *vice versa*.

(33) If all the 8 Un's and *Au*'s of the parents of the deceased are living, and his estate consists of 108—three divisions have to be made : the results of each are shown from right to left below, giving ultimately 32, 16, 12, 12, 9, 9, 9, 9, to the parties respectively.[51]

F's PAT Un	32	48	72	108
„ „ *Au*	16			
„ MAT Un	12	24		
„ „ *Au*	12			
M's PAT Un	9	18	36	
„ „ *Au*	9			
„ MAT Un	9	18		
„ „ *Au*	9			

The principle of division appears from the following table ; F = father or father's ; *M* = mother, mother's ; MAT = maternal ; PAT = paternal ; Un = Uncle ; *Au* = Aunt ; dead persons in ( ).



(34) If in *ill.* (33) some of the Un's and *Au*'s are U and others F or C, their respective aggregates (i.e. 48, 24, 18, 18) are first divided on the principle of 1/6 of that aggregate being given to the UUn's and U*Au*'s if there is only one of them and 1/3 if more than one ; and the residue of the said aggregate to the

[48] Bail. II. 285, 296, 389.
[49] Instead of 1/3 there will be only 1/6 if there is only one on MAT side.
[50] Instead of 2/3 there will be 5/6 if there is only one on MAT side.
[51] Bail. II. 286 (par. 3).

F or C.[52] If there are descendants of the Un's and *Au's* they take their parents' portions : only amongst F (or C) on PAT side would the distribution be on the principle of males sharing twice as much as females, whereas amongst the UPAT and on the MAT side, males and females take equally.[53] SECTION 644. *Illustrations.*

(35) Two[54] or more sons of one UPATUn : 1/6.
One or more sons of one FPATUn : 5/6.

(36) Sons[53] of two or more UPATUn's : 1/3.
Son or sons of one or more FPATUn : 2/3.[54]

(37) A Shia lady, Nurjehan Khanam, *alias* Fatma Khanam, died leaving heirs of only the 3rd class, viz. the great grand-children of two FPATUn's and of one FPAT*Au*, (i.e. great-grandchildren of her father's FB's and FS*i*). The plaintiff was an Un's son's son's daughter (UnSS*D*). Defendants 1 and 2 were an Un's son's daughter's son and daughter, respectively (UnS*D*S and UnS*DD*). Defendant 3 was the aunt's daughter's son's daughter (*AuDSD*). The estate was divided in the first instance into 5 parts, 2 of which were taken by each of the Un's, and 1 by the *Au*. Then the 2/5 share of the plaintiff's great grandfather was allotted to her, the 2/5 share of the great grandfather of defendants 1 and 2 was divided between them, so that defendant 1 took : 2/3 of 2/5 (as a male); defendant 2 : 1/3 of 2/5 (as a female); and defendant 3 : the 1/5 share of her great-grandmother.[55]

645. A person bearing more relations than one to the deceased[1] (each relation being such as by itself would entitle him under s. 640 to inherit)[2] inherits in respect of each such relation.[1] For the purposes of this section kinsmen of the full blood[3] rank as bearing only a single relation : not as bearing one relation through the father and another through the mother. (D) DISTRIBUTION : PERSON BEARING MORE RELATIONS THAN ONE : Shares in respect of each relation.

(1) A's father is both CPATUn, and UMATUn of the deceased.[4] A can share twice, first as the son of a CPATUn, and then as the son of a UMATUn.[1] *Illustrations.*

[52] Bail. II. 389.

[53] Bail. II. 389-390.

[54] Bail. II. 287 (*second*) : same rule applies to sons of MATUn's & MAT*Au*'s.

[55] *Aga Sher Ali* v. *Bai Kulsum Khanam* (1908) 32 Bom. 540. number of authorities cited from Arabic texts, but, (as Court held, p. 558), Bail's transl. of *Sharai'ul-Islam* sufficiently covers the point. In HANAFI LAW all claimants would have been classed as DISTANT KINDRED & plff. as agnate, would have been preferred to the others, & taken whole. If plff. had not survived, (i) according to Abu Yusuf, 1st deft. : 1/2 ; 2nd & 3rd defts. : 1/4 each ; (ii) according to Imam Muhammad, 1st deft. : 4/9 ; 2nd deft. : 2/9 ; 3rd deft. : 3/9.

[1] Bail. II. 287 (*third*), 336 (par. 3). Similarly A may be husband of deceased, & also her PAT or MAT Un's son.

[2] *Ib.* So that if a person is both Br., & son of PAT Un., he inherits only as Br., & shares only once as against other Brs. Bail. II. 311 (par. 2).

[3] When F blood compete with U relations, latter given definite share, viz. 1/6 if one, 1/3 if more than one ; cf. ss. 643-644, pp. 915-918.

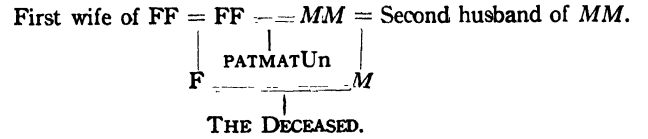
[4] This happens if *MM* is twice married, second time to FF ; then son of *MM* & FF would be both CPATUn & UPATUn of deceased. See *ill.*

SECTION 645

(2) One MATUn, and one PATUn the latter being also Un on MAT side, (PATMATUn): The MAT side would be allotted 1/3, and the PAT side, 2/3; the 1/3 of the MAT side would be divided between MATUn and PAT MAT Un each taking 1/6; and the PAT side's 2/3 would be taken by PAT MAT Un as the only one on the PAT side; so that ultimately MATUn gets 1/6, and PATMATUn 5/6.[5]

DOUBLE RELATIONSHIP is illustrated by the following table:

F = father (or father's) & M = mother (or mother's).
The symbol = represents that the parties are married.



The circumstances indicated above, are as follows: FF has, by his first wife, a son, F; after the death of that wife, he marries *MM*, and *MM* bears to FF, a son PATMATUn. Then FF dies, and *MM* marries a second husband, and gives birth to *M* by her second husband; then PATMATUn is the cB of F, and also the uB of *M*, i.e. the CPATUn and the UMATUn of the deceased.[5]

§ 5.—THE SUCCESSOR BY CONTRACT.

Successor by contract heir in absence of blood relations.

646. In the absence of all blood relations, the estate (subject to the widower or widow taking 1|2 or 1|4 : s. 641) devolves upon the successor by contract, i.e. any person whom the deceased names as his heir in consideration of that person's promising to pay for the deceased any fine or ransom to which the deceased might become liable.[6]

§ 6.—RETURN TO THE HUSBAND.

Husband (or wife ?) next heir.

647. In[7] the absence of blood relations, and of the successor by contract, the whole of the estate devolves upon the widower[8] or widow[9] as the case may be.

[5] Bail. II. 337.

[6] Bail. II. 296, 360. Shia texts place emancipator of slave, called *maula* of manumission (*wala* = relation & *maula* = one having *wala*) in respect of rights of inheritance prior to successor by contract; Bail. II. 345-360. But those rules *semble* including s. 646, cannot apply in India: See s. 5B, p. 39, s. 634(2), p. 894.

[7] Cf. s. 633, p. 894 for Hanafi law.

[8] Bail. II. 262 (par. 4), 265 (par. 1), 339, 367 (par. 2). Nor does right devolve upon heirs of successor by contract. Texts differ whether the contract is absolutely binding, or may be dissolved, so long as *maula* has not had to pay any fine by reason of contract. After he has done so, the contract cannot be revoked or dissolved: Bail. II. 361-362.

[9] *Abdul Hamid Khan* v. *Piare Mirza*, (1934) 10 Luck. 550 (Shia widow entitled in absence of blood relations to whole estate by returns: so *held* on authority of (1) *Rauzat-ul-Ahkam* (from Shaikh Mufid, 333, 413 A.H.), (2) tradition of Abu Basir, (3) Ameer Ali, 4th ed. II. 153, against view preferred in *Sharaiu'l-Islam*. Bail. II.

TABLE OF HEIRS : SHIA LAW.

Husband or Wife.—The husband or wife's share varies only as provided in s. 641, p. 906. Only the heirs by BLOOD RELATION are referred to below. See also s. 640 E, com., pp. 903 ff.

First Class of Heirs.

(1) Descendants *and/or*
(2) Father & mother.

Residue :—(*a*) If there is any son (or his descendants) the residue is taken by the son (or his descendants) together with the daughter (or her descendants), in the proportion of a double share to a male, per stirpes.

(*b*) If there is no son (nor his descendants), the residue is divided amongst the rest of the blood relations (i.e., the daughter or her descendants, and the father and mother) in the proportion of their respective shares.

Deficit—borne by daughter alone. [There is no deficit (where the heirs of the first class succeed), unless there is a daughter ; nor is there any deficit if there is a son, i.e., there is a deficit only where there is a daughter who ranks as a sharer.]

Second Class of Heirs.

(1) Grandparents howsoever high, *and/or*
(2) Brother *and/or* sisters ; or, failing them, their descendants.

Residue taken, or *deficit* borne, by full sister alone : if there is no full sister, but consanguine sister the latter bears the *deficit ;* it is doubtful whether she takes the whole of the residue, or divides it with the uterine relations proportionately to their respective shares.

Third Class of Heirs.

Uncles *and/or* aunts; or, failing them, their descendants.

The estate is divided on the basis shown in table : s. 644, *ill.* (32).

§ 7.—ESCHEAT TO THE STATE.

Escheat to State.

648. In the absence of all blood relations and of the widower or widow, and of the successor [10] by contract, (subject to s. 579 B) the estate escheats to the State.[11]

It has been held that if a Shia dies leaving no natural heirs, his property

262, (par. 4), 339 (par. 1), 272 (par. 1): "Upon this point, however, there are three different opinions : (i) ... She takes the remainder by virtue of reversionary right ; ... (ii) it never reverts to her ... (iii) it reverts to her on failure, that is during the absence, of the *Imam*, but not if he is present. The right doctrine however is that it never reverts to her." In 10 Luck. 550 (iii) was adopted : (i) was not rejected in 10 Luck. 550.

[10] Bail. II. 362 (par. 3): "With the provisions & restrictions already quoted, respecting the latter," viz. respecting widow, cf. s. 647.

[11] Bail. II. 362, 363, 364 (par. 5). See s. 637(1). See (*Sheikh*) *Abdur Rahman*

SECTION 648. vests in the Imam as the ultimate heir ; and, in the absence of the Imam, it goes to his representative the mujtahid,[1] to be distributed equitably and properly among the poor and indigent ; but that there being no person in the nature of an heir capable of succeeding and taking the property, the right of the Crown to take by escheat intervenes and prevails : [12] though the Government may follow the Crown practice in England,[13] and grant the escheated property to the family of, or to persons adopted as part of the family of, the person whose estate the same may have been.[12]

HANAFI AND SHIA INTERPRETATION OF KORAN : RESULTS COMPARED

1.—Shia law : not only women, but cognates placed on equality with customary heir.

1. The most important reform by Islam refers to the rights of women. The general provisions of the Koran with reference to inheritance [14]—such as "Men ought to have a part of what their parents and kindred leave, and women a part of what their parents and kindred leave," (iv. 7); "For men there is a portion of what they earn, and for women a portion of what they earn," (iv. 32) have been interpreted by the Hanafis strictly, retaining the substratum of the pre-Islamic customs. The Koran has not been taken to alter or affect the basic conceptions existing in Arabia regarding proximity of kinship. So the Hanafi interpretation of the law, permits those women alone to compete with the customary heir, in whose case the only bar to recognition (under the customary law) was their sex viz. female agnates. The Shias on the other hand, have, on the strength of such verses, removed the basic distinction made by custom between agnates and cognates. They interpret the Koran as placing those who are related through women, on a footing of equality with those related through men. The result is that with the Shias the agnates have no priority over the cognates, and proximity is reckoned merely by counting the connecting links, whether male or female.

2.—Shias adopt division per stirpes.

(2) The verse that a male shall have as much as the share of two females,[14] in conjunction with the verses referred to in the last paragraph, is interpreted by the Shias as changing the entire principle of distribution prevailing in the pre-Islamic times, and introducing a distribution per stirpes instead of per capita. For, it is clear that if those who are related through females are to succeed, as well as those related through males, and if at the same time the males are to get twice as much as females, there must be a distribution at each stage where the sexes of the intermediate links differ. The step from this to a distribution per stirpes is an easy one.[15]

v. (*Sheikh*) *Wali Mohammad*, (1922) 2 Pat. 75, 81 ; (*Mt.*) *Khurshaidi B.* v. *Sec. of St. for Ind.* (1925-6) 5 Pat. 539, (Sec. of St. takes property without trust in favour of poor). "A relation by blood however remote excludes an emancipator, & in like manner an emancipator or his representative in the inheritance of the freed-man is preferred to the surety for offences, & the surety for offences preferred to the Imam." Bail. II. 271 (para. 4).

[12] (*Mt.*) *Khurshaidi B.* v. *Sec. of St.* (1925-26) 5 Pat. 539, 563-572.

[13] Hals. *Laws of Eng.* (2nd ed.) X. 617, 910 ; *Moggridge* v. *Thackwill*, (1802) 7 Ves. 36, 71 ; *Mason* v. *A. G. of Jamaica*, (1843) 4 Moo. P. C. 228, 235. Cf. *Collector of Masulipatam* v. *Cavaly Vencata Narrainapah*, (1860) 8 Moo. I. A. 500.

[14] Koran, IV. 7, 32 : cited p. 824.

[15] Koran, IV. 11 : cited pp. 824 f.

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An exception is made in the case of the maternal relations, among whom the males and females share alike. This has been explained as a result of the interpretation of the verse of the Koran dealing with the rights of "mother's children"[16]: "If the deceased have a brother or sister (only on the mother's side) then to each of them twain the sixth; and if there be more than two, they shall be sharers in the third"—(iv. 15) wherein no mention is made that the males should take twice the share of females but the contrary is implied. The underlying principle has already been indicated, why in this instance the rule giving to males twice as much as to females, has not been applied: viz. that the males were given a larger share than the females only in those cases in which the males would have succeeded under the old law, and the females were recognized as heirs for the first time by Islam. But since not only the uterine brother and the uterine sister, but all cognates were excluded by the customay law, all of them were newly entitled heirs under Islam. There was no reason, therefore, to give to the uterine brother preferential treatment over the uterine sister, or any male cognate preference over female cognates,—any more than there was any reason to give preference to the father over the mother in cases where descendants of the deceased survive.

3.—Shia law: females, however remote inherit: analogy of daughter or sister.

3. The Koranic provision that the daughter is entitled to succeed with the son, is interpreted by the Shias as entitling all female descendants to succeed. Similarly the mention in the Koran of the full and consanguine sister, and of the uterine brothers and sisters, is taken to indicate that all collaterals whether male or female, whether of the full blood or of the half blood, rank with the customary heirs in their own line. Moreover, the Koran provides that the nearest relation shall succeed: no provision is made that agnates shall have priority: hence cognates and agnates in accordance with the Shia interpretation of the law succeed on terms of equality. So on the one hand the Hanafis give rights of inheritance to the sister (unless she comes into competition with a customary heir who is nearer than herself), but give no such rights to the niece of the deceased, even though no customary heir nearer than herself survives to compete with her: the niece of a Hanafi can only succeed in default of all male agnates. On the other hand, the Shias take the provisions in the Koran as not restricted to the individual instances of the daughter and sister, but as adumbrating the principle that all female and uterine relations shall have rights of the same kind as are expressly stated with reference to the sisters and uterine brothers and sisters. In order that the rights should be of the same kind, the principle must be brought into contact with the circumstances, viz. with the relations existing between the claimants who compete with each other. In other words, the Shias turn their attention first to the females who are expressly mentioned in the Koran; viz. the daughters, the mother, the sisters. They find these females newly clothed with title to inherit jointly with or in preference to the customary heir, provided that the customary heir is not nearer than themselves. The Shias determine what relation exists between the said females and the customary

[16] See, however, ss. 629-631, for the Hanafi law according to Imam Muhammad.

SECTION 648. heir when the females are so given title to inherit. If remoter females bear a similar relation to the customary heir against whom they compete, then the Shias reason out, in favour of remoter females, rights similar to those conferred on the nearer females specifically mentioned in the Koran. Thus the position is reached that, where those remoter females have to compete with claimants who, under the customary law, would exclude them, but who bear in comparison to them no greater proximity to the deceased, there such remoter females are also given rights to inherit,—rights analogous to the daughter's or sister's rights. So it comes about that a uterine sister's daughter is entitled (under Shia law) to take the same rights in the estate in competition with a full brother's son, as a uterine sister takes in competition with a full brother.

4.—Hanafi law : division of heirs into three kinds.

4. The Hanafis leave the pre-existing rights of the 'asaba' or agnates,—who were the customary heirs—intact, giving rights comparable to charges on the estate, to those mentioned in the Koran. It is, therefore, necessary for the Hanafi system to divide the heirs into three different classes: the Koranic sharers, the residuaries (consisting mainly of the "asaba," or agnates) and the distant kindred (cognates and remoter female agnates). The Shias do not leave the old rules of law as they were, but replace them by a set of rules consisting of a fusion of the customary law and the Islamic reforms, and thus, amongst Shias, the classification of heirs becomes important only when we have to deal with the question of the quantum of shares they take, and not for the purpose of considering which persons are entitled to succeed. The clue seems to be that the Hanafis take the Koranic alterations of the Pre-Islamic customs literally, and the Shias take them as illustrations of underlying principles. The former let the substratum of the customary law stand unaltered except to the extent to which it is definitely altered by express provisions of the Koran. The Shias take each instance mentioned in the Koran as speaking not only for itself but as indicating the widest possible principles.

5.—Shia law : principle of parents and descendants succeeding together, extended to remoter ancestors and collaterals.

5. The verse about the relative proximity of parents and children, and the provision that the two ought to succeed concurrently, has received slightly different verbal interpretations by the two schools, but the results have been very far reaching. Here again the Hanafis have given to the Koran the more literal meaning, though their interpretation permits any ascendant howsoever high, to share in the estate with any descendant howsoever low. The Shias on the other hand extract a principle from the instance given. Their method is characteristic, and throws light on their whole system. They reason that if F, (the father of the propositus) is entitled to succeed with his own grandchildren (and failing them with the descendants of his own grandchildren), then F's father, FF (the grandfather of the propositus) ought similarly, in respect of priority, be placed in the same rank as his own grandchildren (i.e. with the brothers and sisters of the propositus) and failing brothers and sisters with their descendants. This is another illustration of the expansion in Shia law of Koranic instances into principles. The operation of such instances is restricted in Hanafi law to the particular cases instanced. Shia law extracts what it considers the principle underlying the particular instances ; and applies that

principle to all analogous cases which are not specially mentioned. Thus, the daughter, the sister, the mother and the uterine brother have rights accorded to them by the Koran.[17] When they and others remoter than themselves survive the deceased, those others, though remoter, are by the customary law, given a preferential right to inherit. The law of Islam provides a remedy. It gives the nearer females a new form of title to inherit in the special method called taking (Koranic) shares. The Hanafis accept the innovation so far as it is expressly laid down, and leave the rest of the customary law unaltered. The amendment of the customary law, having been expressed only with reference to the sister, is not brought into operation under Hanafi law in favour of an aunt or a niece, neither of whom is mentioned. The Shias on the other hand take the express innovation as indicative of a new principle. They hold that the principle is the same whether the venue of competition is near or remote from the deceased. Whether the competing survivors are his immediate kin like the sister or uterine brother, or they are distant cousins, their rights must not be rejected barely upon their own want of proximity to the deceased. Their rights must be judged upon the basis of their proximity to the deceased as compared with the proximity of the other competing survivors. The customary heir cannot successfully resist a female cousin's claim to a share, by merely relying on her being remoter than a sister. He can exclude the female claimant only if he is himself nearer to the deceased than she is : only if he can show a title in himself of the same nature as that which enables the nearer customary heir to resist the claim of the nearer females. If on the other hand the aunt or remote female cousin bears towards the competing customary heir a relation comparable to that borne by the sister towards the customary heir in competition with whom the sister is entitled to inherit, then the aunt or female cousin also inherits under the Shia law. In short from the rights expressly granted to the daughter, mother, sister, uterine brother and uterine sister, the Shias deduce similar rights in favour of the remotest female ancestors or collaterals and half blood relation,—if the relative position of the competitors is similar to the position between the male agnate with whom the nearest females are permitted by express provisions to compete successfully.[18]

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6. The mother is given by the Koran 1/3 of the estate when the father is living. The Hanafis preserve the proportion between her share and that of the father. They give her 1/3 of only the residue if the husband or wife survives. The Shias let her take 1/3 of the whole, leaving only 1/6 to the father if a husband survives and 5/12 if a widow.

6.—Shia law : Mother's rights to take 1/3 not curtailed.

[17] Koran IV., 11, 12, 177.

[18] As to relative rights of ascendants & descendants, Shafiites & Malikis take same view. This principle apparently restricted to grandfather, & not followed in regard to great grandfather, who is made to exclude & not to rank with uncle. But rights of great-grandfather being of little practical importance, are perhaps stated with less thought. Or it is possible that custom governing method of reckoning proximity as between direct agnatic ancestors & agnatic collaterals differed amongst different tribes or in different parts of Arabia : or even was not settled in same tribe or same locality : substratum of the law would thus itself not be uniform.

APPENDIX.

LEGISLATIVE ENACTMENTS.*

	SET OUT ON PAGES
CASTE DISABILITIES REMOVAL ACT XXI. 1850	32-33
DISSOLUTION OF MUSLIM MARRIAGES ACT VIII. 1939	251-252
THE MUSLIM WAKF VALIDATING ACT VI. 1913	589-591
MUSSULMAN WAKF ACT XLII. 1923	931-936
MUSSULMAN WAKF VALIDATING ACT XXXII. 1930	936
(SHARIAT) MUSLIM PERSONAL LAW APPLICATION ACT XXVI. 1937	936-937
INSURANCE ACT IV. 1938, SS. 38, 39	938-939

THE MUSSULMAN WAKF ACT XLII 1923.

An Act to make provision for the better management of wakf property and for ensuring the keeping and publication of proper accounts in respect of such properties.

Assent of Gov.-Gen. 5 Aug. 1923.

Whereas it is expedient to make provision for the better management of wakf property and for ensuring the keeping and publication of proper accounts in respect of such properties ; it is hereby enacted as follows :—

* Ajmere Merwara Laws, 1877.....Table, pp. 28/29
Bengal & Assam Laws Act, 1905.....Table, pp. 28/29
Bombay Regulation IV. 1822.....Table, pp. 28/29
Burma Laws Act, see XIII. 1898.....Table, pp. 28/29
Caste Disabilities Removal Act XXI. 1850.....pp. 32, 33
Central Provinces Laws Act XX. 1875.....Table, pp. 28/29
Cutchhi Memons Act XLVI. 1920 .....p. 48 & *nn.* (6, 8), p. 52 *n.* (27)
Cutchhi Memons (Amendment) Act XXXIV. 1923.....p. 48 *n.* (8)
Cutchhi Memons Act X. 1938.....p. 48 & *n.* (6)
Dissolution of Muslim Marriages Act VIII. 1939.....SET OUT pp. 251–252
Government of India Act 1915, s. 112.....Table, pp. 28/29
Government of India Act 1935, s. 292.....Table, pp. 28/29
Insurance Act IV. of 1938 (amendment by Act XI. 1939) ss. 28, 39.....pp. 937–939
Madras Civil Courts Act III. 1873.....Table, pp. 28/29
North-West Frontier Law & Justice Regulation 1901 .....Table, pp. 28/29
North-West Frontier Provinces Muslim Personal Law (Shariat) Application Act VI. 1933.....Table, pp. 28/29
Order in Council, 3 Mar. 1936 .....Table, pp. 28/29
Oudh Laws Act, 1870.....Table, pp. 28/29
Presidency Small Cause Court Act XV. 1882.....Table, pp. 28/29
Shariat Act (Muslim Personal Law Application Act) XXVI. 1937.....pp. 936–937
Succession (Indian) Act XXXIX. 1925.....See Table on p. 741
Wakf : Mussulman Wakf Validating Act VI. 1913.....SET OUT pp. 589–591
Mussulman Wakf Act XLII. 1923.....SET OUT pp. 931–936
Mussulman Wakf Validating Act XXXII. 1930 .....SET OUT p. 936
Bengal Wakf Act XIII. 1934 & IV. 1935 (Bengal Act).
Mussulman Wakf (Bombay Amendment) Act, Bombay XVIII. 1935.

Preliminary.

WAKF ACT 1923.

Short title extent and commencement.

1. (*1*) This Act may be called the Mussalman Wakf Act, 1923 ;

(*2*) It extends to the whole of British India, including British Baluchistan and the Sonthal Parganas ;

(*3*) This section shall come into force at once ; and

(*4*) The Local Government may, by notification in the local official Gazette, direct that the remaining provisions of this Act, or any of them which it may specify, shall come into force in the Province, or any specified part thereof, on such date as it may appoint in this behalf.

Definitions.

2. In this Act, unless there is anything repugnant in the subject or context,—

(*a*) "benefit" does not include any benefit which a mutawalli is entitled to claim solely by reason of his being such mutwalli ;

(*b*) "Court" means the Court of the District Judge or, within the limits of the ordinary original civil jurisdiction of a High Court, such Court, subordinate to the High Court, as the Local Government may, by notification in the local official Gazette, designate in this behalf ;

(*c*) "mutwalli" means any person appointed either verbally or under any deed or instrument by which a wakf has been created or by a Court of competent jurisdiction to be the mutwalli or a wakf, and includes a naib-mutwalli or other person appointed by a mutwalli to perform the duties of the mutwalli, and, save as otherwise provided in this Act, any person who is for the time being administering any wakf property ;

(*d*) "prescribed means prescribed by rules made under this Act, and

VI. of 1913.

(*e*) "wakf" means the permanent dedication by a person professing the Mussalman faith of any property for any purpose recognized by the Mussalman law as religious, pious or charitable, but does not include any wakf, such as is described in section 3 of the Mussalman Wakf Validating Act, 1913, under which any benefit is for the time being claimable for himself by the person by whom the wakf was created or by any of his family or descendants.

Statements of Particulars.

Obligation to furnish particulars relating to wakf.

3. (*1*) Within six months from the commencement of this Act every mutwalli shall furnish to the Court within the local limits of whose jurisdiction the property of the wakf of which he is the mutwalli is situated or to any one of two or more such Courts, a statement containing the following particulars, namely :—

(*a*) a description of the wakf property sufficient for the identification thereof ;

(*b*) the gross annual income from such property ;

(*c*) the gross amount of such income which has been collected during the five years preceding the date on which the statement is furnished, or of the period which has elapsed since the creation of the wakf, whichever period is shorter ;

(*d*) the amount of the Government revenue and cesses, and of all rents, annually payable in respect of the wakf property;

(*e*) an estimate of the expenses annually incurred in the realization of the income of the wakf property, based on such details as are available of any such expenses incurred within the period to which the particulars under clause (*c*) relate;

(*f*) the amount set apart under the wakf for—

(*i*) the salary of the mutwalli and allowances to individuals;

(*ii*) purely religious purposes;

(*iii*) charitable purposes;

(*iv*) any other purposes; and

(*g*) any other particulars which may be prescribed.

(*2*) Every such statement shall be accompanied by a copy of the deed or instrument creating the wakf or, if no such deed or instrument has been executed or a copy thereof cannot be obtained, shall contain full particulars, as far as they are known to the mutwalli, of the origin, nature and objects of the wakf.

(*3*) Where—

(*a*) a wakf is created after the commencement of this Act, or

(*b*) in the case of a wakf such as is described in section 3 of the Wakf Validating Act, 1913, the person creating the wakf or any member of his family or any of his descendants is at the commencement of this Act alive and entitled to claim any benefit thereunder, VI. of 1913.

the statement referred to in sub-section (*1*) shall be furnished, in the case referred to in clause (*a*), within six months of the date on which the wakf is created or, if it has been created by a written document, of the date on which such document is executed, or, in the case referred to in clause (*b*), within six months of the date of the death of the person entitled to such benefit as aforesaid, or of the last survivor of any such persons, as the case may be.

Publication of particulars and requisition of further particulars.

4. (*1*) When any statement has been furnished under section 3, the Court shall cause notice of the furnishing thereof to be affixed in some conspicuous place in the Court-house and to be published in such other manner, if any, as may be prescribed, and thereafter any person may apply to the Court by a petition in writing, accompanied by the prescribed fee, for the issue of an order requiring the mutwalli to furnish further particulars or documents.

(*2*) On such application being made, the Court may, after making such inquiry, if any, as it thinks fit, if it is of opinion that any further particulars or documents are necessary in order that full information may be obtained regarding the origin, nature or objects of the wakf or the condition or management of the wakf property, cause to be served on the mutwalli an order requiring him to furnish such particulars or documents within such time as the Court may direct in the order.

State of Accounts, and Audit.

Statement of accounts.

5. Within three months after the thirty-first day of March next following the date on which the statement referred to in section 3 has been furnished, and

WAKF ACT 1923.

thereafter within three months of the thirty-first day of March in every year, every mutwalli shall prepare and furnish to the Court to which such statement was furnished a full and true statement of accounts, in such form and containing such particulars as may be prescribed, of all moneys received or expended by him on behalf of the wakf of which he is the mutwalli during the period of twelve months ending on such thirty-first day of March or, as the case may be, during that portion of the said period during which the provisions of this Act have been applicable to the wakf :

Provided that the Court may, if it is satisfied that there is sufficient cause for so doing, extend the time allowed for the furnishing of any statement of accounts under this section.

Audit of account.

6. Every statement of accounts shall, before it is furnished to the Court under section 5, be audited—

(*a*) in the case of a wakf the gross income of which during the year in question, after deduction of the land-revenue and cesses, if any, payable to the Government, exceeds two thousand rupees, by a person who is the holder of a certificate granted by the Local Government under section 144 of the Indian Companies Act, 1913, or is a member of any institution or association the members of which have been declared under that section to be entitled to act as auditors of companies throughout British India ; or

VII. of 1913.

(*b*) in the case of any other wakf, by any person authorised in this behalf by general or special order of the said Court.

General Provisions.

Mutwalli entitled to pay cost of audit, etc. from wakf funds.

7. Notwithstanding anything contained in the deed or instrument creating any wakf, every mutwalli may pay from the income of the wakf property any expenses properly incurred by him for the purpose of enabling him to furnish any particulars, documents or copies under section 3 or section 4 or in respect of the preparation or audit of the annual accounts for the purposes of this act.

Verification.

8. Every statement of particulars furnished under section 3 or section 4, and every statement of accounts furnished under section 5, shall be written in the language of the Court to which it is furnished, and shall be verified in the manner provided in the Court of Civil Procedure, 1908, for the signing and verification of pleadings.

V. of 1908.

Inspection and copies.

9. Any person shall, with the permission of the Court and on payment of the prescribed fee, at any time at which the Court is open, be entitled to inspect in the prescribed manner, or to obtain a copy of, any statement of particulars or any document furnished to the Court under section 3 or section 4, or any statement of accounts furnished to it under section 5, or any audit report made on an audit under section 6.

Penalty.

Penalties.

10. Any person who is required by or under section 3 or section 4 to furnish a statement of particulars or any document relating to a wakf, or who is

required by section 5 to furnish a statement of accounts, shall, if he, without reasonable cause, the burden of proving which shall lie upon him, fails to furnish such statement or document, as the case may be, in due time, or furnishes a statement which he knows or has reason to believe to be false, misleading or untrue in any material particular, or, in the case of a statement of accounts, furnishes a statement which has not been audited in the manner required by section 6, be punishable with fine which may extend to five hundred rupees, or, in the case of a second or subsequent offence, with fine which may extend to two thousand rupees.

Rules.

Power to make rules.

11. (*1*) The Local Government may, after previous publication, by notification in the local official Gazette, make rules to carry into effect the purposes of this Act.

(*2*) In particular and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely :—

(*a*) the additional particulars to be furnished by mutwallis under clause (*g*) of sub-section (*1*) of section 3 ;

(*b*) the fees to be charged upon applications made to a Court under sub-section (*1*) of section 4 ;

(*c*) the form in which the statement of accounts referred to in section 5 shall be furnished, and the particulars which shall be contained therein ;

(*d*) the powers which may be exercised by auditors for the purpose of any audit referred to in section 6, and the particulars to be contained in the reports of such auditors ;

(*e*) the fees respectively chargeable on account of the allowing of inscriptions and of the supply of copies under section 9 ;

(*f*) the safe custody of statements, audit reports and copies of deeds or instruments furnished to Courts under this Act ; and

(*g*) any other matter which is to be or may be prescribed.

Savings.

12. Nothing in this Act shall—

(*a*) affect any other enactment for the time being in force in British India providing for the control or supervision of religious or charitable endowments ; or

(*b*) apply in the case of any wakf the property of which—

(*i*) is being administered by the Treasurer of Charitable Endowments, the Administrator General, or the Official Trustee ; or

(*ii*) is being administered either by a receiver appointed by any Court of competent jurisdiction, or under a scheme for the administration of the wakf which has been settled or approved by any Court of competent jurisdiction or by any other authority acting under the provisions of any enactment.

WAKF ACT 1923. Exemption.

13. The Local Government may, by notification in the local official Gazette, exempt from the operation of this Act or of any specified provision thereof any wakf or wakfs created or administered for the benefit of any specified section of the Mussalman community.

MUSSULMAN WAKF VALIDATING ACT XXXII. 1930.

Assent of Gov.-Gen. 25 July, 1930.

An Act to give retrospective effect to the Mussalman Wakf Validating Act, 1913.

Whereas the Mussalman Wakf Validating Act, (VI. of) 1913, does not apply to wakfs created before its enactment ;

And whereas it is expedient to validate such wakfs without infringing any rights contrary thereto which may have already accrued or been acquired ;

It is hereby enacted as follows :—

Short title.

1. This Act may be called the Mussalman Wakf Validating Act, 1930.

Act VI. of 1913. to apply retrospectively.

2. The Mussalman Wakf Validating Act, 1913, shall be deemed to apply to wakfs created before its commencement

Provided that nothing herein contained shall be deemed in any way to affect any right, title, obligation or liability already acquired, accrued or incurred before the commencement of this Act.

MUSLIM PERSONAL LAW (SHARIAT) ACT XXVI. 1937.

Assent of Gov.-Gen. 7 Oct. 1937.

An Act to make provision for the application of the Muslim Personal Law (Shariat) *to Muslims in British India.*

Whereas it is expedient to make provision for the application of the Muslim Personal Law (*Shariat*) to Muslims in British India ; It is hereby enacted as follows :—

Short title and extent.

1. (*1*) This Act may be called the Muslim Personal Law (*Shariat*) Application Act, 1937.

(*2*) It extends to the whole of British India excluding the North-West Frontier Province.

Application of Personal Law to Muslims.

2. Notwithstanding any custom or usage to the contrary, in all questions (save questions relating to agricultural land) regarding intestate succession, special property of females, including personal property inherited or obtained under contract or gift or any other provision of Personal Law, marriage, dissolution of marriage, including *talaq, ila, zihar, lian, khula* and *mubaraat*, maintenance, dower, guardianship, gifts, trusts and trust properties, and *wakfs* (other than charities and charitable institutions and charitable and religious endowments) the rule of decision in cases where the parties are Muslims shall be the Muslim Personal Law (*Shariat*).

SHARIAT ACT 1937.

Power to make a declaration.

3. (*1*) Any person who satisfies the prescribed authority—

(*a*) that he is a Muslim, and

(*b*) that he is competent to contract within the meaning of section 11 of the Indian Contract Act, 1872, and

(*c*) that he is a resident of British India,

IX. of 1872.

may by declaration in the prescribed form and filed before the prescribed authority declare that he desires to obtain the benefit of this Act, and thereafter the provisions of section 2 shall apply to the declarant and all his minor children and their descendants as if in addition to the matters enumerated therein adoption, wills and legacies were also specified.

(*2*) Where the prescribed authority refuses to accept a declaration under sub-section (*1*), the person desiring to make the same may appeal to such officer as the Provincial Government may, by general or special order, appoint in this behalf, and such officer may, if he is satisfied that the appellant is entitled to make the declaration, order the prescribed authority to accept the same.

Rule making Power.

4. (*1*) The Provincial Government may make rules to carry into effect the purposes of this Act.

(*2*) In particular and without prejudice to the generality of the foregoing powers, such rules may provide for all or any of the following matters, namely :—

(*a*) for prescribing the authority before whom and the form in which declarations under this Act shall be made ;

(*b*) for prescribing the fees to be paid for the filing of declarations and for the attendance at private residences of any person in the discharge of his duties under this Act ; and for prescribing the times at which such fees shall be payable and the manner in which they shall be levied.

(*3*) Rules made under the provisions of this section shall be published in the official Gazette and shall thereupon have effect as if enacted in this Act.

Dissolution of marriage by Court in certain circumstances.

6.* The District Judge may, on petition made by a Muslim married woman, dissolve a marriage on any ground recognized by Muslim Personal Law (*Shariat*) :*

Repeals.

6. Provisions of the Acts and Regulations mentioned below shall be repealed in so far as they are inconsistent with the provisions of this Act, namely :—

(1) Bombay Regulation IV. of 1827, s. 26 ;

(2) Madras Civil Courts Act, 1873, s. 16 ;

(3) Bengal, Agra and Assam Civil Courts Act, 1887, s. 37 ;

(4) Oudh Laws Act, 1876, s. 3 ;

(5) Punjab Laws Act, 1872, s. 5 ;

(6) Central Provinces Laws Act, 1875, s. 5 ;

(7) Ajmere Laws Regulation, 1877, s. 4.

* Sect. 5 is repealed : Dissolution of Muslim Marriage Act VIII. 1939, s. 6.

INSURANCE ACT IV. 1938 (AS AMENDED BY ACT XI. 1939), SS. 38, 39.

ASSIGNMENT OR TRANSFER OF POLICIES AND NOMINATIONS

Assignment and transfer of life assurance policies.

Sect. 38. (1) A TRANSFER OR ASSIGNMENT OF A POLICY of life insurance, whether with or without consideration, may be made only by an endorsement upon the policy itself or by a separate instrument, signed in either case by the transferor or by the assignor or his duly authorized agent and attested by at least one witness, specifically setting forth the fact of transfer or assignment.

(2) The TRANSFER OR ASSIGNMENT shall be COMPLETE and effectual upon the execution of such endorsement or instrument duly attested but, 'except where the transfer or assignment is in favour of the insurer.' * SHALL NOT BE OPERATIVE AS AGAINST AN INSURER and shall not confer upon the transferee or assignee, or his legal representative, any right to sue for the amount of such policy or the moneys secured thereby until a NOTICE in writing, 'together with either the said endorsement or instrument itself or a copy thereof certified to be correct by both transferor and transferee or their duly authorized agents,' * of the transfer or assignment has been delivered to the insurer, 'provided that where the insurer maintains one or more places of business in British India, such notice shall be delivered only at the place in British India mentioned in the policy for the purpose or at his principal place of business in British India.' *

(3) The date on which the notice referred to in sub-s. (2) is delivered to the insurer shall regulate the PRIORITY OF ALL CLAIMS under a transfer or assignment as between persons interested in the policy; and where there is more than one instrument of transfer or assignment the priority of the claims under such instruments shall be governed by the order in which the notices referred to in sub-s. (2) are delivered.

(4) Upon the receipt of the NOTICE referred to in sub-s. (2), the INSURER SHALL RECORD the fact of such transfer or assignment together with the date thereof and the name of the transferee or the assignee and shall, on the request of the person by whom the notice was given, or of the transferee, or assignee, on payment of a fee not exceeding one rupee, grant a WRITTEN ACKNOWLEDGMENT of the receipt such notice, and any such acknowledgment shall be conclusive evidence against the insurer that he has duly received the notice to which such acknowledgment relates.

(5) 'Subject to the terms and conditions of the transfer or assignment the insurer shall, from the date of the receipt of the notice referred to in sub-s. (2)'* recognize the transferee or assignee named in the notice as the ONLY PERSON ENTITLED TO BENEFIT under the policy, and such person shall be subject to all LIABILITIES AND EQUITIES to which the transferor or assignor was subject at the date of the transfer or assignment and may institute any proceedings in relation to the policy without obtaining the consent of the transferor or assignor or making him a party to such proceedings.

* The Insurance Act IV. 1938 has been amended by the Insurance (Amendment) Act XI. 1939. The amendments are indicated by single inverted commas : ' '.

(6) 'Any rights and remedies of an assignee or transferee of a policy of life insurance under an assignment or transfer effected prior to the commencement of this Act shall not be affected by the provisions of this section.' * INSURANCE ACT 1938, s. 38.

(7) Notwithstanding any law or custom having the force of law to the contrary, an ASSIGNMENT in favour of a person made WITH the CONDITION that it shall be inoperative or that the interest shall pass to some other person on the happening, of a specified event during the 'life-time of the person whose life is insured,' * and an ASSIGNMENT IN FAVOUR of the SURVIVOR or survivors of a number of persons, shall be valid.

Sect. 39. (1) The HOLDER of a policy of life insurance 'on his own life, not being an absolute assignee of the benefit under the policy,' * may, when effecting the policy or at any time before the policy matures for payment, NOMINATE the person or persons TO WHOM the MONEY secured by the policy shall be PAID in the event of his death. Nomination by policy holder.

(2) Any such NOMINATION in order to be effectual shall, unless it is incorporated in the text of the policy itself, be made by an ENDORSEMENT on the policy communicated to the insurer and registered by him in the records relating to the policy and any such nomination may at any time before the policy matures for payment be CANCELLED or CHANGED by an endorsement or a further endorsement or a will, as the case may be, but unless notice in writing of any such cancellation or change has been delivered to the insurer, the insurer shall not be liable for any payment under the policy made *bona fide* by him to a nominee mentioned in the text of the policy or registered in the records of the insurer.'*

(3) The insurer shall furnish to the policyholder a written acknowledgment of having registered a nomination or a cancellation or change thereof, and may charge a fee not exceeding one rupee for registering such cancellation or change.' *

(4) A TRANSFER OR ASSIGNMENT of a policy made in accordance with s. 38 SHALL automatically CANCEL a NOMINATION.

(5) Where the POLICY MATURES for payment during the life-time of the person whose life is insured or where the nominee or, if there are more nominees than one, all the nominees die before the policy matures for payment, the AMOUNT secured by the policy shall be PAYABLE to be policy-holder or his heirs or legal representatives or the holder of a succession certificate, as the case may be.

(6) Where the nominee or, if there are more nominees than one, a nominee or nominees survive the person whose life is insured, the amount secured by the policy shall be payable to such SURVIVOR or survivors.

(7) The provisions of the section shall not apply to any policy of life insurance to which section 6 of the Married Women's Property Act, 1874, applies. III. of 1874.

* The Insurance Act IV. 1938 has been amended by the Insurance (Amendment) Act XI. 1939. The amendments are indicated by single inverted commas : ' '.

INDEX AND GLOSSARY.

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ADDENDA ET CORRIGENDA

The word *Koran* has in the first Chapter been occasionally spelt *Quran*. For uniformity it should be spelt *Koran* as in the rest of the book.

p. 4 *n.* (10) last *l. read* : *Jami,*

p. 9 *n.* (2) last *l. read* : Derenburg.

p. 10 *l.* 20 *read* : Muawiya

p. 11 *l.* 7 *read* : Ibn Qutayba's [31]

p. 15 *n.* (9) *l.* 2 read : *Al Itqan fi*

p. 17 *n.* (16) *l.* 1 *read* : *mina'd-Dalail*

p. 18 *l.* 4 *read* : *Musnad-i-Darimi*

p. 20 *n.* (31) *read* : *Wafiatu'l Ayan*

pp. 21-25. *Kazi* has been spelt occasionally as *Qazi*. For uniformity it should be *Kazi* throughout. Similarly, *Qaziul quzat* should be *Kaziul kuzat*. *Waqf* should be *Wakf*.

p. 38 *n.* (18) last *l. add* : *Abdul Safur Rowther* v. *Hamida Bivi,* (1919) 42 Mad. 661 (daughter allowed 6 per cent. interest on her share in her father's business, which her brothers continued.)

p. 59. *add* as *n.* (41) to s. 10. *ll.* 1-4 : *n.* (41) For Shariat Act 1937 see s. 6 A (1) (*b*) p. 47 ; & appx. pp. 936 f.

p. 63 *n.* (25) *l.* 4 *read* : (*Musummat*) *Mehtab Bibi* v. (*Mussummat*) *Hussain Bibi.*

p. 64 *n.* (33) *l.* 6 *read* : *Muhammad Umar* v. *Muhammad Niazuddin.*

p. 70 *n.* (65) *add* : *Secretary of State* v. *Santaraji Shetty* (1913) 25 Mad. L. J. 411, 420 f. ; (in determining whether validity of custom proved, immaterial whether alleged custom is opposed to what might seem necessary consequence of other rules of custom).

p. 71 *n.* (74) *add* in *l.* 1 : *Trustees of Tribune Press, Lahore* v. *Commissioner of Income Tax,* (1939) 20 Lah. 475, 487. (P.C.); *Yeap Cheah Neo* v. *Ong Ching Neo,* (1875) L. R., 6 P. C., 381.

p. 73 *n.* (9) *l.* 7 *read* : *Muhammad Umar* v. *Muhammad Niazuddin.*

p. 74 *n.* (13) *add* : *Beg* v. *Allah Ditta,* (1916) 44 I. A. 89=44 Cal. 749 (*riwaj-e-am,* in absence of rebuttal, sufficient evidence to establish custom that daughter of sonless man, if she is married to near relative who takes up his abode in his father-in-law's house, inherits in preference to collaterals).

p. 77 *n.* (2) *l.* 1 *read* : (1897) 24 I. A. 196=25 Cal. 9.

p. 79 *n.* (11) *l.* 8 *read* : *Assoha Bibi.*

p. 80 *n.* (15) *add* : *Abdul Alim Abed* v. *Abir Jan Bibi,* (1928) 55 Cal. 1284, (District Judge ought to exercise powers of *Kazi* in connection with

public religious trust) ; *Muhammad Yussub* v. *Sayad Ahmed*, (1866) 1 Bom. H. C. R. (APPX), xviii (plaintiff produced *sanad* of appointment as *Kazi* from government of Bombay, 1837 ; not shown to be illegally appointed : allowed to sue for disturbance in office : fees for discharge of official duties ordered to be refunded to plaintiff) ; *Zakeri Begum* v. *Sakina Begum*, (1892) 19 I. A. 157 CAL. (register of marriage by a *mujtahid* in discharge of his professional duty & kept by the *Kazi* admissible in evidence in suit to recover *mahr* : Ind. Ev. Act. 1872, s. 32 ; on evidence High Court Judgment reversed : that of Subordinate Judge, who held *mahr* of Rs. 50,000 proved, restored).

p. 91 *item* 13. *l.* 2 *read* : A. H. 592=1225 A. D.

p. 92 *n.* (2) *l.* 1 *read* : *Muhammad* ; *l.* 2 *read* : *Mahomed.*

p. 110 *n.* (23) *l.* 6 *read* : *Hamidunnessa* v. *Zahiroddin Sheik.*

p. 113 *n.* (43) *l.* 1 *read* : *Khwaja Muhammad Khan.*

p. 117 *n.* (70) *add* : see also p. 284, s. 254, & *nn.*

p. 145 *n.* (19) last *l. read* : Court held delay did not prove agreement.

p. 159 *n.* (4) *l.* 6 *read* : *Mahomed Bauker.*

p. 159 *n.* (4) *l.* 8 *read* : *Shurfoonissa* v. (*Mt.*) *Azeemun.*

p. 164 *n.* (9) *l.* 7 *read* : (1897) 24 I. A. 196=25 Cal. 9, 18.

p. 171 *n.* (11) *read* : *tafwiz*=confiding, resigning.

p. 176 *n.* (17) last *l.* read : *Khajarunnissa B.* v. *Ryeesoonissa B.*

p. 181 marginal note : for "paid passer" *read* : *pari passu.*

p. 184 *n.* (29) *l.* 5 *read* : *Zahiruddin* (1890) 17 Cal. 670.

p. 186 *n.* (7) *l.* 5 *read* : *Beebee Bachun.*

p. 198 *n.* (28) *l.* 5 *read* : *Mahomed Noor K.* v. *Hur D.* (1866) 1 Agra 67.

p. 202 *n.* (21 xiv) *read* : *Mt. Bibi Mahbooban.*

p. 208 *n.* (5) *l.* 3 *read* : *Kumurunissa.*

p. 211 *n.* (14) *read* : (*Moonshee*) *Buzul-ul-Raheem* v. *Luteefut-oon-nissa*, (1861) 8 Moo. I. A. 379.

pp. 222 f. *nn.* (1, 5) *read* : *Bachchoolal* alias *Abdul Khaliq* v. *Bismilla.*

p. 233 *n.* (17)
p. 237 *n.* (12) } *read* :

(*Moonshee*) *Buzul-ul-Raheem* v. *Luteefut-oon-nissa*, (1861) 8 Moo. I. A. 379.

p. 244 *n.* (32) *l.* 1 read : 26 Mad. L. J. 260.

p. 256 *n.* (13) *l.* 1 *read* : *Alla Pichai Rowthan ; and add to n.* (13) *Abdul Saffur Rowther* v. *Hamida Bivi Ammal*, (1919) 42 Mad. 661 (business carried on by father : continued by sons after father's death ; on taking accounts daughter allowed interest at 6 per cent. on her share).

p. 264 *n.* (13) *l.* 3 *read* : *Nuhullah Khan*, (1929) 48 All. 58.

p. 265 *n.* (21) *l.* 2 *omit* : =(1929) 48 I. A. 52.

p. 276 *n.* (10) *begin* : Bail I. 47 (par. 5) ; II. 8 (par. 4), 251 ;

p. 316 *n.* (24) *ll.* 1, 2 *read* : 39 Bom. L. R. 277, 282.

p. 353 *n.* (26) *l.* 4 : *for* differs naturally, *read* : differs materially

p. 360 *n.* (13) *add* : Bail. I. 518 (par. 2) (526).

p. 362, 3rd marginal note, *read* : Donee's undertaking enforceable by donor as trust.

p. 377, s. 364 A *l.* 5, *for* gift to a daughter from his father *read* : gift to a daughter from her father.

p. 467 margin *read* : gift to descendant revocable.

p. 477 margin *read* : muhabat.

p. 488 *n.* 1 last 2 lines *read* : (iv) see page 490 *n.* 8 (iv).

p. 507 *n.* (32) *l.* 6 *read* : intention is disclosed to grant usufruct

n. (33) *l.* 1 *read* : better appreciated if "benefit", or "usufruct"

p. 514 penult. *l.* of par. 1 *add* : "themselves" after "step-brothers".

p. 529, s. 453 com. last *l.*, read : enjoyment of the same excepted."[7]

n. (7), *read* : Ameer Ali, I. 113, (180, 181) (no authority cited).

p. 535 *n.* (30) last *l. read* : (1824) 3 Sel. Rep.

p. 542 *n.* (43) last *l. read* : *Saadat K.* v. *A. G.* (*Palestine*) [1939] A. C. 506 (mutawalli is a manager not a trustee).

p. 576 s. 474 com. *read* : "It is permissible for a man," so it is laid down in the *Daaimu'l-Islam*, "to make a habs of his property...

p. 576 *n.* (13) *read* : Bail. I 589 (par. 2) (599) is to the same effect as the *Daaimul Islam, Kitabul Ataya, Sadaqa* (Shia Ismaili text), from which an excerpt has been translated as the first sentence of s. 474 com.

p. 599 *n.* (17) last *l. add* : See p. 67 *n.* (45).

p. 639 *add* as s. 511 (3 B) :

(3 B) The word "heirs" means heirs generally, not such heirs alone as are also issue : [9A] though the words "heirs" and "issue" may be so used that each must be understood as heirs who were also issue. [9B]

p. 639 after *n.* (9) *add* as *n.* (9 A) (*Nawab Hyder Husain Khan* v. (*Nawab*) *Faghfur Mirza*, (1905) 32 I. A. 135 (OU) (in absence of anything to indicate intention that hēirs must mean heirs who are also issue, heirs general are meant, notwithstanding that (i) in an earlier document executed by same executant, but not embodied or referred to in the present document, heirs were to be so understood ; (ii) the pensioners and their descendants recommended in the present document to kindness and support of government ; but no ground for assuming that the class of persons so recommended were of necessity co-existensive with class that could enjoy pensions ; (iii) in clauses relating to devolution of the rights of the mutawallis & vakils, terms "heirs" & "descendants" said to be used as convertible terms : but descent of trusteeship & descent of beneficial

interest in the pensions are distinct things : there is no right to assume that both were intended to be governed by same rules).

p. 639 before *n.* (10) *add* as *n.* (9 B) : (*Nawab Sultan*) *Maryam Begum* v. *Nawab Sahib Mirza,* (1889) 16 I. A. 175.

p. 640 *n.* (13) last *l. add* : See *Babu Bhagwan Din* v. *Gir Har Saroop* (1939) 67 I. A. 1, 8.

p. 694 *n.* (13) *read* : s. 528 I. *ill.* (8) p. 689.

p. 735 *n.* (6) *add* at beginning : *Appovier* v. *Rama Subba Aiyar,* 11 Moo. I. A. 75.

p. 790 *n.* (40) *l.* 1 *read* : Follow that which God hath sent down.

p. 822 *n.* (14) *l.* 4 *read* : "...kindred against/with you."

p. 822 *n.* (14) *l.* 6 *read* : *Abul Fadl.*

p. 822 *n.* (14) *l.* 7 *add* : "ye have naught to do with their claims of kindred" (Palmer).

p. 836 *n.* (18) *ll.* 1, 2 *read* : In Arabic *sahib-ul-farz* or *zavil-furuz,* i.e. masters of shares : SHARER & RESIDUARY refer primarily....