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DIGEST

OF

ANGLO-MUSLIM LAW

Compiled from the Original Arabic Authorities

BY

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Dedicated
To the Memory of
My Grandfather
Al-Haj Maulvi M. Samee-Ullah
Khan Bahadur, C.M.G.

PREFACE

THESE few pages contain the principles of the **Muslim Law.** It comprises the *Sunni Hanafi* Law, and is compiled mainly from the original Arabic authorities. I have made an attempt to prepare a code, and I have designated it a digest of Anglo-Muslim Law. The Book contains 12 chapters and 307 sections only. and the charts embodied in the last chapter have been carefully prepared. I have taken the liberty to differ from some observations of such eminent writers of Anglo-Muhammadan Law as Baillie, and Ameer Ali, and also some judicial decisions including those of Mahmood J.; for this I crave indulgence. I trust the work will meet with the approval of all those interested in the Muslim Law.

Law Department,
University of Allahabad.
23rd January, 1932.

M. U.

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INTRODUCTION

§ 1. AL-ULUM-US-SHARIAT

The Mus'im encyclopædists have designated the appellation Al-Ulum-us-Shariat to the science of Muslim religion and Jurisprudence.

According to our jurists "Al-ulum-us-shariat" is divided into seven sections or four broad sub-divisions.[1]

I (1) Ilm-ul-Qirat the science of Reading the Koran.
(2) Ilm-at-Tafsir, the science of the Interpretation of the Koran.

II (3) Ilm-al-Hadis, the science of the Traditions.
(4) Ilm-Dirayat-al-Hadis, the science of critical discrimination in matters of Traditions.

III (5) Ilmusul-addin, Ilmal-Kalam, the science of Scholastic Theology.

IV (6) Ilmusal-al-Fiqh, the science of Principles of Jurisprudence.
(7) Ilm-ul-Fiqh, the science of Practical Jurisprudence.

I The Koran

The Koran may well be described as the final and the great legislative Code of Islam. It is the 'Fons publici privatique iuris,' 'Finis æqui iuris,' and "Corpus Omnis *Muslim* iuris" of the science of Muslim Jurisprudence. The Koran is the divine communication and revelation to the Prophet of Islam. The Koran was in existence in manuscript form during the life-time of the Prophet. It was also preserved in memory of the companions. Abu Bakr and Umar preserved this collection carefully. In A. H. 30 Usman finding some discrepancies in the copies of the Koran, which were circulated in the provinces, issued an official copy of the Koran, and all those copies in circulation were suppressed.

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1 Von Hammer in Encyklopadische Uebersicht der Wissenschaften des Orients, p. 568 gives an admirable survey of the whole system See also W. H. Morley's Analytical Digest (The Muhammadan Law) p. CCXXVII.

The following are the eminent interpreters, writers of Tafsir of the Holy Koran.

(I) Abu Jafar Muhammad bin Jarir well known as the historian at-Tabari (died A. H. 310. A. D. 922.)

(2) † The Kashshaf by Abu-Qasim Jar ullah Mahmud bin Umar as-Zamakhshari (died A. H. 538 A. D. 1143.)

† (3) The Anwar-al-Tanzil by Nasir-uddin Abdallah bin Umr al-Baizawi (died A. H. 685 A. D. 1286).

(4) The Yakut-al-Tawil, Tafsir-al-Ghazali by Abu Hamed Muhammad-al-Ghazali (died A. H. 504 A. D. 110).

(5) The Durr-al-Mansur by Jalaludin Abdur-Rahman bin Ali Bakr as-Suyuti (died A. H. 911 A. D. 1505).

(6) The Tafsir-al Jalalain by Jalaluddin Muhammad bin Ahmad Al-Mahalli (died A. H. 864 A. D. 1459) and by Jalal-uddin Abdul-Rahman bin Abu Bakr-as-suyuti.

(7) The Tafsir Kabir by Imam Fakhruddini-Razi.

(8) The Tafsir Fath-al-Aziz by Shah Abdul Aziz of Delhi.

(9) The Tafsir Ahmadiya by Mulla Jiwan Jaunpuri (during the reign of Aurangzib.)

II
The Hadis.

The Traditions consist of the actions precepts and teachings of the Prophet and their authenticity rests on the sunnat. They are classified into these divisions, "Hadisul Sahih Matwatir, Hasan and Zaif," and the essential test is that they should not be contrary to the Koran. The first writers of Hadis, Traditions, are:—

(1) Abu Bakr bin Shihab Ash-Shafi' Az Zuhri. (the Masnad and the Sunan.)

(2) Abdul-Malik bin Juraij.

(3) * Malik bin Anas, the Muwatta.

(4) * Muhammad Ibn Idris.

(5) * Abu Abdillah Ahmad Ibn Hambal. (The Masnadul Imam Hambal).

The most eminent books of Traditions are :—

(1) The Jami-us-Sahih by Abu Abdullah Muhammad Ibn Ismail al Bukhari (died A. H. 255 A. D. 869).1

(2) The Sahih Muslim by Al-Hajaj bin Muslim of Nishapur (died A. H. 261 A. D. 874).

(3) The Jami-al-Lal by Abu Isa Muhammad bin Isa-at-Tirmizi (died A. H. 279 A. D. 892).

(4) The Kitab As-Sunan by Abu Dawud Sulaiman bin Al-Ashas surnamed As-Sajistani (died A. H. 275 A. D, 888.)

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† Both these works are universally respected by the Sunni Muslims.

* The founders of the Maliki. Shafi's and the Hambali Sunni School of Jurisprudence.

1 His compilation contains about 8,000 traditions selected from a mass of 600,000 after a labour of 10 years.

(5) Al-Mujtaba by Abu Abdur-Rahman Ahmad bin Abi Shuaib an Nasai.

(6) The Kitab as-Sunan by Abu Muhammad bin Yazid bin Majah al-Kazwini (died A. H. 273 A. D. 886.)

These six books are called Al-Kutub-as-Sittah fi-al-Hadis, and the first two of Bukhari and Muslim are by far the greatest authority.

§ 2. *The Development of the Muslim law by the Jurists.*

Fiqh.

The Ilm-al-Fiqh is divided under two sections the Ilm-al-Fatawa which is known as the Science of decisions and the Ilm-al-Faraiz, the science of the law of inheritance.

Ifta, Fatawas.

In connection with the Muslim administration of Justice, the Fatawas of the Jurists known as Mujtahids,[1] have played an important part. The opinions expressed by these doctors of laws have virtually controlled the judiciary in administering justice. This is an anomaly which presents itself to a student of Muslim Jurisprudence. During the time of the Prophet only four persons. Umar' Ali, Muaz and Abu Musa were authorised to issue Fatawas, and according to Imam Muhammad Kitab-ul-Asar there were only six persons divided into two groups. They were authorised to issue Fatawas after joint consultation and deliberation. Ali, Ubay and Abu Musa were in one group. Umar, Zaid and Ibn Masud were in the other group.[2]

The first Khalifa, Abu Kakr, adopted the old Arabian precedent of deciding the legal question by Ijma, the consensus of opinion of the first great followers of Islam. Umar followed this practice and the Fatawas passed by this deliberative body were circulated throughout the Muslim world. Shah Waliullah refers to this in the Hujjatullah-ul baligha.[2]

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1 Accordiug to Imam Abu Yusuf the issuing of a Fatawa is not permissible to any one but a Mujtahid.

A Mujtahid is defined in the Talwih thus : "A Muslim, wise, adult, intelligent by nature, well acquainted with the meaning of Arabic words and mandatory passages in the Koran, learned in the traditions of the Prophet, found in text books or orally reported, as well as those which have been abrogated."

2 "It was the practice of Umar to consult and discuss the problems with the followers of the Prophet, till the solution was free from doubt, and it is because of this that Fatawas given by Umar were acted upon throughout the East and West,"

Umar also appointed such leading figures as Ali, Usman, Muaz bin Jabal, Abdur Rahman bin Awf, Ubay bin Kab, Zayd bin Sabit and Abu Hurayra to issu Fatawas. Shah Wali-ullah definitely holds that it was not pemissible to issue Fatawas without Khalifa's permission.[1]

This arrangement continued during the Khilafat of Usman and Ali who was himself a great jurist. However after the era of Khulafa-ur-rashidun, the institution of *Ifta* declined, and no attempt was apparently made by the Umayyads or the Abbaside Kings to re-inaugurate, and establish it on permanent basis.[2] The Mujtahids however of their own accord continued to issue Fatawas on legal points submitted to them. and the multiplication of the fatawas without any authority to control its issue must have created a similar period as at Rome.[3]

Abdullah bin Masud had opened a School for giving instructions in Fiqah. Some of his distinguished pupils like Alqamah and Aswad and their successors 'Ibrahim al Nakhai had prepared a book containing the Fatawas of the fourth Khalif, Ali, and those of Abdullah bin Masud. In 120 A. H. the great Imam Abu Hanifa was made the Head of this institution, and he was the first to realise the necessity of establishing "a faculty of law," where legal problems could be debated and then published as authoritative opinion or combined Fatawas. The works of this deliberative body were published in the form of a Code, forty Jurists notably among them Kazi Abu Yusuf, Daud al-Taiyy, Hafs Ibn Ghiyas, Habban, Mandal, Yahya Ibn Ali Zaida, Qasim Bin Ma'n, Zufar and Immam Mnhammad worked

1 Shah Wali-ullah Izalatul-khifa:—Vide the administration of Justice of Muslim law by the present author p. 118.

2 Of the later Muslim Kingdoms Turkey is the only country which established a special department called the Fatwa Khanah under the Grand Mufti who was given the appellation of Sheikh-ul-Islam by Muhammad II.

3 At Rome some jurists were invested with the jus-respondendi (which is similar to the fatawas) and their works principally of Papinian, Paulus Gaius, Ulpian and Modestinus had acquired a prescriptive authority. The multiplication of the Responsas created difficulties and the remedy provided by the law of Citations enacted by Theodosius II and Valentinian III in A. D. 426 was "that the opinion of the majority of the above jurists should prevail and if the numbers were equal the view of Papinian should be applied."

for a period of thirty years to produce this gigantic Code. The publication of the Code was greeted with acclamations throughout the Muslim world. But unfortunately the Code was lost and we have no trace of it.

The authorship of Fiqh-i-Akbar is attributed by some to Abu Hanifa, while some well-informed authorities doubt that to be his production. Of his works Masnadul Imam and a letter to Kazi Abu Yusuf have only come down to us. For his independent view and original thought Abu Hanifa had acquired the title of up-holder of private Judgment. The Fatawas of Imam Abu Hanifa had a binding effect on the decision of the Courts, and it is related in Siratun-Nu'man,[1] that the famous Kazi Ibn Abi Layla who had served on the bench for 33 years, was once much annoyed by Imam Abu Hanifa's criticisms on his judgments, and he reported to the Governor of Kufa, that the great Imam should be stopped from issuing Fatawas. The Governor reluctantly issued the order with which the Imam complied. This incident once more illustrates that jurists can only issue Fatawas with direct permission (at least by tacit consent) of the ruling power.

The present Hanafi jurisprudence consists mainly of the commentaries written by various authors on the works and opinions of Imam Abu Hanifa. In some cases the opinions of the great Imam have been superseded with the consent of all the jurists and the view of one or more of the disciples has been accepted *in toto*. But there is no such general rule that in case of conflict between the great Imam and his two chief disciples the view of majority should be adopted.[2]

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1 Shibli Siratun-Numan (in Urdu), p. 193.

2 The opinion expressed by Mahmood, J. in Abdul Kadir v. Salima, 8 All., 149, is incorrect. Mahmood, J. observed that "it is a general rule of interpretation of the Muhammadan Law that in cases of difference of opinion among the jurisconsults Imam Abu Hanifa and his two disciples Quazi Abu Yusuf and Imam Muhammad the opinion of the majority must be followed and in the application of legal principles to temporal matters the opinion of Quazi Abu Yusuf is entitled to the greatest weight." See criticisim in "the Muslim Law of Marriage" by the present author, p. xxix.

"The age of Abu Hanifa was the age of jurists." At Medina Imam Malik had established the Maliki School and his pupil Imam Shafi'i founded the Shafi'i school. Imam Shafi'i's pupil, Imam Hambal, founded the fourth and the last of the Sunni Schools of jurisprudence.

These four great Imams were recognised as Mujtahids by the Muslims. There is not much difference in the fundamental principles enunciated by these four Schools, they only differ in minor details.

During the reign of the Omayed Khalifs the jurists of Iraq and Mesopotamia commenced the study of law as a science. The Khalif Umar-ibn Abdul Aziz himself possessed an extensive knowledge of Fikah and Hadis, and encouraged the scientific study of law. Wasil ibn Ata the founder of the Motazala sect introduced technical legal phraseology, and classified the laws under different subjects.

§ 3. *The four Sunni Schools.*

The most important era in the development of law began with the reign of the Abbaside Khalifs. This period is remarkable for the consolidation and the theoretical study of the science of jurisprudence. The four great Sunni Schools of law came into prominence.

Imam Abu Hanifa (his real name was Numan bin Thabit), the founder of the most important sect was born in 80 A. H. He visited Imam Baqir in Medina and was a contemporary of his son Jafar-Sadik, the great Imam of the Shiah School of law. He attended the lectures of Hamad and the famous traditionists Ash Shabi Qatadah and others. He became the Head of the School of Kufa. Immam Abu Hanifa was known all over the Muslim world as a master of Jurisprudence, and "upholder of private judgment". He boldly enunciated the doctrine of *Qiyas* or analogical deduction and modified its application calling it *Istehsan*." The theory of *Istehsan* resembles the Preator's Edict or Equity in England. He further extended the application of the doctrine of the consensus of opinion, known

A. H. 80—150.
A. D. 699—767.

as *Ijma*, and recognised the force and validity of reasonable immemorial customs. His two principal disciples, Abu Yusuf who eventually under the Abbasides became the Chief Justice and Muhammad, both great traditionists, were influenced by Imam Malik's teachings. They are universally respected by the Muslims of the world, and are given the appellation of "Sahibain". Abu Hanifa refused to accept high judicial offices which were offered to him. He was imprisoned and there he died, poisoned it is said at the instance of the second Abbaside Khalif. He was so popular with the people that for ten consecutive days about fifty thousand people offered his funeral prayers. His followers are found all over the Muslim world.

Malik Ibn Anas is another great jurist. He was born at Medina in 95 A. H. He lived there all his life and held the position of Mufti. He is the founder of the second School known after his name as the Maliki.[1] Malik's doctrines were not essentially different from Abu Hanifa, but he relied more upon traditions and precedents established by the Prophet's "principal companions." He inaugurated the important doctrine of *Muslahat*, and to the four main sources of Muslim law the Koran, the *Hadis, Ijma* and *Qiyas* he added a fifth source *Istadlal*, a juristic deduction distinct from analogy. This sect is mostly found in Africa.

A. H 93—179.
A D. 711—795.

Malik's favourite pupil was Muhammad Ibn Idris Ash-Shafi who became the leader of the third School of Muslim jurisprudence. Shafi was a jurist of great eminence and repute, and his followers are found mostly in Egypt and Arabia. He adopted the views of Abu Hanifa as well as those of his master Imam Malik with such clearness of thought, balance of judgment and moderation, that in importance this School is now reckoned as next to the Hanafis. He was the first to write a legal treatise on Usul. He visited Baghdad in A. D. 810—13 but returned to Cairo where he spent the rest of his life.*

A. H. 150—204
A. D. 767—820.

1 Mr. F. H. Ruxton's Maliki law.

* The development of law by these four Schools may favourably compare with the rise of the Humanists the French historical School in the 16th century, or to that of Hugo and Savigny's Schools of jurisprudence.

Shafi's favourite scholar was Abu Abidullah Hamid Ibn Hambal. Imam Hambal founded the fourth and the last of the Sunni Schools of Jurisprudence. He was born In Baghdad in 164 A. H. He was well-known as a famous traditionist and theologian. The Khalif Al-Mamun persecuted him for his views on divinity, which served only to enhance his popularity far and wide, and it is said that when he died in 241 A. H. over 800,000 men and 600,000 women attended his funeral. The Hambalis are numerously found in central Arabia, the Persian gulf and in Central Asia.

A. H. 164—241.
A. D 780—813.

§ 4. *The Sources of Muslim Law.*

According to some jurists the origin of Law is to be found in a fictitious primordial covenant ***misaq-i-azali*** entered into between man and God at the beginning of Creation. This alleged covenant is not accepted by all jurists, but this much is conceded that the authority to make laws belongs to God, and this system of promulgation of laws has been vouchsafed through successive prophets. Thus the fundamental source of the Muslim Law is the Holy Koran and next are the authentic ***Hadis*** the precepts of the Prophet in matters of Law and religion.

Ijma, or "Consensus of juristic opinion" is the next important source of law. It is defined "as agreement of the jurists among the followers of Muhammad in a particular age on a question of law."[1] Its authority is based on well-known Hadises. 'It is incumbent upon you to follow the most numerous body. 'Who ever separates himself from the main body will go to hell.' 'He who opposes the people to the extent of a span will die the death of men who died in the days of ignorance.' The Hanafi, Shafii Maliki and Hambli Schools of Sunni jurisprudence recognise *Ijma* as a valid source of law.

Ijma

Ijma is of various kinds.

(1) *Ijma* of the companions of the Prophet which is universally respected throughout the Muslim world, and is incapable of being repealed.

1 Abdur Rahim, 'Muhammadan Jurisprudence' pp. 115—136.

(2) *Ijma* of the jurists.

(3) *Ijma* of the people, the general body of Muslims.

The majority of the jurists are of the opinion that if agreement of all the Muslims is essential, *Ijma* would become impracticable, and the *Mujtahids*, learned men in law are alone competent to participate in *Ijma*. However the fundamental observances of Islam, as to prayers, the poor rate, fasting pilgrimage have been established by *Ijma* of the people. Thus *Ijma* is also applicable as the majority principle in the Muslim polity. The election of the first Khalif Abu Bakr was based on the doctrine of *Ijma*.

Ijma is not confined to any particular age or country. It is completed the moment the jurists after deliberations come to an agreement, and after decision it cannot be reopened or challenged by individual jurists. However *Ijma* of one age may be reversed by subsequent *Ijma* of the same age or subsequent age. *Ijma* may be based on the Koran, *Hadis* or on *Qiyas*.

Qiyas

According to the four Sunni Schools of jurisprudence matters which have not been provided for by Koran, *Hadis* or *Ijma* the law may be deduced from any of these by means of *Qiyas*, analogy.[1] *Qiyas*. is defined as "an extension of law from the original text by means of a common cause *illat*." It is a process of deduction applying the law of a text to cases which though not covered by the language of the text, are nevertheless covered by the reason of the text, the rules of law thus deduced are not absolutely authoritative as those laid down by Koran, *Hadis* or *Ijma*. But the deduction should not really change the law of the text and if two deductions are found to be in conflict, a jurist may accept any of them.

Illustrations.

(1) According to Shafii school:—"A marriage does not stand on the same footing as property, and therefore cannot be proved by the testimony of two women and one man."

According to the Hanafi School:—"The deduction is bad, as it is based on a negation. The reason, why mixed evidence is allowed by the Hanaf in marriage is that its validity cannot be affected

1 Abdur Rahim Jurisprudence pp. 137—162.

by the existence of a doubt in the proof of it as appears from the fact that a valid marriage would be constituted even if it be contracted in jest."

(2) *Shafiis:—"A wrong doer who has forcibly taken possession of the property of another is liable to restore it to him and is further liable to account for the mesne profits, just as a man who commits breach of a contract is liable for the consequent damages." Hanafis :—"The wrong doer is bound to restore the property, but is not liable for the mesne profits because usufruct is an accident and does not stand on the same footing as property, which must be a thing or a physical object. Hence there is no basis for assessment of damages, the principle of which is that the parties should be placed on a footing of equality."*

Istehsan juristic equity.

According to the Hanafi School a law analogically deduced may not commend itself to the jurist, then he may accept instead a rule better advance in conformity with the interest of justice. This doctrine is technically known as *Istehsan*, "Juristic Equity."[1] Some Hanafi jurists call it hidden analogy, but there is no doubt it has a wider scope than *Qiyas*. It should not be opposed to a perfect analogical deduction relating to the same matter.

Public good Muslahat.

Imam Malik proposed a similar doctrine of "public good" deduction of law based on considerations of the public good. The Hanafi jurists considered it as too vague to be useful, and the Maliki jurists apparently did not take full advantage of this doctrine.

Istidlal.

According to the Maliki and the Shafii jurists *Istidlal* is a "distinct method of juristic ratiocination," *Istidlal* means the drawing of an inference from a particular thing. According to the Hanafis it is a special mode of interpretation. According to some jurists the Hanafi doctrine of *Istehsan*, and the Maliki doctrine of public good are convered by *Istidlal*.

Custom.

Custom, *Urf*, is a valid source of law. It is deemed to have the force of *Ijma*. Thus the Hedaya says, "that custom holds the same rank as *Ijma* n the absence of an express text." According to the jurists custom

1 Abdur Rahim 'Jurisprudence pp. 161, 163.

is preferred to analogical law. According to some Hanafi jurists custom is recognised as a source of law under *Istehsan.* A custom which is immemorial, continuous, certain, reasonable and not inconsistent, with the Koranic injunctions has the force of law though in fact it has no spiritual or divine authority.

§ 5. *The Shia School.*

The term Shia means *a party,* and it specifically means the followers of Ali, the fourth Khalif, who is considered by the Shias to be the immediate rightful successor to the Holy Prophet. According to L Massignon *Annvaive du Monde Musalman* (3rd ed. 1929. pp. 24 and 38) out of 250 million Muslims, the Shia are 20 million and according to C. Frank Islamica (1926, ii, 176), there are 220 million Sunnis and 10 million Shias. The Shias may be divided into several sub-schools, but the most important are the Isna-Asharis, Twelvers, and the Ismailis, and the Zaidis of Southern Arabia. The most eminent Shia jurists are Zaid the author of *Majmul—Fiqh,* Imam Baqir and his illustrious son, Imam Jafar-as-Sadik, these Imams are universally respected by the Sunnis also. It was on the death of Imam Jafar that a great difference arose between the Shias, the majority following Imam Musa Kazim, and through him six other Imam making up the twelve Imams of the Isna Ashari, and the minority followed Ismail elder brother of Imam Musa Kazim. At the present time the Eastern Ismailis Khojas represent in India the followers of Aga Khan,[2] and the Western Ismailis, the Bohras, are divided chiefly into the Daudis and the Sulaimanis, they are spread over Syria and the Persian Gulf. However the Isna Ashari are the only important school of the Shia Law. The Persians, including the kings of Persia and the Nawabs of Lucknow, and Murshidabad in India belong to this school, and this branch of the law is just as much law of the land in British India as is the Sunni Hanafi Law.[3]

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1 In British India custom on many points has superseded the Muslim Law, e.g. the exclusion of daughters from inheritance. Vide sec. 237 p. 186.

2 Vide Advocate General v. Muhammad Husain (Aga Khan) 12 Bom. H.C.R. 323 (1866) [Held Khojas are Ismailis,] Haji Bibi v. H. H. Sir Sultan Mahomed Shah the Aga Khan, 11 Bom. L. R. 409 (1908). [Held Khojas are not Isna Asharis Shias]

3 Vide Aziz Bano v. Mahomed Ibrahim (1925) 47 All. 823. (835).

The eminent Shia writers of Tafsir are :—

(1) Abu Jafar Muhammad bin Babawaih surnamed As-Saduk.
(2) Abu Jafar at-Turi The Mujmia-al Bayan li Ulum-al Kuran.
(3) Nur-uddin Abdur-Rahman Jami.
(4) Kamal-uddin Husain al-Waiz-al-Kashifi as Sabzawari. TheTafsir Husani.

The Shia jurists of the Traditions are:—

(1) Abdullah bin Ali Al-Halabi.
(2) Abu Muhammad Hisham Ash-Shaibani.
(3) Yunus bin Abdur-Rahman Al-Yaktini.
  (i) Ilm-al-Hadis.
  (ii) Ikhtilaf al Hadis.
(4) Sheikh Abu Jafar at Tusi.
  (i) Tahzib-al-Ahkam.
  (ii) Istibsar.
(5) Muhammad bin Yakub Al-Kulini ar Razi.
  (i) Kutub-i-Arbaa.
(6) Abu Jafar Muhammad Al-Kummi.
  (i) Man la Yahzuruhu al-Faqih.
(7) Abul-Abbas Ahmad bin Muhammad Ibn Ukdah.
(8) Ali bin Husain Al-Masudi,
(9) Abul-Faraj Ali bin Al-Husain al-Isfahani.
(10) Shaikh al-allamah Al-Hilli.

§ 6. *The Development of Law.*

Law is developed by a process of interpretation and by private judgment. The guiding factor is to secure the ends of equitable justice. While it is true that the Koranic law of Islam is unalterable and unchangeable, however a wide latitude is given by *Shera*, (Law) for the expansion of law. We may refer to the tradition reported by Muaz bin Jabal that the Prophet of Islam had approved of deciding cases, when the Koran and the traditions were silent on the point, in accordance with private Judgment.[1] This is technically known as *Ijtihad* its scope is very wide. The Fatawa Alamgiri says accordingly, "When there is neither written law, nor concurrence of opinions, for the guidance

1 When the Apostle of God sent Muaz to Yemen, he enquired, " How will thou administer justice," Muaz replied " I will judge by the Koran." The Prophet said, " If thou do not find its solution in the Koran." Thereupon Muaz replied, "Then I will decide in accordance with the traditions of the Prophet." The Prophet said, " And if you do not find its solution in the traditions," Muaz replied " then I will decide according to my own judgment."

of a Kazi, if he be capable of legal disquisition and have found a decisive judgment on the case, he should carry such judgment into effect by his sentence, although other scientific lawyers may differ in opinion from him, for that which, upon deliberate investigation, appears to be right and just, is accepted as such in the sight of God."

According to Sir Henry Maine the chief agencies by which the progress of law is affected are in their historical order, (1) Legal Fictions, (2) Equity and (3) Legislation.[1] Fiction is "any assumption which conceals, or affects to conceal, the fact that a rule of law has undergone alteration its letter remaining unchanged, its operation being modified." In Roman law the Fiction of Adoption, the interpretation of the pontifices and that of the prudentes are notable examples. Similarly under the Muslim law the doctrine of *Ijtihad*, and later juristic deduction technically known as analogy, *"Qiyas,"* are instances of development of law by legal Fictions. The function of analogy is to extend the law of the text, the theory being that the newly discovered law, though not covered by the language of the text, is governed by the reason of the text. But Mr. Abdur Rahim points out that "the writers on jurisprudence do not admit that extension of law by process of analogy amounts to establishing a new rule of law."[2]

The next stage is the development of law by Equity. "The Equity whether of the Roman Praetors or of the English Chancellors, differs from the Fictions which in each case preceded it, in that the interference with law is open and avowed."[3] It seems to possess a superior sanctity. The introduction of *Jus Naturale* illustrates the influence of Praetorian equity in the Roman law, and the point of contact between the Jus Gentium, and Jus Naturale was this notion of "Aequitas," a levelling influence. In the Muslim law Imam Abu Hanifa supplemented this process of law and called it *Istehsan*. Thus a jurist was permitted to devise a rule of law in the interest of justice and public welfare. The Hanafi jurists speak of *Istehsan* as hidden analogy; the other

1 Vide Maine's Ancient Law, p. 29.

2 Abdur Rahim Muhammadan Jurisprudence, p. 139.

3 Maine's Ancient Law, p. 33.

three Schools opposed this innovation, and Imam Shafi'i retorted "whoever resorts to *Istehsan* makes law." But in course of time they were forced to modify their views, and Imam Malik, founded the doctrine of public good, "*Maslahat*", a process similar to juristic equity, and followed it up by inventing *Istidlal* a distinct method of juristic ratiocination which the Shafi'i also accepted. The development of law by *Istehsan, Maslahat and Istidlal* represents the period of juristic Equity in the Muslim law.

Legislation is the last agency to come into operation, as a suitable and proper means of effecting alterations in the laws governing civilised communities. It differs from Legal Fictions and just as much from Equity as "Its obligatory force is independent of its principles." In the Muslim countries the edicts of the Kings for instance the *Kanunnameh* of the Sultans of Turkey are good examples of direct legislation on points not covered by the Shera. The doctrine of *Ijma* is alsc notable example of legislation by the jurists in Muhammadan law. The codification of Roman law under Justinian, and partial codification and enactments relating to the Muslim law, notably the modern Egyptian Code of Hanafi law of Muhammad Kadri Pasha and various enactments in Turkey and other countries, and in India for istance the Waqf Acts of 1913 and 1923 are the latest agencies in the development of the Shera of Islam.

But the Muslim law was greatly developed in a movement parallel to the Responsa Prudentium of Roman law. Bryce has correctly remarked " In the East, as for instance, in such countries as Turkey or Persia, there is little that can be called general legislation. Hatts are no doubt occasionally promulgated by the Sultan though they are sometimes not meant to be observed, and are frequently not in fact observed. So far as new law is made, it is made by the learned men who study and interpret the Koran, and the vast mass of tradition which has grown up round the Koran. The existing body of Musulman law has been built up by these doctors of law during the last twelve centuries, but chiefly in the eighth and ninth centuries ot our era; and a vast body it is."[1] "No system of law is the product of a single mind

1 Studies in History and Jurisprudence, Vol. II, p. 263.

or age,"[1] the divine communications of the Holy Koran laid down only the fundamental principles, and the entire bulk of the Muslim jurisprudence is the result of development and expansion, by Juristic interpretation and judicial dicta, by legislation and codification, covering centuries of constant labour on the study of the "Shera" itself, and the comparative jurisprudence of other legal systems of the world. "We all recognise now that law has grown by conscious efforts towards the solution of social problems conditioned by causes which spring from previous stages of development and from the influence of surroundings..... Evolution in this domain means a constant struggle between two conflicting tendencies the certainty and stability of legal systems and progress and adaptation to circumstances in the order to achieve social justice."[2]

§ 7. *The Muslim Law in British India.*

The Muslim Law is applied by the Courts to the Muslims in matters affecting their personal law. It is regulated by enactments of the Parliament and by local legislation. As to the Presidency towns vide the Government of India Act 1915, 5, 112 [5 and 6 Geo. 5 ch. 62.]

"The High Courts at Calcutta, Madras and Bombay in the exercise of their original jurisdiction in suits against inhabitants of Calcutta, Madras, or Bombay, as the case may be, shall in matters of inheritance and succession to lands rents and goods, and in matters of contract and dealing between party and party, when both parties are subject to the same personal law or custom, and when the parties are subject to different personal laws or customs to which the defendant is subject".

In Bengal United Provinces and Assam it is provided by Act XII of 1887 s. 37 that the Civil Courts shall decide questions relating to "succession, inheritance, marriage or any religious usage or institution" by the Muhammadan Law where the parties are Muslims.

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1 " Law is the product of the entire history of a people, an evolution, by organic growth." Dr. Sherman, Roman Law in the Modern World. p. 232.

2 Vinogradoff, P. "Historical Jurisprudence," Vol. I, p. 146.

In Madras the same is advocated by the Madras Civil Courts Act 111 of 1873 s. 16, that all questions affecting the Muslims regarding "Succession, inheritance, marriage.....or any religious usage or institution" shall be decided by the Muslim Law or custom.

In the Punjab and the North-Western Frontier Province the Punjab Laws Act IV of 1872 S. 5 and the North-Western Frontier Regulations VII of 1901 provide as follows.

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

(1) Any custom applicable to the parties concerned.....

(2) The Muhamedan Law, in cases where the parties are Mohamedans.....

Similarly in Oudh, the Oudh Laws Act XVIII of 1876 s. 3, in Ajmer Merwara, the Ajmer Merwara Laws Regulation III of 1877 ss 4-5, in the Central Provinces the Central Provinces Laws Act and XX of 1875 s. 5, and in Burma the Burma Laws Act XIII of 1898 s. 13 enact similar provisions safeguarding the application of the Muslim Personal Law for the Muslims especially regarding marriage, dower divorce inheritance etc. and some parts of the Muslim Law are administered as a matter of justice equity and good conscience *e.g.* the Muslim Law of Pre-emption.

Communities

The Muslim Khojas and Cutchi Memous in the Bombay Presidency are governed regarding succession and inheritance by the Hindu Law in preference to the Muslim Law. The same is provided now in the Cutchi Memons Act XLVI of 1920 and the Cutchi Memons Amendment Act XXXIV of 1923. Similarly in matters of succession and inheritance the Muslim Borahs of Gujrat[2] and the Mulesalam Girasies of Broach[3] are governed by the Hindu Law and among

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1 Khojas and Memon's case (1847) Perry's O. C. 110. Hirabai v. Gorbai 12 Bom. H. C. 294 (1875), [Khojas], Abdul Cadur v. Turver (1884) 9 Bom. 158 (Cutchi Memons). Moosa Haji Joonas. v. Haji Abdul Rahim 30. Bom. 107 (1905). Jan Mahomed v. Datu 38 Bom. 449 (1914).

2 Bai Bajpai v. Bai Santok 20. Bom. 58 (1894).

3 Fatesangji v. Harisangji (1894). 20 Bom. 181.

the Lubbais of Coimbatore[1] the daughters are excluded by the son. However the Halai Memons[2] of Bombay are governed by the Muslim Law.

Who are Muslims

The term "Mahomedan" used in the enactments includes a Muslim by birth, as well as a Muslim by religion, that is the Muslim Law is equally applicable to *bona fide* converts to *Islam*.[3]

The Privy Council and the High Courts

The decisions of the Privy Council and the Indian High Courts have had considerable affect on the Muslim Law. In Khaja Husain Ali *v.* Shazadi Hazari Begum,[4] Markby, J. observed: "The means of discovering the Muhammadan Law which this Court possesses are so extremely limited that I am glad to avail myself of any mode of escaping a decision on any point connected herewith." While in Mallick Abdool Gafoor *v.* Mulika.[5] Garth, C. J. observed, "In dealing with these points we must not forget that the Muhammadan Law, to which our attention has been directed in works of very ancient authority, was promulgated many centuries ago in Baghdad and other Muhammadan countries under a very different state of laws and society from that which now prevails in India and although we do our best here in suits between Muhammadans to follow the rules of Muhammadan Law, it is often difficult to discover what these rules really were.....we must endeavour as far as we can to ascertain the true principle upon which that law was founded, and to administer it with due regard to the rules of equity and good conscience, as well as to the laws and state of society and circumstances which now prevail in this country." However again in Aga Mahomed *v.* Kulsum Bibi[6]

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1 Shaikh v. Muhammad 39 Mad. 664 (1916).

2 Khojas and Memon's case (1847) Perrys O. C. 110. Khatubai v. Mahomed Haji Abu (1923) 53. I. A. 108

A Cutchi Memon can bequeath his entire property by will. Vide Advocate General v. Timbabai 41. Bom. 181 (1915).

3 Skinner v. Orde 14. Mad. I.A. 309 (1871 Skinner v. Skinner 25 Cal. 537 (1897). Nandi v. The Crown I, Lah. 440. (1920).

4 12 Weekly Reporter, 344—7.

5 10 Calcutta, 1123.

6 25 Calcutta, 9.

the Court observed: "It would be wrong for the Court on a point of this kind to put their own construction on the Quran in opposition to express ruling of commentators of such great antiquity and high authority." Thus the opinion expressed by the Bench is indecisive. But if the Privy Council and the Indian High Courts consider themselves (as they really are in fact) to have displaced the Muhammadan tribunals, Kazis and Muftis, then it is submitted, that the development of Anglo-Muslim Law ought not to be hampered by any consideration, it is to be developed on the principle of equity and good conscience with due regard to the state of society and circumstances of the country. The principle of *Ijtihad* has been the avenue for the development of the Muslim Law, and that can always be applied to develop Anglo-Muslim Law to suit the requirements of the time. Law is the product of the entire history of the people. It is an evolution by an organic growth.

CHAPTER I

§ 1. NIKAH—MARRIAGE

MARRIAGE—

1. *Nikah* literally means to unite, and in Law it denotes marriage. Marriage though essentially a contract is also a devotional act, its object are the right of enjoyment, procreation of children and the regulation of social life in the interest of the society.[1]

OFFER AND ACCEPTANCE—

2. Marriage is legally contracted by a proposal made by one of the contracting parties and accepted by the other. The declaration of proposal may be made by either of the spouses, or by the agents of the contracting parties[2] or if they were

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1 Thus under the Muslim Law marriage is both a civil contract and a religious rite. There is a consensus of opinion among the jurists that a marriage is 'sunnat-i-muwakidda', that is, an act the compliance with which is considered as virtuous and a deviation from which is regarded as a sin. For a full discussion vide "The Muslim Law of Marriage" by the present author pp. XVII—XXIII and pp. 1-2.

The personal law has been made applicable to the Muslims of India by various statutes and Acts.

The Bengal North-Western Provinces and Assam Civil Courts Act XII of 1887 section 37. The Punjab Laws Act IV of 1872, section 5 amended by Act XII of 1878 section 1; The Madras Civil Courts Act III of 1873 section 16; The Central Provinces Laws Act XX of 1875 section 5; The Oudh Law Acts Act XVIII of 1876 sections 3 and 5; The Lower Burma Courts Act XI 1889 section 4 and VI of 1900; The Bombay Regulation IV of 1827 section 28. The Bengal Act I (B.C.) of 1876 provides for voluntary registration of Muslim marriages and divorces. Vide also 21 Geo. III Ch. 70. Sections 3—17; 37 Geo. III C. 142 sections 3—13 and 39; 40 Geo. III C. 79, section 5; 4 Geo. IV C. 71 section 9, and Bengal Regulation IV 1793 section 15.

2 The agent may be appointed verbally or in writing, it is not essential that there should be witnesses present, but it is desirable to do so in order to avoid any dispute or denial by the principal. It is not permissible for the agent to delegate the powers conferred upon him to a third party unless so authorised by the principal.

minors by their lawful guardians.[1] The proposal and acceptance must be completed if the contracting parties are present at the same meeting.[2]

Under the *Hanafi* law marriage[3] must be contracted in the presence of two male adult witnesses of sound mind, or one male and two female witnesses. Under the *Shia* law the presence of two witnesses is not essential to the validity of marriage.

Marriage may be contracted by correspondence if one of the parties were absent, provided the person to whom the proposal has been made reads the letter or causes it to be read, and accepts it in the presence of witnesses.

The deaf and dumb persons may legally contract marriage by visible signs indicating their intention to contract marriage.

CAUSES OF PROHIBITION—

3. A proposal of marriage may be made to any women except those prohibited. Under the Anglo-Muhammadan Law the causes of prohibitions[4] are as follows, (*a*) *Qarabat,* consanguinity. (*b*) *Musharat,* affinity. (*c*) *Riza'* fosterage. (*d*) *Jama',* joining together.

1 The marriage of minors is subject to an "option of repudiation," a right vested in a minor to repudiate the marriage on attaining.

2 Marriage must be completed at one meeting. 'Aklemannissa Bibi v. Mahomed Hatim 31 Cal. 849 (1904).'

Under the 'Hanafi' Law the consent of a Muslim girl who has attained the age of puberty is essential to make the marriage valid.

3 It is not necessary but preferable that the contract of marriage should be reduced to writing. This document is known as 'kabin-nameh.' However the validity of marriage is entirely dependent upon the declaration of one party and acceptance of it by the other contracting party, but the acceptance ought not to vary from the proposal.

4 The cause of prohibition is either absolute perpetual or temporary. The causes that produce absolute prohibition arise by reason of consanguinity, affinity and fosterage, while all other prohibitions are merely temporary. The distinction is drawn mainly to illustrate that as regards consanguinity, affinity and fosterage, the physical conditions on which prohibitions rests are permanent, therefore the cause of prohibition is absolute and perpetual, while in other cases subsequent conditions can put an end to the prohibition, and thereby render marriage possible. In other words while a man can never lawfully, with full knowledge, marry a woman perpetually prohibited, he may lawfully marry a woman temporarily prohibited after the supervening illegality has been removed. The legal result of marrying a woman whether perpetually or temporarily prohibited, with knowledge of its unlawfulness, is the same, that is, the marriage in both cases is absolutely void 'ab initio.'

(e) ***Shirk*** infidelism, polytheism, associating something with God. *(f)* The impediment of divorce, the case of the triple divorced wife. *(g)* The existence of the lawful right of another man in virtue of marriage or *iddat*,[1] *e.g.*, a married woman or a woman observing *iddat*. *(h)* Polygamy where the person has already four lawful wives. *(i)* Apostacy.

(a) ***Consanguinity.***—A person is prohibited to marry, (*a*) his own ascendants how high soever; (*b*) His father's or his mother's descendants[2] how low soever; (*c*) The brothers or sisters of any ascendant how high soever.[3]

(*b*) ***Affinity.***—A person is prohibited to marry:—(*a*) His own wife's mother[4] or grandmother how high soever; (*b*) His own father's wife[5] how high soever; (*c*) His own wife's daughter how low soever;[6] (*d*) His own son's wife or grandson's wife (paternal or maternal) how low soever.

(*c*) ***Fosterage.***—A person is prohibited to marry:—(*a*) His own foster-mother, or her own foster-father; (*b*) The foster-mother's or foster-father's ascendants or descendants; (*c*) The sisters and brothers of the foster-ascendants; (*d*) The wife's or husband's foster-ascendants or foster-descendants; (*e*) The wife or husband of the foster-child.

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1 'Iddat' is the waiting period, for the divorced woman it is three courses, for the widow it is four months and ten days.

2 i.e., brothers, sisters nephews and nieces.

3 Paternal or maternal uncles or aunts.

4 According to the 'Hanafi' Law if A contracted marriage with B and repudiated her before co-habitation, then also he can not lawfully marry B's mother. This is also the 'Shia' Law.

5 A step-mother is also prohibited.

6 According to the 'Hanafi' Law. If A contracted marriage with B and repudiated the marriage before co-habitation, then marriage with her daughter is permissible. And according to the 'Shia" law such a marriage is also allowed.

Thus the prohibition by affinity does not arise only in the case of marriage, it arises with some relations on marriage and with some after consummation of marriage. Similarly a person who had an illicit intercourse with a woman is forbidden to her females ascendants and descendants, and his ascendants and descendants become forbidden to her. This view is accepted by the 'Hanafi,' 'Hambali' and also by the 'Shia" jurists. And further according to the 'Hanafi' and 'Hambali' jurists "undue familiarity" between a man and a woman also has the same effect.

The *Shia'* jurists hold that marriage is forbidden by reason of fosterage in the same degrees as in the case of consanguinity, but the *Sunni* jurists admit a few recognised exceptions.[1]

(*d*) ***Joining together.***—A male person is prohibited to marry two wives at the same time related to each other by consanguinity, affinity, or fosterage, so that if either of them had been a male they would have been forbidden from intermarrying. However such two women may be married after the supervening illegality has been removed, *e.g.*, by the death or divorce of the woman already in marriage. It is not lawful for a man to marry the sister or paternal or maternal aunt or the niece of his wife during the subsistence of her marriage, and also during the continuance of her *iddat* in case she were divorced by him. The prohibition ceases after death, or divorce of the woman after the termination of her *iddat*.

(*e*) ***Shirk.***—*Shirk*[2] is an absolute impediment to marriage. Thus a marriage with a *mushrik* is void.

(*f*) ***The Triple divorce.***—The Triple Divorce is an impediment to re-marriage. The parties separated by divorce cannot lawfully re-marry, unless the woman had already contracted marriage and was also divorced again, if so the parties may re-marry.[3]

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1 A male person is allowed to marry the foster-mother of his brother or sister, the sister of his foster-son or foster-daughter, grandmother of his foster-child, the mother of his foster-uncle or aunt whether paternal or maternal, the paternal aunt of the foster child, the niece or the cousin of the foster-child, the mother of his foster-grand child, the foster-sister of his foster-brother or foster-sister and the foster-sister of maternal uncle. It is also permissible for a woman to marry his foster-son's grandfather, or brother, or maternal uncle or his nephew and also the son of foster-son's maternal aunt. She could also marry the father of her foster-brother and the father of his paternal or maternal uncle.

The relationship by fosterage is established and the marriage is prohibited if the nursing of the child (some act of suckling) takes place before the age of two years even after the child has been already weaned.

2 'Shirk' literally means an association of something with God. Thereby divesting the essence or repudiating the conception of Unity of Godhead. The Muslim jurists give an exhaustive list chiefly consisttng of the worshippers of the Sun, stars and images, and they include Atheists also as 'mushrik.'

3 Under the Hanafi' law there are two kinds of divorce, 'Talaq-i-Sunnat,' and 'Talaq-i-biddat.' The former is if two kinds, 'Ahsan' (best), 'Hasan' (good).

The Triple divorce means divorce pronounced three times it is irrevocable and dissolves the marriage.

(*g*) ***Married women.***—A person prohibited to marry a married woman; and if a person with full knowledge marries a married woman, then such a marriage is *batil* void. Similarly a person is prohibited to marry a woman observing *iddat* whether on divorce or widowhood. She may be lawfully married on the termination of the period of *iddat*.

(*h*) ***Polygamy.***—Under the *Hanafi* Law, the institution of polygamy[1] is allowed, but the number is restricted to four wives only. If a person marries a fifth woman, then such a marriage is *batil* void.

(*i*) ***Apostacy.***—A Muslim can not lawfully marry a person who has renounced the Muslim faith. Such a person is known as *murtid*.

§ 2. THE VALIDITY OF MARRIGE

SAHIH—VALID MARRIAGE—

4. *Sahih* marriage denotes that a marriage is valid that is lawful both in its essence and quality. *Nikah* is affected by its pillar *runk* emanting from *ahl*, one who is competent to contract, and in reference to *mahl* a fit subject of marriage. The legal consequences are that parentage is established, *iddat* and dower, *mahr*[2] , are obligatory.

BATIL—VOID MARRIAGE—

Batil marriage denotes that the marriage is unlawful both in its essence and in its quality. It is void *ab initio*. No legal consequences follow, there is no dower and no *iddat*, and parentage is not established. The issue if any is illegitimate to his father.[3]

FASID—INVALID MARRIAGE—

Fasid marriage denotes that the marriage is lawful in its essence to a certain extent but unlawful in its quality. The marriage

1 Polyandry is not allowed that is a woman cannot have more than one husband.

2 Dower 'Mahr' is the property incumbent on the husband either by reason of its having been fixed at the time of 'nikah' or by virtue of the contract itself.

3 Under the " 'Hanafi' Law children always inherit from their mother.

is not wholly devoid of legal consequences. If co-habitation has not taken place then no legal results follow, but if the marriage has been consummated, then *iddat* and dower becomes necessary and parentage is established. Whereas in a *batil* marriage whether co-habitation takes place or not no legal consequences follow, its existence and non-existence are alike in the eye of the law.

Marriage contracted with full knowledge of its illegality on the part of the contracting parties is *batil* void *ab initio*; but a marriage contracted without knowledge of its unlawfulness is *fasid*, invalid.

The Hanafi jurists appear to classify women with reference to an individual in three distinct classes.

(*a*) Women with whom marriage is permissible by law.
(*b*) Women with whom marriage is forbidden by law.
(*c*) Prohibited women with whom marriage takes place under a *bona fide* doubt.

The fact of doubt in the woman amounts to an ignorance of fact which is excusable, but ignorance of law is not excusable. [1] It is presumed that every person knows the law of the land. The parentage is established in the case of doubt in the woman. Let us consider the following cases.[2]

(*a*) If a Muslim marries *mahrim*, a woman within the perpetual prohibited degree.
(*b*) If a Muslim marries two sisters, at one and the same time or one after another.
(*c*) If a Muslim marries a woman observing *iddat*.
(*d*) If a Muslim marries a fifth wife having at that time four lawful wives.
(*e*) If a Muslim marries a divorced wife.
(*f*) If a Muslim marries another's wife.
(*g*) If a Muslim marries without the presence of witnesses.
(*h*) If a Muslim marries a pregnant woman.
(*i*) Marriage with a *mushrik*.

1 'Ignorantia facti excsat'; 'Ignorantia juris non excusat.'

2 For original Arabic Authorities vide "The Muslim Law of Marriage" pp 14—7 by the present author.

(*j*) Marriage with *murtid.*

(*k*) Marriage with an *ahl-i-kitab.*

(*l*) Marriage in *ihram.*

(*a*) If a man marries his own mother or sister or any woman within the perpetual prohibited degree with knowledge of its illegality on the part of both or one of them only, then such a marriage is *batil* void ; but if it were contracted without knowledge of the illegality, that is, in ignorance of the fact that the woman was related to him within the prohibited degree, and therefore the marriage took place under a *bona fide* doubt, then such a marriage is merely *fasid* invalid. But the moment the factum of relationship is known, the parties must be separated, if unwilling the Kazi (Court) must separate them.

Marriage with mahrim.

(*b*) If a man knowingly marries two sisters by one contract at one and the same time, then such a contract of marriage is *batil* void, and separation must take place between the man and the two women, but if it were contracted without knowledge of its illegality, that is in ignorance of the fact, that the two women were related to one another by consanguinity, then such a marriage is *fasid* invalid only.

Two sisters.

If a man marries two sisters one after another, then there is no doubt that the marriage of the first is a *sahih* valid marriage, and as regards the second marriage it depends whether it was contracted with knowledge or without knowledge of its unlawfulness, in the former case the marriage is *batil* void, and in the latter case it is merely *fasid* invalid.[1]

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1 Cases of two sisters being married to one man have come up before the Courts In 'Shureefoonissa v Khizooroonissa 3 S. D. A. 210 (1823)' the Court held that the marriage with his wife's sister while his own wife was alive or undivorced was a 'batil' marriage void. Again in 'Azizunnissa Khatoon v. Karimunnissa Khatoon 23 Cal. 130 (1895).' It was held by the Court that such a marriage was void 'batil' and not 'fasid' invalid, and the children are illegitimate. However in 'Tajbi v. Mowla Khan 41 Bom. 485 (1917)' the Court held that "The marriage with a wife's sister during the subsistence of the first marriage is only 'fasid' invalid and not 'batil' void." The Calcutta ruling appears to be correct, but it should be noted that the essential question, whether the marriage was contracted with or without knowledge of its unlawfulness, was not raised before the Calcutta or the Bombay High Court at all. Probably it was presumed that the second marriage with the wife's sister

If a man marries his wife's sister, having already divorced his wife, but before her *iddat* had terminated, then such a marriage is merely *fasid* invalid.[1] If a man marries his wife's sister after her (his wife's) death or divorce, her period of *iddat* having terminated, then such a marriage is *sahih* valid.

(*c*) If a man marries a women observing her *iddat* after her husband's death or divorce, then such a marriage with knowledge of this fact is *batil* void. It seems that an important reason for prohibiting a woman in *iddat* from marrying is to ascertain whether she is pregnant or not with a view to avoid "confusion of blood." Some jurists consider such a marriage as *fasid* marriage. However without any doubt it will be a void marriage, if it was ascertained during the period of *iddat* that the woman was pregnant, nevertheless she contracted a fresh marriage.[2]

Woman in iddat.

(*d*) It is a fundamental principle of the Muslim Law that at one time a man cannot have more then four lawful wives. If he desires to marry another woman, then he must divorce one of the four wives. Hence a marriage with a fifth wife in presence of four lawful wives is a *batil* marriage void *ab initio*.[3] If a man marries a fifth wife having divorced one of his four wives, but before the termination of her *iddat*, then such a marriage is a *fasid* marriage only. If the

Fifth wife.

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was contracted with full knowledge of its illegality, hence it was obviously a 'batil' marriage void 'ab initio.'

For a full discussion vide "the Muslim Law of Marriage" by the present author, and Moulvi Mahomed Yusoof Tagore Law Lectures Vol. 11 p. 111. For the contrary view vide Ameer Ali Muhammadan Law Vol. 11 p. 341.

1 This is a good case of a 'fasid' marriage, it would have been a 'sahih' marriage if the period of 'iddat' had terminated. The divorced sister had a chance of being reunited to her husband by his revoking the divorce before the termination of the period of 'iddat.'

2 Decision Mad. S.D.A., 157 (1855).

3 In 'Shumsoonissa v. Gouher Ali 4 Sel. Rep. S.D.A. 359 (1827)' it was held that the Muslim Law prohibits the marriage with a fifth wife in case all four are living.

In 'Khurshaid Jahan v. Abdul Hamid P. R. (1908) 43 No. 6, p. 43,' it was held that such a marriage is a 'fasid' marriage, but he illustration relied upon is the accepted case of a marriage with a fifth wife during the 'iddat' of the fourth divorced wife.

marriage takes place after the end of the period of ***iddat***, it will be a ***sahih*** valid marriage.

(*e*) If a man marries a thrice divorced wife without her having been married to another person, and also been divorced from him, then such a marriage is ***batil*** void. If a Muslim marries a wife divorced by the '***Ahsan***' mode of divorce, whether her having been married to another person or not, then such a marriage is valid.

Divorced wife.

(*f*) If a man marries another's wife, then inasmuch as another person's wife is not a fitting subject of marriage, such a marriage with knowledge of its illegality is ***batil*** void ***ab initio***.[1] However if a man marries another's wife without knowing her status, and in complete ignorance of the fact, under a ***bona fide*** doubt, then such a marriage is a ***fasid***, invalid, marriage.

Another's wife.

(*g*) According to the Muslim Law there should be witnesses to a marriage contract. The *Hanafi* jurists require that there should be two male adult witnesses or one male and two female witnesses. The *Shafi'i* jurists hold that the witnesses can only be male persons. According to some of the jurists if a marriage is contracted without the presence of witnesses then it is a ***batil*** marriage, but majority of the jurists consider it to be a ***fasid*** marriage. The latter is an accepted view.[2]

Without witnesses.

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1 The Allahabad High Court in an exhaustive judgment has adopted this view in "Ata Mohammad Chowdry v. Saiqul Bibi" 8 A. L. J. R. 953. Vide "Ameena v. Kuttoo Khan" 7 Sel. Rep. S.D. A 32 (1841).

If a Muslim marries a wife divorced by the 'Ahsan' mode of divorce, without her having been married to another person, then such a marriage is valid.

2 It is self evident that there is a fine distinction between a marriage without witnesses and a marriage with a prohibited woman. In the latter case the woman herself is not a fit subject of marriage, while in the former case of marriage without witnesses, the woman is a fit subject of marriage, and the defect is in the procedure only. According to the 'Shia' Law the presence of witnesses is not essential. Mr. Abdur Rahman treats such a marriage as void. Institutes of Mussalman Law p. 14. and p. 82. Vide also "Butoolun v. Koolsoom" 25 W. R. 444 (1876).'

(*h*) It is unlawful to marry a pregnant woman when the author of pregnancy is known, but is permissible to marry a pregnant woman if the child was conceived unlawfully, provided the husband does not co-habit with her till delivery, unless he himself happens to be the author of pregnancy.[1] This is the view adopted in the *'Fatawa-i-Alamgiri.*

Pregnant woman.

(*i*) If a Muslim marries a ***Mushrik*** woman then such a marriage is ***batil*** void. It is not permissible to marry the polytheists, fire worshippers, star worshippers, or idolators.[2]

Mushrik.

If a Muslim woman marries a non-Muslim such a marriage is ***batil*** void.

(*j*) If a Muslim marries a *murtid* woman, who has renounced Islam, the marriage is ***batil*** void, and similarly if a *murtid* marries a Muslim woman, the marriage is void.

Murtid.

(*k*) If a Muslim marries an ***Ahl-i-kitab*** woman, a follower of a divine faith, then such a marriage is a ***sahih*** valid marriage.[3] But if a Muslim woman marries a follower of a divine faith, then such a marriage is considered by the jurists to be ***batil*** void.

Ahl-i-kitab.

In British India marriage between a Muslim and a Christian woman must be contracted in presence of a Registrar appointed under the Christian Marriage Act XV of 1872.

However this Act does not enable a Muslim woman to contract marriage with a non-Muslim husband.

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1 The 'nasb' paternity of the child would be established in the man, if the child is born at least at six months from the date of marriage.

2 Ameer Ali holds that such marriages are merely 'fasid', for it is possible for the woman at any time to be converted to Islam, but it is difficult to reconcile this opinion with the view of the jurists. Mahommedan Law Vol. 11 p. 282.

Vide also "Abdul Razak v. Agha Mohammad" 21 Cal 66 (1893) "Bakshi Kishen Prasad v. Thakur Das" 19 All. 373. (1897), "Himmat Bahadur v Shebzadi Begum" 14 W. R. 125 (1870).

3 As regards 'Ahl-i-kitab' it is recognised that the followers of the prophets mentioned in the Koran are without doubt members of a divine faith. Ameer Ali is of the opinion that as marriages were allowed between the Muslims and the Persians, therefore a Muslim in India can lawfully marry a Brahmo or a Hindu woman. And he cites the cases of the Moghul Emperors contracting marriages with the Rajput ladies, Mahommedan Law Vol. 11 p. 154, 'ibid' p. 281.

A marriage between a Muslim and an *Ahl-i-kitab* celebrated in a foreign country, if performed in accordance with law of the land, *lex loci contractus,* is valid under the Muslim Law also. [1] Under the Muslim Law the domicile of the husband would be domicile of marriage, however according to the *jus gentium* mere fact of marriage does not necessarily imply that the wife has abandoned her domicile.[2]

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1 This principle of the Muslim Law conicides with the English Law; Vide "Brooks v. Brooks" 9 H. L. C. 193 (1861) A foreign marriage valid according to the law of a country where it is celebrated is good everywhere". Vide also "Herbert v. Herbert 2 Hagg," Consist 271 "Hyde v. Hyde and Woodmansee" 1 L. R. P & D 130 (1866) is the case of marriage between two Mormons according to Mormon rites. The decision points out some essential principles of the Christian conception of marriage.

2 "Colliss v. Hector L. R. 19 Eq." 334. This principle follows from rule of the Muslim Law that the husband has the right to insist upon the wife to reside with him wherever he resides, and accompany him wherever he goes, unless she has contracted with him otherwise.

Wilson observes (Digest of Anglo-Muhammadan Law p. 112). A marriage duly solemnised in England between a Muhammadan domiciled in India and a Christian (or any woman) is valid in England, but it cannot be dissolved in England or in India at the instance of the husband. "The King v. Superintendent Registrar of Marriages Hammersmith ex-parte Mir Anwaruddin L. R 1917 I. K. B. D., 634". According to "Cheti v. Cheti L. R (1909) p. 78", if a Hindu (or a Muslim) domiciled in India and having a wife married to him in India marries an Englishwoman in England, then his Indian marriage will not be recognised in England, but his English marriage will be recognised as valid in England Under the Muslim Law when he returns to India both the marriages will be recognised provided the wife was an 'Ahl-i-kitab'.

The English marriage cannot be cancelled in England because the husband has no English domicial "Le Mesurier v. Le Mesurier L. R." (1895) A. C. 517, nor can it be dissolved by the Courts in India because they have no jurisdiction, the petitioner not being a Christian nor the marriage solemnised in India. Wilson further says the marriage cannot be dissolved according to his personal law, as it cannot govern an English marriage. But here he is incorrect for under the Muslim Law such a marriage can be dissolved, but if the parties were to return to England, under the English law, they would find thenselves in an embarrassing position once more as husband and wife.

Under the English Law if both the married parties are Jews, then they both will be bound by the Jewish Law. Queare whether on the same principle would the Muslim Law apply to the Muslims residing permanently in England. The question is interesting from the point of view of so many English converts to Islam, and Muslim Indians residing in England.

(*l*) According to the ***Hanafi*** Law marriage in a state of *ihram* on pilgrimage to Mecca is lawful. According to the ***Shia,*** the ***Shafi,*** the ***Maliki,*** and the ***Hambali*** Law such, marriages are prohibited.

Ihram.

REAL FASID MARRIAGES—

5. The list of ***fasid***[1] marriage's is limited, and it is not possible to add a single instance, where there is a consensus of opinion among the jurists.[1]

The recognised instances are:—

(*a*) The marriage without the presence of witnesses.

(*b*) The marriage with the wife's sister during the *iddat* of the divorced wife.

(*c*) The marriage with a fifth woman during the *iddat* of one of the wives who has been divorced.

(*d*) The marriage with a prohibited woman under a ***bona fide*** mistake.

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1 The classification of 'fasid' marriages is due to the clemency of the jurists with a view to establish parentage of the child with respect to his father. Under the 'Hanafi' law, a child is always legitimate to his mother, that is, it will always inherit from her. According to Imam Abu Hanifa the principle of clemency should be extended to all cases of irregular defective marriages to render a child legitimate, though the parties may be separated from each other. That is the factum of marriage followed by consummation should be deemed sufficient to establish parentage. If this view is accepted then all cases enumerated above will become instances of 'fasid' marriages. The view of his two disciples Imam Abu Yusuf and Imam Muhammad was, that if a man was sensible of the unlawfulness of marriage, then the contract of marriage is no defence. The 'fatwa' with the concurrence of the Ulemas jurists accords with the view of the two disciples. I think we may add to the accepted list of 'fasid' marriages, the case of marriage with a non-Muslim woman, other then a 'mushrik'. Such a marriage if it is not to be considered as 'sahih' should be deemed to be 'fasid'.

§ 3. VOIDABLE MARRIAGES

MINOR'S MARRIAGE—

6. (*a*) If a minor is married by his lawful guardian except his or her father or grandfather, then such a marriage is subject to an option of puberty, also known as an option of repudiation ***Khyar-ul-bulugh,*** that is, a right vested in a minor to ratify or rescind on attaining puberty the marriage contracted on his or her behalf during minority.[1]

Under the *Shia* Law such a marriage has no effect unless ratified by the minor on attaining puberty.

The option must be exercised by a female at once on attaining puberty, or if she did not know of her marriage then she must exercise the option at the moment she is informed of *nikah*, otherwise she will forfeit her right.[2] A male person retains the option, until he has ratified the contract by declaration, by conduct or otherwise *viz.* by co-habitation or payment of dower.

If a minor's marriage was contracted by the father or grandfather, then according to the Hanafi Law such a marriage cannot be cancelled by the minor on attaining puberty, unless the father or grandfather is previously known to be irreligious or of bad judgment or has wickedly contracted marriage with a person, who is not a suitable match. According to some jurists, if a guardian other than the father or grandfather marries a minor to an unsuitable spouse, then such a marriage is *void ab initio.*

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1 According to some jurists the exercise of the option of puberty does not 'ipso facto' dissolve the marriage it requires a decree of the Court to rescind the marriage tie, the judicial decree is a confirmation of the exercise of the right. According to Ameer Ali the decree of the court is not a necessary condition, a mere declaration is sufficient to dissolve the marriage. Mohammedan Law. Vol. II. P. 375.

If before the dissolution of marriage one of the contracting parties dies, then the other is entitled to inherit from him or her in the capacity of wife or husband, and the dower will become due to the woman or her heirs.

Strictly speaking the Child Marriage Restraint Act XIX of 1929 has not effected this part of the Muslim Law, because the Sarda Act has not declared such marriages to be void, it only penalises persons who take part in celebrating it.

2 19 A. L. J. R. 846.

(*b*) If a minor whether male or female contracts a marriage without the authority of his or her guardian, the contract is not binding, unless ratified by the guardian. If the guardian disapproves of the marriage, then it is ***null*** and ***void***.

(*c*) The marriage of a minor contracted by a distant relative is not binding, unless approved by the immediate nearest lawful guardian, who may cancel it if he so desires.

AGENCY IN MARRIAGE—

7. If a principal intimates his agent to marry him to any woman he likes, and the agent marries him to his minor daughter or minor ward, then such marriage is not binding unless ratified by the principal. But if the agent had married him to any other woman or his own grown up daughter or a grown up sister, then such a marriage is lawful. A marriage contracted by the agent to any other woman other than the woman specially designated by the principal is not binding at all, unless ratified by the principal.

If a woman intimates her agent to marry her to whomsoever he likes, and he marries her to himself or his own son, or his own father, then such a marriage is not binding, unless ratified by the woman; but if he had married her to a stranger fixing proper dower then such a marriage is binding.

If a marriage is proposed or accepted by a person professing to be an agent, but who has no power then such a marriage remains in suspense, unless ratified or cancelled by the other party.

EQUALITY IN MARRIAGE—

8. The doctrine of equality, ***Al-kufa't,*** is to betaken into consideration in determining the validity of marriage.[1] Equality is considered as regards the husband and not as regards the wife.

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1 Islam as a religion is opposed to such distinctions. The doctrine of equality attempts to prescribe a social bar. Several unequal marriages were contracted in the early days of Islam. Asma bin Zaid married Fatima-bint-Qais, Billal Habshi marriaged a sister of Abdur Rahman and Abu Hazigha's slave married his own master's niece. Freedom is considered as an essential condition of 'Al-kufa't,' but with the abolition of slavery this law may be taken to be obsolete in British India. If a womas marries a person of higher status than herself, then her guardian has no right to separate them at all.

There are six essential qualities of equality.

(*a*) Islam, (*b*) Nobility of birth, (*c*) nobility of knowledge, (*d*) Equality of wealth, (*e*) Equality in trade and business, (*f*) Piety and virtue.

The right to demand equality may be invoked by the *wali* the woman's immediate lawful guardians, the *Asabah,* that is by the agnates and not by *zavi-il-'Arham* the uterine relations known as the distant kindred.

Islam is an essential condition of equality. Nobility of knowledge has been held superior to nobility of birth. The excess of wealth of the woman is not taken into consideration, provided her husband is in a position to pay her dower, and is able to maintain her. As regards equality of trade, the Great Imam was of opinion that it is immaterial, but his two disciples were of the contrary opinion, *viz.* a sweeper is not to marry a perfumer. A wicked and corrupt person is not the equal of a pious and virtuous woman.

The better view is that there is nothing fundamentally wrong with marriages contracted between persons of unequal status, that is, they remain valid till cancelled by the Kazi (Court). And after the birth of the child the marriage cannot be dissolved. According to some jurists the objection should be made at the time of the marriage and not afterwards, unless the person had previously asserted that he was the equal of the woman.

FRAUD IN MARRIAGE—

9. If the man deceived the woman as to his condition in life attributing to himself false title or false quality, and the woman discovers this fact after the *nikah,* then she has the option to maintain the marriage or dissolve it.[1]

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1 This agrees with the general principle of law that fraud will vitiate any transaction however legal otherwise.

CHAPTER II

§ 1. MAHR—DOWER

DOWER—

10. *Mahr*, dower is the property, or its equivalent, incumbent on the husband either by reason of being agreed in the contract of marriage or by virtue of the contract, as special consideration for *buza*, the right of enjoyment itself. The minimum dower is fixed at ten dirhams and there is no maximum limit.[2]

The whole dower may be paid in full at any time at or after the *nikah*.

PROMPT AND DEFERRED DOWER—

11. The amount of dower is generally divided into two parts, one portion of the dower is prompt *mu'ajal* payable immediately

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1 It is suggested that the Arabic word dirham is derived from the Greek drachma. Its value as a coin seems to have never been constant. Von Kremer considers it as equilvalent to the French franc.

Wilson suggests that 10 dirhams are equivalent to Rs. 16 estimated in modern Indian money. In Sugra Bibi v. Masuma Bibi 2 All. 573 (1877) ten dirhams were erroneously treated as equivalent to Rs. 107. Vide also "Asma Bibi v. Abdul Samad Khan" 32 All. 107 (1909) where the mistake was indicated viz Rs. 107 is treated as equivalent to 500 dirhams.

2 There is no maximum limit but in the Province of Oudh by the Oudh Laws Act Sec. 5. (1876) and in Ajmere-Merwara by the Ajmere-Merwara Laws Regulation 3 of 1877 Sec. 32 the law to be applied where the wife claims her dower in her husband's lifetime or after his death, the Court is to allow only such amount as appears to be reasonable with reference to the means of the husband and the status of the wife. But the mere fact of a marriage being contracted in Oudh does not authorise abatement in the stipulated dower if the parties are not domiciled in Oudh or Ajmere-Merwara "Zakeri Begum v. Sakina Begam" 19 Cal. 689 (1892) "Rukia Begum v. Muhammad" 32 All. 477 (1910).

on demand, and the other portion is deferred *mu'wajal* payable on divorce or death of the husband to the wife from his property, or on the death of the wife to her own heirs.

If there is no specification at the time of *nikah*, as to what part of the dower is to be prompt or deferred, then the presumption would be in favour of the amount usually paid as prompt dower to women of equal status specially with reference to the custom of the wife's family, and also of the part of the country. And further the amount of dower fixed should also be taken into consideration in determining the prompt portion.[1]

Under the *Shia* Law, in such a case the whole dower is deemed to be prompt.

PROPER DOWER—

12. If at the time of marriage no dower has been fixed, or it has been expressly agreed that there should be no dower, nevertheless the wife is entitled to *Mahr-i-misl*, proper dower of her equals, such would be the dower as assigned to her sisters of full blood or half blood on her father's side, or to her paternal aunts.

INCREASE IN DOWER—

13. It is lawful for the husband, and if he were a minor for his father or grandfather to increase the dower during the subsistence of the marriage. The increase is incorporated in the original

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Some authors suggest that personal services to be rendered by the husband to the wife do not count as property for the purpose of dower, but this view is not quite correct. There is no doubt that menial services are not fit subject of dower, but services of permanent nature are proper subject of dower, 'e.g.' an agreement to teach the Koran.

1 According to the Privy Council (following Macnaghten art 22 page 59.) the whole dower is deemed to be prompt. "Mirza Bedar Bakht v. Muhammad Ali" 19 W. R. 315 (1873). It should be noted that the parties in this case were Shias, though the Privy Council took no notice of this fact. Vide also Tadiya v. Hasanebiyari 6 Mad. H. C. 9. (1871) and Masthan Sahib v. Assan Bibi 23 Mad. 371 (1900). In support of the correct Hanafi view as stated above vide Umda Begum v. Mohammadi Begum 33 All. 291 (1910) and also Eidan v. Mazhar Husain 1 All. 483 (1877) and Taufikunnissa v. Ghulam Kambar 1 All. 506. In Fatma v. Sadruddin 2 Bom. H. C. 291 (1865) a third of the dower was treated as prompt.

dower, and in order to be operative it should be acccepted by the wife or her lawful guardian before the dissolution of the marriage.

REMISSION OF DOWER—

14. An adult wife is competent to remit the whole or part of her dower in favour of her husband.[1] The father of a minor daughter is not competent to remit her dower at all.

The widow is also competent to remit the dower in favour of her husband's heirs after the death of her husband.[2]

REPUDIATION BEFORE CONSUMMATION—

15. If a woman is repudiated before consummation of marriage, then she is entitled to half of her stipulated dower. And if she has already received her whole dower, she must restore half of it to her husband. And if there was any increase made in her favour, she would not be entitled to half of the increase. If a woman was married without fixing her dower, or with a stipulation that there should be no dower, and consequently *Mahr-i-misl* becomes due to her, and if she were divorced before consummation of marriage she would not be entitled to half of the *Mahr-i-misl.* In such a case the husband is bound to give her *mut'a* which consists of three articles a *dira* shirt, a *mulhifah* an outer garment, and *khimar* a head dress.

However if the woman by her own fault[3] has contributed to the dissolution of marriage before consummation, then she is not entitled even to half of her dower.

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1 In "Abi Dhunimsa Bibi v. Muhammad Fatihuddin" 41 Mad. 1026 (1918) it was held that a remission by a wife who had attained majority according to the Muhammadan Law but not under the Indian Majority Act (IX of 1875) is invalid. It is difficult to support this view, under the Muslim Law. Vide also, "Ahmed Allah v. Fueza Bibi" 1 Sel. Rep. S. D. A. 391 (1809). "Babu Munwan v. Nusrat Ali" 1 Sel. Rep. S. D. A. 86 (1803). "Jyani v. Umrao" 34 Bom. 612 (1908). In Nurannessa v. Khale Mahomed 47 Cal. 537. (1920) relinquishment in great mental distress was held to be not valid.

2 Nurunnissa Khanum v. Khaje Md. Sakre 24 C. W. N. 320.

3 'e. g.' if the women commits fornication adultery with an ascendant or descendant of her husband, it would constitute an impediment to marriage, or if the woman renounces the Muslim faith and becomes a mushrik, it would constitute an impediment to consummation of marriage. In such a case if any part of the dower has already been paid to the woman, she should be obliged to return it to her husband.

DUE DOWER—

16. The dower becomes due by cohabitation, or valid retirement ***khilwat-us-sahih*** and by the death of the husband or the wife. By ***khilwat-us-sahih*** is meant the actual retirement of the husband and wife into the nuptial chamber, and there should be no impediment to connubial intercourse. Thereafter if the marriage is dissolved for whatever reason it might be, the whole of the dower would become due to the wife.

DOWER GUARANTEED—

17. It is lawful for a person (the guarantor) to guarantee to the woman the payment of her dower, the guarantee is to be accepted by the woman, or if she were a minor then by her lawful guardian. The woman on attaining majority may recover the amount from the guarantor, even if he happens to be her guardian. The guarantor cannot recover the sum from the husband, unless the guarantee was authorised by him.

The father of the minor husband does not become surety for the dower by the mere fact of the marriage having been arranged by him, unless he himself guarantees payment of the dower.[1]

LOSS OF DOWER—

18. If the property assigned as dower to the wife has perished while still in the hands of the husband, or has been consumed by him before delivery, or if the wife was dispossessed, for some reason, of that property, then in all these cases she has the right to receive her dower, or its value thereof from her husband. If she were dispossessed of a part of the property assigned to her as dower, then she has the option to return the rest, and claim the full dower, or its value thereof, or only its value in lieu of the part perished, consumed or dispossessed.

DISPUTED DOWER—

19. If the dispute arises between the spouses as to the amount of the dower itself, then ***Mahr-i-misl*** will serve as a basis for

1 "Muhammad Siddiq v. Sahabuddin" (1927) 49 All. 557.

determining the dower, and the evidence adduced by the parties will also be taken into consideration. But if the dispute takes place before consummation of the marriage followed by repudiation, then the woman is entitled to *mut'a*, present of clothes only.

WIDOW IN POSSESSION—

20. The widow's claim for dower[1] entitles her to obtain in a peaceful manner, lawfully, and without fraud, possession of the whole or a part of her husband's property, and she is entitled to remain in quiet possession, until her dower debt is completely paid up.[2] The widow in possession in lieu of dower debt is bound to render an account to her husband's heirs of the rents and profits received by her, on their demand for an account[3] ; but at the same time in British India she is entitled to charge a reasonable amount of interest on the dower debt hitherto unsatisfied.[4]

The widow in possession is not allowed to transfer the property by sale or gift or mortgage, inasmuch as she is not an absolute owner of the property such a transfer is void. It is submitted that the

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1 There is no real analogy between a usufructuary mortgagee and a widow in possession in lieu of dower debt. The dower debt is not a charge on her husband's estate. So if the mortgagee of a certain property of which the widow is in possession brings it to sale, the widow cannot retain its possession, "Ameer Ammal v. Sankaranarayan" 25 Mad. 658 (1900).

2 There is conflict of decisions whether consent of the husband or his heirs is necessary for the wife to obtain possession of the property in a peaceful manner. For the affirmative vide "Sabur Bibi v. Ismail" 51 Cal. 124 (1924); "Amaunt-un-nissa v. Bashir-un-nissa" 17 All. 77 (1894); "Muhammad Karimullah v. Amani 17 All. 93; for the negative view vide "Beeju Bibi v. Syed Moothiya" 43 Mad. 214 (1920) "Sahebjan v. Ansuruddin" 8 Cal. 475 (1911). "Ramzan Ali v. Asghari Begum" 32 All. 563 (1910) 'Muhammad Shoaib v. Zaib Bibi 50 All. 423 (1928).

3 The husband's heirs are entitled to bring a suit for an account whenever they desire, and even if a decree is passed conditional on their paying the balance of the dower, and they fail to pay the amount, nevertheless they are entitled again to bring another suit which will not be barred by 'res judicata'; 'Maina Bibi v. Chaudhari Vakil 52 I. A. 145, 47 All 250. (1925).

4 The widow is entitled to interest though interest is contrary to the Muslim Law, vide "Hamira Bibi" v. Zubaida Bibi 33 All. 182 ; and vide for the same case 38 All. 581, (1916); 43 I. A. 294. However in "Nawasi Begum v. Dilafrooz

widow's right to dower is transferable and also inheritable, that is after her death her heirs are entitled to the possession of the property, [1] until the dower debt is satisfied.[2]

A widow in possession of her husband's property in lieu of dower debt is at the same time entitled to sue her husband's heirs separately for the dower, or to realise the dower out of her husband's estate.[3]

If the widow in possession has been dispossessed of the property, then she is entitled to institute a suit to recover possession thereof, or for payment of the dower debt itself.[4]

DOWER A DEBT—

21. The widow's right to claim dower, is a debt payable out of her husband's estate,[5] and after the death of the husband it is to

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Begum" 48 All 803 (1926) the Court expressed an opinion that the grant of interest is equitable and discretionary. "The disproportion between the value of property and the amount of the dower debt is a good ground for holding that interest cannot be equitably allowed." In my opinion interest should be allowed in every case, for it is only equitable to do so.

1 The transferee of the widow obtains no title though she transferred the property in the capacity of an absolute owner. Ali Mohomed Khan v Aziz Ullah 6 All. 50 (1883) Chuki v. Shamsunessa Bibi 17 All. 19 (1894) but it seems that the transferee will be in a position to plead adverse possession since he received no legal title from his transferor. But if the widow has transferred both her right to dower debt and her right of possession in the capacity of a widow in possession, then the transferee obtains a limited right to retain possession of the property, until the dover debt is satisfied.

2 There is no doubt that this right is heritable. "Azizullah Khan v. Ahmad Ali Khan 7 All. 353 (1885)" "Ali Bukash v. Allahabad 32 All. 551 (1910)." "Abdullah v. Shamshul Haq" 43 All. 127 (1921); Majidmian v. Bibisaheb 40 Bom. 34 (1916). but according to "Hadi Ali v. Akbar Ali" 20 All. 262 (1898) it is not heritable;

3 "Mr. Ghulam Ali v. Sager-ul-Nissa (1901) 23 All. 432. This is a better view and it is also desirable for the wife to sue for the recovery of her dower debt, for it seems that even after a long possession of the property in question, she cannot become absolute owner of the property. Her possession is simply permitted to enable her to realise the dower debt, and if the interest is also not allowed, then in the long run she will be a greater sufferer.

4 Majidmian v. Bibi Saheb 40 Bom. 34 (1916).

5 The dower debt has no priority over other debts vide "Bhola Nath v. Maqbul-un-nissa 26 All. 28 (1903). The husband may choose deferred dower as prompt,

be paid like other debts before legacies, and distribution of the inheritance.

The widow in capacity of the heir is also entitled to claim her fixed share out of the inheritance.

LIMITATION—

22. There is no period of limitation under the Muslim Law, however under the Anglo-Muhammadan Law the period of limitation for a suit to enforce payment of dower is three years in the case of prompt dower from the date of demand and refusal; and if no demand has been made during the subsistence of the marriage then three years from the date of dissolution of the marriage; and in the case of deferred dower the period of limitation is three years from the date of dissolution of the marriage by death or divorce.[1]

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and treat it as a consideration for the transfer of property to his wife, such a transfer will not be void as fraudulent transfer merely because his object was to defeat the claim of ano her unsecured creditor Suba Bibi v. Balgobind Das, 8 All. 178 (1886), Hamidunnissa v. Nazirunnissa, 31 All. 170 (1909).

In Kamarunnissa v. Husaini 3 All. 266 (1884) the husband gave his property to his wife in lieu of dower. Held by the Privy Council whether the dower was due or not, the gift followed by delivery of possession was valid.

1 The Indian Limitation Act 1908 Schedule 1 Arts. 103 and 104. Vide also "Ameeroonnissa v. Moorad-un-nissa" 6 Moo. I. A. 211 (1855). "Kjarunnissa Begum v. Risaannissa Begum" 2 I. A. 235 (1875).

§ 2. RECIPROCAL RIGHTS AND DUTIES OF THE HUSBAND AND WIFE.

RIGHTS AND DUTIES—

23. The husband is bound to maintain his adult wife in a befitting manner suitable to their status, to provide for her a house, at least separate apartment, and if he has more than one wife to treat them equally in every respect, and to allow her to visit and be visited by her parents and her blood relations within the prohibited degrees. On the other hand, the wife is bound to obey all reasonable demands of her husband, and to reside in his house and to observe strict conjugal fidelity.

The remedies of the husband against a wife, who is disobedient and is rebellious are, that he may refuse to maintain her or he may institute a civil suit for restitution of conjugal rights[1] or he may divorce her. The remedies of a wife aganist her husband are that she may sue him for maintenance,[2] she can also institute a suit for restitution of conjugal rights and in case of non-payment of her prompt dower, she may refuse to admit her husband and obey his orders.

The dower is the sole property of the woman, and she may dispose of it in any manner she desires, her heirs are entitled to demand her dower from her husband's heirs. Property is not the object of marriage therefore the wife is under no obligation to use her dower for the benefit of her husband, neither she is expected to use her own property, nor her father is obliged to provide for her. The husband is under legal obligation to provide for her maintenance.

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1 Abdool Fulleh v. Zabunnessa 6 Cal. 631 (1881).

2 Buzloor Ruheem v. Shumsoonissa 11 Mod. I. A. 551 (1867) Abdul Kadir v. Salima 8 All 149; Hamid Husain 40 All. 332 (1918); Asirunnissa Khatun v. Buzloo 34 Cal. 79 (1906).

WIFE'S RIGHT OF REFUSAL—

24. In case of non-payment of prompt dower on demand, the wife is entitled to refuse herself to her husband or accompany him, and refuse to leave her own house, until the husband pays the prompt part of the dower. In such circumstances she is not considered as disobedient, therefore she is entitled to claim maintenance from him. The right of refusal exists before and also after the consummation of marriage.[1]

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1 The above is the correct law in accordance with the opinion held by the Great Imam Abu Hanifa and as adopted by all recognised authorities 'Fatawa Sirajiya, Fatawa Monia, Bahrul Raiq, Fatwa Khariya, Fatawa Alamgiri, Durrul mukhtar, and the Hedaya' etc. It is submitted that reason of justice and equity preponderate in favour of the view of Imam Abu Hanifa. There has been some difference of opinion in the view taken by the Indian High Courts, as to the wife's right of refusal after consummation, but there has been no conflict as to the right before consummation, or similarly where consummation has taken place against her consent.

The following decisions follow Imam Abu Hanifa :—

"Abdul Shukkoar v. Raheemunnissa" 6 N. W. 94 (1873);

"Eidan v. Mazhar Husain 1 All. 483 (1879);

"Wilayat Husain v. Allah Rakhi 2 All. 831 (1880)";

Jaun Bibi v. Sheikh Moonshee Beparee 3 W. R. 93; Nazir Khan v. Umrao A. W. N. 96 (1882); Khodaija Begum. v. Saiyad Naki Select case No. 57 (Oudh); Nawab Wazir Jahan v. Nawab Haidar Raza Khan 10, O.C. 11.

For the contrary view vide "Abdul Kadir v. Salima 8 All. 149 (1886)" where Mahmood J. upheld the view of the Sahibain, that is according to the view expressed by Imam Abu Yusuf and Imam Muhammad the wife has no right to refuse to admit her husband after consummation of marriage has taken place with her consent. The latter case has been criticised by Maulvi Samee Ullah C. M. G. in a judgment delivered by himself in the case of "Rasulan v. Mirza Naim Ullah (1891), this judgment is cited with approval by Ameer Ali, Mahommedan Law Vol. 11 p. 449 and also by Wilson Digest p 121. However 8 All. 149 has been followed in "Kunhi v. Moidin 11 Mad. 372 (1888); in Hamidunessa Bibi v. Zohiruddin 17 Cal. 670 (1890) and in Bai Hansa v Abdullah 30 Bom. 122 (1905)." But in Abdul Karim v. Musammat Chhoti A. W. N. 136 (1906) the Allahabad High Court did not follow 8 All. 149.

The Lucknow Judicial Commissioner's Court in "Wajid Ali Khan v. Sakhawat Ali Khan 15 Oudh Cases 127 (1911) has expressly dissented from the view taken in Abdul Kadir v. Salima 8 All. 149.

The Egyptian Code of Muhammadan Personal Law by Kadri Pasha also adopts the view of Imam Abu Hanifa vide Sec. 213.

Ballie's Digest of Moohummadan Law p. 125, and Hamilton's Hedaya 11, iii, p. 50 adopt the view of Imam Abu Hanifa. For full discussion vide "The Muslim Law of Marriage" p. 32 by the present author.

CHAPTER III

§ 1. TALAQ—DIVORCE

DIVORCE—

25. ***Talaq,***[1] divorce, signifies the dissolution of the marriage tie. It may be effected by the act of the husband,[2] or in certain special circumstances by the wife, or by mutual agreement, or by the operation of law.

All separations effected for causes directly originating in the husband are termed *talaq,* and separations effected otherwise by the decree of the Court are known as ***furqat.***[3] If the decree is for causes imputable to the husband it has the effect of ***talaq,*** and if for causes imputable to the wife it has the effect of annulment of the marriage tie, ***faskh.***

26. Divorce is the absolute privilege of the husband, and he may pronounce it at his pleasure, it may be effected by express words, ***surih,*** or by allusive words ***kinaya.*** An adult person of sound mind can effect divorce, but persons of unsound mind cannot validly pronounce divorce, a dumb man can effect divorce by intelligible signs.

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1 "Talaq" in its literal sense means "the taking off of any tie or restraint". The Muslim Law concedes the right of divorce, but prohibits its exercise by threats of divine displeasure. Ballie says (Digest p. 205.) "It was originally forbidden and is still disapproved, but has been permitted for the avoidance of greater evils."

2 Ameer Ali Mahommedan Law Vol. 11 p. 472. "The Mutazilla sect asserts that in no case divorce is lawful without the sanction of the Court."

3 Ballie's Digest p. 203. "There are thirteen kinds of 'firkut' or separation of married parties, of which seven require a judicial decree and six do not. The former are separations for 'jub' and impotence, and separation under the option of puberty, or for inequality, or insufficient dower, or a husband's refusal of Islam, or by reason of 'Lian' imprecation. The later are separations under the option of emancipation, or eela, apostasy, or difference of 'dar', or by reason of property, (that is, one of the parties being the owner of the other) or a marriage being invalid."

§ 2. DIVORCE BY THE ACT OF THE HUSBAND

DIVORCE HOW EFFECTED—

27. There is no special form of divorce[1] recognised by the *Hanafi* jurists, all that is necessary is that the words of divorce, pronounced by the husband, should show an intention to dissolve the contract of marriage.

However under the *Shia'* Law there is a prescribed formula, which must be recited in the presence of two witnesses in order to effect the divorce. The formula is in Arabic, but if the person is ignorant of Arabic, then he may use any language known to him.

Talaq is ordinarily effected by addressing to the wife,[2] but it may also be effected in writing addressed to the wife, but it should reach her in order to effectuate the *talaq,* and for the purpose of estimating the period of *iddat* the divorce in writing takes effect from the date of writing and not from the date of receipt, unless otherwise indicated.

Under the *Shi'a* law divorce in writing is only permissible when the husband is physically incapable of pronouncing divorce verbally.

REVOCABLE AND IRREVOCABLE DIVORCE—

28. The divorce is classified into two classes.

(*a*) *Rajai,* revocable divorce, that is divorce which may be revoked before the expiration of the period of *iddat.*

(*b*) *Bain,* irrevocable divorce which is imperfect if uttered once or twice, it is perfect if uttered three times, and it dissolves the marriage on its mere utterance.

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1 "Wahid Khan v. Zainab Bibi" 36 All. 458 (1914). "Asha Bibi v. Kadir" 33 Mad. 22 (1909). "Ibrahim v. Syed Bibi" 12 Mad. 63 (1888).

2 But the presence of the wife is not essential vide Ful Chand v. Nawab Ali, 36 Cal. 184 (1908.)

In Furzund Hossein v. Janu Bibee 4 Cal. 588 (1878); a husband pronounced the 'talaqs' before members of his family, and in the absence of his wife, without naming her, held there was no divorce.

'Talaq' in writing operates as irrevocable divorce "Sarai v. Rabiabai 30 Bom. 537 (1905)". "Gouhar Ali v. Ahmad 20 W. R. 214 (1873) "Wajlebee v. Azmat Ali" 8 W. R. 23 (1866) in the latter case it is said that if the wife's father tears up the letter without showing it to her, the divorce will take effect if he had the general disposal of her affairs, but if otherwise not. In "Sherif Saib v. Usanabibi" 6 Mad. H C. 452 (1871) the letter was delivered to the town kazi.

TALAQ-I-SUNNAT REVOCABLE REPUDIATIONS—

(i) The approved form of divorce is known ***Talaq-i-ahsan,*** which takes place when the husband pronounces divorce during the wife's ***tohur,*** period of purity, without having cohabited during that ***tohur,*** and thereafter abstains from the exercise of conjugal rights, till the expiration of the period of ***iddat.*** The divorce remains revocable during the ***iddat,*** and the parties retain the right of inheritance ***inter se,*** and after the divorce is complete, the parties if they desire, may re-marry.

Under the ***Shi'a*** law it is also required as a condition that the wife must not be in her puerperal courses.

(ii) ***Talaq-i-hasan*** takes place when the husband, having had no sexual intercourse, pronounces divorce three times during three successive ***tohurs,*** and on the third repudiation it becomes final and irrevocable. In this case the parties cannot re-marry even if they desire, unless the woman marries another, and is divorced again after consummation of the marriage.

The ***ahsan*** and ***hasan*** mades of divorce are known as ***talaq-i-sunnat.***

The revocable repudiation whether pronounced once or twice does not dissolve the marriage, which continues to exist during the ***iddat,*** and it may be revoked before the termination of the period of ***iddat.*** And if one of the spouses dies during the ***iddat*** the survivor is entitled to inherit.

TALAQ-I-BIDDAT IRREVOCABLE REPUDIATIONS—

(iii) ***Talaq-i-biddat,*** if the husband pronounces repudiation once or twice without regard to ***tohur***[1] it would be an imperfect irrevocable divorce, it dissolves the marriage immediately, but even in this case the husband may remarry the wife during or after the ***iddat,*** but by her consent, and subject to a new dower.

(iv) ***Triple divorce,*** the triple divorce is where the husband pays no regard for ***tohur,*** and pronounces repudiation in contravention to

1 e.g. Either having cohabited during the 'tohur', or at a time that the wife was actually in her menses.

sunnat three times repeatedly[1] in this case the divorce is perfect and irrevocable and the husband cannot remarry the wife unless she marries another person by *sahih* valid marriage, and after consummation of marriage is repudiated or divorced, or becomes a widow and has completed her *iddat*.

Talaq-i-biddat is considered by the *Hanafi* jurists as the sinful mode of divorce. It is not recognised by the *Shi'a* law.

Repudiation does not effect a woman whose marriage itself is void, *batil*. Every repudiation of woman before consummation of marriage is irrevocable.

In the case of irrevocable divorce if one of the spouses dies during the period of *iddat* the surviving spouse does not inherit from the other, unless the divorce was pronounced in *marz-ul-maut*, death illness.

DIVORCE UNDER COMPULSION—

29. According to the *Hanafi* jurists divorce given under compulsion is valid,[2] but according to *Imam Shafi, Imam Malik and Imam Hambal* divorce given under compulsion is invalid. The *Fatawa-i-Alamgiri* refers to divorce given under compulsion by the order of the Sultan as valid, but it considers a compulsory acknowledgment of divorce as invalid.

According to the *Shi'a* Law divorce pronounced under compulsion of threats of serious nature is invalid.

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1 "Abdul Ali v. Ismailji" 7 Bom. 180 (1883). In "Amiruddin v. Khatun Bibi" 39 All. 371 (1917) the divorce was given three times in immediate succession. In "Jorena Akbar Khatun v. Hafizuddin" 90 I. C. 633 Cal. (1925). These words were held sufficient, "I release you by giving you three 'talaqs". Vide also "Nur Bibi v. Ali Ahmad" 88 I. C. 408 All. (1925).

All the figurative formulæ of repudiations give rise to perfect or imperfect irrevocable repudiations in accordance with the intention of the husband, except those formulæ which have been considered by the jurists to mean revocable repudiations. e.g. "Count your lunar courses." "See to the purification of your womb," "you are single." These are revocable repudiations.

2 Quaere what should be the decisions according to the Anglo-Muhammadan Law in British India. It is submitted on the ground of justice and expediency, that divorces pronounced under compulsion (or under intoxication) should

DIVORCE UNDER INTOXICATION—

30. If a husband becomes intoxicated of his own free will, and pronounces divorce it is valid, but if he were intoxicated under compulsion or from necessity, then the repudiation has no effect. Thus the *Hanafi* jurists make distinction between voluntary and involuntary drunkenness. But according to the *Hanafi* law, if a man takes something lawful *e.g.* extract of honey and becomes inebriated and loses his consciousness, then the *talaq* pronounced by him is deemed to be invalid.

According to the *Shi'a* Law divorce pronounced in the state of intoxication is invalid. The same is the *Shafi'* Law.

CONDITIONAL REPUDIATION—

31. A repudiation is conditional when it is subject to a condition or deferred to a certain time. Such a repudiation is effective on the happening of the event. However a contingent divorce must relate to an uncertain possible event. For if the condition relates to a certain fact, it is void, but the repudiation is effective, and if it relates to an impossible event, it is also void and the repudiation is also void.

Similarly a repudiation cannot be qualified by an option. *e.g.* If a man says I divorce you, but I reserve to myself an option for five days. Here the repudiation is valid and the option is invalid. The fact of repudiation may also be postponed to the

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be deemed to be invalid. The divorce given under compulsion has been recognised by the Calcutta High Court in "Ibrahim Moola v. Enayet-ur-Rahman 12 W.R. 460 (1869)". Divorce given under compulsion in writing has also been recognised valid by the Calcutta High Court in Jorina Aktar Khatun v. Hafizuddin 30 C W. N. 178. 90 I. C. 033 (Cal. 1925).

Ameer Ali boldly suggests that a Hanafi Muslim should place himself under the 'Shafi' law, and thereby invalidate the divorce given under compulsion Muhammadan Law, Vol. 11 p. 483.

It is also suggested by the Hanafi jurists that a divorce pronounced in jest is also valid, but it is equally true that the husband had no intention to divorce his wife in jest. Similarly it is held that marriage contracted in jest is also valid.

happening, from the time of speaking, to some future time without any condition *e.g.* You are repudiated tomorrow.[1]

According to the *Shi'a* Law all *talaqs* subject to a condition or option are void.

§ 3. DIVORCE BY THE ACT OF THE WIFE

Delegation of Power of Divorce—

32. According to the Muslim Law at the time of *nikah*, if the woman proposes to have the power to effect divorce, and the man accepts this condition, then the marriage is valid and so is the condition; but if the condition was proposed by the man and was accepted by the woman, then the *nikah* is valid, but the condition is void.[2]

Similarly after *nikah* the husband is entitled to confer the power of repudiation *Tafwiz-ul-talaq*, on his own wife, or on a third party.

There are three kinds of *Tafwiz-ul-talaq*.

(*a*) *Ikhtiyar* (power), (*b*) *Amar-ba-yad* (the affair is in your hands), (*c*) *mashiat* (at pleasure).

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1 There are various examples of conditional repudiations given in Arabic authorities and good many of them may be read in Baillie's Digest pp. 266—270, vide also p. 223 for various other examples. If a man says to his wife, "Thou are repudiated if this be the day," now if it is the day, then the repudiation takes place immediately. This is an example of the repudiation being suspended on an existing fact. If a man says, "If a camel enter the eye of a needle thou are repudiated." There is no divorce at all for the condition is an impossibility.

2 This is the view of the jurist Abu Lais, though it may be rather difficult to see the distinction, vide Fatawa-i-Osmania by Maulvi Mazhrul-Haq published in Hyderabad Deccan p. 20 and vide Fatawa-Kazi-Khan by Maulvi Mahomed Yusoof Khan, Tagore Law Lectures Vol. 11 p. 21. The Muslim jurists have fully explained the distinction on the basis of the reasoning, that in the former case the proposal of the husband is premature, the contract of marriage not having taken place, the husband cannot confer the power, while in the latter case the husband on accepting the proposal completes the nikah, and at the same time thereby delegates the power of divorce. It should be noted that the delegation is the act of the husband and not of the wife.

There are numerous examples given in Hamilton's Hedaya (Grady) p. 89 and in Baillie's Digest p. 250. The point has come up before the High Courts also, vide

There is very little difference in the first two modes according to which the husband may give the choice to his wife to divorce herself, and the wife would be entitled to divorce herself in that meeting but not thereafter. And if there is any condition attached to the delegation then she must comply strictly with it. The third mode of *Tafwiz* is where the husband leaves the choice of divorce at the pleasure of his wife, in which case she is entitled to exercise the right whenever she desires. The wife cannot in any case give herself a more complete *talaq* than the husband had intended, or that his expression would naturally indicate or imply.

§ 4. DIVORCE BY MUTUAL AGREEMENT

KHULA DIVORCE—

33. (*a*) *Khula* signifies an agreement oral or written between the husband and the wife or their respective agents with a view to dissolve the marriage in lieu of compensation to be paid by the wife to her husband.

The *khula* divorce effects an irrevocable repudiation imperfect or perfect or triple in accordance with the intention of the husband.

The husband is also competent to propose *khula* separation, but the consent of the wife with full knowledge of the compensation proposed is essential, and such a proposal cannot be retracted at the meeting at which it is made, until the wife has declared her refusal or acceptance, but she cannot defer to express her intention till after

"Ashruf Ali v. Ashhad Ali 16 W. R. 260 (1871)", "Badarunnissa v. Mafitulla 7 B.L.R. 442 (1871)", "Hamidoola v. Faizunnissa" 8 Cal. 327 (1882) in the latter case the woman exercised the power alleging ill treatment and refusal to pay her dower. And in "Ayatunnissa Bibi v. Karam Ali 36 Cal. 23 (1908)" the power was conferred upon the wife to divorce herself in the event of her husband marrying a second wife. An attempt was made to confuse this delegation of power with the special delegation as in the case of Ikhtiyar and Amar-ba-yad, but it is clear that this transaction is quite distinct from the post-nuptial delegations, it being a condition to the 'nikah' itself. Some other recent cases are, where the husband undertook not to take a second wife and delegated the power, Mahram Ali v. Ayesa Khatum, 19 C. W. N. 1226. Sainuddin v. Latifunnissa, 22 C.W.N. 922. 46 Cal. 141 (1918).

But a condition allowing divorce if the husband does not allow the wife to reside with her father has been held to be void "Inamali v. Arfatunnissa" 21 I.C. 87 (Cal. 1913).

the meeting. If the husband had made the proposal without compensation, then it amounts to a divorce which takes place without being subject to the consent of the woman.

If the wife has proposed *khula* separation subject to compensation, then she has the right to withdraw her offer before acceptance of it by the husband.

(*b*) Everything that can be given as a dower may be validly given as compensation for *khula*. The compensation so fixed may be greater than the dower itself. If the subject of compensation promised perishes before delivery to the husband, then the wife must substitute another compensation or pay its value. But failure on the wife's part to pay the consideration does not invalidate *khula* separation.[1]

(*c*) According to *Hanafi* jurists *khula* is valid when given under compulsion or in a state of voluntary intoxication.[2]

Khula of an insane person is invalid.

(*d*) A father can obtain *khula* repudiation for his minor daughter, but he cannot consent to a *khula* separation on behalf of his minor son.

MUBARRAT DIVORCE—

34. A separation effected with mutual consent, is also known as *mubarrat* form of divorce because of the use of the word *mubarrat* which means mutual release. It effects irrevocable divorce.

Mubarrat is similar to *khula* separation and similarly all words equivalent to release even by using terms sale and purchase would effect separation by consent.

EFFECT OF KHULA AND MUBARRAT—

35. The divorce by consent is subject to the terms of its agreement, but in the absence of express agreement to the contrary, the presumption is that the wife's right to dower is extinguished both by

1 A 'khula' document effects an irrevocable divorce even if consideration is not yet paid "Saddan v. Faiz Baksh" 55 I. C. 184 (Lah. 1920).

2 Khula under compulsion "Vadaka Vitil Ismal v. Odakal Beyakutti Umah" 3 Mad. 347 (1881).

khula and *mubarrat* forms of separations. There is consensus of opinion that all rights other than dower are not affected either by *khula* or *mubarrat* form of divorce.[1]

DIVORCE IN LIEU OF PROPERTY—

36. *Talaq-bi-iwaz,* divorce in lieu of property is similar to *khula,* and in this case also the wife is bound to pay the agreed compensation.[2]

The husband may propose *talaq-bi-iwaz,* to his wife and if she agrees, then it will effect an irrevocable divorce. Thus *talaq* in lieu of property is similar to the *khula* form of separation, but there is a fine distinction between them. If the husband has proposed such an *iwaz* as has no value in the eye of the law, (*e.g.* a flesh of swine or wine), then in case of *khula* it will effect an irrevocable divorce, but in the case of *Talaq-bi-iwaz* it will effect a *rajai* revocable divorce.

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1 There is difference of opinion among the jurists as to the effect of 'khula or mubarrat' separation on dower, where the deed of separation is silent. According to Imam Abu Hanifa in the absence of contract, the wife's right to dower is extinguished both in the case of 'Khula' and 'mubarrat' forms of separations. According to Imam Abu Yusuf 'mubarrat' form of divorce only extinguishes the right to dower, while Imam Muhammad maintained that neither 'Khula nor mubarrat' separation can extinguish the wife's right to dower. The 'Hanafi' jurists have adopted the view expressed by Imam Abu Hanifa.

According to Imam Abu Hanifa there can be four possible cases of 'khula' separation. (i) Where some consideration has been agreed in lieu of 'khula'; (ii) Where the dower has been agreed as a consideration for 'khula' separation (iii) Where a part of dower has been agreed as a consideration for 'khula' (iv) where no consideration has been agreed at all for 'khula' separation.

Under the Muslim Law it is considered sinful for the husband to force his wife by ill treatment to accept the 'khula' separation, and vide Buzul-al Raheem v. Lutifutoonnissa 8 Moo. I. A. 378 (1861) where the agreement was executed under coercion and intimidation.

2 If the husband A says to his wife B, I propose to give you divorce in lieu of Rs. 1,000 and B declines the offer, then according to the view of the sahibain there is no divorce.

§ 5. DIVORCE BY THE OPERATION OF LAW

JUDICIAL DIVORCE—

37. The contract of marriage may be dissolved by the husband by reason of (*a*) Impotency, (*b*) the option of puberty, (*c*) inequality of the husband with reference to the wife's status, (*d*) Li'an (*e*) Fasid marriages, (*f*) husband's or wife's refusal of Islam.

HUSBAND'S IMPOTENCY—

38. A wife is entitled to claim divorce if she were unaware of her husband's impotency prior to the *nikah*, but if she married him with full knowledge of the fact that he was impotent, then she is not entitled to judicial separation.[1]

The separation effected by reason of impotence does not create an impediment to remarriage of the parties whether during or after *iddat*. These is no right of inheritance *inter se*, if one of the spouses dies during *iddat*.

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1 If the husband admits the fact that he has had no intercourse with his wife, hen the case is to be adjourned for a period of one full year, and if at the end of he year the wife still claims that her husband had no sexual intercourse with her, hen she is entitled to separation. If the husband denies the statement of the vife, but the wife maintains that she is 'virgo intacta', the Court will appoint two ady doctors to examine her, and if they declare her to be virgin the case is similarly postponed for one full year.

There is no adjournment, if the person is 'majub' whose genital organ is mutilated, or if the wife suffers from some physical obstruction to penetration, in the latter case it is open to the husband to divorce the woman.

After judicial separation subject to 'khilwat-us sahih', valid retirement, the wife is entitled to full dower, but if there has been no vaild retirement she is entitled to half dower. Under the 'Shafi'i Law she is entitled to half dower only.

However if the woman was not a virgin at the time of her marriage, and the husband maintains that he had had sexual intercourse with her, then the wife is not entitled to divorce, inasmuch as it cannot be successfully proved that the husband is impotent.

In "Muhammad Ibrahim v. Altafan" 22 A. L. J. R. 1045 (1924). The medical expert's evidence was found to be conflicting, the lady doctors deposed the woman to be 'virgo intacta', and the male doctors that the man was not suffering from any physical disability. But the male doctors had not examined the woman. The Court enforced the rule of Muhammadan Law, and allowed the husband a period of one year to enable him to exercise his marital rights. Vide also "Altafan v. Ibrahim" 21 A. L. J. R. 811, 83 I. C. 27 (All. 1925). Vide A v. B 21 Bom. 77 (1896) and also Vadaka Vitil Ismail 3 Mad. 347 (1881), where impotency was not proved.

OPTION OF REPUDIATION[1] —

39. The option of repudiation must be exercised by a female minor immediately on her attaining puberty,[1] or if she were ignorant of the fact of her marriage, then the moment she comes to know of her marrirge, she must repudiate it otherwise she will forfeit her right.[2]

A male person retains the option of repudiation, until an express declaration or by his conduct *e.g.* by payment of dower or by cohabitation.

The exercise of the option of repudiation does not *ipso facto* dissolve the marriage tie, it requires a decree of dissolution or that of confirmation to be passed by the Court.[3]

It is submitted that if a marriage of a *Shia* minor is contracted by her father with a *Sunni* husband, then such a marriage ought not to be cancelled without just cause by the court on the ground of option of repudiation, the Allahabad High Court has however held that the *Shia* minor retains the option of puberty on the ground that a marriage with a *Sunni* husband is abhorrent for a *Shia* woman, according to the *Shia* Law.[4]

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1 Vide Sec. 6.

The girl must repudiate immediately she perceives signs of menstrual flow. Husaina v. Jiwani 1924 Lah. 385. The right can only be exercised after puberty and not before. Hub Ali v. KE 21 A. L. J. R., 787. The word immediately is not strictly interpreted the test being has the girl acquiesced "Khanoo v. Bhag Bhasi" 76 I. C. 45 (Lah. 1923).

2 After knowledge the woman forfeits her right "Ghulam Fatima v. Khaira" 77 I. C. 901 (Lah. 1923). Vide also "Muhammad Ibrahim v. Ghulam Ahmad" 1 Bom. H. C. 236 (1864).

The option continues until the girl becomes aware of the fact of marriage Maula Dad v. Fateh Bibi 96 I. C. (Lah. 1923).

In "Bismillah Begum v. Nur Muhammad" 19 A. L. J. R. 845 (1921), 44 All. 61 (1922.) The Allahabad High Court held that a woman's right of option is prolonged until she is acquainted with the fact that she has such a right. In other words that if she does not know that she has a right of rescinding the marriage, she will have the power to do so when she is aware of it." It is difficult to support this view for ignorance of law is not an excuse under the Muslim Law. Vide also "Sultan v. Waryam" 73 I C. 895 (Lah 1923).

3 Ameer Ali argues (Mohammadan Law Vol. 11 p. 375) that the judicial decree confirming the exercise of the option is not essential. That is if the woman after exercising the option were to marry again, she would not be guilty of bigamy. "Badal Aurat v. Queen Empress 19 Cal." 79, (1891). Vide also Bulande v. K. E. 8 I. C. 494 (Punjab 1910). 4 "Aziz Ban v. Muhammad" (1925) 47 All. 823.

INEQUALITY IN MARRIAGE[1] —

40. The parties may be separated by a judicial decree in the following circumstances.

If the woman of her own free accord has contracted an unequal marriage, then she is not entitled to claim judicial divorce herself, but her father,[2] failing him her *wali*, guardian, is entitled to move the Court to grant judicial decree (*Faskh*) annulling the marriage. The right to demand annalment is extinguished on the birth of a child.

If the woman with the approval of a certain *wali* has contracted unequal marriage, then all *walis* guardians of the same degree or of a lower degree have no right to demand annalment of marriage, but a *wali* of higher degree is entitled to claim annalment of the *nikah*.

If certain *walis* have agreed to the marriage with a person stipulating equality of status, thereafter it is discovered that the husband was not equal to the wife, in such circumstances they are entitled to demand annalment of the *nikah*, but if they had not so stipulated, then they would not be entitled to claim judicial divorce.

If after *nikah* it is discovered that the husband had misrepresented his status, and was in fact not the equal of his wife then the wife as well as her *walis* are entitled to demand annalment of marriage.

FRAUD—

41. It is submitted that the marriage would be cancelled by the Court, at the instance of either party on the ground of fraud or misrepresentation. This agrees with the general principle that fraud will vitiate any transaction however legal otherwise. The fraud

1 Vide Sec. 8

2 In "Mohumdee v. Bairam" 1 Agra 130 (1866) it was held that the father could set aside the marriage on account of inequality, nothwithstanding the consent of the bride's mother.

But in "Atkia Begum v. Muhammad Ibrahim" 36 I. C. 20 (1916) the Privy Council observed that an adult woman can marry a man of her own choice despite family opposition.

In "Jamir Ali Shah v. Mir Muhammad" Punjab (1916) 38 I. C. 10 the Court held under Shi'a Law the doctrine of inequality is not recognised.

may have been practised deliberately by the agent of one of the contracting parties.[1]

LI'AN—

42. When the husband makes a statement accusing his wife of adultery, the procedure for the settlement of this accusation, by swearing and imprecating upon them the curse of God, is known as *Li'an*.[2] *Li'an* is thus the taking of oaths in the prescribed manner.

The following conditions are essential.

(*a*) *Li'an* is only applicable in the case of a *shiah* marriage, there is no *Li'an* in a *fasid* marriage. It is to be taken between the spouses once only. And the parties must possess all necessary qualifications of a competent witness.[3] The wife must be reputed to be of good character.

(*b*) An accusation of adultery to the wife, if proved to be false would make the husband liable to ***hadd*** punishment of eighty stripes.[4] But if proved to be true would make the wife liable to ***hadd*** punishment of one hundred stripes.[5]

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1 Such a marriage will be valid, if either party, after the true state of affairs has come within his knowledge, ratifies it.

In "Abdul Latif v. Niaz Ahmad" 31 All. 343 (1909) the father of the bride had suppressed the fact that she was suffering from serious illness, and the husband married on the faith of a representation that she was in good death. She died of the same illness before consummation of marriage. Held that the heirs of the woman were not entitled to any part of the dower.

2 The procedure of 'Li'an' is mentioned in the Koran vide Part XVIII Ch. XXIV by Maulvi Muhammad Ali.

Baillie says 'Li'an' are testimonies confirmed by oaths on both sides referring to a curse on the part of the man, which is a substitute for the 'hudd-ool-kuzf', or specific punishment for scandal, and for ghuzab or wrath on the part of the woman, which is a substitute for the 'hudd-ooz-zina', or specific punishment for adultery." Digest p. 335. It is thus clear that by taking the oaths the parties avoid being punished.

3 A minor, an insane person or a dumb person or a person convicted of delicts cannot take the oaths of Li'an.

4 And in British India he would be criminally liable for defamation or liable for damages in the Law of Torts. But it should be admitted that comparing it with "hadd" this liability is nothing.

5 The Koran Part XVIII Ch. XXIV.

"The whore and the whoremonger shall ye scourge with a hundred stripes."

However in British India she would go scot-free there being no punishment for conjugal infidelity.

(*c*) If the husband cannot tender requisite evidence, there being no four witnesses to prove adultery, or none at all except himself, [1] then it is open to him to take the oaths of *Li'an*,[2] and if the wife declines to take the oaths, then she would become liable to ***hadd*** punishment, and if she also takes the oaths, the ***Kazi*** (Court) must separate them, nothwithstanding the fact that the parties are unwilling to be separated.

(*d*) The judicial divorce takes effect on the compliance of the formalities of ***Li'an*** by the actual taking of oaths, and the legal effect is that both the parties avoid being punished, and connubial intercourse becomes unlawful, but if the husband acknowledges that his accusation was false, or retracts his accusation, then though he becomes liable to receive the punishment, sexual intercourse again becomes lawful.

(*e*) Until the marriage is dissolved the parties retain ***inter se*** the right of inheritance and all other rights. The separation due to ***Li'an*** is equivalent to ***Talaq-i-Bain*** irrevocable divorce.

(*f*) Under the Hanafi Law the parties may remarry on the transpiry of any fact which would have prevented the taking of oaths of ***Li'an, e.g.*** if the husband were to acknowledge that his accusation was false and was punished. Under the ***Shi'a*** Law and the ***Shafi'i*** Law and the ***Maliki*** Law the parties cannot remarry.

(*g*) ***Li'an*** cannot be performed by the agent. It does not admit of forgiveness nor can the wife compromise in lieu of some property.

(*h*) ***Li'an*** is also resorted to disclaim paternity of the child born to the wife.

ACCUSATION OF ADULTERY—

43. Mere accusation of adultery whether truly or falsely does not entitle the wife to seek judicial divorce, it is the compliance

1 "Under the Shi'a Law it is only taken when the husband has no evidence to offer but his own, that he may proceed by imprecation against his wife." (Ameer Ali Mahommedan Law, Vol. 11, 5th edition p. 527).

2 "It is requisite to exact an oath from the defendant in all cases excepting in the case of punishment or of 'Li'an.'" Hamilton's Hedaya (Grady) Book XXIV Ch. 11 of Oaths.

with the formalities of Li'an, the taking of oaths in the prescribed manner, that makes it imperative for the Court to separate the parties, nothwithstanding their unwillingness to be separated.[1]

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1 The application of the Law of 'Li'an by the Courts in British India is very recent, there being only one old case "Jaun Bibi v. Sheikh Mooshee Beparee" (1865) 3 W. R. 93 which held "That a charge of adultery by a Mahomedan against his wife does not operate as a divorce, though if false, it might be an item of ill usage towards making up a sufficient answer to his claims for restitution of conjugal rights." This case does not carry us far but the decision is quite sound.

The recent cases are : "Zafar Husain v. Ummat-ur-Rahman" 41 All. 834 (1919).

Where the Court held that a "Muhammadan wife is entitled to bring a suit for divorce and obtain a decree for dissolution of marriage on the ground that her husband has falsely charged her with adultery."

In "Rahima Bibi v. Fazil" 48 All. 834 (1926) an attempt was made by the husband to retract the accusation in an ambiguous manner, but the Court was not prepared to accept such a retraction.

In "Ahmed Suliman v. Mt. Bai Fatma" (1931) A. I. R. Bom. 76, the Bombay High Court has remarked, "That the express opportunity of retraction even if necessary under the strict form of 'Li'an' as laid down under the Mahomedan Law has no place in the procedure in British Courts." The Allahabad High Court only speaks of false accusation and in "Khatijabi v. Umrasahib" 52 Bom 295 (1928), the Bombay High Court has expressly rejected the view of Sir Roland Wilson to the effect. "The fact of the husband having (whether truly or falsely) charged his wife with adultery will (probably) entitle her to claim a judicial divorce, without prejudice to any proceedings for defamation which she may be advised to institute, and independently of the result of any such proceedings. (Anglo-Muhammadan Law p. 148.")

In my opinion the Muslim Law has not been correctly understood or applied in all these recent cases The Courts have confused mere accusation of adultery with the actual taking of oaths of 'Li'an,' which are quite distinct. And further they only speak of false accusation. False accusation would give rise to proceedings criminal or civil for damages against the husband, and not to judicial divorce, which can only be effected if the parties have sworn in the manner prescribed by the Law. Thus the point is not whether the accusation is true or false, but it resolves itself into a simple question, have the parties sworn in the prescribed manner? Of course if the accusation is proved to be true by ordinary evidence, the wife under the Muslim Law would become liable to receive 'hadd' punishment, but in British India there being no is punishment for conjugal infidelity she escapes punishment, though her paramour criminally liable under section 497 of the Indian Penal Code. Vide a case decided by the Lahore High Court "Muhammad Husain v. Begam Jan" 93 I. C. 1017 (1926), where the criminal complaint under section 497 having failed previously, the Court dissolved the marriage at the wife's instance. For a full discussion vide A dissertation on the Muslim Law of 'Li'an' in the Allahabad Law Journal No. 6 February 13th 1931 by the present author.

FASID MARRIAGE—

44. In case of *fasid* marriages, the moment the factum of prohibition is known the parties must be separated, if unwilling then it is the duty of the Kazi (Court) to cause separation.

In British India, it is obvious, that the Court will pass order as to the validity of marriage, and may cause separation, only when the matter is brought before them in some form, and they will not go out of their way to cause separation in those cases of which they have no judicial notice.

JACTIATION OF MARRIAGE—

45. A suit for jactiation of marriage for declaration that the defendant is not as alleged the wife or the husband of the plaintiff will lie in Courts in British India.[2]

HUSBAND'S REFUSAL OF ISLAM—

46. According to the Muslim Law if a married woman whether she be an infidel or a follower of a divine faith accepts Islam as her faith,[3] then the *Kazi* should offer Islam to her husband, and if he refuses the parties are to be separated. If the husband accepts Islam, then the marriage tie continues to subsist, unless it was contracted within the prohibited degrees, in which case the parties must be separated.[4]

If the married parties are members of a divine faith and happen to be minors, and the girl becomes a Muslim, then the Kazi (Court) will not effect separation between them, until the boy is of an age to understand Islam. Then he shall be offered Islam, and if he refuses, the Kazi shall effect separation.

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1 Vide Sec. 4.

2 "Mir Azmat Ali v. Mahmud-un-nissa" 20 All. 96 (1898).

3 Converts to Islam must be presumed to be governed by the Muslim Law. Vide "Advocate General v. Jimbabai" 41 Bom. 181.

In case of a Hindu convert the presumption is that he has renounced the Hindu Law, vide "Bai Machh Bai v. Hir Bai" 35 Bom. 264 but the presumption may be weakened, vide "Najim uddin v. Abdul Hamid" Lah. 175 (1923).

4 In all the following cases the woman had not followed the correct procedure of giving notice through Court to her husband to accept Islam and to have the marriage dissolved; the Courts have pointed out that if such a procedure had been adopted,

It seems in British India, if a married woman on accepting Islam does not obtain a decree of dissolution of her previous marriage, and marries subsequently with another person, then her marriage is void and her children are illegitimate,[1] and she would be guilty of bigamy.

WIFE'S REFUSAL OF ISLAM—

47. If the married parties were *mushrik* and the husband is converted to the Muslim faith, then Islam should be offered to the woman, and if she refuses, then separation is to be caused between them.

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then separation would have been decreed in the ordinary course. The decisions are somewhat ambiguous inasmuch as they are not on the point directly. Ram Kumari, 18 Cal. 264 (1891) appears to be a fair judgment but is a case of bigamy, vide also Budamsa Rowther v. Fatema Bibi 26 Mad. L. J. 260 (1914) in this case the point arose in an indirect manner. A Hindu woman married to a Hindu became a convert to Islam, and married a Muslim and a daughter was born to them. The daughter claimed a share in her paternal grandfather's property. Held that she was illegitimate, and could not inherit inasmuch as her mother's marriage was not proper. Vide also Maktabunnissa v. Rifaqatullah 85 I. C. 459 All. (1924) where the view taken in Ram Kumari case was approved. Again in Sundari Letani v. Pitambarin 32 Cal. 871 (1905). The point came up in an indirect manner. A Hindu married woman embraced Islam and married a Muslim and had sons. She herself sought to inherit from her own father, held that as her sons were illegitimate, she was in a position of an unchaste daughter, and was thus disqualified from inheriting her father's property.

It raises a very difficult question as to the effect of conversion of a married Hindu woman, for strictly speaking under the Hindu Law there is no divorce. It is submitted that the Muslim Law which becomes the personal of the converts should prevail. In Rahmed Bibi v. Rokeya Bibi, 1. Norton's leading cases on Hindu Law p. 12 the mere fact of conversion was taken to dissolve the previous marriage.

Under the Muslim Law if the married parties were 'zimmis' residing in a Muslim territory, then on their both embracing Islam, the proper dower would become due to the woman.

1 "Liaqat Ali v. Karimunnissa" 15 All. 396 (1893).

In "Mohammad Shafiqullah v. Nuhullah" 88 I. C. 954 All. (1925); 23 A. L. J. R. 917 (1925) where a Hindu married woman subsequently married a Muslim and her children were held to be illegitimate.

Such a woman herself cannot inherit from her ancestral property vide 26 Mad. L. J. 260 and 32 Cal. 871 cited above.

If the married parties belong to a divine faith and the husband becomes a Muslim, then the marriage tie subsists, and is not dissolved inasmuch as a Muslim is permitted to marry an *ahl-i-kitab*.

Such a separation is a cancellation of marriage and is not divorce, so the parties may remarry again on the wife subsequently accepting Islam.

§ 6. SPECIAL CASES OF DIVORCE

APOSTACY—

48. When either the husband or the wife[1] apostatises from Islam and becomes a *mushrik*, then the marriage tie is dissolved *ipso facto* immediately and separation takes place between the parties,[1] and no judicial divorce is necessary.

If both the husband and wife become apostate simultaneously, [2] then separation is not caused between them *ipso facto* according to the doctrine of *istehsan*, that is if both of them again become Muslim the marriage tie will subsist.

If a Muslim married woman abjures Islam for a scriptural faith, then according to some jurists by her renunciation of the Muslim faith, the marriage tie is dissolved; but according to others the

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1 It is observed by the jurists that if the woman has apostatised she will be compelled to become a Muslim, and renew the marriage on a small dower, unless the husband repudiates the wife by a triple divorce, vide also the Egyptian (Code of Mohammedan Personal Law by Kadri Pasha translated by Wasey Sterry and N. Abcarius Ch. IV section 304).

That the apostacy of either party dissolves the marriage was affirmed in Ghaus v. Faggi 29 I. C. 857 Lah. (1915) vide also Imamdin v. Hasan Bibi Punj. Rec. 309 (1906). In Bakho v. Lal 71 I. C. 830 Lah (1922) the wife had become a Christian.

Vide also 132 P. R. (1884), 61 P. R. (1899) and "Sona-ullah v. Makin" 46 I C. 719.

2 In Zuberdust Khan 2 N. W. 70 (1870) both the spouses had become Christians without remarrying. In British India the parties may contract a fresh marriage under the Christian Marriage Act XV of 1872, or under the special Marriage Act III of 1872.

marriage tie is not dissolved, inasmuch as marriage is permitted between a male Muslim and a woman of a scriptural faith.[1]

However if the husband apostatises from Islam, then there is a consensus of opinion that the marriage tie is dissolved immediately.

If apostacy has taken place after consummation, the wife is entitled to her dower, but if consummation is not taken place, and it is the husband who apostatises, then he shall pay her half the dower, and if the wife has changed her religion, then no dower is due to her.

The separation on the ground of apostacy is a cancellation and not a divorce, and it is a temporary prohibition, that is, if the apostate returns to Islam, he may validly renew the marriage immediately.

If the husband has changed his religion whether in *marz-ul-maut* or not, and dies during the *iddat*, the Muslim wife is entitled to inherit from him, and if the wife has renounced Islam in *marz-ul-maut* and dies during *iddat*, then the Muslim husband will inherit from her; but if she changed her religion in good health, the husband will not inherit from her.

ILA—

49. *Ila* form of divorce takes place when a man swears that he will not have sexual intercourse with his wife for a period of four months or more (but not less), and if he accordingly abstains himself from sexual intercourse, then one irreversible divorce takes place.

According to *Imam Shafi* after the termination of the fixed period (of four months), a judicial decree is essential to confirm the *Ila* separation, but under the Hanafi Law the order of the Court is not necessary.

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1 Amir Ali (Mohommedan Law Vol. 11, p. 384) advocates this view and refers to the jurists of Bokhara and Samarkand as authority But the Allahabad High Court has expressly dissented from this view in "Amin Beg v. Saman," 33 All. 90, (1910) But there is a difference in the wife's conversion to a divine faith, and becoming a 'Mushrik' in the latter case the marriage is dissolved instantly.

By the husband accepting Ahmadiya faith a person does not become an apostate, and if the wife marries, she will be guilty of bigamy "Naranta Kath Avullah v, Parakkal Mammu" (1923) Mad, 171.

Ila may be rescinded by cohabitation, but the husband must make proper atonement for the oath.[1] *Imam Shafi'i* holds that *Ila* cannot be rescinded except by sexual intercourse, but according to the *Hanafi* Law if the wife were at a distance or sick so as to be unfit for sexual intercourse, then the husband may rescind *Ila* by express declaration. *Ila* may be made with respect to a wife under *rajai* revocable divorce, and also during her *iddat* but on termination of *iddat Ila* will also terminate. There is no *Ila* in case of a wife under irrevocable divorce.

According to Imam Muhammad but not Abu Yusuf it seems, that *Ila* may be made subject to a condition, a penalty annexed.[2]

ZIHAR—

50. *Zihar* separation takes place, when the husband compares his wife to one of his own female relations within the prohibited degree, whether by consanguinity affinity or fosterage.

Zihar amounts to a temporary prohibition without dissolving the marriage contract, and it continues so till the performance of expiation, viz. (*a*) manumission of a slave (*b*) or fasting for two months (*c*) or distribution of *fitr* alms, (feeding sixty poor persons).

The wife is entitled to prevent her husband from enforcing conjugal rights, unless he has made proper atonement for ***zihar.*** She is entitled to file a suit demanding from her husband expiation for ***zihar,*** and the Court may order and may even imprison the husband to make him expiate or to divorce the woman. However if the parties have actually cohabited then the atonement drops, but it is considered sinful to avoid expiation.

Zihar declaration may be conditional, if so, it will take place on the happening of the event.

According to the *Shia* Law *mut'a* form of marriage which admits strictly speaking of no form of divorce could be dissolved only by a ***zihar*** declaration.

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1 Manumission of a slave or clothing or feeding ten poor persons.

2 e.g. "I vow not to cohabit with you at all, unless I free this slave".

DIVORCE IN DEATH ILLNESS*—

51. *Marz-ul-maut,* death illness,[1] is a malady of a kind that it is highly probable will end fatally and it actually so ends.[2] And under Anglo-Muhammadan Law there must be probable and immediate apprehension of death in the mind of the person suffering from the illness.[3]

The factum of death illness must be established by some external indicia *viz.* inability to attend to necessary avocation.

A person who divorces his wife in death illness is deemed to be an evader *faar,* and is suspected of a design to defraud his wife of her share in the inheritance.

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* If a person marries in death illness then he is not allowed to fix more than the proper dower.

1 The lame the paralytic and the consumptive if chronic, and in short any person suffering from long continuous illness for a year or so are not in a state of marz-ul-maut for there is no immediate and approximate apprehension of death in these cases. But in some cases, paralysis or consumption may be good cases of marz-ul-maut.

2 The following cases my be noted as to what is marz-ul-maut.

Long standing trouble of Asthma is not a case of Marz-ul-maut vide "Labbi Bibi v. Bibbun Bibi" (1874) 4 N. W. P. H. C. 159: "Hassrat Bibi v. Goolam Jaffar" 3 C. W. N. 57 (1898).

A long lingering disease is not death illness vide "Muhammad Gulshere Khan v. Moriam Begum' 3 All. 731 (1881).

Albaminuria for longer than a year is no marz-ul-maut vide "Fatima Bibi v. Ahmad Baksh" 37 Cal. 271 (1907) P. C.

A bursting of a blood vessel is not marz-ul-maut vide "Ibrahim Goolam Ariff v. Saiboo" 34 I. A. 167 P. C. 30 Cal. 1.

Paralysis is not death illness vide "Sarabai v. Raibai" 30 Bom. 537 (1906). where the Law has been discussed fully.

Whether rapid comsumption is marz-ul-maut for the affirmative vide "Rashid v. Sherbano" 31 Bom 264 (1907), "Fazl Ahmed v. Rahim Bibi" 40 All. 238. For the negative vide, "Jangira v. Mohammad" 49 Cal. 477 (1922).

The actual pains of child birth are considered as marz-ul-maut "Shams-ul-Hasan v. Syed Hasan" 71 I. C. 296 (All. 1922).

3 Mr. Abdur Rahim (Muhammadan Jurisprudence p. 256) observes that as regards "a subjective apprehension on the part of the patient himself cannot, it is submitted, be decisive of the inquiry and is hardly of much importance" and he questions the following rulings as they lay stress on the subjective apprehension of death (31 Cal. 319, 37 Cal. 271, and 35 Cal. 1.

If a sick man pronounces revocable or irrevocable divorce, it is valid, but if he dies before the expiration of the *iddat*, then the widow would be entitled to inherit from him, on the other hand if the woman were to die before her husband, he is not entitled to inherit from her, for he has forfeited his right, since he himself manifestly desired so by repudiating his wife in illness.

However if the sick person after pronouncing irrevocable divorce recovers his health, but again happens to die of another disease during the period of his divorced wife's *iddat*, then wife would not be entitled to inherit from him.

Under the *Shafi'i* Law the wife is not entitled to inherit just as the husband is not entitled to inherit from her.

The wife is also entitled to inherit, if the husband makes *Ila* or *Li'an* while in *marz-ul-maut*.

But the wife will not inherit from the husband, if she herself asks her sick husband to irrevocably divorce her, or she obtains a *khula* divorce, or she exercises the option of puberty or obtains divorce by reason of her husband's impotency.

If the wife abandons Islam during her death illness and becomes a *mushrik*, and dies during the period of *iddat*, nevertheless her husband would be entitled to inherit from her.

Under the *Shi'a* Law the rule is the same as the *Hanafi* Law.[1]

PERIL OF DEATH—

52. A person in an imminent danger, peril of death is also governed by the same rules as the sick person.[2]

IDDAT—[3]

53. *Iddat* is a waiting period, which a woman on widowhood or divorce must observe, for the widow it is four months and ten days, for the divorced woman it lasts for three courses (and if

1 In "Khurshed Hussain v. Faiyaz Hussain" 36 All. 289 (1914) it was laid down that the Shi'a Law is the same as the Sunni Law, though these appears to be some difference of opinion in the original Shi'a authorities.

2 A person on board a ship in a storm, in an imminent danger of ship wreck, a criminal sentenced to death on way to execution, a person actually engaged in battle, but a person in the army or in a besieged town is deemed not to be in peril of death.

3 Vide also Sec. 4 p. 8.

she does not menstruate the period is three lunar months) and for the pregnant woman it ends with delivery.[1]

It is incumbent whether separation takes place due to irrevocable or revocable repudiations or is effected in consequence of a judicial decree, or after *khilwat-us-sahih* valid retirement, in the case of *sahih* marriage. In a *fasid* marriage *iddat* commences on the separation of the parties. There is no *iddat* in a void *batil* marriage, or for a woman repudiated before consummation and where there has been no valid retirement.

The obligatory *iddat* commences immediately on widowhood[2] or divorce, therefore according to some jurists it is possible for the woman to keep *iddat* in ignorance of the fact of widowhood or divorce as the case may be. However the better view is that *iddat* commences from the time the fact of divorce or widowhood is publicly made known, or comes within the knowledge of the woman herself.

A wife observing *iddat* is entitled to maintenance and in case of revocable divorce during the period of *iddat*, the parties retain the right of inheritance *inter se*. A husband has the right to revoke revocable divorce before the termination of *iddat*. According to the *Hanafi* Law the husband's right to revoke divorce ceases on the tenth day of her last menstrual period.

If the husband of a wife revocably divorced dies before the expiration of *iddat*, then the woman must begin again the *iddat* prescribed for widowhood.[2] It is immaterial whether the husband had repudiated in death illness or in a state of sound health.

But in the case of irrevocable divorce, if the husband were to die during wife's *iddat*, she will have to observe the longest period of the two *iddats* that is, four months and ten days only.

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1 According to "Ilahia v. Imam in" P R. 29 (1909) p. 77 Iddat of a pregnant widow continues for 4 months and 10 days even if a child is born within this period. But Iddat of a pregnant divorced woman terminates on miscarriage "Mohon Molla v. Baru Bibi" 64 I. C. 704 (Cal. 1922).

2 In "Jainan v Rulia" 25 I. C. 43 Punj. (1912) the Court remarked that a child widow is to observe iddat of widowhood as a mark of respect for the deceased husband.

The widow or divorced woman should pass the period of *iddat* in her husband's residence, except in cases of necessity.[1]

Iddat while it lasts is an impediment to marriage.[2]

The deferred dower becomes payable on the termination of the *period of iddat.*

RAJAT-REVOCATION OF DIVORCE—

54. The husband is entitled to revoke the revocable[3] divorce of the *Ahsan* and the *Hasan* mode pronounced by himself before the termination of the period of *iddat*, without it being necessary for him to make a new contract or fix a new dower. And according to the jurists the right of revocation may be exercised without the consent or even knowledge of the wife. But it is desirable that the husband should inform her, and should declare so before two witnesses that he has done so, but the presence of the witnesses is not an essential condition. The revocation would be impliedly deemed valid by the conduct and act of the husband. Under the *Shafi-i* Law divorce must be revoked in presence of witnesses by express declaration.

The return of the woman does not destroy anterior repudiations, that is if after being repudiated previously twice the wife after return is repudiated once more, it would dissolve the marriage tie immediately and divorce would become irrevocable.

There is no right of revocation in the case of a *Talaq-i-Biddat* wife divorced thrice or whose marriage was not consummated.

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1 The woman may keep iddat where she happens to be residing vide "Usmanbhai Samadbhai v. Bai Sakina" 100 I. C. 1021 (Bom. 1926).

2 In "Jhandu v. Husain Bibi" 73 I. C. 590 (Lah. 1923) the Court refused restitution of conjugal rights to the husband since the wife was married during her iddat, the marriage being illegal.

3 "Syed Muzuffur v. Kumurunnissa" W. R. Sup. Vol. 32 (1864) where it is pointed out that in the case of Ahsan and Hasan modes of divorce, the husband may take the wife at any time before the expiration of her 'iddat,' but not after, vide also, "Ibrahim v. Syed Bibi" 12 Mad. 63 (1888), "Amiruddin v. Khatun Bibi" 39 All. 371, 15 A. L. J. R. 272, where the Court held that revocation is not permissible except in the case of Rajai repudiations, there is no revocation in the case of divorce pronounced thrice.

CHAPTER IV

PARENTAGE AND ACKNOWLEDGMENT

§ 1. PATERNITY AND MATERNITY—

55. Paternity and maternity are legal relations between the father and child and between the mother and child respectively.

Under the *Hanafi* Law the paternity of the child is established in the father, if the child is born at least six months after the celebration of a *sahih* marriage, and in the case of a *fasid* marriage the period of six months is reckoned from after the consummation of marriage.

The maternity of the child is always established, in the mother, by the simple fact of the birth of the child, that is, under the *Hanafi* Law, the child will always inherit from his mother whether lawfully married or not.[1]

Under the *Shi'a* Law, a child to be legitimate must be born six months after the consummation of a *sahih* marriage. Maternity is not established unless the mother is lawfully married.[2]

According to the *Hanafi* Law the natural period of gestation is from nine to ten months. And this is the rule of *Shi'a* Law also.

SECTION 112 OF THE EVIDENCE ACT—

56. According to the Indian Evidence Act a child is considered to be legitimate if born at any time (even after a day) during the continuance of a valid marriage, unless it is established that the husband and wife had no access to each other at any time, when the child could have been begotten.

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1 "Bafatun v. Bilaiti Khanum" 30 Cal. 683 (1903).

2 An illegitimate child however is prohibited from intermarrying his natural mother, and if a girl she cannot marry her real begetter.

And according to section 112 of the Evidence Act, for conclusive presumption, the period of gestation after the dissolution of marriage is 280 days, to render the child legitimate.

According to the *Hanafi* Law the child must be born within two years after dissolution or divorce in order to render it legitimate, provided the woman has declared herself to be pregnant during and before termination of her *iddat*, for if after her declaration the woman were to exceed the natural period of gestation she is entitled to the benefit of the maximum two years rule fixed by the *Hanafi* jurists, to cover abnormal cases. [1]

Thus section 112 of the Indian Evidence Act is in direct conflict with the Muslim Law, and it is submitted that the Muslim Law should prevail.[2] The decisions of the Courts in British India are conflicting.[3]

DISCLAIMER BY LI'AN—

57. The paternity of the child is also disclaimed by the procedure of *Li'an*, whereby the spouses are called upon to take the oaths, and

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1 If a child is born after 280 day's (say on the 290th day) then under the Evidence Act it is a question of fact for the Court to determine whether it is illegitimate under section 112, but under the 'Hanafi' Law such a child is undoubtedly legitimate.

According to the Code Napoleon the maximum period of gestation is 300 days. Some authorities consider 44 weeks that is 308 days and even 315 to 322 days as the possible limit. (Vide Taylor's Medical jurisprudence p. 60. Dr. Lyon's Medical Jurisprudence p. 277.)

2 This topic has been fully discussed in "A dissertation on the Muslim Law of Legitimacy and section 112 of the Indian Evidence Act" by the present author.

3 In Indian Cases Vol. 43, p. 883 (1917) the Judicial Commissioner of Nagpur held that section 112 of the Evidence Act was inapplicable to Muhammadans.

In "Sibt Muhammad v. Muhammad Hameed" 48 All. 625 (1926). The Allahabad High Court held that "on a question whether a Muhammadan child born within six months of the marriage of his parents was to be considered legitimate section 112 of the Indian Evidence Act 1872 applied and the child was legitimate."

It has also been held in the Punjab that section 112 applies to the Muslims "Nur-ul-Hasan v. Muhammad Hasan" 7 I. C. 1022 (1910).

According to the Lucknow Chief Court section 112 of the Evidence Act does not apply to 'fasid' marriages "Musammat Kaniza v. Hasan Ahmad" Indian Law Reports Lucknow Vol. 1 p. 71 (1926) 92 I. C. 82. (Oudh 1925).

In "Muhammad Allahdad v. Muhammad Ismail" 10 All. 289 (1888) Mahmood J was unwilling to answer the question whether section 112 of the Evidence Act should be deemed to supersede the Muslim Law? In "Fatteh Din v. Umrao" 82 I. C. 592 All (1923) the rules of Muslim Law of paternity were accepted.

if they do not take the oaths, the child is considered to be legitimate.

And if the husband retracts his accusation of adultery imputed to the wife, at any time before or after judicial separation, the child would be considered to be legitimate.

The paternity of the child must be denied at the time of its birth, or when the information about the birth of the child is brought to him. As regards the duration within which the paternity should be disclaimed, regard should be had to custom and local usage. The denial cannot take place after a formal or implied acknowledgment by the husband.

The relation of maternity established by the birth of the child cannot be disclaimed at all. Under the *Shi'a* Law a child disclaimed by *Li'an* is considered as related to his mother and her relations.

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§ 2. THE DOCTRINE OF ACKNOWLEDGMENT

IQRAR—ACKNOWLEDGMENT* —

58. (*i*) A man may acknowledge another as his child subject to the following conditions.

(*a*) The acknowledgee must be of such an age to admit the possibility of the relation of father and child to one another. That is there must be a reasonable difference in age to establish paternity.

(*b*) The acknowledgee must be of an unknown descent, that is a man cannot acknowledge a child whose birth is known, and whose paternity is thereby already established.

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1 Imam Aby Yusuf and Imam Muhammad have fixed 40 days as the maximum period for disclaiming paternity, and if the husband is present at the time of the birth of the child, then some of the 'Hanafi' jurists only allow a week's time, and the 'Maliki' jurists allow only two days. The Shi'a jurists allow 10 days.

* There is no doubt that the Muslim Law of acknowledgment is an integral part of the Muslim Family Law vide Muhammad Allahdad's case 10 All. 289 and Imambandi v. Mustaddi 45 I. A. 73 (1918).

(*c*) The acknowledgee, if he is of sufficient age to understand the transaction must consent to the fact of acknowledgment.

According to the view taken by the Privy Council a mere casual acknowledgment of paternity does not confer the status of legitimacy.[1]

Under certain circumstances acknowledgment may be presumed from the fact of a person treating another as his son habitually.[2]

An acknowledgment lawfully effected cannot subsequently be revoked.[3]

The fact of acknowledgment confers on the child the status of a lawful heir, and the right to participate with the other heirs in the inheritance of the father and of the grandfather, even if the latter himself and other heirs refuse to admit the filiation of the child.

The mother of the acknowledged child is also entitled to her lawful share in the inheritance.

(*ii*) Subject to the above conditions a woman who is not married at the time, nor observing *iddat* is entitled to acknowledge a child, and thereby the mother and child are entitled to inherit from one another. But a married woman or one observing *iddat* can only acknowledge with the express ratification of her husband.

(*iii*) Subject to the above conditions a child of either sex whose birth is unknown, is competent to acknowledge a man as his father or a woman as his mother, and such an acknowledgment would create the legal relations of paternity and maternity provided the person concerned has given his or her consent.

(*iv*) A declaration of acknowledgment made by a brother in respect of another person as his own brother is not binding on other heirs,

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1 In Khajah Hedayat v. Rai Jan 3 Moo. I. A. 295 (1844) it was proved that cohabitation with a woman was a continual one as man and wife and having that repute and a child born was treated as legitimate. These facts are sufficient to raise a presumption of marriage and acknowledgment.

2 Vide Muhammad Azmat v Ladli Begum 8 Cal. 422 9 I. A. 8

3 Vide Ashruf-ood-dowlah 11 Moo. I A. 94,

but it will be binding on him only. The brother thus acknowledged is entitled to half of the share of the brother who acknowledged him, in the inheritance of his father.

WALAD-UZ-ZINA—

59. It is not permissible to acknowledge a *walad-uz-zina* child born of illicit connection whether incest, fornication, whreodom or adultery or a child whose mother's marriage as alleged has been disproved. An illegitimate child cannot be made legitimate by the fact of acknowledgment or subsequent marriage. Acknowledgment is merely a declaration of legitimacy, and it is distinct from legitimation *per subsequens matrimonium* as found in other systems of Jurisprudence.[1]

1 Some of the old decisions of the Courts are based on the rule legitimation per subsequens matrimonium which is contarary to the Muslim Law, and it has been held that a child born out of wedlock if acknowledged acquires legitimacy. "Bibi Naujeeboonissa v. Bibi Zameerun" (1869) 11 W. R. 426; that acknowledgment is sufficient even if there be no evidence of lawful 'nikah', Bibi Wuheedun v. Syed Wusee Hossein (1871) 15 W. R. 403. The Privy Council erroneously has repeatedly held that an illegitimate child could be acknowledged and thus acquire the status of legitimacy. "Ashrufood Dowalah v. Hyder Hossein" 11 Moo. I. A. 94. "Nawab M. Azmat Ali v. Musammat Ladli Begum" (1881) 9 I. A. 8; 8 Cal. 422. "Abdool Razak v. Aga Mahomed" (1894) 21 I. A. 56; 21 Cal. 666. In "Sadakat Hossein v. Syed Mahomed Yusoof" 11 I. A. 31 (1883); 10 Cal. 663. The Privy Council hesitated to express the old view.

However the correct Muslim Law has been laid down in "Muhammad Allahdad Khan v. Mahomed Ismail Khan" (1888) 10 All. 289, and this view was practically accepted by the Privy Council in "Sadik Husain Khan v. Hashim Ali Khan" (1916) 43 I. A. 212 and finally in "Syed Habibur Rahman v. Syed Altaf Ali" 19 A. L. J. R. 414 (1921); The Privy Council observed, "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 Mohammadan Law examples of it may be found in other systems. The adoption of the Roman and the Hindu Law effected legitimacy. The same was done under the Canon Law and the Scotch Law in respect of what is known as legitimation 'per subsequens matrimonium'. By the Mohammadan Law a son to be legitimate must be the offspring of a man and his wife.....any other offspring is the offspring of zina that is illicit connection and cannot be legitimate. The term wife necessarily connotes marriage; but as marriage may be constituted without any ceremonial, the existence of marriage in any particular case may be an open question. Direct proof may be available, but if there be no such proof indirect proof may suffice. Now one of the ways of indirect proof is by an acknowledgment of legitimacy in favour of a son, ...It must not be impossible upon the face of it, i.e. it must not be made when the

PRESUMPTION REBUTTABLE—

60. The evidential value of acknowledgment is that it raises a presumption of valid marriage, and if not set aside by contrary proof, the marriage will be held proved, and legitimacy would thereby be established, and the claimant would be absolutely entitled to claim his share in the inheritance.

The presumption from acknowledgment only operates when direct proof of ***nikah*** is not available at all, this presumption can be rebutted by proof that the marriage was under the circumstances void.[1]

There are some other grounds also, to rebut the presumption of acknowledgement.

(*a*) The acknowledgee may disclaim the fact of acknowledgment, the child being of sufficient age to understand the transaction.

(*b*) Proof that the acknowledgee is the child of a particular person.

(*c*) That the difference in the respective ages of the acknowledgor and the acknowledgee is such as would render the relationship physically impossible.

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ages are such that it is impossible in nature for the acknowledgor to be the father of the acknowledgee, or when the mother spoken to in an acknowledgment, being the wife of another, or within prohibited degrees of the acknowledgor, it would be apparent that the issue would be the issue of adultery or incest. The acknowledgment may be repudiated by the acknowledgee. But if none of these objections occur then the acknowledgment has more than a mere evidential value. It raises a presumption of marriage, a presumption which may be taken advantage of either by a wife claimant or a son claimant. Being however a presumption of fact and not 'juris et dejure' it is, like every presumption of fact capable of being set aside by contrary proof.....'

This view has been reaffirmed by the Privy Council in Mohabbat Ali Khan v. Muhammad Ibrahim Khan (1929) A. L. J. R. 465

1 In Liaqat Ali v. Karimunnissa 15 All. 396 (1896) it was ascertained that the mother of the acknowledgee was the undivorced wife of another person at the time she married the acknowledgor. Held following Muhammad Allahdad's case 10 All. 239 that the defect could not be remedied by the acknowledgment of legitimacy. The same Law was adopted in Dhan Bibi v. Lalon Bibi 27 Cal. 801 (1900) which is a case of the child being the result of fornication—walad-uz-zina. This view was followed by the Bombay High Court in Mardan Sahib 34 Bom. 111 (1909).

In Mohammad Shafiqullah v. Nuhullah 88 I. C. 954 (All. 1925) it was ascertained that the Hindu Woman married was the wife of another at time of marriage and hence the 'nikah' was void 'ab initio.'

CHAPTER V

GUARDIANSHIP

61. According to the Muslim Law the lawful guardian is a person having the care of a minor and his property and empowered to contract the minor in marriage.

There are three kinds of guardianships.

(*a*) Guardianship for contracting marriage on behalf of a minor or an adult insane person.

(*b*) Guardianship of the person of a minor.

(*c*) Guardianship of the property of the minor.

The rules under the first head would expressly be determined by the rules of the Muslim Law, and the rules under the latter two divisions would be determined partly by the Muslim Law and partly by the Guardians and Wards Act VIII of 1890.

§ 1. MINORITY AND GUARDIANSHIP FOR MARRIAGE

MINORITY.—

An infant is by presumption of Law ***doli incapax*** and is not endowed with discretion. The age of reason for a child of either sex is full seven years. The right of ***hizanat*** custody of the boy ceases at this age. The girl is considered to be adolescent at the age of nine years, and the right of ***hizanat*** custody ceases for her at that age. The age of adolescence for the boy is fixed at twelve years.[1]

For the purpose of marriage the term minority means physical immaturity, and in default of evidence as to attainment of puberty, under the Muslim Law, a minor is deemed to have attained puberty on the completion of his or her fifteenth year.[2]

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1 The minor even if adolescent cannot effect divorce.

2 Vide Atkia Begum v. Muhammad Ibrahim (1916) 36 J. C. 20 P. C, Yusuf v. Mt. Zainab 1923 Lah, 102.

Thus under the Muslim Law it is open to the parties to terminate their own minority,[1] and a boy on attaining puberty can choose between his father and mother and can even elect to live separated, but a virgin girl (on attaining puberty) but not a woman advanced in years, must continue to remain under the guardianship of her father or paternal grandfather. A girl who has attained puberty cannot be married without her consent.[2]

However the guardianship of property of either sex may continue till the ward is considered fit to manage the property.

ACT X OF 1891—ACT XIX OF 1929—

63 (i) According to the Age of Consent Act X of 1891. No evidence of actual puberty will terminate a girl's minority until she has completed her twelfth year.

(ii) Under the Child Marriage Restraint Act XIX of 1929, the "Child Marriage" is made penal[3] and the term child means a person who, if a male, is under eighteen years of age, and if a female is under fourteen years of age.[4]

JABR—GUARDIANSHIP FOR MARRIAGE—

64. The *wali* guardian must be adult and sane. The guardians who can lawfully contract the marriage of minors are those who are residuaries in their own right and the nearer excludes the more remote.

1 Under the Muslim Law, puberty and majority are one and the same and the Indian Majority Act 1875. does not apply to matters relating to marriage dower and divorce, but as regards other matters guardianship of person and property Muslims will apparently be governed by the Majority Act, thus in case of wills gifts, waqfs, minority well terminate on completion of the eighteenth year, and in case of a minor who is under the Court of Wards the age of majority will terminate on his completion of twenty one years of age.

2 Her consent is essential vide Asgar Ali v. Muhabbat Ali 22 W. R. 403 (1874). A minor of either sex before attaining puberty cannot choose between his or her father.

3 Section 3—A male above 18 and under 21 is punishable with fine up to Rs. 1000. Section 4—A male above 21 is punishable with simple imprisonment up to one month or with fine up to Rs. 1000. Sections 5 and 6—Persons interested on child marriage are punishable with simple imprisonment up to one month or with fine up to Rs. 1000 or with both.

4 Vide Section 2.

(*i*) The following is the fixed order of the guardians[1] who can contract marriage on behalf of the minor (1) The father[2] (2) in the absence of a father the father's father how high so ever, (3) failing these and subject to the option of repudiation it falls upon the full brother, (4) then on the half brother on the father's side, (5) the son of the brother of the full blood, (6) the son of the brother of the half blood on the father's side, (7) the paternal uncle of the full blood, (8) the paternal uncle of the half blood, on the father's side, (9) the son of the paternal uncle of the full blood, (10) the son of the paternal uncle of the half blood on the father's side.

(*ii*) An insane person cannot personally contract marriage,[3] but a marriage may be contracted on behalf of a lunatic by his or her lawful guardian.

In the case of the marriage of an insane woman, it is the right of the son to give her in marriage, this is the view of Imam Abu Hanifa and Imam Abu Yusuf, but Imam Muhammad considers that the father of the insane woman is the fit and proper person.

A female lunatic married by her father or father's father h. h. s. or by her son or son's son, h. l. s. is bound irrevocably, but if she was married by any other relative she has an option on recovering, her intellectual faculties.

(*iii*) In the absence of residuaries in their own right, the right of guardianship devolves thus :

First of all the mother is entiled to contract marriage on behalf of her minor child of either sex, (2) thereafter failing her the paternal grandmother, (3) the maternal grandfather, (4) the sister of

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1 In the strict order of residuaries in their own right the son, then son's son, come first in order of preference, but in the case of a minor girl or boy it is obvious that he or she cannot have a son, therefore the father is the fit and proper person to contract marriage on his or her behalf.

2 In Shahul v. Allah Bachayo (Sindh 1915) 34. I. C. 504.* The Court held the father who was profligate, and had abused his right was unfit to act as the guardian for his minor daughter aged 10 years.

3 A male lunatic on recovering his reasons can validly effect divorce.

full bolod, (5) the sister of half blood on the father's side, (5) the uterine brother and sister and to the descendants of each class, (6) then the paternal aunt, (7) the maternal uncle, (8) the maternal aunt, (9) the daughters of the paternal uncles (cousins) and their descendants, and other distant kindred.

In the case of the marriage of an insane person the following guardians will come before the maternal grandfather no. (3), *viz.*, (*a*) the daughter, (*b*) the son's daughter, (*c*) the daughter's daughter, (*d*) the daughter of the son's son, (*e*) the daughter of the daughter's daughter.

(*iv*) In case there were no such guardians, then under the Muslim Law the *Sultan* is the lawful guardian and after him the *Kazi* duly authorised.

(*v*) If the nearest guardian refuses permission to sanction a minor's marriage, the one more remote has no right to sanction it. But if the *Kazi* is of opinion that the refusal was improper and the husband was equal to the wife and the dower was sufficient, he may sanction it.

If for some proper reason the lawful nearest guardian is unable to act, then the guardian next in order, is permitted to act *e.g.* When the proper guardian is at a distance "out of the tract of *caravans* or if the place is not visited by a *caravan* more than once a year."

TESTAMENTARY GUARDIAN—

65. A testamentary guardian has no right to contract a minor in marriage, unless his right arises by virtue of relationship, or he is authorised by the *Kazi* or is himself the *Kazi* duly empowered.[1]

MOTHER AS GUARDIAN—

66. Under Anglo-Muhammadan Law, it seems, that the mother or the grandmother may in special circumstances lawfully contract

1 Even in those cases where the minor is under a District Court or a Court of Wards, it seems the guardian for marriage is competent to make a choice, subject to the Court's sanction, vide Monijan Bibi v. District Judge Birbhum (1914) 42 Cal. 351.

marriage, on behalf of a minor, and it will not be annulled unless proved to be unsuitable.[1]

If the father has become an apostate he loses his right of guardianship for marriage for his minor children, and it seems that under Anglo-Muhammadan Law the mother in such circumstances, may contract marriage for a minor child without his (the father's) consent.

AGREEMENTS IN CONTEMPLATION OF MARRIAGE.—

67. A minor boy or girl, who has been married by their lawful guardians, who have made provisions for their benefits, is entitled to claim fulfilment of any of the terms of the agreement as regards *Kharch-i-pandan*, etc.[2]

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1 In Kaloo v. Gureeboolah (1868). 10 W. R. 12 the Court refused to dissolve the marriage contracted by the mother without the consent of the nearest paternal relation, who was at that time in Jail, vide In the matter of Mohin Bibi (1874) 13 B. L. R. 160 where the father having apostatised from Islam, the mother contracted her minor daughter's marriage, and it was pointed out that a Muslim apostate to Judaism was disqualified from contracting marriage for his minor daughter. But the Act XXI of 1850 provides that no law shall inflict on an apostate from it any "forfeiture of rights or property" and in Muchoo v. Arzoon 5 W. R. 235 (1866), the Calcutta High Court held that a Hindu father is not deprived of the custody of his children on account of his conversion to Christianity. Again in Shamsing v. Santabai (1901) 25 Bom 551, it was held that a Hindu convert to Islam is not disqualified from giving in adoption his son to a Hindu, and in Gul Muhammad v. Must. Wazir Begum 36 Punjab Rec. 191 (1901) a convert from Islam to Christianity successfully competed for the guardianship of property of his own son and daughter. But it should be noted that none of those cases are on the question of guardianship for marriage.

2 In Khwaja Mahomed Khan v. Husaini Begum 37, I. A. 152, 32 All. 410. The Privy Council held "Kharch-i-pandan (betel box expenses) is a personal allowance to a wife fixed before or after marriage.....On Act 25th 1877, the appellant executed an agreement with the respondent's father that in consideration of the respondent's marriage with his son (both being minors at the time). He would pay to the respondent Rs. 500 a month in perpetuity for her betel leaf expenses .....held that the respondent, although no party to the agreement was clearly entitled to proceed in equity to enforce her claim."

Under Anglo-Muhammadan Law a minor on attaining puberty may choose his or her own husband, and thereby may commit breach of a betrothal arranged by the lawful guardian.[1]

REPUDIATION BY GUARDIAN.—

68. The father of a minor cannot validly repudiate the wife of his minor son. And he cannot consent to *khula* separation on behalf of his minor son but he can obtain a *khula* separation for his minor daughter.

MARRIAGE CONTRACTED BY MINOR.—

69. Under the Muslim Law the marriage contracted by a discreet minor becomes valid on being ratified by his or her lawful guardian.

If a discreet minor requires the lawful guardian to contract him or her in marriage to a particular person who is his or her equal, for whom he or she has a liking, the guardian should comply.

§ 2. GUARDIANSHIP OF THE PERSON OF A MINOR

HIZANAT—CUSTODY OF A MINOR—

70. *Hizanat* means the right of guardianship of the person of a minor of tender age.

In *hizanat* the guiding principle is that women have preference over men, and the maternal side is preferred to the paternal side.

The mother if alive, of age, sane, and worthy of confidence, has the right to the custody-*hizanat*, of her child of either sex.

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1 In Imam Din v. Kamal 29 I.C. 750, it was held that in such circumstances the guardian is not liable for damages, but in Ghulam Mahomed v. Mehraj Din 1923 Lah. 679 it was held that compensation under S. 73 of the contract Act for any loss caused to the aggrieved party by the breach thereof may be granted.

However in Abdul Razak v. Mahomed Hussein 42 Bom. 499 it was held that no suit lies to recover damages for breach of mere promise of marriage.

(i) She forfeits her right, by becoming apostate, by marriage to a person not related to the minor within the prohibited degrees, by immorality, and by not taking proper care of the child.[1]

(ii) Thus in the absence or default of the mother the right passes to the mother's mother, or other maternal ancestress,[2] next it passes to the nearest paternal ancestress of the child,[3] then the full sister, the uterine sister, the consanguine sister, the full sister's daughter, the uterine sister's daughter, the maternal aunt of the full maternal aunt of the half blood on the mother's side (uterine), the blood, the maternal aunt of the half blood on the father's side, the daughter of the consanguine sister, the daughter of the brother, the paternal aunt of the full blood, the paternal aunt of the half blood on the mother's side, the paternal aunt of the half blood on the father's side, the maternal and paternal aunts of the mother and the father, in accordance with the established order.

(iii) In the absence or default of all these it passes to the residuaries of the paternal line, in accordance with the order of

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1 That a mother is to have charge of an infant son under the age seven years Futteh Ali v. Fuzeelatunnissa W. R. Sup. Vol. 131 (1864) vide also in the matter of Tayheb Ally 2 Hyde 63 (1864), in the matter of Ameeroonissa 11 W. R. 297 (1869), Idu v. Amiran 8 All. 322.

That the mother is entitled to custody of the children even after divorce vide Zara Bibi v. Abdur Razzak 8 I. C. 618 (Bom. 1910).

On her marriage to a stranger she forfeits the right, and the father is entitled to custody Ulfat Bibi v. Bafati 102 I. C. 103 (All. 1927) vide also Beedhun v. Fuzuloolah 20 W. R. 411 (1873) and Fuseehun v. Kajo (1883) 10 Cal. 15.

In Bhoocha v. Elhai Bux (1885) 11 Cal. 574 a grandmother was preferred as against a paternal uncle. In this case the minor girl was married by uncle to a male minor. The girl therefore had the option of repudiation.

As to the mother's right to custody of a minor married daughter and vide also in the matter of Khatija Bibi (1866) 5 B.L.R. 577, Wazeer Ali v. Kaim Ali (1873) 5 N. W. 196 Nur Kadir v. Zaleikha Bibi (1885) 11 Cal. 619; Korban v. K.E. (1904) 32 Cal. 444. This provision of the Muslim Law is in conflict with s. 19 of the Guardians and Wards Act (1890) which speaks of the husband's right of guardianship. But it may be argued that the girl has option of repudiation and her physical immaturity may also justify the Court in holding the husband as unfit guardian.

As to immorality see Abasi v. Dunne (1879) 1 All. 528. Hazara Bibi v. Suleiman Haji Mohammad 59 I. C. 562 (Lower Burma Chief Court 1920). The Court may make a mandatory order to this effect.

2 i.e. h.h.s.

3 Father's mother, father's mother's mother, Father's Father's mother h.h.s.

succession. That is, it devolves on the father, then on the grandfather, the brother of the full blood, the consanguine brother, the nephew on the father's side, the uncle of the full blood, and the uncle, of the half blood on the father's side.

(iv) In the absence or default of the residuaries the right of custody passes to the distant kindred of prohibited degree, *viz.*, the maternal grandfather, the uterine brother and his son, the paternal uncle of the half blood on the mother's side, the maternal uncle of the whole blood, to the maternal uncle of the half blood on the father's side and to the maternal uncle of the half blood on the mother's side. The paternal or maternal female cousins have the custody of females only and the paternal or maternal male cousins have the custody of males only.

EXPENSES—REMOVAL—

71. The custody expenses are paid by the father, unless the child has sufficient means to meet all expenses.

The mother is not entitled to remuneration in lieu of custody during subsistence of marriage or even in her *iddat* in consequence of a revocable divorce, but in case of irrevocable divorce, or if custody is given to mother while married to another person within the prohibited degree to the child, or she is still unmarried, she would be entitled to claim expenses.

If the father and the child both are without means, and the mother declines to keep the child without payment, then any relation who offers to keep the child gratuitously may do so.[1]

Any guardian other than the mother is always entitled to necessary expenses, and the guardian is not entitled to remove the child from the place of custody without the permission of the father, but the mother may remove the child to her native place (where her *nikah* was made) without express permission of the father. However during custody the father himself cannot remove the child out of the place, without the consent of the mother.

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1 But if the father or child has the means no gratuituos offer to keep the child in opposition to the mother who insists on payment can be accepted.

TERMINATION OF HIZANAT—

72. (i) *Hizanat* ceases in respect of a child when it attains the age of seven years if a boy, and at nine years if a girl. Thereafter the father[1] is entitled to take the child, and under the Muslim Law if he does not do so, he may be compelled to take the child out of custody. Next to the father the executor appointed by the father's will is entitled to take charge of the minor. If the father or grandfather are dead the child is given to the nearest residuary, but a girl is only handed to a relation within the prohibited degree.

The mother is always entitled to visit and see the child.

(ii) Under the Shi'a Law *hizanat* of a boy belongs to the mother, until he is weaned (two years), and of her female child until completion of the seventh[2] year. After the mother the right devolves on the father ;[3] in his default it passes to the maternal grandmother, and other ascendants.

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§ 3. GUARDIANSHIP OF THE PROPERTY OF A MINOR

73. The lawful guardians of a minor's property are the following :[4]

1. The father of the minor.

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1 As to the father's right to take charge of such minors, vide Idu v. Amirun (1886) 8 All. 322, and in the matter of Ameeroonissa (1869) 11 W. R. 207. But the father should not abuse his right e.g. by marrying his daughter aged 10 years to an infant aged one year, vide Shahul v. Allah Bachayo 34 I. C. 504 (Sindh 1915). In this case the marriage was declared invalid.

2 In the matter Hosseinl Begum 7 Cal. 434 (1881) a Shia widow was awarded the custody of a girl aged six and a boy aged four as against the executors of the husband.

3 The custody of a female child rests with the mother upto the 7th year vide Raj Begum v. Reza Hossein 2 W. R. 76 (1865).

In Lardi Begum v. Mahomed Amir Khan (1887) 14 Cal. 615, a Shia father was given the custody of a boy of eleven years age and a girl of seven years age as against the mother who living separately.

On the mother's death the father is entitled to the custody of the child vide Salim-un-nissa v. Saadat Husain (1914) 36 All. 466.

4 Imambandi v. Mutsaddi 45 I.A. 73 (1918) may be cited as the leading case on the Law of guardianship, and in this case the late Mr. Ameer Ali has ably expounded the law.

2. The *wasi* executor appointed by the father's will, even though the executor were no relation and after him the guardian appointed by the latter.
3. In the absence of an executor duly appointed the right devolves on the grandfather in the first instance, and after him on the guardian appointed by him, and after him on the guardian appointed by the designated guardian.
4. And finally failing all these it is for the *Kazi* (Court) to appoint a guardian one or more.

THE FATHER—AS GUARDIAN—

74. The father is entitled to exercise the parental authority over the person and property of his own children, and even on those who are of age, but are in a state of incapacity, by reason of unsoundness of mind.

The right ceases when the child attains majority or in the case of insanity recovers his intellectual faculties.

The father can deal with the minor's property[1] in any way just as a man of prudence. He can even validly purchase for himself the property of his children, or sell to them his own property. And similarly he may take in mortgage the minor's property or give in mortgage his own property.

But the fraudulent sale of some property made by the father for his son is binding on the father and not on the son.

DE JURE AND DE FACTO GUARDIANS—

75. Anglo-Muhammadan Law makes a distinction between legal *de jure* guardian and *de facto* guardian.

A *de facto* guardian is a person who has charge of the person of the minor, and as such cannot validly discharge the functions of a legal guardian, he has no power to transfer any right or

1 The Muslim Law maintains distinction between the treatment of moveable property and immoveable property, the former are owing to its nature easily perishable, and liable to decay, while immoveable property is considered to be of permanent nature.

interest in the immoveable property of the minor, but in special circumstances to meet the emergencies[1] he is entitled to incur debts on the pledge of the minor's goods and chattles only.

POWERS OF A LEGAL GUARDIAN—

76. An Executor-guardian, *wasi*,[2] is entitled to sell or purchase moveables on behalf of the minor, but his dealings with the immoveable property is restricted. He is entitled to sell the immoveable property in the following cases: (*a*) Where he sells it to discharge the debts of the deceased, (*b*) where the sale is necessary to meet the minor's emergencies, (*c*) where he obtains double value for the peoperty.[3]

The guardian can take possession, of a gift made in the minor's favour. If the minor has reached the age of reason he can himself receive a gift.

The father only (and not any other guardian not even the *Kazi*) has the right to sell the moveable as well as the immoveable property of the minor, or his child who is of age but insane to meet the expenses of his maintenance, that of his mother, his wife and his children.[4]

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1 e.g. food, clothing aliment and nursing.

2 The mother may be appointed an executrix.

3 There are some cases mentioned in Baillie's Digest of Moohammadan Law p. 687 and Baillies Moohammadan Law of Sale p. 247, e.g. where there are some legacies to be paid and there are no means of paying them. Where the property is liable to decay, or where the expenses exceed the income, or where the property is usurped there being no chance of restoration or fair restitution.

4 Similarly the father can sell the moveable property but not immoveable property of his child who is of age and absent, but he has no right to sell the property of his absent child whether minor or of age for any debt other than that of maintenance.

In various cases the principle has been accepted by the Courts in British India that relations other than the father or the grandfather have no right to deal with the property of minor. Vide as to an elder brother Must. Bukshan v. Maladi (1869) 3. B. L. R. (A.C.) 423; As to the mother, Sita Ram v. Amir Begum (1886) 8 All 324. Moyna Bibi v. Banku Bihari (1902) 29 Cal. 473; As to the uncle Nizam-ud-din v. Anandi Prasad 18 All. 373 (1896), Alimullah Khan v. Abadi Begum 29 All. 10 (1906); Abdul Kader v. Chidambaram (1908) 32 Mad. 276. The Court of Wards v. Abrar Ali (Lah. 1924) 78 I. C. 285. As to the sisters

§ 4. ANGLO-MUHAMMADAN LAW

77. The general Law of British India respecting guardianship is contained in the Guardians and Wards Act VIII of 1890.[1]

The following are some of the important sections equally applicable under the Muslim Law.

APPOINTMENT AND DECLARATION—

(i) When the Court is satisfied that it is for the welfare of a minor that an order should be made

(*a*) appointing a guardian of his person or property or both, or,

(*b*) declaring a person to be such a guardian,

the Court may make an order accordingly.[2]

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husband vide Ashgar Ali v. Amina Begum (1914) 36 All. 280. The decisions of the Courts are conflicting, on the point whether a sale of the property of minors by a legal guardian of their person, and 'de facto' manager of their properties to pay off ancestral debts in good faith is valid or not. For the affirmative vide Hasan Ali v. (1887) 1 All. 533, Majidan v. Ram Narain 26 All. 22 (1903); Mafazzal Hossein v. Basid Sheikh 34 Cal. 36. The Madras High Court has expressly dissented from Hasan Ali's case 1 All. 533 vide Abeul Majeeth v. Krishnamachasiar (1915) 24 Mad. 213. And in Abdul Haq v. Muhammad Yahya (Pat 1923) 78 I. C. 483 the Court held that a de facto guardian has no power to enter into a contract for the sale of property, and according to the Calcutta High Court the minor cannot be bound by his guardian's statement Basarat Sarkar v. Him Pramik 65 I. C. 353. (Cal. 1921), and in Mata Din v. Ahmed Ali 39 I.A. 49 in the Privy Council an infant on attaining majority successfully challenged a sale by his elder brother. A sale by the mother for the benefit and advantage of the minor was held to be valid Sheikh Rajab Ali v. Wazir Ali. 1 Pat. L. J. 188 (1916) and for necessity it seems that the mother could lawfully mortgage the property vide Abid Ali v. Imam Ali. 38 All. 92 (1915). But under the Muslim Law all such acts effected by the mother are invalid, unless she is the executrix of the father, or authorised by the minor's legal guardian or by the Kazi Court. This is also the view taken by the Privy Council in Imambandi v. Mutsaddi 45. In. Ap. 73 (1918). It disapproved of Ayderman v. Syed Ali 37. Mad. 514.

1 Sir Courtenay Ilbert who originally introduced the Guardians and Wards Act in the Legislative Council in 1886 observed as follows. "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 measure to make any alteration in Hindu or Muhammadan Family Law." The Act is of a permissive character giving guardians an opportunity to place themselves under the Control of the Court.

2 Section 7.

(ii) An order shall not be made under the last foregoing section except on the application of—

(*a*) the person desirous of being, or claiming to be, the guardian of the minor, or,

(*b*) any relative or friend of the minor, or,

(*c*) the Collector of the district or other local area within which the minor ordinarily resides, or in which he has property, or,

(*d*) the Collector having authority with respect to the class to which the minor belongs.[1]

(iii) If the Law to which the minor is subject admits of his having two or more joint guardians of his person or property or both, the Court May if it thinks fit appoint or declare them.

(*a*) separate guardians may be appointed or declared of the person, and of the property of a minor.

(*b*) If the minor has several properties the Court may, if it thinks fit appoint or declare a separate guardian for any one or more of the properties.[2]

(iv) 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, [3] appears, in the circumstances, to be for the welfare of the minor.

(2) In considering what will be for the welfare of the minor the Court shall have regard to the age, sex, and religion of the minor, the character and capacity of

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1 Section 8. 2 Section 15.

3 That is the Muslim Law in case of a Muslim minor ; but there are some cases which are not free from doubt. In the matter of Saithri 16 Bom. 307 (1891) a girl of fifteen educated in a Christian Missionary School was claimed under Sec. 419 Criminal Procedure Code by a Hindu mother, her petition was dismissed, and the girl allowed to go wherever she liked. In the matter of Joshy Assam 23 Cal. 290 (1895) where the child was brought up as a Christian the Court refused the application of father on the ground that he had deliberately previously resigned parental authority.

In Makoond Lal Singh v. Nabadwip Chunder 25 Cal. 881 (1898) the father had become a Christian and left his son in charge of his Hindu relatives. Later he claimed the son restored to him, his application was refused.

Gul Muhammad v. Must. Wazir Begum Punj. Rec. 1901 where the father accepting Christianity had his children also baptised.

the proposed guardian, and his nearness of kin to the minor, the wishes, if any, of a deceased parent, and any existing or previous relationship of the proposed guardian with the minor or his property.

(*c*) if the minor is old enough to form an intelligent preference, the Court may consider that preference.

(*d*) the Court shall not appoint or declare any person to be a guardian against his will.[1]

DUTIES, RIGHTS AND LIABILITIES—

78 (i) A guardian appointed or declared by the Court shall be entitled to such allowance, if any, as the Court thinks fit, for his care and pains in the execution of his duties.[2]

(ii) 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 as the law to which the ward is subject requires. [3]

(iii) A guardian of the property of a ward is bound to deal therewith as carefully as a man of ordinary prudence would deal with it if it were his own, and, subject to the provisions of this chapter he may do all acts which are reasonable and proper for the realisation, protection, or benefit of the property.[4]

(iv) Where a person other than a Collector, or than a guardian appointed by will or other instrument, has been appointed or declared by the Court to be guardian of the property of a ward, he shall not without the previous permission of the Court,

(*a*) mortgage or charge, or transfer by sale, gift, exchange, or otherwise, any part of the immoveable property of his ward or

(*b*) lease any part of that property for a term exceeding five years, or for any term extending more than one year beyond the date on which the ward will cease to be a minor.[5]

1 Section 17.
2 Section 22.
3 Section 24.
4 Section 27.
5 Section 29.

(v) A disposal of immoveable property by a guardian in contravention of either of the two last foregoing sections is voidable at the instance of any other person affected thereby.[1]

TERMINATION OF GUARDIANSHIP—

79 (i) On the death of one of two or more joint guardians, the guardianship continues to the survivor or survivors, until a further appointment is made by the Court.[2]

(ii) In certain circumstances the Court may remove the guardian.[3]

(iii) If a guardian appointed or declared by the Court desires to resign his office, he may apply to the Court to be discharged.[4]

(iv) The powers of a guardian of the person cease

(*a*) by his death, or removal, or discharge ;

(*b*) by the Court of Wards assuming superintendence of the person of the ward;

(*c*) by the ward ceasing to be a minor;

(*d*) in the case of a female ward, by her marriage to a husband who is not unfit to be guardian of her person or, if the guardian was appointed or declared by the Court, by her marriage to a husband who is not, in the opinion of the Court, so unfit; or,

(*e*) in the case of a ward whose father was unfit to be a guardian of the person of the ward, by the father ceasing to be so, or, if the father was deemed by the Court to be so unfit, by his ceasing to be so in the opinion of the Court.[5]

The powers of a guardian of the property cease as stated above in clauses (*a*), (*b*) and (*c*).[6]

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1 Section 30.

A guardian selling land to avoid litigation vide Kali Dutt Jha v., Abdul Ali 16 Cal. 627 (1888) as to mortgage vide Hurbai v. Hiraji Byramji 20 Bom. 116 (1895). As to specific performance of the contract minor on attaining majority cannot demand it vide Mir Sarwarjang v. Fakhruddin 39 I. A. 1 (1911).

2 Section 38. 3 Section 39. 4 Section 40. 5 Section 41. 6 Section 41.

CHAPTER VI

MAINTENANCE

Maintenance consists of food, clothing and lodging compatible with the social status of the parties. It should however be a reasonable amount, if fixed in monetary value.

MAINTENANCE OF THE WIFE—

80. An obedient wife is lawfully entitled to maintenance from her husband.[1] And when divorced by the husband she is also entitled to maintenance during the period of her *iddat*.

The wife is entitled to maintenance in the following cases :— (*a*) *Li'an*, (*b*) *Khula* divorce unless she has released, her husband from such obligation, (*c*) apostacy of her husband or his refusal to embrace Islam, (*d*) if the husband has availed himself of the option of puberty, (*e*) if the husband has had illicit connection with the wife's ascendants or descendants which creates a prohibition in marriage, (*f*) if the wife has availed herself of the option of puberty because of low dower or it being an unequal match, if otherwise she is not entitled to maintenance, (*g*) if the marriage was dissolved on account of the husband's impotency.

The wife is not entitled to maintenance if the marriage was dissolved by reason of some blemish act on her part, *e.g.* if a woman who has apostatised again becomes a Muslim within the period of *iddat* she would not be entitled to maintenance.

If the husband has not fixed an allowance for his divorced wife, observing *iddat*, and she has not claimed it by filing a suit, then on

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1 Whether obedient or not if she has the right of refusal for non-payment of dower, and in which case it seems, she will be entitled to maintenance, similarly an obedient wife suffering from illness which renders her unfit for sexual intercourse is nevertheless entitled to maintenance.

The wife is entitled to maintenance during 'iddat' but a widow is not entitled to maintenance during 'iddat' Aga Mahomed Jaffer v. Koolsom Beebee (1897) 25 Cal. 9.

the expiry of the period of *iddat* she loses her right to maintenance, as similarly in all other cases the right to maintenance ceases on the termination of the *iddat*.

The wife is not entitled to a decree for past maintenance unless on a specific agreement. Under the *Shafi* Law the wife is always entitled to past maintenance. The wife cannot release her right to future maintenance.

Under the Hanafi Law, if the wife is too young for sexual intercourse her maintenance is not incumbent on the husband, but under the *Shafi* Law it is incumbent. But if the husband is a minor and the wife is adult she is entitled to maintenance at his expense.

MAINTENANCE OF CHILDREN—

81. Maintenance is due from the father to the minor child of either sex and to one of age if he were poor, crippled or subject to continuous disease which prevents him from earning his livelihood.[1]

And maintenance is due to a major daughter if she is still unmarried and poor even though she may not be suffering from infirmity, unless she is able to maintain herself.[2]

If the father has no means, then the mother if she is able must contribute maintenance to her children.

If the mother has no means then the paternal grandfather is liable to maintain the children, and if he were not alive then the nearest relation who would participate in the inheritance of the spouses and children is liable to contribute maintenance. The amount so paid by the nearest relative constitutes a debt payable by the father on the improvement of his financial position.

ABSENT FATHER—

82. If the father is absent then the wife and children are liable to be maintained from property left by him, and if necessary by

1 A minor son can sue his father to provide maintenance vide Mahomed Jusab v. Haji Adam. 37 Bom. 71 (1911), Emperor v. Ayshabai (1904) 6 Bom. L. R. 536.

2 A girl when married belongs to her husband's family and even if she is divorced there is no obligation to maintain her, vide Pakriehi v. Kunhacha 36 Mad. 385 (1911).

the order of the *Kazi* the household effects may be sold or money may be borrowed on credit in her husband's name. According to some jurists the property of the husband should not be sold to provide maintenance, but money should be borrowed on their security. The Court may also order the depositary or debtor of the husband to provide maintenance.

MAINTENANCE OF PARENTS—

83. A child of either sex who has sufficient property whether minor or major is liable for the maintenance of his parents, grandfathers, and grandmothers if poor, irrespective of the fact whether they are capable of earning or not.

But if mother has married another person, then the child is not liable for her maintenance, unless her husband happens to be very poor to support her, in which case maintenance paid to the mother would constitute as a debt recoverable from her new husband when his financial condition improves.

A poor child is not bound to maintain his father, unless the latter is in a state of infirmity, and cannot earn his living, in such a case the father is entitled to share the nourishment with the child. The mother is entitled to nourishment even though not in a state of infirmity. A poor child is thus to maintain his parents, but is not to provide for them separately.

If the child is absent then the Court may order maintenance to be contributed from his property, or from his debtor if any for the benefit of his parents.

If a poor person has a son and a daughter them maintenance is due in equal shares from them.

If he has a son and a grandson, then maintenance is due from the son, he being the nearest in degree, unless he is himself poor or absent.

PROPORTIONATE LIABILITY—

84. The liability for maintenance is generally imposed upon relatives in proportion to the shares which they would inherit in case of the death of the person to be maintained, assuming that he left some property.

But if there is a sole relative and he happens to be poor the responsibility for maintenance devolves on the next heirs, and in case of two or more relatives in the same degree, the poor is excused but others in easy circumstances are liable to provide maintenance.[1]

STATE TREASURY—

85. Finally the maintenance of the poor persons, old or sick or infirm is due from the state treasury *Bait-ul-mal* if they have no relative to support them.

DIFFERENCE OF RELIGION—

86. Under the Muslim Law maintenance is not due where there is a difference of religion except in few cases,[2] but it seems that under Anglo-Muhammadan Law the responsibility to maintain a relative will continue in spite of conversion to or from Islam.

SECTIONS 488-490 CRIMINAL PROCEDURE CODE ACT V OF 1898—

87. Under the Criminal Procedure Code, a person may be compelled to make a monthly allowance not exceeding fifty rupees for the maintenance of his wife his legitimate or illegitimate child whether minor or major who is unable to maintain itself.[3]

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1 If a poor person has a paternal grandfather and a grandson, the grandfather must contribute one-sixth and the grandson five-sixths of the sum required for his maintenance.

If a poor person has a mother and a paternal grandfather, the mother must contribute one-third and the paternal grandfather two thirds for his maintenance.

2 Except to a wife, parents, grand parents child, and son's child.

3 Mahomed Haji v. Kalimabi 1918 41 Mad. 211. "Maintenance" means to find food, clothing and lodging. It does not include, education vide Naga Hla 11 Cr. L. J. 40, Ma Shive 24 Cr. L. J. 590. Kunli 25 Cr. L. J. 1249. But if there is an admitted agreement for living apart by mutual consent, there should be no order vide Rahim 42 P. R. 1888, Fazalunnissa 12 P. R. 1890. There must be proof of marriage according to the Personal Law where this fact is denied vide Abdur 5 Cal. 558 Din 5 All. 226.

An order for maintenance under Sec. 188 Criminal Procedure Code will cease in case of divorce on the expiration of 'iddat' vide in re Abdul Ali 1883 7 Bom. 180. In the mother of Din Muhammad 5 All. 226 (1882) Shah Abu v. Ulfat Bibi (1896) 19 All. 50.

CHAPTER VII

§ 1. HIBA—GIFT

GIFT—HIBA—

88. The Muslim Law of *Hiba* is expressly recognised in the Punjab, in the North-West Provinces (now the Province of Agra in the United Provinces of Agra and Oudh), in Oudh, in the Central Provinces, it is treated as an integral part of the Muslim Law in Bengal, in the Madras Presidency and in other parts of British India.[1]

HIBA—GIFT

HIBA DEFINED—

89. *Hiba*, gift, is a voluntary transfer of ownership in some specific property without consideration. It is the conferring of the right of property without any exchange.

VALIDITY OF GIFT—

90. The acts essential for the validity of *hiba* are "tender, acceptance, and seisin."

(i) The donor must be capable of making the transfer, that is, he must be adult, of sound judgment, and the owner[2] of the thing given.

(ii) A donation is complete by the offer of the donor and its acceptance by the donee.

(iii) The gift should be accompanied by the delivery of possession actual or constructive.

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1 The Punjab Laws Act IV of 1872 s. 5 as amended by Act XII of 1878 and the North-West Frontier Reg. VII of 1901. The Oudh Laws Act XVIII s. 3. The Central Provinces Laws Act 1875 s. 5.

2 These decisions have been confirmed by the Legislature Zahorooddeen v. Baharoola 6 W.R. 185 (18864), Shumsoonissa v. Zohra 6 N. W. 2 (1873), Khader Husain v. Husaini Begum 5 Mad. H. C. 114 (1870). The Transfer of Property Act 1882 section 129 declares that nothing on the Chapter on Gifts shall be deemed to effect any rule of Mohammadan Law. Vide also Chekonekutti v. Ahmed 10 Mad. 196 (1886).

2 Where the subject of gift is in possession of the agent of the donor or a trustee etc., their custody is considered as the custody of the donor.

Writing is not necessary to the validity of a gift.

Thus a person if not in *marz-ul-maut* may make a gift of all or a part of his property to an ascendant or to a descendant or to any relative or even a stranger, whether of his own or a different religion, provided all the conditions are duly fulfilled.

POSSESSION—

91. (i) The donee must take actual possession of a thing susceptible of physical possession.[1] The possession required to be given must be such as the nature of the property permits. And registration is not a valid substitute for the delivery of property, nor is it essential for the validity of *hiba*, but it is helpful in establishing the factum of donation of property.[2] No physical entry is required if the donor and the donee are residing in the house which is the subject of gift, some overt act by the donor indicating an intention to

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1 The possession of the property in the occupation of tenants may be delivered by allowing the donee to realise rents and profits, or by requesting the tenants to attorn to the donee vide Muhammad Hamid Ullah v. M. Majid Ullah 40 I.C. 374 (1977) Shaik Ibrahim v. Shaik Suleman (1884) 9 Bom. 146; Bibi Khaver v. Bibi Rukhia (1905) 29 Bom 468. Khajooroonissa v. Rowshan Jehan (1876) 2 Cal. 184, 3 I.A. 291. Vide Mullick v. Mullka 10 Cal. 1112 where the question is fully discussed.

2 As regards registration vide Mogulsha v. Mohomed Saheb 11 Bom. 517 (1887) though there is no saving clause fn the Registration Act 1908, and s.17 of this Act requires "instruments of gift of immoveable property" to be registered nevertheless under Anglo-Muslim Law registration is not necessary, though registration is not a valid substitute but it affords the clearest possible evidence of intention to make a valid gift, where the fact of delivery is somewhat ambiguous, vide Ismail v. Ramji 23 Bom, 682, (1899).

But a registered-deed would be void for want of delivery of possession, vide Sadik Husain v, Hashim Ali 43 I. A. 212 (1916).

An invalid deed under Section 123 of the Transfer of Property Act IV of 1882 because of a defect in attestation would nevertheless be valid if it satisfies the requirements of the Muslim Law, vide Karam Ilahi v. Sharf-ud-din 38 All. 212 (1916).

Similarly it has been held recently by the Calcutta High Court Nasib Ali v. Wajid Ali 100 I. C. 296 (Cal. 1926) that a deed of gift requires no registration, but the Lahore High Court has held that it requires registration, vide Maula Bux v. Hafiz-ud-din. 94 I. C. 7 (Lah 1926).

As regards moveable property its registration is optional under Section 8(f) of the Registration Act 1908.

transfer possession is quite sufficient. That is no formal transfer is necessary (*a*) in the case of a gift by the father to his minor son[1] ; (*b*) in the case of a gift to a bailee, lessee, pledgee or mortgagee [2] (*c*) as between the husband and wife.[3]

(ii) Where the subject of gift is incorporeal property or an actionable claim the gift is complete by an act of the donor indicating an intention on his part to divest himself *in præsenti* of the property and to confer it upon the donee.[4]

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1 In the case of an infant son the declaration of gift is considered sufficient to change the possession of the father on his own behalf into that of the lawful guardian of the minor, vide Wajeed Ali v. Abdul Ali W. R. 1864, 127 ; Husain v. Shaikh Mira 13 Mad. 46 (1889). Ameeroonissa Khatoon v. Abedoonissa 15 B. L. R. 67. 2 I.A. 87 (1875) Fatima Bibee v. Ahmad Baksh 31 Cal. 319 (1903) ; Fakir Mynor M. Rowthar v. K. K. Vandan 35 Mad. 120 (1912) Fateh Mahomed v. Mihta 92 I.C. (Lah. 1925).

2 But a servant or an agent for the collection of rent cannot be said to be in possession like a bailee or lessee. Vide Valayet Hossain v. Maniram 5 C. L. R. 91 (1879).

3 As between husband and wife, Bee Jan Bee v. Fatima Beebee (1910) 8 I.C. 431. A case of joint residence, vide Amina Bibi v. Khatija Bibi (1864) 1 Bom. H. C. 157, Azim-un-nisa v. Dale (1868) 6 Mad. H. C. 455 where property let out to tenants, Emnabai v. Hajerobai (1888) 13 Bom. 352.

4 Debts negotiable instruments and Government Promissory notes are all choses in action. A gift of Government Promissory notes is completed by endorsement and its delivery to the donee. Nawab Umjid Alley v. Muhumdee Begam 11 Mad, I. A. 517 (1867). The fact of endorsement is essential for the gift is incomplete without it. Vide Aga Mohamed Jaffer v. Koolsom Beebee (1897) 25 Cal., 9, which is a case of a "deposit receipt" of money deposited in the bank.

In Yacoob Saheb v. Pacha Bibi 38 I. C. 248. (Mad. 1915) a case of the assignment of an Insurance Policy, unaccompanied by delivery of the document, by the execution of the assignment, and its intimation to the company were held sufficient to vest the property in the donee.

In Anwari Begum v. Nizamuddin Shah 21 All. 165 (1896). The Court observed, "There is in our judgment, nothing in the Muhammadan Law to prevent the gift of a right to property. The donor, must so far as it is possible for him, transfer to the donee that which he gives, namely, such right as he himself has ; but this does not imply that, where a right to property forms the subject of a gift the gift will be invalid unless the donor transfers what he himself does not possess, namely the corpus of the property. He must evidence the reality of the gift by divesting himself so far as he can, of the whole of what he gives."

PROOF OF POSSESSION.—

91A. (i) The burden of proof is on the donee to show that possession has been taken by him, but in the case of the father making gift to his minor child, the onus would lie on him to show that this subsequent possession is not on behalf of the minor.[1]

(ii) The acknowledgment by the donor that he has made a gift and delivered its possession to the donee would show that the gift has been previously completed as acknowledged.[2]

(iii) All acts of ownership exercised by the donee would show that possession was transferred to him.[3]

REQUISITES OF HIBA.—

92. The requisites of *hiba* required are with reference to (*a*) the subject of *hiba mahub*, (*b*) with respect to the donor *wahib*, (*c*) and the donee *mahub alaih*.

(*a*) *With respect to Mahub the subject of Hiba.*—

CONTINGENT GIFT.—

(i) A gift cannot be made to take effect on the event of some contingency, *viz.* I will give this thing to you to-morrow. If A enters this house then I will make a gift of this thing to you.[4]

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1 Moulvie Majid Ali v. Moulvie Abdool Ali. (1864) W. R. 121; Fatima Bibi v. Ahmad Baksh 31 Cal. 319 (1903).

2 Shaik Imam. v. Shaik Suleman (1884) 9 Bom. 116 Humera Bibi v. Nagmunnissa (1905) 28 All. 147, 152 (Acknowledgment that possession was given may of course operate as an admission.)

3 This adopts the rule of Law, vide also Bhagwansingh v. Secretary of State 10 Bom. L. R. 571; Sharifa Bibi v. Ghulam Mahomed 16 Mad. 43 (1892); Rajabhai Ismail Ahmad (1870) 7 Bom. H.C.R. 27 (donee giving lease to the donor); Gulam Jafar v. Sasludin (1880) 5 Bhm. 238.

After the gift has been completed by delivery of possession it cannot be vitiated by the fact that the donee does not continue to be in possession of the property vide Amina Bibi v. Khatija Bibi 1 Bom. H. C R. 157 (1864). Jafier Khan v. Hubshee Beebee 1 S. D. A R. Bengal Morley's Digest pl 55 p. 268.

4 A Shia Muslim made a gift to a person for his life and in the event of his death leaving no male issue to another person. The latter gift was treated as contingent gift, vide Casamally v. Currimbhai 36 Bom. 214 (1911). Again in Sadiq Husain v. Hashim Ali where a Muslim made a gift of his property to his wife and after her death to his children. The Privy Council observed that the latter gift was contingent but expressed no opinion as to its validity.

RAQBA.

(ii) A gift by way of *Raqba* meaning thereby that my house is thine if I die but if thou diest it is mine. Here the contingency is the death of one another, so it is void.

SEPARATE EXISTENCE —

(iii) A gift of a thing which is not considered to have a separate existence is void, *e.g.* of the flour in growing wheat, or of the butter in milk.

The subject of gift must be in its nature distinct and not joined to or occupied with anything that is not given.

e.g. The gift of a vessel without its contents is invalid.[1]

The gift of some land without the crops standing on it, or a palm tree in bearing without its fruits is unlawful.

SERVICES, AND LOVE AS A GIFT.—

(iv) Neither services nor natural love and affection can form the subject of a gift.

(*b*) *With respect to the donor Wahib.*—

(v) The donor must be sane adult and lawful owner and the subject of gift, may be *mal* any existing property.

(*c*) *With respect to the donee, Mahub alaih.*—

HIBA TO UNBORN PERSON.—

(vi) A gift to an unborn person is void.[2]

HIBA IN FUTURO.—

(vii) A gift to take effect at any future period whether definite or indefinite is void. A gift to be performed at some future time is also void.[3]

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1 Similarly the gift a pitcher without the water contained in it is invalid, but the gift of the water without the pitcher is valid.

2 Abdul v. Turner 9 Bom. 158; Mahomed Shah v. Official Trustee Bengal 36 Cal. 431 (1909).

3 This rule follows from the proposition that delivery of possession is essential and it is also treated as a distinct rule. A gift of the fruits that may be produced

§ 2. KINDS OF GIFTS

KINDS OF GIFTS.—

93. The following kinds of gifts are known to the Muslim Law ;—(*a*) *Hiba* (simple,) (*b*) *Hiba-bil'iwaz,* (*c*) *Hibi-bi-shartil-'iwaz,* (*d*) *Sadqa.*

(*a*) *Hiba*—

Hiba is the conferring of the right of property in some specific thing without any consideration.

(*b*) *Hiba-bil-'iwaz*—

Hiba-bil-'iwaz is a transaction made up of two distinct donations, separate acts of *hiba,* between two persons, each of whom is alternately the donor of one gift and the donee of the other. That is when the donee of a certain gift makes a gift to the original donor signifying his wish, that the present gift is by way of return *'iwaz* for the original gift.[1] *e.g.* "This is the *'iwaz* in the place of thy gift."

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on a certain tree in a certain year is void. But if the tree is made a gift of, it will be valid. But if the tree did not belong to the donor and he merely had the right to receive the fruits only, it seems the gift would be valid. In Yusuf Ali v. Collector of Tipperah (1882) 9 Cal. 138 the deed of gift contained the words "So long as I live I shall enjoy and possess the properties, and I shall not sell or make gift to any one but after my death you will be the owner". The gift is void being in futuro. As to future indefinite period vide Chekkone Kutti v. Ahmed (1887) 10 Mad. 196.

In Atulnissa v. Mir Nuruddin 22 Bom. 489 (1896) A Mustim executed a deed giving his wife Rs. 4,000 every year out of his share of the income of certain Jagir villages. Farran J. treated it as a gift in futuro. It is submitted that such a gift is valid undoubtedly for the Jagir is usually not alienable and partible, and in case of a partible estate if the donor had a right to receive a fixed share of the income it will be also valid.

There is no doubt that the right to receive a fixed share in the offerings is valid, vide Ahmaduddin v. Ilahi Bakhsh 34 All. 465 (1912) ; Anwari Begum v. Nizamuddin 21 All. 165 (1896).

1 Ballie has pointed out (Digest pp. 122 and 532) that the term Hiba-bil-'iwaz is inaccurately used and it seems to apply to transactions which appear to be really sales. The Courts in British India should bear this fact in mind when documents are to be construed. Under the Muslim Law hiba-bil-'iwaz consists of two distinct acts of donations. The original gift is absolutely independent and without

(*c*) ***Hiba-bi-shartil-'iwaz.***—

When a ***hiba*** is made witha definite stipulation for a return whether specified or unspecified it is termed ***hiba-bi-shartil-'iwaz,*** the reciprocal exchange of property transfers the ownership, thus the whole transaction is in the nature of an exchange. But if only one party has made delivery then it remains a simple ***hiba*** and the donor retains the right of revocation.

(*d*) ***'Iwaz—Return.***—

(i) All what may be given as the subject of gift may validly form the subject of ***'iwaz*** or return. The performance of something; or abstinence from doing something may operate as ***'iwaz,*** and it is immaterial whether such abstention has been antecedently stipulated or it is subsequently accepted as an ***'iwaz.***

(ii) Under the ***Hanafi*** Law the ***'iwaz*** or return may also be made by a third person without having been directed to do so by the donee.

(iii) In the case of ***hiba-bil-'iwaz*** the donor is under no obligation to accept the ***'iwaz*** offered by the donee, but in the case of ***hiba-bi-shartil-'iwaz*** the donor is ***expected*** to accept the return.

(iv) According to the ***Shi'a*** Law a portion of the gift may validly be given as ***'iwaz,*** but according to the ***Sunni*** Law ***'iwaz*** of ***hiba-bil-'iwaz*** cannot be a part of the original gift, unless a sufficient change has already taken place in the latter of such a nature so as to make the gift irrevocable.

It has been held by the Privy Council that the produce of the subject of the gift is distinct and is not a part of the subject of the gift.[1]

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regard to the second donation in any way. It is a case of mutual gifts which are so common in our own society. We only refrain from making the statement that it is an 'iwaz' instead we wait for a suitable opportunity and use it as pretext to make a reciprocal gift. The only difference is that under the Muslim Law such a transaction as if of reciprocal gifts becomes irrevocable after the acceptance of the latter gift.

1 Nawab Umjad Ali v. Muhumdee Begum 11 Moo. I. A. 517 (1867).

(v) If the portion of the gift is proved to be the property of and is resumed by the true owner, then a proportionate part of the *'iwaz* may also be resumed, but if the *'iwaz* is claimed by the true owner then the donor cannot resume a part of the original gift, but he may return the remaining part of *'iwaz* and thereafter revoke the gift.

(vi) If the *hiba* and its *'iwaz* have both been interchanged, thereafter neither the *hiba* nor the *'iwaz* can be revoked.

(vii) In *hiba-bi-shartil-'iwaz* if the stipulated return is unlawful then both the gift and stipulation are void.

(viii) Natural love and affection cannot be the subject of *'iwaz* just as it cannot be the subject of a gift.

HIBA-BIL-'IWAZ UNDER ANGLO-MUHAMMADAN LAW.[1]—

93A. Under Anglo-Muhammadan Law the term *hiba-bil-'iwaz* has acquired quite a different meaning, it is deemed to be a gift for a consideration and it resembles a sale in all its incidents.

The following conditions are essential.[2]

(*a*) The actual payment of consideration by the donee, but the adequacy of the consideration is immaterial.

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1 It is respectfully submitted that the recognition of this special transaction by Anglo-Muhammadan Law has not in effect superseded the old Hiba-bil-'iwaz. Both these transactions are an integral part of the present Anglo-Muslim Law in India, and it will be open to the parties to establish whether it is the old Hiba-bil-'iwaz or the new 'Hiba-bil-'iwaz' on the facts of each particular case.

2 It is obvious that in the case of the new 'Hiba-bil-'iwaz' whatever is valid consideration for a contract within the meaning of section 2 cl. (d) of the Indian Contract Act 1872 would be a valid consideration in this case also. And such a transaction is undoubtedly a sale within the meaning of section 54 of the Transfer of Property Act and it should comply with all formalities, registration, etc., required under that Act. Vide Abbas Ali v. Karim Baksh, 13 C. W. N. 160. (1909).

In the following decisions the transactions have been held to be Hiba bil-'iwaz Muhammad Faiz v. Ghulam Ahmad 3 All. 490 (1881); 8 I. A. 25. which is a case of transfer of two villages to a widow who in consideration of the grant gives up her claim to her husband's estate. In Khajooroonissa v. Rowshan Jehan 2 Cal. 184 (1876); 2 I. A. 291, the Privy Council pointed out that the adequacy of consideration is immaterial. In Chaudhri Medhi Hasan v. Muhammad Hasan 28 All. 439, 33 I. A. 68 (1906); it was pointed out that there must be an intention by the donor to divest himself in præsenti of the property. Vide also Mohan Lal v. Mahmud 44

(*b*) The donor must intend to transfer and to divest himself *in præsenti* of the property, and to confer it upon the donee, though delivery of possession is not necessary for its validity.[1]

Such a transaction from its very nature is irrevocable.

SADQA,—ALMS.—

(*c*) *Sadqa* is a gratuitous transfer in the same manner as an *hiba*. It is a gift in the nature of charity. The delivery of the property is essential.

According to the Fatawa-i-'Alamgiri a gift is not valid without acceptance but *sadqa* is deemed to be valid without due acceptance.

Sadqa whether of divisible or indivisible property is similar to gift.

Sadqa once effected cannot be revoked at all.

MUSHA—GIFT.—

94. Musha denotes an undivided but known share in property. The gift of an undivided share of any property which does not admit of partition is lawful. But the gift of property which does admit of partition is not lawful, and according to some jurists even if

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All., 580 (1922) Muhammad-unissa v. Bachelor 29 Bom. 428 (1905) Ashidbai v. Abdulla 31 Bom. 271 (1903).

As to whether a transaction is hiba or Hiba-bil-'iwaz depends on the facts of that case, Seraj-ud-din v. Isab 49 Cal., 161 (1922) again in Sarif-ud-din Mohammad v. Mohi-ud-din 54 Cal., 751 (1927), the Calcutta High Court pointed out the difference between a true and a false hiba-bil-'iwaz the lattter being merely a sale. And that in true Hiba-bil-'iwaz the doctrine of seisin and musha apply both to the original gift and the 'iwaz.

In Abbas Ali v. Karim Baksh 13 C. W. N. 160 (1909); 4 I. C. 466 it was held that a copy of the Holy Koran is a good consideration for hiba-bil-'iwaz.

In Rahim Baksh v. Muhammad Husain 11 All., 1 (1888) Mahmood J. held that gift in consideration of past services is not hiba-bil-'iwaz but simple hiba. In this case Mahmood J. tested the transaction first from the point of view of the old hiba bil-'iwaz and also the new hiba-bil-'iwaz of Anglo-Muhammadan Law.

1 Gift of property to wife has been held in several cases as hiba-bil-'iwaz though possession was not delivered to the wife. Muhammad Eusuph v. Pattamsa Ammal (1889) 23 Mad., 70 and vide Ram Prasad v. Rahat Bibi 18 O. C. 367.

Again in Firoz-ud-din Ahmad v. Sirdar Shah 79 I. C. 81 (Lah. 1924) the old view was re-affirmed that in hiba-bil-'iwaz delivery of possession in not essential.

possession is taken it would not establish its property in the donee, but according to other jurists it would establish ownership invalidly *fasid*.[1]

And if a person who had made a gift of an undivided part of a thing which admits of partition and subsequently he makes a partition and delivers it to the donee, such a gift would be deemed to be valid.[2]

Sadqa of an undivided part of a thing capable of division is similarly not valid as in the case of a gift.

Under the *Shia* Law a gift of an undivided share whether capable of partition is lawful.[3]

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1 The instance of indivisble things are a small house or bath. In Kaim Husain v. Sharifunnissa 5 All. 285 (1833) a staircase, privy and a door were used in common and it was held that the gift of the owner's undivided share in the staircase is valid for a staircase is not capable of partition.

In Muhammad Mumtaz v. Zubaida 16 I. A. 275 The Privy Council observed the doctrine relating to the invalidity of gifts of Musha is wholly unadapted to a progressive state of society and ought to be confined within the strictest rules." In Alabi Koya v. Mussa Koya (1301) 21 Mad. 513, the Madras High Court held that the doctrine of Musha did not apply in the Madras Presidency but this case was overruled vide Vahazuilah v Boyapati (1907) 30 Mad. 519.

Again in Ibrahim Goolam Ariff v, Saiboo 35 Cal. 1 ; 34 A. I. 167. Where a person made a gift 1/3 of the house situated in Rangoon, the Privy Council applied the Law of Musha but expressed an opinion that it would be inconsistent with the previous ruling "to apply a doctrine which in its origin applied to very different subjects of property, to shares in companies, and freehold property in a great commercial town."

2 Where the gift of a certain undivided property but it was subsequently separated and its possession was delivered to the donee. Such a gift invalid in its inception was treated as valid Muhammad Mumtaz v. Zubaida (1889) 11 All. 400 ; 16 I. A. 205. Mahomed v. Cooverbai 6 Bom. L. R. 1043 ; but vide Mohib Ullah v. Abdul Khalik 30 All. 250.

Where definite shares were recorded in the khewat, the Musha was deemed to be cured, and the deed which did not state the shares which donees were to take was held to be valid. Zaibunnissa v. Irshad Husain 89 I. C. 284 (Oudh 1925).

In Abdul Aziz v. Fateh Mahomed 38 Cal. 518 (1911) ; 9 I. C. 635, the donor had recognised the donee's joint possession for fourteen years with himself, it was held that Musha did not apply.

3 Baillie's Digest 11 204-5 vide also Haji Kalab Hossein v. Must. Mehrum Bibee 4 N. W. 155 (1872) and Sadik Husain v. Hashim Ali (1916) 43, I. A. 212, 38 All. 627.

EXCEPTIONS UNDER ANGLO-MUSLIM LAW.—

(i) Where one of two or more co-sharers transfers his undivided share in the property to the other, or one of the others.[1]

(ii) Where the right to receive separately a definite share of the rents of some undivided property is transferred.[2]

(iii) Where the gift is of a share in some zemindari property, or of a share in property situated in a commercial town or of shares in a land company.[3]

GIFT TO TWO OR MORE PERSONS.—

95. A *sadqa* charitable gift of some property capable of partition to two or more poor persons is valid according to all jurists, and in the case of *sadqa* to two or more rich persons it is valid according to one report of Imam Abu Hanifa and also according to the *sahibain*.

A gift of some property to two or more poor persons is valid according to all jurists and in the case of a gift to two or more rich persons without specification of definite share given or in equal halves or two-thirds and one-third etc., then according to Imam Abu Hanifa in no cases it is valid, and according to Imam Muhammad it is valid in all cases and according to Imam Abu Yusuf it is not valid in the case of specification, but valid if not specified or made in equal halves.

Under *Shia* Law a gift to two or more donees is valid.

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1 As regards where the gift is made by one co-heir to another vide Ameens v. Zeifa 3 W. R. Civ. Rule 37 (1860) Macnaghten President of Gift case 13 Q. 1 p. 212, and vide Mahomed Bakhsh v. Hosseini Bibi 15 Cal. 684, (1888) 15 I. A. 81. In this case the mother made a valid gift of her 1/6 undivided share in her deceased daughter's estate to the children of that daughter only, there being also a husband. Recently in Ahmad v. Qamarul Zaman 102 I. C 829 (Lah. 1927) The Court made a distinction between gifts by a co-heir and gifts by a co-sharer. It is submitted that perhaps it is too late to make this distinction now in Anglo-Muhammadan Law.

2 As regards the right to receive share of rents of undivided land in Ameeroonnissa v. Abedoonnissa L. R. 2nd App. 87 (1875) the question was raised but not decided, however in Jiwan Baksh v. Imtiaz Begum 2 All. 93 (1800) and in Kasim Husain v. Sharif-un-nisa 5 All. 285 (1883) and in Mullick v. Muleka 10 Cal. 1112 (1884) it was observed that the rule of Musha was not applicable to such cases.

3 As regards gift of property in a commercial town the gift is valid vide Ibrahim Goolam Ariff v. Saiboo 35 Cal. 1 (1907) 34, I. A. 167.

§ 3. LIMITED ESTATES AND CONDITIONAL GIFTS.

ARIAT.—

96. (i) (*a*) *Ariat, commodatum,* is a temporary gratuitous transfer of property without consideration or any exchange.[1] The *muir,* donor, should be a sane person, but puberty is not essential as in the case of *hiba* ; the *musta'ir* donee must take possession of the subject of *ariat,* but the formal acceptance of the *ariat,* before taking its possession is not essential.

(*b*) *Ariat* of *dirhams* or *dinars* (coins) is deemed to be a loan of money, and of consumable things is deemed to be a loan, *commodatum* of them. The loan of tame animals is also *ariat.*

(*c*) Ariat is distinct from *hiba,* in the latter there is a *bona fide* transfer of property vesting complete ownership in the donee, while in the former the transfer is with a view to allow the donee to enjoy the fruits for a limited period.

(ii) (*a*) The *musta'ir* is not permitted to let on hire or otherwise deal with the subject of *ariat.*

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1 The distinction between hiba and ariat has well been pointed out by the learned subordinate Judge (M. Samee Ullah Khan C. M. G.) of Aligarh in Muhammad Faiz Ahmad Khan v. Ghulam Ahmad 3 All. 491 (1881 P. C. " To make a person the owner of a substance of a thing without consideration is hibbah (gift) while to make him the owner of the profits only without consideration is an ariat or commodatum (vide Dur-ul-mukhtar Kitab-ul-hibbah).....The words by which an ariat is constituted have a special chapter assigned to them in the Alamgiri .. ..Second chapter kitab-ul-Ariat Alamgiri :—If he said " I have made thee owner of the profits of this house for a month without a consideration it, will be an ariat. This is in the Fatawas of Kazi Khan. And it is valid by the words" I lent thee this robe thou mayest wear it for a day, or lent thee this house, thou mayest live therein for a year" Tatarkhania). If he said 'I make this house of mine thy residence for one month' or if he said 'thy residence for my lifetime' this will be an ariat (this is in the Zahiria)..... ....And if he said " my house is for thee a gift by way of residence" or 'a residence by way of gift, it is an ariat.—This is so in the Hedaya..... ....Alamgiri Kitab-ul-hibbah Chapter I The words by which a gift is made are of three kinds : first those which are specially adopted or made for hibbah, secondly, those which denote hibbah by application or metaphorically ; and third those which may import hibbah or ariat equally. Of the first kind there are such as these. "I made a gift of this thing to thee," or " I made thee owner of it," or " I made it for thee" or "this is for thee....."

(*b*) The *muir* is entitled to revoke the subject of *ariat* at his pleasure, even if the *ariat* was limited to certain period which had not expired.

(*c*) In the case of *ariat* of land for cultivation, the *muir* cannot revoke the *ariat* if the crops are standing, until they have been cut and removed, in due course, thereafter the land may be resumed by the owner.

CONDITIONAL GIFT.—

97. If a gift is made subject to an invalid, *fasid*, condition inconsistent with full ownership derogating with the completeness of the grant in favour of the donee, then such a condition is void but the gift is valid.[1]

e.g. A house is given on condition that it shall not be sold. Such a restraint is a *fasid* condition. Hence the gift is valid but the condition is void.

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1 According to the Fataw-i-Alamgiri—a contract wherein delivery of possession is essential, is not invalidated by a fasid condition 'e.g.' mortgage and gift, but there are some contracts which are invalidated by being subject to a fasid condition 'e.g.' sale.

e.g. A woman made a gift of her dower in favour of her husband on condition that he should perform the Haj on her behalf and the husband did not fulfil this condition, then her right to dower would revive in toto.

A woman made a gift of her house to her husband on condition that he would not absent himself from her as he was accustomed to do frequently. The husband lived with her for sometime thereafter divorced her. There are different solutions to this problem.

(a) If this was merely a contract there being no formal hiba, then obviously the house does not belong to to the husband.

(b) If there was a formal hiba accompanied by delivery of possession then the house belongs to the husband.

(c) Since the husband has accepted the condition the house does not belong to him, and this is the better view.

A woman made a gift of her house to her husband thus: "If you do not illtreat me, I make gift of my dower to you." The husband accepted it.

The jurists consider this to be fasid, inasmuch as the gift itself is made contingent, on the contrary if the woman says "I make a gift of my dower to you provided you should not illtreat me," then the gift is valid and the right to dower would not revive. But according to accepted view if the husband were to illtreat her then her, right to dower would revive. According to some jurists if the husband illtreats her without lawful excuse her right to dower would revive, but if he admonishes her with a view to exact her obedience, then no right to dower arises.

LIFE-ESTATE.—

98. If a person makes a gift of some property to a person saying that this is yours during my life or this is for your life and thereafter it will revert back to me. Then the gift is valid and the condition is void.[1]

If a person says that this house is thy *raqba* or *habs* and delivers possession of it to the donee, then according to Imam Abu Hanifa and Imam Muhammad it is a case of *ariat* only.

It is submitted that strictly speaking under the Muslim Law life estate can only be created by means of *ariat* and not by way of *hiba*.

Thus the important point is that it is only an invalid fasid condition which is deemed to be inoperative.

A woman made a gift of her dower to her husband on condition that he will keep her with him and not divorced her. The husband accepted it. Then if no period has been fixed, the husband must keep her forever, but if some period was fixed and the husband divorces the wife before the termination of that period, her right to dower would revive.

1 That under the Hanafi system the grantee of a life interest takes an absolute estate has been hold in several cases. Nizam Uddin v. Abdul Gafur 13 Bom. 264 Sec., 17 Bom. 15. 19 I. A. 170 (affirmed by the Privy Council) Vide also Mahomed Ibrahim v. Abdul Latif 37 Bom. 447 (1913). In Humeeda v. Budlum 17 W. R. 525 (1871). The Court held that view and it was referred to with approval by the Privy Council in Abdul Wahid v. Nuran Bibi 12 In. Ap. 91 (1885).

In a recent case Amjad Khan v. Ashraf Khan 4 Luck 305 (1929), 87 I.C. 445 (Oudh 1924) Wazir Husan J after citing various authorities in original Arabic came to the conclusion that life estate is fully recognised by the Muslim Law and could be createdby way of hiba while Ashworth J took the contrary view. On appeal the Privy Council (1929, A L.J. R. 571,) this matter appears to have been again not clearly decided, but in their Lordship's opinion it is possible to create a life interest

That an ariat for life dould be created and would be revocable at the will of the donor, Mumtazunnissa v. Tufail Ahmad 28 All. 264. (1905) unless there was consideration for the ariat, vide Khalil Ahmad 30 All. 309 (1908).

In Mohammad Siddiq Khan v. Rishaldar Khan 95 1. C. 220 (Oudh 1926) a grant to an illegitimate son by way of life interest was held valid as an ariat and not as a gift.

Tybaji has argued at length in favour of creation of life estate under the Muslim Law. He has closely examined all important decisions 'viz.,' Humeeda v. Budulun 17 W. R. 525 (P. C.); Suleman Kadr v. Dorab Ali Khan 8 Cal. 1 (1881). Nizamuddin v. Abdul Gafur 13 Bom. 264, 275 (1888); Abdul Karim v. Abdul Qayum

(ii) Under the *Shia* Law the creation of life-estate is allowed,[1] and it is also allowed under the *Shafi Law*, as administered in British India.

Under the *Shia* Law the donor may limit the interest of the donee in the subject of the grant to his own lifetime or the grantee's life. This is called *'Umra*. Where the grant consist of a right of residence only it is called *sukna*, and where it is limited to a specified time it is called *raqba*.

Similarly the grant after the grantees lifetime may be vested in the descendants of the grantee and finally it will revert to the donor or his heirs.

GIFT WITH A CONDITION RAISING A TRUST—

99. Under Anglo-Muhammadan Law where a gift is made of the corpus and the donor stipulates a right to the income from the property during his life, or that the donee undertakes to do something in return, the gift and the undertaking may form valid consideration for each other and the Court may enforce such an agreement as raising a trust for the benefit of the donor.[2]

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28 All. 342 ; Abdullah v. Mahomed 7 Bom. L. R. 306. Mahomed Shah v. Official Trustee of Bengal 36 Cal. 431 (1909). And he comes to the conclusion (2nd Ed., p. 502) " That there is no distinct or binding pronouncement by the Privy Council A bench of any of the High Courts in India would be free to examine the texts for itself and to give effect to the Law as it may consider it to be. Nor is there any decision of the Madras or Allahabad High Courts which would, hamper the exercise of a similar discretion even by a single judge."

1 Banoo Begum v. Mir. Abed Ali 32 Bom. 172 (1907).

2 This is according to the view adopted by the Privy Council in Nawab Umjad Ali v. Muhumdee Begum 11 Moo. I. A. 517. (1867) The facts were that the Nawab of Oudh made a gift to his son of Government promissory notes with the condition that the donee should during the lifetime of the Nawab make over to him the interest accuring on the notes. It was contended before the Privy Council hat the gift was invalid.

The actual question was not about the reservation inasmuch as the dispute arose after the death of the Nawab, bat their Lordships went further and observed that " as this agreement between the father and the son is founded on a valid consideration, the son's undertaking is valid, and could be enforced aginst him, in the Courts of India as agreement raising a trust and constituting a valid obligation to make a return of the proceeds during the time stipulated." Thus here the income was treated as 'iwaz. Under the Hanafi Law 'iwaz cannot be valid if it is a part of the

GIFT BY MEANS OF A TRUST.—

100. Under Anglo-Muslim Law a gift can be effected by means of a trust, and the same requisites are essential as in the case of *hiba*. Here the gift is to be accepted by the trustees and possession must be taken by them.[1]

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§ 4. MISCELLANEOUS CASES.

EQUITY OF REDEMPTION.—

101. According to Anglo-Muslim Law a Muslim mortgagor may make a valid gift of his equity of redemption, and it is immaterial whether he is in possession of the property or not, for in the latter case it would be considered as the transfer of an incorporeal right, in other words the transfer being such as the subject of gift is capable of.

The decisions of the Indian High Courts are conflicting.[2]

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original gift, the Privy Council considers produce of the subject of the gift as distinct. Under the Shia Law a portion of the gift may be given as 'iwaz, and the parties in this case were Shias, but the decision of the Privy Council did not purport to rest on any distinctive feature of the Shia Law.

In Mohammad v. Fakhr Jahan 49 I. A. 195 (1922); 44 All. 301, the parties were Sunnis and the same rule was applied.

This principle has been farther extended to apply to payment being made to person or persons nominated by the donor during their lifetime of such persons. Vide Lali Jan v. Muhammad (1912) 34 All. 478 where the donor directed payment to his grandson during his lifetime. Vide also Tayakalbhai v. Imatiyal Begum (1916) 41 Bom 372.

1 Vide Sadik Husain v. Hashim Ali. 38 All. 627, 43. I.A. 212. (1916).

2 The Bombay High Court has held that the gift of equity of redemption is not valid if the mortgagee is in possession of the property at the time of the gift. There is an obiter dicta to this effect in Mohinuddin v. Manchar Shah 6 Bom. 650 (1882) and it was directly reaffirmed in Ismail v. Ramji 23 Bom. 682. However in Hashimbi Yakub Saheb 83 I.C. 208 (Bom. 1924) held the gift of an equity of redemption valid where the donee redeemed it afterwards. The Allahabad High Court in Rahim Baksh v. Muhammad Husain 11 All. 1 (1888) per Mahmood J had expressly dissented from the view expressed in Muhinuddin's case. However the Punjab Chief Court in Harnan Singh v. Sujwal 8 I. C. 307 (1910) reviewed the authorities and came to the conclusion,

GIFT OF DEBT.—

102. It is lawful to make a gift of debt to the debtor both according to the doctrines of *Qiyas* analogy and *Istehsan*, equity favourable construction. The acceptance of the debtor is not essential, but if he refuses it will become void.

It is lawful to make a gift of a debt after the death of the debtor, in which case his heirs may if they like refuse it, and then the debt would become due. This is the view of Imam Abu Yusuf and according to Imam Muhammad their refusal is of no consequence and the gift would remain effective.

If a person makes a gift of the debt to the debtor and the latter dies before refusing it, the transaction is effective and similarly if after the death of the debtor the creditor releases the debt, then according to Imam Abu Yusuf the deceased's heirs are entitled to refuse it, and on their refusal the debt would become lawfully due, but according to Imam Muhammad their refusal is of no consequence, the release would remain effective.

If a person makes a gift of a debt to a surety who guranteed its discharge, then his acceptance is required to effectuate the *hiba*.

According to *Istehsan* it is lawful to make a gift of debt to a stranger provided the right to recover the debt has also been conferred upon him.

The conditional or contingent gift of a debt or the gift to take effect at a future time is void.

"On the authorities cited we have no hesitation in differing from the decisions in the cases of Muhinuddin (6 Bom. 650) and Ismail (23 Bom. 682) and in holding that the gift was valid, placed the donee in the shoes of the donor, and necesstiated notice on the donee of the foreclosure, although the donor was still alive." But curiously in Sharif Husain v. Rukan Din (Lah. 1922) 70 I. C. 493. The Lahore High Court took the contrary view, but it may be noted that Harnam Singh's case was not brought to their notice.

The Madras High Court considers such a gift valid vide Yacoob Sahib v. Pacha Bibi 38 I. C. 248 (Mad. 1915) and Ajagar Hazar Sahib v. Chedulavada Annammah 100 I. C. 63. (Mad. 1926).

The Calcutta High Court has consistently held the gift of equity of redemption as valid. Mullick v. Muleka 10 Cal. 1112 (1884) where original authorities are discussed and vide Tara Prasanna Sen. v. Shandi Bibi (1922) 49 Cal. 68,

GIFT IN MARZ-ULMAUT—DEATH ILLNESS.[1] —

103. (*a*) The gift made in death-illness to a stranger is only lawful if possession is taken of the subject of the gift before the death of the donor, and it is lawful to the extent of one-third of his eatate only.

It would be valid to the extent more than one-third of his estate if the heirs consent to it after the death of the donor.

If the donor dies without making delivery then the gift is void.

(*b*) The gift made in death-illness to an heir is not valid even to the extent of one-third, unless other heirs give their consent after the death of the donor.

(*c*) A gift made during illness would be valid to the whole extent if the donor recovers his health,[2] and even in cases of prolonged illness which has continued for more than a year provided the gift was made after one year, and before the donor had become absolutely bed-ridden in state of dying.

(*d*) Anglo-Shia Law is the same as the *Hanafi* Law that is the gift is valid to the extent of one-third only.[3]

GIFT BY A WOMAN.—

104. Under Anglo-Muslim Law, where a ***pardanashin*** woman makes a gift, it is incumbent on the donee to satisfy that the donor

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1 As to what is death illness vide section 51 page 45. As regards various case vide annotations on pages 45 and 46.

It is evidentt hat if a person in death-illness makes a gift of some property which is much less than one third of his e tate, then such a gift is obviously valid, the rule speaks about one-thrid of the estate. And on the contrary if a person makes a gift of a house and he has no other property besides that, then the donee must return two-thirds of the same house to the heirs.

If a person in death-illness acknowledges a debt, the acknowledgment is conclusive as against heirs and legatees, but if the acknowledgment was made in favour of an heir then it is not effective.

2 It is obvious that an illness from which a sick person recovers is not death illness, in fact it is considered as a gift made in health.

A woman makes a gift of her dower to her husband, then if she recovers her health it would be valid, but if it ends in her death, the gift would not be valid without the consent of the heirs.

3 Vide Khurshed Husain v. Faiyaz Husain. 36 All. 289 (1914) Where original authorities which are somewhat conflicting were considered and the Court held that the Shia Law is it the same as Sunni Law.

knew what she was doing, the presumption that a person who affixes his signature understands it full well does not effectuate the gift entirely, something more is required *viz.* that the donor had acted independently and not under coercion or undue influence [1]

GIFT BY INSOLVENT.—

105. If an insolvent Muslim makes a gift with intent to defraud defeat or delay his creditors, it is voidable at the option of the person so defrauded.[2]

FIDUCIARY GIFT.—

106. If the donee stands in a fiduciary relation to the donor the donee must show that the donor had independent advice in making the gift.[3]

AGENCY IN GIFT.—

107. An agent may be asked to make the gift on behalf of the donor. The donee may authorise an agent to take possession of the subject of the gift on his behalf.[4]

BENAMI GIFT.—

108. If a Muslim purchases some property or invests money in Government securities in the name of his wife or child, then no presumption arises that the gift of property was intended by the said act of the purchase or investment.[5]

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1 Ashgar Ali v. Delroos Banoo Begum 3 Cal. 324 (1877) where the lady had executed a deed without any consideration for it.

Fuzul Hossein v. Amjad Ali Khan (1872) 17 W. R. 523. Mariam Bibi v. Sakina (1891) 14 All. 8. Khan Mehal (Osman Nawab) v. Administrator General of Bengal (1900) 5 C.W.N. 505 (a case of a will.)

2 Azimunissa Begum v. Dale 6 Mad. H.C.R. 456; Chunder Madhub Das v. Ameer Ali 25 W.R. 119. (1876), Sadik Husain Khan v. Hashim Ali Khan 38 All. 627 (1916).

3 Rajabai v. Ismail Ahmed (1870) 7 Bom. H.C.R. (O.C.J.) 27, a gift by a woman to a confidential adviser, without independent advice.

4 Vide M. Hamed Ullah v. M. Majid Ullah 40 I. C. 374 (1917) where the agent demanded possession from the donor.

5 S. Uzur Ali v. Must., Bibee Altaf Fatma (1869) 13 Moo I. A. 232; Nagimbhai v. Abdulla (1892) 6. Bom. 717. Nawab Ibrahim Khan v. Ummat-ul-Zohra 19 All. 267 (1896) a case of transfer of G. P. Notes to the eldest son.

SPES SUCCESSIONES.—

109. The mere chance of an heir-apparent succeeding to the estate of a person cannot validly form the subject of a gift.[1]

§ 5. REVOCATION OF GIFTS.

REVOCATION OF GIFTS.—

110. (i) The donees may be of several classes; *viz.* relations within the prohibited degrees, relatives not within the prohibited degrees, and non-relatives that is strangers.

In all cases before delivery of the subject of the gift, whether permission to take possession has been given or not, the donor is entitled to revoke the gift. It is immaterial whether the donee is present or absent at the time of revocation, and the sanction of the Kazi is not necessary. But after delivery of possession of the subject of the gift, the donor cannot revoke it from deserving relatives within the prohibited degrees. And from other donees he may revoke the gift with the sanction of the Kazi (Court), or with the consent of the donee.

According to the *Shia* Law revocation is complete without the sanction of the Court.

A partial revocation is allowed that is the donor may revoke a part of the subject of the gift at his pleasure.[2]

(ii) It is not necessary for the validity of revocation that the donor must take repossession of the subject of the gift.

If the donor seizes the subject of gift without the consent of the donee or obtaining the Court's decree he will be liable to the donee for any loss occasioned by his act, and after the donee has

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1 Vide the Transfer of Property Act s. 6 (a). Sumsoodin v. Abdul Husain (1906) 31 Bom. 165. Asa Beevi v. Karuppan Chetty (1917) 41 Mad. 365. Abdul Wahid Chan v. Must. Nuran Bibi (1885) 11 Cal. 597. 12 I. A. 91. But vide Hashmat Ali v. Kaniz Fatma 13. A L. J. R. 110 (and Chahlu v. Parmal 41 All.,611.)

But the heir's interest after being vested may be transferred. Mahammadunnissa Begum v. J. C. Bachelor 29 Bom. 428 (1907) (a case of contract).

2 e.g. If the donee has sold a part of the land granted to him, then the donor may resume the unsold part.

received a notice of the decree be would become liable for any loss occasioned to the gift, while in his possession.

(iii) There are several grounds which prevent retraction of gifts ;

(*a*) The destruction of the subject of the gift, whether by gift or having been transferred by the donee, or having changed its identity or having been increased in its value.[1]

(*b*) On account of the marriage relation between the donor and donee or by reason of relationship within the prohibited degrees.

(*c*) The death of the donor or the donee.

(*d*) An exchange or return having been received in lieu of the gift.[2]

Under Hanafi Law retraction of *sadqa* is not lawful.

According to some *Shia* jurists gifts to blood relations is irrevocable, and according to others gifts to parents alone is irrevocable, and gifts *inter se* between the husband and wife are revocable.

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1 The gift of the land cannot be revoked after the donee had constructed a house on it. Vide Mulani v. Maula Bux 78 I. C. 222 (All. 1923) 46 All. 260. Wali Bandi v. Tabeya (1919) 41 All. 534; Maqbul v. Ghafurunnissa 36 All. 333 (1914) a case of change of identity.

2 For case law with regard to exchange or return in case of Hiba-bil-'iwaz or hiba-bi-shart-iliwaz vide Mossa Adam Patel v. Ismail Moosa (Bom. 1909) 5 I. C. 446. Rasool Bee v. Gulam Kasim (Mad. 1914) Gulam Kasim (Mad. 1914) 23 I. C. 802. Abirjan Bewa v. Sheik Kabil 54 I. C. 542 (Cal. 1919).

CHAPTER VIII

§ 1. WASIYAT-WILLS.

WASIYAT-WILLS.—

111. (i) *Wasiyat,* will means a testament, an assignment of property, to take effect after death of the testator.[1]

The person who makes the will is called *musi,* testator, and the person who takes under the will is known as *musiliah,* legatee, the person who is appointed to execute the will is termed *wasi,* executor, and the subject of bequest is known as *musibeh.*

FORM OF WILL.—

112. A will may be made verbally or by writing. No particular form is required, it suffices, if the intention of the testator is clear and ascertained.[2] It is effected thus: "I bequeath this property to that person."

It may also be effected by visible signs indicating an intention to bequeath some property, if the testator happens to be sick or unable to speak and he dies without regaining the faculty of speaking.

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1 Bequests come next to the debts, and thus have preference over gratuitous transfers.

2 Vide Mahomed Altaf v. Ahmed Buksh (1876) 25 W. R. 121.

In Mazhar Husain v. Bodha Bibi 21 All. 91 (1898) a letter containing directions as to the disposition of his property was held as a valid gift.

A Muslim will in writing need not be signed vide Aulia Bibi v. Alauddin 28 All. 715 (1906), and it requires no attestation at all vide in re Aba Sattar 1905 7 Bom. L. R. 558, Sarabai v. Mahomed 43 Bom. 641 (1919).

In Mohammad v. Fakhr Jahan 44 All. 301, 49 I. A. 193, the donor reserved the usufruct for himself, held it did not render the transaction a will.

A tamliknama, if it possesses the characteristics of a will, may be treated as such Saiad Kasim v. Shaista Bibi 7 N.-W. P. 313 (1875).

REQUISITES OF WASIYAT.—

113. According to the Fatawa-i-Alamgiri Kitab-ul-Wisaya the conditions to the validity of a will are as follows :—

(i) The testator must be competent to transfer, (*tamlik,*) the property. Every adult person of sound mind may dispose of his property by will.[1]

(ii) The lagatee must be a fit person for (*tamluk*) to receive the property.[2]

(iii) The subject of the legacy must be *mal,* property fit for *tamlik,* that is, it must be some property susceptible of being transferred, it is immaterial whether the thing were in existence at the time of making of the will *wasiyat* or not, but it should be in existence at the time of the death of the testator.

(iv) The legatee must accept the bequest either expressly or by implication after the death of the testator.[3] It shall be deemed to be an acceptance by implication if the legatee were to die before rejecting or accepting the bequest, his heirs will be entitled to inherit. If the legatee refuses to accept the bequest, it is thereby cancelled and reverts to the testator or his heirs or as the case may be.

LIMITATION ON WASIYAT.—

114. (i) A bequest to an heir is not valid unless the other heirs give their consent after the death of the testator.[4] If one or more heirs give their consent it will be binding against them only.[5]

1 Under Anglo-Muslim Law, minority terminates on the completion of the eighteenth year, and for a ward it would terminate on completion of the twenty-first year.

2 The legatee may be a non-Muslim, 'Zimmi' (subject of a Muslim State), or an alien Harbi 'mustamim', (those protected by the Muslim Law). Abequest of a non-Muslim in favour of a Muslim is also valid.

3 Acceptance or repudiation before death is of no legal consequence. Acceptance may be inferred from conduct.

4 Upon the petition of Keramatulnissa Bibee 2 Morley 120 (1817). Ameeroonissa v. Abedoonissa 23 W. R. 208 (1875); Muhammad Ismail v. Fidayatunnissa 3 All. 723 (1881); Shek Muhammad v. Shek Imamuddin 2 B. H. C. 50 (1865); Ahmad v. Bai Bibi (1916) 41 Bom. 377, Ramzan v. Kamal 101 I.C. 570, (Lah. 1927); Khajooroonissa v. Roshan Jehan, (1876) 2 Cal. 184, 3 I.A. 291 (a case of bequest to a son as executor).

5 Vide Salayjee v. Fatima Bibi 1 Rang. 60, 63, 71 I.C. 753 (1922).

It is with reference to the time of the death of testator that it is determined whether a certain legatee is his heir or is to be treated as a stranger, for the purpose of the legacy.[1]

(ii) A bequest to a stranger of more than one-third of one's property is not valid, unless the heirs give their consent. If one or more of the heirs consent then it will be binding as against them only. But a bequest to a stranger to the extent of one-third of one's property is valid, and no consent of the heirs is necessary at all.

(iii) If a person bequeaths some property to an heir and also to a stranger, the bequest to the heir is not valid, but that to the stranger is valid.[2]

(iv) A bequest by a person having no heir is valid to the extent of his whole property.[3]

Under the *Shia* Law the heirs may give their consent during the life-time of the testator and it need not be ratified after his death. And a bequest to an heir not exceeding one-third of one's property requires no consent of other heirs at all.[4]

LEGATEE'S TITLE.—

115. The legatee derives his title from the testator and not from the heirs, and actual possession is not essential to complete it.

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1 A Muslim dies leaving a son, a father and his paternal grandfather. He leaves a bequest for the granfather which will take effect without the son's consent; but if the father were to die during his lifetime, then the bequest to his granfather cannot take effect, unless the son gives his consent.

If the consenting heirs happens to be an insolvant, it does not effect the bequest. Azizunnissa v. Chiene (1920) 42 All. 593, 59, I.C. 296, (All. 1920).

2 Vide Muhammad Junaid v. Aulia Bibi 42 All. 497. 18 A. L. J. R. 613.

3 As against the right of the State to take by escheat the testator may bequeath the whole of his property by will.

If a man dies leaving his wife and no other heirs, be is entitled to make a will disposing 5/6 of his estate [i.e. the Koranic Share is determined with reference to the net estate after the creditors and legatees are satisfied. Hence assuming that there are no creditors 1/3 of the estate could be lawfully disposed of by will, and out of the resedue 2/3 the wife is entitled to 1/4 of 2/3 = 1/6 only].

And similarly the woman leaving her husband as the sole heir could dispose of 2/3 of her estate. [i.e. the husband would take 1/2 of 2/3 residue = 1/3 only.]

4 Vide Qasim Ali v. Ahmad Shah 32 I. C. 516.

§ 2. VOID BEQUESTS.

116. Under the Muslim Law a will is wholly or partly rendered void in the following cases :—

(*i*) If the testator bequeaths more than one-third of the estate.[1]

(*ii*) If the will is for the benefit of one of the heirs.

(*iii*) If the will is for the benefit of some object opposed to Islam.[2]

BEQUEST TO AN UNBORN PERSON.—

117. A bequest to a person not in existence at the time of death of the testator is void, but a bequest in favour of a fœtus is valid provided it is born within six months from date of the will.[3]

BEQUEST IN FUTURO.—

118. A bequest to take effect *in futuro* is void.

CONTINGENT BEQUEST.—

119. A contingent bequest is void, but an alternative bequest is valid.[4]

BEQUEST BY A MINOR.—

120. A bequest by a minor is void, even if he dies after attaining majority, but it will become effective upon his confirming it on attaining majority.

BEQUEST IN COMPULSION OR JEST.—

121. A bequest made by a person in jest, or compulsion, or by mistake is void.

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1 The disposition in excess to the legal third is validated by the consent of the heirs.

2 e.g., a will for building a place of worship of an Idol.

3 Abdul Cadar v. Turner (1894) 9 Bom. 158.

4 Property bequeathed in default of a son or grandson to charity is an alternative bequest. Advocate General v. Jimabhai (1917) 41 Bom. 181. (284—286).

BEQUEST BY AN INSANE PERSON.—

122. A bequest by an insane person is invalid even if he recovers his mental faculties afterwards.

A will made by a person of sound mind becomes invalid if later on he becomes permanently of unsound mind.[1]

TESTATOR COMMITTING SUICIDE.—

123. Under Anglo-Muslim Law if a person wounds himself mortally or takes poison with a view to commit suicide, and then makes a will it is void; but if he makes a will and thereafter commits suicide it is valid.[2]

BEQUEST OF A THING NON-EXISTING.—

124. A bequest of any thing not in possession or disposal of the testator at the time of his death is null, unless the testator had desired that it may be discharged by payment of its value from his property.

BEQUEST TO A SLAYER.—

125. A bequest to the person who had inflicted a mortal wound to the testator is not valid. If the legatee had actually slain the testator the bequest is rendered void, unless the heirs give their consent, then the bequest becomes valid, and it would also be valid if the slayer is a minor or a lunatic or if the testator has no heirs.

ACCIDENT TO BEQUEST.—

126. An accident with respect to the subject of legacy or legatees resulting in a certain amount of uncertainty with reference to it would make the will void.

BEQUEST IN SICKNESS.—

127. A bequest by a person in *marz-ul-Maut*, death illness in favour of the woman whom he later on marries is void.

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1 Even say for six months.

2 Vide Mazhar Husen v. Bodha Bibi 21 All. 91 P. C. (1898); a case of suicide after making the will.

Bequests in death-illness, take effect out of the third of the estate. If a sick person made a bequest, and recovers from his illness, his bequest is deemed to be wholly valid.[1]

BEQUEST OF ANOTHER'S PROPERTY.—

128. If a person, makes a bequest of some property belonging to another person, then the validity of bequest rests upon the consent of the owner of the bequeathed property.

BEQUEST BY A DEBTOR.—

129. If a person in debt to the extent of his whole property makes a bequest, it is not lawful unless the creditors release the property.

BEQUEST FOR BENEFIT OF ONE'S SOUL.—

130. If a person makes a bequest that prayers should be offered at his grave, or that a tomb be erected over his grave, it is void.[2]

BEQUEST OF THE LEGAL THIRD TO GOD.—

131. If a person bequeaths one-third of his estate to God the bequest is void; but according to Imam Muhammad it may be spent on charitable purposes.[3]

§ 3. PREFERENCE, ABATEMENT, USUFRUCTUARY BEQUESTS, ETC.

PREFERENCE OF BEQUEST.—

132. (i) If the testator has made several bequests exceeding one-third and are not allowed by the heirs, then it is to be considered whether they are (*a*) *farayiz*, or (*b*) *wajibat* or (*c*) *nawafil*.

(*a*) The *farayiz* are expressly ordained duties prescribed in the *Koran* itself and have precedence over all, *e.g.*, pilgrimage, *zakat*. (*b*) the *wajibat* come next in order of preference and denote purposes

1 Ashruffunissa v. Azumun, I. W. R. 17 (1864). Gulam Mustapha v. Hurmat 2 All. 854 (1880). Wazir Jan v. Altaf 9 All. 357 (1887). Aga Mahomed v. Koolsom 25 Cal. 9, 24, I. A. 219 (1897). Sharifa Bibi v. Gulam Muhomed 16 Mad. 43. (1892).

2 Vide Durrul-Mukhtar (Brij Mohan Dayal p. 415).

3 Ibid. p. 415.

which are deemed necessary and proper, though not actually prescribed, *e.g.*, erection of a *Masjid*, or a receptacle for travellers or a bridge.

(*c*) The *nawafil* consist of voluntarily imposed obligations.

If the bequests all happen to be *farayiz* then a beginning is to be made with that which the testator mentioned first. And where the objects are pious though not ordained the arrangement of the testator is to be followed.

ABATEMENT OF LEGACIES.—

133. (i) If a person makes bequests to individuals of more than the legal third of his estate, and the heirs do not give their consent, then the legacies must abate rateably.

(*a*) The rateable portions of each bequest of a secular nature must be separately allotted.

(*b*) The rateable portion of bequests of pious nature should be consolidated and priority must be given to *farayiz*, next *wajibat*, and then *nawafil*.[1]

(*c*) If any legacy is by itself more than the legal third, then according to Imam Abu Hanifa, it must be reduced to a third, and thereafter it will again abate along with other bequests.[2]

According to the *Shia* Law bequests prior in date take priority over those later in date, unless the later bequests are in fact a revocation of the prior bequests.

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1 A Muslim makes a will that 100 be paid to faqirs, Rs 40 to the poor in expiation of the prayers missed by him, and Rs. 100 to his relatives. But the legal third of his estate is 72 only. Hence the legacies abate in the proportion of 72 to 240 viz. 30, 12, 30. Now the legacy to relatives is paid out and the other two are consolidated out of which the legacy for expiation of prayer Rs. 40 is first satisfied in full thus leaving Rs. 2 for the faqirs.

2 The two disciples differ from their master. Thus if a Muslim leaves a legacy of 1/2 of his estate to X and 1/4 to Y. According to Imam Abu Hanifa the legal third will be divided between them in the proportion of 1/3 and 1/4. But according to his two desciples it will be divided in the proportion named by the testator viz. 1/2 and 1/4.

According to Imam Abu Hanifa the principle of cutting down the legacy to 1/3 does not apply where the legacies consist of a sum of money or take the form of a colourable sale transactions muhabat.

ACCESSION TO A LEGACY.—

134. (i) If there is an accession to a legacy after the death of the testator but before its acceptance by the legatee, then the legatee will be entitled to such an accession without consent of the heirs if the bequest together with the accession is less than or equal to the legal third of the estate.

(ii) If such an accession is after acceptance but before distribution of the estate, then according to some jurists the legatee is entitled to the accession and it may exceed the legal third, but according to other jurists it must be less or equal to the legal third or must abate rateably and the legatee takes as much as makes up the legal third.

According to Imam Abu Hanifa the legatee is always entitled to the whole bequest and also to the accession if the legacy thus extended is valid.[1]

BEQUEST OF USUFRUCT.—

135. It is lawful for the testator to make bequest of use and produce of a thing, of the occupation of a mansion, or the produce of lands or gardens, in favour of a living person for life or for a limited time.[2] In this case the subject of legacy belongs to the testator's heirs subject to the interest of the usufructuary. It is

1 Vide Baillie's Digest 1 p. 638, 639.

X bequeaths a mare to Y. After X's death the mare foals, and the value of the mare and the foal is less than the legal third therefore Y is entitled to both.

X dies leaving an estate worth 900 and bequeaths a mare to Y of the value of 300. After X's death the mare foals and the foal is valued also at 300. (Now the total value of the estate is 1,200 and the legal third is 400.) According to Imam Abu Hanifa Y can take the mare (300) and a third of the foal (1/3 of 300=100). According to his disciples Y can take two-thirds of the mare (2/3 of 300=200) and also two-thirds of the foal (2/3 of 300=200). Vide Tyabji's, Muhammadan Law, p. 799.

2 If the property of the testator consists of a single house, the use of which has been bequeathed, then the house is to be partitioned and the legatee may occupy 1/3 of the house, and if the parties agree to use the house by turns it is permissible.

A bequest of the produce of something does not include or imply the personal use of that thing by the legatee, but it seems he may let it, and the bequest of use of a thing does not entitle the legatee to let out the property on hire.

The bequest of a year's product where the testator has left a single house and it exceeds a third of the estate would entitle the legatee to

also lawful for the testator to bequest the usufruct of some property to one person and the property itself to another person.

If the legatee dies before the termination of the limited period the property would revert to the testator's heirs.

A bequest of produce is cancelled by the subject of legacy being purchased by the legatee from the heirs of the testator.

RESTRICTIONS DEROGATING FROM THE GRANT.—

136. If a person makes a bequest otherwise absolute in its terms, and nevertheless makes it subject to a condition derogating from the grant *viz.* that the legatee shall not alienate the property, or that on his death it shall go to certain persons or revert to the heirs, then the bequest takes effect, but the condition is deemed to be invalid.[1]

TRANSFER WITH DEFERRED POSSESSION.—

137. If a person executes a deed transferring some property to a living person, and providing that the transferee shall take possession after his death, then such a deed may take effect as a will.[2]

BEQUEST TO TWO PERSONS.—

138. (*a*) A bequest made in favour of two persons, one of them being dead at that time accrues entirely to the other legatee.

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receive a third of the product, and he is not entitled to have the property divided up.

A bequest of produce includes existing and future produce, but a bequest of fruits means only the existing fruits, unless it appears otherwise from the terms of the will.

1 Vide Nasir Ali Shah v. Must. Sughra Bibi 54. I. C. 85 3 M. Abdul Karim v. Abdul Qayum 28 All. 342 (1906) The Court took the view that "Life estates and contingent interests are not recognised by the Muhammadan Law." Vide also Bakhtawar Khan v. Farooq Ahmad, 37 I. C. 423. (Oudh 1916) Mahmoed Bibi v. Sulaiman Ahmad 98 I. C. 838 (Mad. 1925). It is submitted that under the Muslim Law it is possible to create a life-interest in the form of a usufruct of the property.

In Allah Din v. Abdul Gafar. (All. 1922) 69, I.C. 848 a bequest creating a life estate has been held to be invalid It is submitted that this rule is too wide, there were also other reasons in this case why the will was not upheld.

2 It is clear that it cannot take effect as a gift for want of delivery of possession, but it may be held valid as a will, vide Saiad Khanum v. Shaista Bibi 7 N. W. 318, (1875).

(*b*) A bequest made in favour of two persons and one of them subsequently dies, then only half of the bequest would be given to the other legatee.

(*c*) If the bequest was to be divided between two persons, and if one of them was non-existent, his share would lapse to the testator's heirs.

(*d*) If a bequest is made in favour of two persons, thereafter the testator declares a third person to be a participator in the bequest, then he would be entitled to take the legacy along with the other two legatees.[1]

WILLS IN BRITISH INDIA.—

139. In British India a Muslim if he likes may have his will registered.[2]

A written will may also be deposited in a sealed cover with the Registrar to be opened after the death of the testator.

A will may be admitted to probate,[3] if so the powers and duties of the executor will be determined by the Indian Succession Act XXXIX of 1925. It is submitted that with or without probate a *wasi* will be deemed to be an executor within the meaning of Parts VIII and IX of the Indian Succession Act 1925.

Probate cannot be granted to a minor or a person of unsound mind.[4]

When several executors are appointed probate may be granted to them simultaneously or at different times. The surviving executor is responsible for the management of the estate.[5]

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1 'e.g.' If a person bequeaths 100/ to A and 100/ to B. And makes C a sharer with A and B Then C is entitled to 1/3 from the share of A and 1/3 from the share of B. The result would be that A. B. and C. each would take 1/3 of the whole property. But if the portions of A and B were unequal then C would be entitled to take a moiety of each of their shares.

2 Registration is not compulsory at all.

3 Probate means the copy of a will certified under the seal of a Court. Indian Succession Act S 2 (f) s. 222.

A Muslim will may be admitted in evidence after due proof, even if no probate has been obtained. Shaik Moosa v. Shaik Essa. (1884) 8. Bom. 241. Saikina Bibi v. Mahomed Ishak 37. Cal. 839 (1910); Mahomed Yusuf v. Hargovandas, 47 Bom. 231. (1923) [The executor may sell the property without taking probate].

4 I.S.A. s 223. 5 I.S.A. 224 226,

Probate when granted establishes the will from the death of the testator and renders valid all intermediate acts of the executor as such.[1]

The executor is in the position of a trustee for the heirs to the extent of two-thirds, and he is an active trustee as to one-third of the net assets for purposes of the will.

§ 4. INTERPRETATION OF WILLS AND REVOCATION OF BEQUESTS.

INTERPRETATION OF WILLS.—

140. "A will speaks from date of death", and the description contained in it will be deemed to comprise the property of that description, at the death of the testator.[2]

If a person bequeaths a thing without identifying the subject of the bequest, and he has no such object at the time of his death, then the Court must determine whether or not he desired that the thing should be purchased out of his assets for the benefit of the legatee.[3]

If a person bequeaths a fraction of things of a specified kind being homogeneous, the legatee will take the fraction as fixed at the time of the bequest provided the fraction does not exceed the legal third. And if the articles were not homogeneous the legatee will take the fraction of the things as existing at the time of the testator's death.[4]

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1 I.S.A. s. 227.

ILLUSTRATIONS.

2 A poor person bequeaths a fourth of his property, later on he becomes rich and dies. The legatee would take one fourth as stated in the will.

3 A person bequeaths thus (a) "A goat of my property" (b) "One of my goats," (c) "A goat." In case (a) a goat is to be purchased from the property whether or not the testator possess a goat at the time of his death; according to case (b) the bequest will take effect if the testator leaves some goats. The case (c) is ambiguous, and it may be interpreted as in either of the two above cases.

4 e. g. A testator bequeaths "a fourth of my goats" and he has forty goats. At his death he has only 20 goats nevertheless the

SIGNIFICANT ARABIC TERMINOLOGY.—[1]

141. A person makes a bequest (*a*) to the *ahl* of such a person (*b*) to the *ahl* of the *house* of such a person. (*c*) to fhe *Ahal* of such a person's *nasab*, or (*d*) *gins*, (*e*) to *awlad* (*f*) to *Ashar*.

According to Imam Abu Hanifa, the term *Ahl* includes the wife only and according to his two disciples it includes every member entitled to maintenance from that person.

The term *ahl* of the *house* includes the father, the grandfather and descendants on the paternal side.

The term *Ahl* of such a person's *nasab* deuotes descendants from his ancestor.

The term *gins* denotes descendants from the paternal stock only and not from the maternal.

The term *awlad* includes children both males and females.

The term *ashar* includes all the relations of his wife within the prohibited degrees, and relations of his father's wife and also son's wife within the prohibited degrees.

A woman makes a bequest to her *jins* or the people of her *bait*. In the first case her own son or daughter cannot take for they are of the *nasab* of their father unless of course the father happens to be one of their mother's paternal relatives *ashirah*.

REVOCATION OF BEQUESTS.—

142. A bequest may be revoked expressly or impliedly.

An express declaration oral or written is when the testator says "I have revoked this bequest." And when he does an act from which revocation may be inferred it is implied revocation. *viz.* by destroying the subject matter or transferring it to another person.

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the legatee will take 10 goats provided the value of the goats does uot exceed the legal third.

A testator bequeaths "a fourth of my clothes." The clothes are of various kinds, and some are destroyed. At the testator's death the legatee will only take a fourth of what exists at that time.

1 For further examples vide Shama Churun Sircar Tagore Law Lectures 1874 pp. 65—73.

A bequest to one living person, is cancelled by the bequest of the same thing to another person, unless the latter happens to be not alive, or the latter is made a sharer along with the former.

If in a will the subject matter of a bequest is again bequeathed to another person, unless clearly stated the first bequest is not thereby revoked, the two bequests will be considered as one, the legatees being jointly entitled to the thing. But if in a subsequent will the same bequest is bequeathed to another person it is a valid revocation of the former bequest.

A denial of the bequest by the testator is not considered as a retraction of the bequest.

A certain land is bequeathed, later on the testator builds a house upon it. The bequest is thereby revoked.

A bequest is made of a bar of iron, subsequently it is made into a sword. The bequest is revoked

1 Mira Bakhsh v. Mehr Bibi 31. I. C. 693. [a will may be revoked by oral or written declaration. A testator may make such a statement in Court].

CHAPTER IX

SHUF'A—PRE-EMPTION.

SHUF'A DEFINED—

143. The right of pre-emption, *Shuf'a*[1] means a right to be substituted in place of the transferee of some immoveable property by reason of such right.

Shuf'a means a right to acquire by compulsory purchase some immoveable property in preference to all other persons[2] by reason of such right.

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1 " The original meaning of ' Shuf'a ' is conjunction."

The Muslim Law of Pre-emption is administered by the Courts of British India on the ground of "justice, equity and good conscience." Spankie, J. in Chundo v. Alimoodeen, 6 N. W, 28 (1873) and Mahmood, J. in Gobind Dayal, 7 All., 775, (1884), insisted that the Muslim law of pre-emption should be treated under the Bengal, N.-W.P. and Assam Civil Courts Act as a "religious usage or institution," but the majority of the judges were not prepared to accept this view. The Muslim law of pre-emption is recognised to a limited extent in the Bombay Presidency, and it is not recognised in the Madras Presidency even on the ground of equity and good conscience except in Malabar. In the Punjab, the law of pre-emption is regulated by the Punjab Pre-emption Act I of 1913. And in the North-West Frontier Province pre-emption is regulated by the Regulation II of 1906. In Oudh it is regulated by the Oudh Law Act XVIII of 1876. The recent Act regulating pre-emption is the Agra Pre-emption Act XI of 1922, as amended by Act VIII of 1923. All these enactments have almost abrogated the Muslim Law.

The Muslim Law of Pre-emption is frequently modified by local custom and is applicable among the Hindus by custom and under the Wajib-ul-'arz. In Bihar and Gujrat (Surat and Broach) a custom of pre-emption is recognised among the Hindus. Parasasth Nath v. Dhanai (1905) ; 32 Cal., 988 ; Fakir Rawat Imam Baksh. (1863), B. L. R., Sup. Vol. 35 ; Jadu v. Jani Koer (1908). 35 Cal., 575 ; Gordhandas v. Pankor (1869), 6 B. H. C. A. C., 263, but ' vide ' Dahya Bhai v. Chuni Lal (1913), 38 Bom., 183. A statement in the ' Wajib-ul-'arz ' is good ' prima facie ' evidence of custom. A Muslim pre-emptor may lawfully base his claim in the alternative either on the Muslim Law or on the ground of custom. Abdul Hamid, 36 All., 573 (1914) ; 12 A. L. J. R., 966.

Wilson, pp. 373 etc, Tyabji, pp. 651—etc. ; Abbasi, pp. 3—etc. Sircar, T. L. L. (1873), pp. 509; T. L. L. (1874), pp. 444 etc, Baillie, Part I, pp. 478 etc, ; Agarwala, pp. 31.

2 The right of pre-emption arises when there is a sale to a stranger, and the term stranger means in the pre-emption law a person who is neither a co-sharer

The privilege of *Shuf'a* appertains to *'aqar*,[1] that is immoveable property,

KINDS OF PRE-EMPTORS.—

144. The right of pre-emption appertains (i) to *Shafi'-i-Sharik*, a partner in the property, owner of an undivided share, a co-sharer; (ii) *Shafi'-i-Khalit* a participator in the immunities and appendages of the property[2]; (ii) *Shafi-i-jar* neighbour, owner of contiguous immoveable property, a pre-emptor by right of vicinage.[3]

nor participator in the appendages nor a neighbour to the subject-matter of pre-emption. A co-sharer who has concealed his interest (that is, there is a secret purchase, 'bainami farzi,' in the name of another) cannot defeat the pre-emptive right of a 'bona fide' co-sharer without any notice of the concealed purchase. Beni Shankar Shalhet v Mahpal Bahadur Singh, 9 All., 481 (1887).

1 The subject of pre-emption must be 'Aqar and that which comes within the meaning of the term 'Aqar. 'Aqar means immoveable property. 'Aqar includes land whether arable or pasture, mansions, vineyards, gardens and enclosures, e.g., a bath, a well. Under the 'Shafi' Law there is no pre-emption in indivisible things but under the 'Hanafi' Law there is pre-emption in the case of a bath, a well and a mill. The 'Maliki' jurists agree with the 'Hanafi' view. It includes agricultural land. Shaeikh Jahangir v. Lala Bhekari Lal, 6 B.L.R., 42; 11 W.R., 71. It extends to a whole village. S.D.A., Cal., Vol. III, 85. Moveables if they are accessories are included in the term 'Aqar. There is no pre-emption if trees or buildings are purchased with a view to removal, they are not included within the term 'Aqar.' It is otherwise if the trees are purchased with the ground on which they stand.

2 The owner of a dominant tenement may lawfully pre-empt the servient tenement, his claim is preferred to that of a neighbour. And likewise the owner of the servient tenement in respect of the sale of the dominant tenement is preferred to a mere neighbour; Ranchoddas v. Jugal Das (1899), 24 Bom., 414; Karim v. Priyo Lal (1905), 28 All, 127; 2 A L J R., 619. However a 'khalit' is not necessarily an owner of dominant or servient tenement.

3 The right of pre-emption by vicinage applies to small plots of land and enclosures. It does not apply to large estates. Abdul Azim v. Khondkar Hamid Ali, 2 B. L. R. A. C, 63; 10 W. R., 356; Ejnas Kooer v. Shiekh Amjad Ally, 2 W. R., 261; Roshun Mahomed v. Mahomed Kalim, 7 W. R., 150, etc. In Mahomed Husain v Mohsin Ali, 14 W. R. F. B., 1; all authorities were closely examined. However a partner in a big estate has a right to pre-empt when one of the co-sharers of the estate sells his share, Sheikh Karim Baksh v. Kamurddin Ahmad, 6 N.-W. P. H. C. R., 377.

A mere tenant upon the land as such has no right of pre-emption, Gooman Singh v. Tripor Singh, 8 W. R., 437, nor can a mere possessor with no legal title, Bellaree Ram v. Musammat Sheobhudra, 9 W. R., 455.

A neighbour in the land on which a common partition wall stands is preferred to all other neighbours, in fact under the 'Hanafi' Law he is deemed to be a partner. Vide The Muslim Law of Pre-emption by the present author p. 84.

In case of competition the first class excludes the second and second excludes the third.

According to the *Fatawa-i-'Alamgiri* the *Shafi-i-jar* must demand pre-emption immediately on hearing of the sale and not wait till the *Shafi-i-sharik* has surrendered his right, otherwise he will forfeit his right of pre-emption.

Under the *Shi'a* Law[1] there is no right of pre-emption if there are more than two co-sharers and there is no right of pre-emption on the ground of participation in the appendages nor on the ground of mere vicinage.

Under the *Shafi-i* Law pre-emption can only be claimed on the ground of partnership.

EQUAL RIGHTS OF ALL SHAFI.—

145. The rights of all pre-emptors of one and the same class are equal, and they are entitled to equal shares *per capita,* but under the *Shafi-i* Law the shares claimable are not necessarily equal, but should be in proportion to their respective interests in the property.

PERSONAL LAW OF PARTIES.—

146. It appears that according to the High Court of Allahabad both the seller and the pre emptor must be Muslims, and the personal law of the purchaser is of no consequence. That the *Shi'a* law of Pre-emption is to apply when both the vendor and the pre-emptor or either of them is a *Shi'a.* According to the Calcutta High Court the vendor, the vendee and the pre-emptor should all be Muslims, and in Bihar the Muslim Law of Pre-emption is recognised to be the territorial law.[2]

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1 Baillie, Part II, p. 175 (Sharaya-al-Islam) ; Ameer Ali, Vol. I, p. 787 ; Sircar, T. L. L. (1874), pp. 443—462; Abbasi, pp. 111—120. The 'Shi'a' Law of Pre-emption is recognised by the Indian High Courts vide Abbas Ali, v. Maya Ram 12 All., 229 (1889); Rajah Deedar Hossein, v. Ranee Zuhooroonissa 2 Moo. Ind. Ap., 441; Qurban Husain, v Chote 22 All, 102 (1899).

2 Ameer Ali, Vol I, p 728 ; Wilson, p. 382 ; Tyabji, pp. 663 664 ; Abbasi, p. 33. The Muslim Law of Pre-emption by the present author p. 9.

(a) Personal Law of the vendor :—

The seller must be governed by the law of pre-emption, e.g., if a non-Muslim sells some property, then there is no pre-emption under Anglo-Muhammadan Law.

VALID SALE.—

147. The right of pre-emption takes place when some property subject to pre-emptive right is transferred by a valid sale,[1] or by some means equivalent to a valid sale. There must be an exchange

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In Pir Khan v. Faiyaz Husain, 36 All., 488 (1914). A 'Shi'a' sold some property to the vendees who were Hindus. A 'Sunni' pre-emptor claimed to pre-empt the property. The 'Shi'a' vendor succeeded on the ground that there was no right of pre-emption for there were more than two co-sharers. It seems that according to the Allahabad High Court the 'Shi'a' Law of pre-emption is to apply when both the vendor and the pre-emptor or either of them is a 'Shi'a.' The Calcutta High Court in Jog Deb Singh v. Mahomed Afzal 32 Cal., 982 (1905) allowed the 'Sunni' law to prevail where the vendor was a 'Shi'a' and the pre-emptor was a 'Sunni.'

(b) Personal Law of the vendee :—

If a Muslim sells some property to non-Muslim, according to Allahabad High, Court there is pre-emption under the Muslim Law Gobind Dayal v. Inayat Ullah 7 All., 775. But according to Calcutta High Court there is no pre-emption at all. Kudrat Ullah v. Mahini Mohan Shaha (1869), 4 Beng. L R., 134; 13 W. R., 21

According to previous decisions of the Allahabad Court the right of pre-emption could be enforced even if the seller was a Hindu. Chundo v. Hakeem Alimoddeen (1873), Agra F. B., 105; 6 N.-W. P., 28. The last case was overruled in Dwarka Das v. Husain Bakhsh 1 All., 564 (Stuart, J. and Pearson, J. dissenting); but there is no doubt that the earlier cases were in conformity with the Muhammadan Law. As regards Bihar it has been held by the Privy Council in Jadu Lal Sahu v. Janki Koer, 9 A.L.J.R., 525, 39 I. A, 101; that "is Bihar the right of pre-emption under the Muhammadan Law is enforceable irrespective of persuasion of the pre-emptor, vendor and vendee."

(c) Personal Law of the pre-emptor :—

The pre emptor must be a Muslim to claim pre-emption under the Muslim Law. A 'Shi'a' however cannot claim pre-emption on the ground of vicinage, even if the seller and purchaser were 'Sunni' Muslims. Qurban Husain v. Chote 22 All., 102. But 'vide' Rokaiya Begam v. Ahmadi Khanum (1912), 9 A. L. J. R., 769, where a purchaser a 'Shi'a' woman was allowed to defend the suit on the ground that she was a 'Shafi'-i-khalit' and the 'Sunni' pre-emptor was also a 'khalit' and the pre-emptor's contention that under the 'Shi'a' law 'khalits' have no right of pre-emption was rejected by the Court.

1 According to the Muslim Law sale means commutation of goods for goods, goods for money, of money for money, of money for goods. Sale is contracted by declaration and acceptance, the subject and consideration of sale must be determinate and the subject must be in actual existence. The Muslim Law does not prescribe any particular form for a sale transaction. The conception of sale under the

of property for property or money and there must be an entire cessation of the vendor's interest.

There is no right of pre-emption in an invalid sale[1] so long as the invalidating circumstances or conditions continue to exist. The right of pre-emption arises when the vendee exercises his right of ownership, and obtains possession of the property or erects a

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Muslim Law is wider than the conception of sale under the Transfer of Property Act, Section 54, in fact it includes the definition of exchange as defined in Section 118 of the Transfer of property Act. In Begum v. Muhammad Yaqub, 16 All., 344., F. B. citing original authorities the Allahabad High Court has held that the sale must be complete according to the Muslim Law. However in this very case Mr. Justice Banerji took the contrary view, and similar view was expressed by Mr. Justice Mahmood in Janki v. Girjadat (1884), 7 All., 482 F. B. The Calcutta High Court in Budhai Sardar v. Sana Ullah (1914), 41 Cal., 943 and the Patna High Court in Kheyali v. Mullick Nazarul Alum (1916), 1 Pat. L. J., 171, did not accept the view of the Allahabad High Court and held that Sec. 54 of the Transfer of Property Act embodies the general law which is paramount and supersedes the Muslim Law. In Abdullah v. Ismail (1922), 46, Bombay, 302, the Bombay Hight Court preferred the view of the Allahabad High Court and held that a right of pre-emption arose in the case of an oral agreement to sell followed by payment of price and delivery of possession to the vendee even though no registered sale-deed was executed. It seems that the difficulty could be solved in each case by determining the actual intention of the parties 'vide' Sitaram v. Jiaul Hasan, 45 Bom., 1056 (P.C.)

1 It is to be determined under the Muslim Law as to what is an invalid sale, as for instance by reason of uncertainty in price or the time for delivery of the property sold. Najam-un-nissa v. Ajaib Ali, 22 All., 343 is a good case to illustrate what is an invalid sale and its effect on ownership of the vendee. The facts are that Aminullah sold a house and site to Ajaib Ali stipulating Rs. 84 for the site and a further sum for the house to be ascertained by carpenters or masons appointed by the vendor and the vendee, and upon the additional sum being paid possession of the house would be made over within 10 days. This transaction took place by a registered contract of sale on the 17th May, 1895. Abrar Husain, the owner of adjacent houses, sold his property to Najam-un-nissa on the 14th July, 1896, Ajaib Ali instituted a suit for specific performance and eventually obtained possession of the house on the 6th of September, 1896. Najam-un-nissa and Ajaib Ali sued one another, each claiming a right of pre-emption against the other The Court held quite correctly, that Ajaib Ali did not become owner of the house purchased by him until the 6th September, 1896, and therefore he was not entitled to claim pre-emption against Najam-un-nissa when she purchased her houses on the 14th July, 1896, and the Najam-un-nissa was entitled on the sale to Ajaib Ali becoming complete on the 6th September to claim pre-emption against him.

building or plants trees on it.[1] However in no case ownership relates back to the date of the original contract for sale or of sale. The ownership of the vendee dates from the date of his taking possession of the property.

There is no right of pre-emption in a sale with reservation of an option of repudiation for the vendor, until the option drops, but there is a right of pre-emption in a sale under a condition of option to the vendee, for in the latter case there is a complete extinction of the vendor's interest.

If the sale is subjected to the option of a third person then the right of pre-emption arises after the sale is confirmed by him.

WHERE NO RIGHT ARISES.—

148. (i) The right of pre-emption does not arise out of inheritance, gift,[2] *sadaqa* (pious gift) bequest, *waqf*[3] (charity) and lease.[4]

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1 According to the 'Fatawa-i-'Alamgiri the mere fact of taking possession is not sufficient at all, it mentions the case of erecting a house along with taking possession.

2 Property alienated by a simple gift is exempted from pre-emption, but in the case of gift amounting to sale or disguised as a sale, pre-emption is permitted. Angan Lal v. Muhammad Husain, 13 All., 409 F.B.

If A makes a gift of property to B and B subsequently makes a gift of his own property to A, then no right of pre-emption arises. This is 'Hiba-bil-'iwaz It is a mere exchange of presents.

If A makes a gift and there is a distinct understanding that B is to make a return this transaction amounts to an exchange, 'Hiba-bi-shartil-'iwaz. This righf of pre-emption arises. But if B fails to make the stipulated return or A refuses to accept the return (whether A has the right to refuse is a doubtful, point) then the transaction amounts to a simple gift and there is no pre-emption. To fall under 'Hiba-bi-shartil-'iwaz it is essential to stipulate for the return. 6 S.D A., Beng., 34.

3 There is no pre-emption as regards 'waqf' property, and there is no pre-emption in favour of 'waqf property. There is a Punjab ruling to the effect that the 'Mutawalli of a mosque could pre-empt. Jind Ram v. Hussain Baksh, 49 Punjab Rec. 197 (1914). This decision was however under the statutory law although it was discussed as a question of Muhammadan Law.

4 Mooroolee Ram v. Haree Ram, 8 W.R., 106.

The rent reserved was only one rupee per annum. Ram Golam v. Narsingh, 25 W.R., 43 and Dewanutullah v. Kureem Molla, 15 Cal., 184. But dressing up a sale in the garb of a lease cannot defeat the right of pre-emption. Muhammad Niaz, v. M. Idris 40 All., 322 (1918).

In the case of gift with a condition of return *Hiba-bi-shartil ʿiwaz* after possession has been taken on both sides the right of pre-emption arises.

(ii) There is no right of pre-emption in the case of partition of the property amongst co-sharers of an undivided immoveable property.[1]

MORTGAGE AND DEBT.—

149. In the case of mortgage the right of pre-emption arises after the equity of redemption has been foreclosed. If a mortagagor sells the mortaged property with its encumbrances or the equity of redemption the right of pre-emption arises.

In the case of release from debt the right of pre-emption arises, *e.g.*, where a debtor gives some property to his creditor on condition that he shall release him from the debt.[2]

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1 Partition ends the right of a sharik, it destroys co-parcenary body. To extinguish the partners' right of Shuf'a it is necessary that a formal division has taken place. For instance if the separation is merely of rent then it is not enough. In Karam Ali v. Amir Ali, 3 C.L.R., 166, two co-sharers paid rent separately to the zamindar by arrangements though the lands continued joint. The Court held that such a partition did not destroy their mutual rights of pre-emption. However if each partner is made owner of his share and the boundary of each partner is marked and defined then the right of Shuf'a is completely destroyed. Wahid Ali v. Hunoman, 12 W.R., 484.

If the mortgage be such that a decree for sale would be passed then the right of pre-emption arises when the sale becomes absolute under Order 34, Rule 5 or 8 of the Civil Procedure Code. The leading cases are; Batul Begam v. Mansur Ali Khan, 20 All., 315 F.B ; affirmed by the Privy Council in 24 All., 17; approved by the Punjab Chief Court F.B., in P.R. (1901), No. 103, Ali Abbas v. Kalka Prasad, 14 All., 405 F.B.

In the case of mortgage by conditional sale the right of pre-emption arises when the conditional sale becomes absolute, Ajaib Nath v. Mathura Prasad, (1888), 11 All., 164. The pre-emptor may show that an ostensible mortgage is in fact a sale transaction, P. R. (1904), No. 78 and P. R. (1906), No. 145.

2 In the case of assignment of property for payment of debts if the property is made over in complete discharge of the debts then such a transaction practically amounts to a sale. When however the property is handed over to the trustees to manage the property and pay off the debt and then return the property to the debtor, it is not a sale and there is no pre-emption. Outar Singh v. Mussammat Ablakhee, 2 Agra, 328.

PROPERTY AND DOWER—

150. There is no right of pre-emption in the property assigned by a husband to his wife as her dower, but a transfer of property in lieu of the dower-debt itself does give rise the right of pre-emption.[1]

However if the husband transfers some immoveable property to his wife in lieu of relinquishment of her right to claim dower then the right of pre-emption does not arise.[2]

DEMANDS OF SHUF'A—

151. The right of pre-emption is not established unless the pre-emptor on hearing of the transfer from some trustworthy source makes the demands of pre-emption in the following order.—

The demands are of three kinds :

(a). Talab-i-muwasabat or immediate demand.

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1 Agarwala, p. 23 ; Sircar, T.L.L. (1873), p. 511 ; Wilson, p. 390 ; Tyabji p. 669 ; Ameer Ali, Vol. I, p. 713. The Muslim Law of pre-emption by the present author p 14.

Fida Ali v. Muzaffar Ali, 5 All., 65. 2 A.W.N., 175. Following Peare Begum v. Sheikh Hushmat Ali, N.W.R.S.D. A.R., 1864, Vol. I, p. 475. Where it was held—"Price as a term of Muhammadan Law includes not only money, but also any other kind of property capable of being valued at a definite sum of money. But when a transfer of property takes place for a consideration not capable of being estimated at a definite money value such transfer is not regarded as sale at all and does not give rise to the right of pre-emption. Therefore when a man marrying, a woman does not fix the amount of dower at a money value, but assigns property to her as her dower, the right of pre-emption cannot have any operation the transfer not being a sale and the consideration thereof being unascertained and unascertainable at a definite money value But no such impediment to the operation of the right of pre-emption exists in cases in which the dower was originally fixed at an ascertained sum and the property is subsequently sold in lieu of a part or the whole of such amount."

2 This is an instance of 'Hiba-bil-'iwaz and consequently the right of pre-emption does not arise. In Ram Prasad v. Rahat Bibi, 18 O.C., 367, a Muhammadan transferred some property to his wife in lieu of relinquishment of her claim to dower it was held that the transaction was not one of sale but of 'Hiba-bil-'iwaz'. There was an exchange of gift. The husband gave certain property and the wife gave relinquishment of her claim to dower. The same view has recently been held by the Chief Court Lucknow in Bashir Ahmad v. Musammat Zubaida 1 Luck 83 (1926) and also in Chaudhri Talib Ali v. Musammat Kaniz 2 Luck 575 (1927). The decisions proceed rather on technical grounds on strict interpretation of Sec. 54. Transfer of Property Act. Where a marriage was contracted without dower having been agreed, and thereafter the husband transfers some property in lieu of Mahr-ul-misl, dower of her equals the right of pre-emption arises.

(*b*) ***Talab-i-'ishhad*** or ***'Istishhad*** or demand with invocation of witnesses also known as ***Talab-i-taqrir*** confirmatory demand.

(*c*) ***Talab-i-tamlik*** or demand of possession also known as ***Talab-i-khusumat*** or demand by litigation.

The demands of pre-emption may be made by the pre-emptor himself or his authorised agent or his lawful guardian if he be a minor, or by the manager of a Court of Wards.[1]

The distinction between *Talab-i-muwasabat* and *Talab-i-'ishhad* is not recognised by the *Shi'a* law, all that is necessary is that the pre-emptor should prefer his claim.

Under Anglo-Muhammadan Law, the fraudulent or otherwise omission to register the sale-deed does not affect the demands of pre-emption, which could be made immediately after the execution of the deed, and they are also valid if made after registration of the sale-deed, as required by Sec. 54 of the Transfer of Property Act.[2]

(*a*) ***Talab-i-Muwasabat.***

The ***Talab-i-muwasabat*** should be made without the least possible delay, in fact, immediately after the fact of transfer of property comes within the knowledge of the pre emptor,[3] and any words indicative of intention to pre-empt the property are sufficient.[4]

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1 Jadu Lal v. Janki Koer, 1908, 35 Cal., 575; 39 Cal., 915; 39 I.A., 101.

2 In Zamani Begum v. Khan Muhammad Khan (1923), 46 All., 142, it was held that that demands made after the execution of the sale-deed but before registration were not premature or defective. In Budhi v. Sanullah (1914), 41 Cal., 943, the pre-emptor after the execution of the sale-deed did not make the demands of pre-emption, it was held that he was not bound to make the demands, and that his right did not arise till he became aware of the registration of the sale-deed.

3 In Ali Muhammad v. Taj Muhammad, a delay of 12 hours was held to be too long. In Amjad Hossein case, v. Kharg Sen 4 B. L. R. A. C. (1870), it was held that a pre-emptor may take a 'short time' to ascertain the information conveyed to him before making the 'Talab-i-muwasabat.

4 Followed in Muhammad Nazir Khan v. Makhdum Baksh 34 All., 53 (1911) distinguishing Muhammad Abdul Rahman Khan v. Muhammad Khan 8, A.L.J.R., 270 (1903).

Whether the 'Talab-i-muwasabat' may be made through agent is a disputed question. According to the Bengal Sadar Dewani Adalat the performance of the first demand through another is not a valid compliance with the law. Moyemooddeen v. Ihlaroodeen (1847), Ben. S.D. A.R., 267, Meer Syed Alee v. Sheikh Muham-

Talab-i-'ishhad

The *Talab-i-'ishhad* should be made with the least possible delay.[1]

(ii) In the presence of witnesses called upon to bear witness to it;

(ii) on the premises, the subject of pre-emption, or in the presence of the vendor provided he is in possession of the property,[2] or before the vendee.

It is also necessary to refer to the *Talab-i-muwasabat* having been duly made.[3]

Talab-i 'ishhad may be made by a duly appointed agent.[4]

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mad (1857), 13 Ben. S.D.A.R., 1172. The Allahabad High Court has however held that the first demand can be made by a general-attorney. In Munna Khan v. Cheeda Singh (1906), 28 All., 690, the demand was made by the brother of the pre-emptor 'vide' also Abadi Begum, v. Inam Begum 1 All., 521.

1 It is submitted that what is the least practicable delay is a question of fact to be determined in each particular case.

In Nathu v. Shedi, 37 All., 522, 13 A.L.J.R., 714, it was held, that if at the time of 'Talab-i-muwasabat' the pre-emptor invoked witnesses in the presence of vendor or vendee or on the premises to attest the immediate demand, it would be sufficient and 'Talab-i-'ishhad was not necessary. This view is according to the 'Durrul-Mukhtar, also.

In Muhammad Khalil v. Muhammad Ibrahim, 14 A.L.J.R., 148, 38 All, 201, it was held that 'Talab-i-'ishhad cannot be made by a letter where it was possible for the pre-emptor to make the same personally.

2 In Inayat Khan v. Muhammad Yosuf, 10 A.L.J.R., 92, it was held that if the 'Talab-i-'ishhad is made before the seller who was not in possession of the property the demand was not made properly.

3 This point was fully discussed in Rajjab Ali Chopdar v. Chund Churn Bhadse, 17 Cal., 543, F. B. Akbar Husain v. Abdul Jalil, 16 All., 383 (1824); Abbasi Begum v. Afzal Husain, 20 All., 457 (1898), Abid Husain v. Bashir Ahmad, 20 All., 499, and Mubarak Husain v. Kaniz Bano, 27 All., 163 (1904).

In Ahmad Hakim v. Mohammad Hikmat Ullah, 25 A.L.J.R., 312 (1927), the pre-emptor omitted to ask the witnesses to bear testimony. It was held that the omission was not fatal.

4 'Talab-i-'ishhad may be performed by an agent duly appointed. By a letter appointing an agent, Wajid Ali Khan v. Hanuman Prasad, 4 B.L.R.A.C., 139 (1870); Imam-ud-din v. Jan Bibi, 6 B.L.R., 167; Abadi Begum v. M. Ibrahim, I All., 521 (1877); Ali Muhammad Khan, 18 All., v. M. Said Husain 309, (1896). But a letter direct to the vendor or vendee is not sufficient. Muhammad Khalil v. Inam Begum, 38 All, 201 (1616). Any act or omission by the agent has the same effect as that by the pre-emptor himself.

Talab-i-Tamlik **:—**

The above preliminary demands having been made, the pre-emptor must make ***Talab-i-Tamlik,*** that is, file the suit in a Court of Justice [1]

(i) Within a year of the purchaser taking possession of the property, and

(ii) Where the subject of the sale does not admit of physical possession within a year of registration of the instrument of sale.

PAYMENT OF PRICE—

152. (i) A pre-emptor need not tender the purchase money at the time of asserting or demanding pre-emption. It is sufficient that he is prepared to pay the sale consideration stated in the deed or if he suspects it then the amount determined by the Court should be paid by him.[2] The sum decreed need not be paid if the pre-emptor prefers an appeal. The pre-emptor is not liable to the vendee for any such contingent charges as brokerage or agency.

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1 Limitation Act IX, 1908, Schedule II, Art. 10. The Limitation Act supersedes the Muhammadan Law.

The starting point for limitation is when "physical possession" (the term used in Art. 10 of the Limitation Act) is taken of the whole property; if the property is not susceptible of physical possession then from the time of the registration of the sale-deed. In this case Art. 120 will apply—Ali Abbas v. Kalka Prasad, 14 All., 405, Batul Begum v. Mansur Ali, 20 All., 315; affirmed in 24 All., 17 P.C. In the latter case the term "physical possession" was fully discussed.

Where a suit was instituted on the last date allowed by pre-emption and subsequently amended it was held not to be time barred—Muhammad Sadiq v. Abdul Wajid, 33 All, (1922). 'Vide' also Yawar Husain v. Abdul Kadir, 2 A.L.J.R., 151 Mamraj Singh v. Hirday Ram, 8 A.L.J.R., 814. Mehdi Hasan v. Bachcha Pande, 13 A.L.J.R., 383.

Nubee Baksh v. Kaloo, 22 W.R., 668; 1 A.W.N., 44; Khoffejan v. Mahomed Mehdee, 10 W.R., 211. 'Prima-facie' the consideration in the sale-deed should be taken as the true consideration. Under Anglo-Muhammadan Law, there is no objection to fancy price being paid to prevent pre-emption. B. E. O'Conor v. Ghulam Haider, 3 A.L.J.R., 365; 28 All., 617.

Abatement :—

(ii) If after valid sale the vendor has reduced the price then the pre-emptor is entitled to claim the benefit of their abatement.[1] If the vendee on discovering a pre-existing defect does not avoid the sale, but elects to demand compensation from the vendor then the pre-emptor is also entitled to abatement thus effected in the price.

Under the *Shi'a* Law the pre-emptor is not entitled to the benefit of the abatement.[2]

(iii) If after a valid sale the vendor foregoes the entire sale consideration at one and the same time in favour of the vendee, then the pre-emptor cannot claim the benefit of the whole remission, but he is entitled to pre-empt the property at its original price.[3]

Increase :—

(iv) If after a valid sale the vendee increases the sale consideration in favour of the vendor, then the pre-emptor is not liable for such augmentation.

Credit :—

(v) If the vendor has sold the property on credit[4] to the vendee, then the pre-emptor may either wait, until the period expires, and then pre-empt the property, or he may take the property immediately on payment of the sale consideration, and he can avail himself of benefit of deferred payment with the consent of the vendor. The pre-emptor should however make the demands

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The price is usually paid to the vendee by the pre-emptor. In Wazir Khan v. Kale Khan, 16 All., 126 (1893), the question was whether the money could be paid to discharge a mortgage debt.

1 Tajammul Husain v. Uda, 3 All., 668, I. A. W. N., 44.

2 Baillie, Part II, p. 183 ; Querry, II, p. 279, Sec. 58.

3 The Muslim Law of Pre-emption (Fatawa-i-Alamgiri) by the present author, p. 302.

4 Ibid, p. 148.

If the pre-emptor was misinformed about the sale consideration, or about the purchase, or of the property actually sold, and he thereupon relinquished his right, and later on he becomes aware of the true facts, then his right of pre-emption is not invalidated by his previous submission or surrender.

of *Shuf'a* immediately as in all other cases, the execution of the claim may be delayed till the expiration of the period. The *Shi'a* and the *Shafi'i* jurists hold that the pre-emptor can claim the benefit of the condition of sale on credit also.[1]

CLAIM WHOLE PROPERTY.—

153. (i) The pre-emptor must pre-empt the whole of the property sold. Partial pre-emption is not allowed.[2]

(ii) When two or more persons are entitled to the right of *Shuf'a* in a property, then each of them must pre-empt the whole property. The claim must be in its entirety, though the decree will be given in equal shares amongst all pre-emptors.[3]

The vendee is a necessary party to the suit, but the vendor is not a necessary party to the suit unless he is in possession of the property.[4]

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1 Baillie, Part II, p. 177 ; Querry, II, p. 272, Secs. 12 and 12 and 13.

Mr. Yusuf Ali, editor of Wilson's Digest, 6th edition, p. 400, adopts the view of the 'Shafi'i jurists, but in previous editions Sir Roland Wilson had affirmed the view of the 'Hanafi' jurists.

2 Pre-emption of a part was not allowed in Cazee Ali v. Museet Ullah, 2 W. R., 285 (1865) ; Durga Prasad v. Munsi, 6 All., 423 (1884) ; Izzat Ullah v. Bhikari Mollah (1870) 6 Beng. L. R., 386 ; 14 W. R., 469, Raghunandan Singh v. Majbuth Singh (1863), 10 W. R., 379.

In L. A. Puch v Aziz Fatima, 19 A.L.J.R., 107.—A plot of land was sold together with a house ; the pre-emptor sued to pre-empt only so much of the land as was not covered by the house The suit failed on the ground of partial pre-emption.

3 Amir Hasan v. Rahim Baksh (1897), 19 All., 466, is an important case citing original authorities. In Salig Ram v. Kali Shankar, 27 All , 465—A co-sharer had demanded pre-emption, and while the suit was pending another co-sharer having equal rights filed a similar suit for pre-emption of the same sale. Held that the second plaintiff was entitled to one-half of the property sold.

In Abdullah v. Amanat Ullah, 19 A. W. N., 82. 21 All., 292 (1899). A property was sold to a vendee who happened to be a pre-emptor also, and five persons having equal right of pre-emption sued for 5/6th of the property. It was contended that the suit should have been for the whole of the property. The Court overruled this contention. [It appears to me to be a doubtful decision, and it conflicts with the 'Hanafi' Law.]

4 Harbans Tiwari v. Jola Sahu, 32 All. 14 (1909),

PARTIAL PRE-EMPTION.—

154. There are some well-known exceptions to the rule against partial pre-emption.

(i) If several persons have purchased a certain property from one man then the pre-emptor may take the share of any one of them.[1] If however one man has purchased a certain property from several persons then the pre-emptor is not entitled to pre-empt under the *Hanafi* Law, any particular share of the vendors but he can do so under the *Shafi'i* Law.

(ii) If several owners of different properties combine and sell their properties by one sale-deed for a single sale consideration to one man, then a pre-emptor of one of such properties may pre-empt that particular property only.[2] But if he happens to be a common pre-emptor of all different properties sold, then it is submitted that he should pre-empt all, that is, he cannot pre-empt any property which he may prefer.

(iii) If a person by one sale-deed for one sale consideration sells two distinct properties situated in two different cities, then if there is a common pre-emptor to both these properties, he must pre-empt both of them, that is, he cannot pre-empt one of the properties only; but if these properties were sold by two sale-deeds then he could pre-empt either of them. However if he be the pre-emptor of one of the properties only, then the better opinion is that he could pre-empt that property.[3]

1 A, B and C have purchased the property from D. And E is the pre-emptor of the property sold. E if he prefers may pre-empt the share of B only

Where several persons purchased some property, the pre-emptor is entitled to pre-empt the whole property or share of one of such purchasers by making the demand to him alone. It has been recently held by the Allahabad High Court that "Where the first demand was made to all the vendees but the second demand was made only to one of them, then the pre-emptor was entitled to claim pre-emption against that vendee only." Muhammad Askari v. Rahmat Ullah, 25 A.L.J.R., 473 (1927), and 'vide' also Aliman v. Ali Husain (1923), 45 All., 449. Gufoor v. Nur Banu, 10 W. R., 111. The best and the easiest course for the pre-emptor would be to make the demand at the site, which would apply to all vendees.

2 X, Y, Z, owners of different properties have sold by one sale-deed their properties to M. And N is the pre-emptor of the property sold by Y, hence N may lawfully pre-empt that property.

3 'Vide' Mohammad Wilayat v. Abdul Rab (1889), 11 All., 108, followed in Nujib Ullah v. Umid Bibi (1899), 21 All., 119.

(iv) If the pre-emptor discovers that his own property has been wrongfully included in the sale, then he may lawfully claim his own property as owner and the remaining portion by way of pre-emption.[1]

(v) If the pre-emptor discovers that the title of the vendor is defective as to a portion of the property then he may claim pre-emption as to the rest of the property only ; but he shall conclusively establish that the vendor had no title to that portion before the suit is decreed[2]

ASSIGNMENT OF RIGHT.—

155. (i) A pre-emptor of equal degree cannot assign his share to one of the other pre-emptors. If he has assigned his right before the decree of the Court, the property will nevertheless be equally divided amongst the pre-emptors who have preferred their claim.

(ii) If a pre-emptor has waived his right to pre-empt, then the other pre-emptors have a right to pre-empt the whole. But if the right has been perfected by the delivery of the property to a pre-emptor or by the decree of the Court, then he has a separate and definite interest, and he may lawfully surrender it at will.

RIGHT LOST.—

156. The right of pre-emption cannot be established[3] :—

(i) if the pre-emptor has omitted to demand pre-emption or enforce his right ;

Similarly if a certain property was exchanged for another property then the pre-emptor of each of them could pre-empt that particular property, and if there is a common pre-emptor he must pre-empt both the properties comprised in one transaction. The property A is exchanged for the property B. Then on paying the value of the property B the pre-emptor of A may pre-empt the property A and the pre-emptor of B may pre-empt the property B on payment of the ascertained value of the property A. But if there was a common pre-emptor, then it is submitted on the analogy of the case of sale of two properties by one sale-deed, that both the properties must be pre-empted if at all.

1 In Bhagwati Saran v. Parmeshar Das, 36 All., 476, it was held that there was no defect in the frame of the suit if the plaintiff claimed the property as full owner and in the alternative for pre-emption. 'Vide' also Abdul Aziz v. Maryam Bibi, 25 A.L.J.R.; 48 (127).

2 Badri Prasad v. Khuwaja Muhammad Husain, 11 A.W.N, 44.

3 Baillie, Part I, pp. 505—508 ; Sircar, T.L.L. (1873), p. 533 ; Ameer Ali, Vol. I, p. 733 ; Dayal, p. 395 ; Abbasi, p. 107 ; Tyabji, pp. 690—697. The Muslim Law of Pre-emption by the present author p. 27.

(ii) if he, of his own accord, has surrendered his right of pre-emption.

(iii) if he has acquiesced in the sale of the property.

The right of *Shuf'a* once relinquished cannot subsequently be resumed.

It is submitted that in certain circumstances refusal to purchase the property contemporaneously with, that is, at the time of the actual sale transaction,[1] may extinguish the right of pre-emption. Mere refusal to purchase before the sale does not destroy the right of pre-emption as the right of pre-emption arises after the sale.[2]

The surrender of the right of pre-emption in favour of one person does not operate in favour of another.

The surrender of the right of pre-emption before the sale does not prevent pre-emption Abadi Begam v. Inam Begum, 1 All., 521 ; Karim Baksh v. Khuda Baksh, 16 All., 247.

Surrender and acquiescence are liable to be confused. The difference is that surrender is a legal plea, while acquiescence acts as an equitable estoppel.

1 It may be argued that if the pre-emptor and the vendee make simultaneous offers for the same, and if the pre-emptor was aware of this fact and allowed the vendee to take the house at a higher price then his conduct would amount to equitable estoppel on the ground of acquiescence If the pre-emptor preferred not to exercise his claim on one occasion of the sale of a certain property, he is not thereby precluded from pre-empting the same property on the subsequent sale of that property.

In Munawar Husain v. Khadim Ali, 5 A.L.J.R., p. 331, it was held, in order to debar the pre-emptive right an opportunity to purchase must be given to the pre-emptor when a definite agreement to purchase at a fixed price has been entered between the vendor and the vendee.

In Ghulam Mohi-ud-din Khan v. Hardeo Sahai, 18 A.L.J.R., 413 ; 42 All., 402 ; an insolvent's property was sold by public auction by the official assignee. The auction was notified and was within the knowledge of the pre-emptor, but he did not bid at the sale this was construed to be a refusal to purchase. This was a case under the 'wajib-ul-arz,' strictly speaking under the Muslim Law, it would be incumbent on the official assignee to offer the property to the pre-emptor at the highest price bid at the auction.

2 The mere fact that the pre-emptor refused to purchase before the price was settled does not debar his right of pre-emption 'vide' Kanhni Lal v. Kalka Prasad, 2 A.L.J.R., 390 ; 27 All., 670. Here the property was sold by a receiver. Subhagi v. Muhammad Ishaq, 6 All., 463 ; Kuldeep v. Ram Deen, 24 W.R., 198 ; Braj Kishore v. Kirti Chandra, 15 W.R., 247, and Toral v. Auchhi, 18 W.R., 10. And if the refusal was due to dispute about the price or 'bona-fide' belief that the price demanded was fictitious then the right remains subsisting though the sale actually takes place.

Similarly the right of pre-emption is destroyed if the pre-emptor takes from the vendee the same property, the subject-matter of pre-emption, on rent, or negotiates with the vendee for the purchase of the property to himself, or for its lease.

It is not necessary for the vendor to give notice to the pre-emptor, and offer to sell the property to him.

PRE-EMPTOR AND STRANGER.—

157. (i) If the pre-emptor together with a stranger has purchased a certain property then his right of pre-emption becomes void with respect to the purchased property.[1]

(ii) If the pre-emptor has associated with himself a stranger as co-plaintiff who has in fact no claim to pre-emption, then his own right of pre-emption becomes void,[2] as he has omitted a part of his claim, so the whole of his right is extinguished.

However if the person joined as co-plaintiff is not a stranger and is one entitled to pre-empt the property and belongs to the same category then the suit is perfectly lawful.

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1 This was the view also held by the Sardar Diwany Adalat of the North-Western Provinces in Sheo Dayal v. Bhairo Ram (1860), 15 N. W.P., S.D.A.R., 53, where it was held that a co-sharer purchasing property jointly with a stranger forfeited his pre-emptive right and rendered the entire sale liable to pre-emption by other co-sharers 'vide' also Guneshee Lal v. Zaryat Ali (1870), N.-W. P., H.C.R. 341; Manna Singh v. Ramadhin Singh (1882), 4 All, 252 and in Saligram Singh v. Raghubar Dayal (1887), 15 Cal., 224, and in Mushtaq Ahmad v. Amjad Ali, 19 All., 311, the Court held that where the share sold to the stranger was stated in the sale-deed then that share is alone to be pre-empted on proportionate payment of the price, but where the sale-deed does not specify the share purchased by the stranger, then the co-sharer-vendee is to be treated in the same position as the stranger and the claim is to be decreed against him also. However under section 45 of the Transfer of Property Act co-vendees are presumed to be equally interested in the property sold, and hence it may be argued that the claim of the pre-emptor should be decreed to that extent only and not against the co-sharer-vendee.

2 This rule is based on the principle of equitable acquiescence, that is, a person co-(sharer-vendee) cannot claim the pre-emptive right which he has himself violated, by associating himself with a stranger. Bhawani Prasad v. Damru, 5 All., 197; 2 A.W.N., 217; In Ali Ahmad v. Rahmat Ullah, 14 All., 195; 12 A.W.N., 42, the pre-emptor had joined the mortgagee as co-plaintiffs in the suit for pre-emption the suit was

PRE-EMPTOR AS VENDEE.—

158. If some property has been sold to a person who happens to be its pre-emptor also, and there are other pre-emptors of the same degree, then under the Muslim Law the other pre-emptors are entitled to claim an equal share in the property sold. And if there happens to be a pre-emptor of a superior degree, then he alone is entitled to pre-empt the property.[1]

DEFEASIBLE RIGHT.—

159. If the pre-emptor previous to the decree of the Court sells the property by means of which he derives his right of

dismissed in toto (vide also Rajoo v. Lalman, 5 All., 180). Is it possible for the pre-emptor to strike out the name of the stranger associated with him in filing the suit? It is submitted that his error could be rectified in the Court of the first instance, but not afterwards in the Appellate Court. Under O. 6, R. 17 of the Civil Procedure Code the Court has power to amend any pleading. The Allahabad High Court has however maintained the view that amendment of the plaint cannot be allowed. Bhupal Singh v. Mohan Singh, 19 All., 324; 17 A. W.N., 72. But vide Karan Singh v. Muhammad Hussain, 7 All., 860, which favours the correct view. The Punjab Chief Court allowed the names of strangers to be struck out. P.R., No. 83 (1898); P.R , No. 29 (1894); and also No. 102, P.R., No. 94 (1895); and P.R., No. 19 (1898).

The Punjab Chief Court has also held that if the pre-emptor has merely entered into agreement with a stranger as to what he will do with the property after decree simply in order to raise funds to meet the litigation expenses then he does not forfeit his claim to pre-emption. P.R (1898), No. 19, P.R. (1896), No. 87, P.R. (1902), No. 10.

If two persons equally entitled to pre-empt file a suit and one of them withdraws, then the other may lawfully pre-empt the whole property. Udey Ram v. Maula, 5 A.W.N., 189. and vide Chotu v. Husain Baksh, 13 A. W.N., 25.

Where the vendee is a total stranger then the right against him is not lost owing to the fact that the pre-emptor has joined with him persons, who have different rights 'inter se' Sheoraj Singh v. Naik Sahai, 41 All., 423 ; 17 A.L.J.R , 391.

1 The Calcutta High Court held that other pre-emptors are not entitled to claim pre-emption against the Shafi vendee vide Lalla Noawbat Lall v. Lalla Jevan Lall 4 Cal. 831 (1878) ; but if a stranger was associated with the Shafii the latter would forfeit his right of pre-empton as stated in the previous section. This is the view of the Calcutta High Court also, vide Saligram v. Raghubardayal 15 Cal. 224 (1887). The old decisions of the Allahabad High Court were also to the same effect ; but in Amir Hasan v. Rahim Baksh 19 All. 466 (1897) original authorities were cited before the Court, and it held in conformity with the Muslim Law that other pre-emptors of equal degree could pre-empt and take equal shares as the vendee shafii. This case has been followed in Abdullah v. Amanat Ullah 21 All.

pre-emption, then his right is thereby invalidated. That is, the pre-emptor must retain the pre-emptive cause at the time of the institution of the suit and till the decree of the Court of first instance.[1]

After the pre-emptor has obtained the decree, then the pre-emptor may sell the property to a third person who may deposit the purchase-money in Court.[2] But such a transaction may give rise to a fresh cause of action to other pre emptors if any.

DEATH OF PARTIES.—

160. (i) If the vendee died, the property can be alienated or taken by the creditors of the vendee, but the right of pre-emption is not invalidated.

(ii) If after having sold a certain property the vendor died the right of pre-emption is not invalidated.[3]

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292 (1899). And recently the Calcutta High Court has overruled its previous decisions and have adopted the correct Muslim Law vide Enatullah v. Kowsher Ali 98 I. C 220 (Cal. 1926)

The Bombay High Court has followed the Allahabad High Court, vide Vithall Das v. Jametram 44 Bom. 887 (1929).

Consequently if the pre-emptor belongs to the same class, he would take half of the property sold vide Nadir Husain v. Sadiq Husain 47 All. 324 (1924).

1 It is submitted that in British India the first Court is equivalent to the Kazi's Court, hence the first decree is important and therefore if subsequent to the decree the pre-emptor's right is extinguished, it does not affect the property pre-empted. The same view would apply if the pre-emptor's right is extinguished after the decree of the first Court but during the course of the appeal, vide Umrao v. Lachman, 22 A.L.J.R., 234. "In dealing with suits for pre-emption, three dates have to be looked for, namely, the date of the sale sought to be pre-empted, the date of the suit, and the date of the first Court's decree."

2 Ram Sahai v. Gaya, 7 All., 107, where a pre-emptor alienated his share pending an appeal, held it cannot affect his right. Sakina Bibi v. Amiran, 10 All., 472 ; 8 A.W N., 177 ; Bela Bibi v. Akbar Ali, 24, All., 119 ; 21 A.W.N , 183 ; where the pre-emptor sold his decreed share, to raise funds to pay the purchase money.

3 If the vendor was suffering from 'Marz-ul-maut,' death-illness when he sold a certain property, and he had no other property, then his legal representatives according to some jurists cannot claim pre-emption with respect to the property sold, and according to others they can on paying the value of the property, but if the deceased left some other property also then there is a consensus of opinion that his legal representatives by reason of the inherited property have the right of pre-emption. But according to Imam Abu Hanifa in all cases the legal re-presentatives have no right to pre-empt the property sold.

(iii) If the pre-emptor died before he perfected his title, by obtaining possession of the subject-matter of pre-emption, or by judicial decree, then his right under the *Hanafi* Law is thereby extinguished,[1] but under the *Shafi'i* Law and the *Shi'a* Law[2] it passes to the pre-emptor's representatives. It appears that the *Hanafi* view has not been accepted by the Bombay High Court,[3] and the Allahabad High Court has applied it subject to certain restrictions.[4] It is submitted that under Anglo-Muhammadan Law the right to sue survives to the executor and administrator according to Sec. 306 of the Indian Succession Act XXXIX of 1925.[5]

PRE-EMPTOR AS AGENT, SURETY.—

161. (i) If the pre emptor act as the vendor's[6] agent and sells the property for him then he has no right of pre-emption in respect of the same property. But if he acts as the vendee's agent then he retains the right of pre-emption.[7]

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1 Sircar, T.L.L. (1873), p. 531; Wilson, p. 401; Abbasi, p. 108; Tyabji, p. 692; Kathalay, p. 124; Dayal, p. 396.

2 Baillie, Part II, p. 190; Querry, II, p. 285; Secs. 89, 90; Wilson, p. 464.

Under the 'Shi'a' Law the right is inheritable among all the heirs in proportion to their shares of inheritance e.g.,—a 'Shi'a' Muslim dies after filing the suit for pre-emption and leaves a widow and son. Then if both claim pre-emption the property will be divided in the ratio of 1/8 to 7/8.

3 In Sayyad Jiaul Hussain, v. Sita Ram 36 Bombay, 144 (1911), the pre-emption was claimed under the Muslim Law and the Court held that section 89 of the Probate and Administration Act, 1881, has superseded the 'Hanafi' Law vide also Sitaram, 41 Bombay, 636 (1917), 45, Bom., 1056 (1921). P.C.

4 Muhammad Husain v. Niamut-un-nissa, 20 All., 88 (1897)

5 The Indian Succession Act XXXIX of 1925 has repealed the Probate and Administration Act V of 1881.

6 It is obvious that the vendor cannot claim pre-emption in respect of the property sold by himself.

7 Bohra Ganga Prasad v. Pooran (1928), 26 A.L.J.R., 89; Ganga Prasad was the 'Mukhtar-'am' of the vendor and took part in the proceeding relating to the sale of the 1st of February, 1922, to the vendee. Subsequently he purchased a part of the property sold, from the vendee, on 7th March, 1922. Held assuming that Ganga Prasad has disqualified himself from pre-empting the sale to the vendee, it does not follow that he has also disqualified himself from resisting a claim for pre-emption against him after he has purchased a part of the property.

If the pre-emptor acts as a *zamin*, surety, guaranteeing vendor's title then he forfeits his right to pre-empt the same property. If the pre-emptor becomes surety for the payment of sale-consideration by the vendee, he forfeits his right of pre-emption.

PRE-EMPTOR AS GUARDIAN.—

162. The lawful guardian or the father of the minor or the guardian of a person of unsound mind may lawfully demand pre-emption on his behalf or he may relinquish the right. If he does not do so, then the claim is barred absolutely, and cannot be set up again by the minor on coming of age or by the insane person on recovering his reason.[1]

And similarly if the father purchases a certain property for himself, and his minor son happens to be the pre-emptor of that property, then his minor son on attaining majority (puberty) cannot pre-empt the said property, but if a person sells his own property, then his minor son pre-emptor, on attaining majority (puberty) may lawfully pre-empt the property sold. If a woman gives birth to a child within six months from the date of the sale transaction, then such a child may claim pre-emption by reason of the property he inherits on birth.

VENDEE'S RIGHTS—IMPROVEMENTS.—

163. (i) The vendee has the right to retain the property, until he receives the purchase-money from the pre-emptor, and if the vendor is in possession he may also retain the property until payment of the money by the pre-emptor.

(ii) If the vendee has made improvements, altered or erected a building or planted trees on the land, then the pre-emptor has the option to cause the building and trees to be removed, or if the

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1 Vide Lal Bahadur Singh v. Durga Singh 3 All., 437 (1881), Umras Singh v. Dalip Singh 23, All., 129, (1901).

Under the 'Shi'a' Law the minor on coming of age, or lunatic on recovering his reason, may demand pre-emption of the property on his own account. And he may annul a pre-emptive purchase if he considers it to be disadvantageous. Some 'Hanafi' authorities support this also. This is the view of the Code Civil Ottoman, Art., 1035, also.

removal be found to be injurious, then he may take the land with the said improvements on payment of the value of the materials only.[1]

(iii) If the vendee has improved the property by engraving, drawing, painting then the pre-emptor must pay for the improvements or forego his claim altogether.[2]

(iv) If the vendee has cultivated the land then the pre-emptor must wait, until the crops are ready, and thereafter the vendee should remove the crops, and the pre-emptor may then pre-empt the land at its value.

IMPROVEMENTS BY PRE-EMPTOR.—

164. If the pre-emptor in possession of the pre-empted property makes any improvements or erects a building, and it afterwards appears that the vendor had no title to pass to the vendee and thereby to the pre-emptor himself, then the pre-emptor is entitled to recover the price paid from the vendor, and according to the *Shafi'i* Law from the vendee as it is paid to him always, but he cannot recover the expenses incurred in making improvements or erecting the building.[3]

DESTRUCTION—VIS MAJOR.—

165. (i) If the vendee or a stranger destroyed the whole or any part of the building then the pre-emptor is entitled to take the property on a proportionate part of the original sale-consideration or he may forego his claim altogether. The vendee is entitled to keep the materials for they are not appendages of the site any longer.

(ii) If the subject of pre-emption is completely destroyed by some supernatural calamity, *Afat Samaviyah, vis major*,[3] by fire, flood and tempest, then the pre-emptor is to pre-empt the property in its present condition on payment of the original sale-consideration or

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1 The Muslim Law of Pre-emption by the present author p. 37, and 169.

2 Ibid, pp. 37-38, and pp. 169, 288.

3 Ibid, pp. 38, 170—172.

forego his claim altogether. However if a part of the property was destroyed and the vendee removed the materials, then a portion of the sale-consideration will accordingly be reduced.

LIS PENDENS.—

166. All transactions done by the vendee in possession affecting the property are voidable at the instance of the pre-emptor. The pre-emptor is to take the property as it stood at the date of sale.[1]

The right of pre-emption is not affected by the parties dissolving the sale after it was finally completed.[2]

OWNERSHIP OF PROPERTY.—

167. The pre-emptor becomes the owner of the property, when he takes possession of the subject-matter of pre-emption either with the vendor's or vendee's consent or in pursuance of the decree on payment of the purchase-money. The vendee is in the meantime entitled to retain the income and fruits of the property. In case

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1 In Kamta Prasad v. Mohan Bhagat, 6, A.L.J.R., 966; 32, All., 45, a vendee having purchased the property mortgaged a portion of it to the vendor. The pre-emptor pre-empted the property and paid the sale-consideration which was then taken away by the vendee. In a suit for sale upon the mortgage—held that the vendee's right as a purchaser is subject to the pre-emptor's right of pre-emption and that the vendee cannot defeat the pre-emptive right by subsequently mortgaging the property so as to force him to take the property subject to the mortgage.

A pre-emptor made the demands of pre-emption. Subsequently the vendee transferred the property to a third person. Held that the subsequent sale must be deemed to have been effected subject to any right of pre-emption in force by the plaintiff. Muhammad Abdul Rahman v. Muhammad Ayyub Khan, 22 A.L.J.R., 817; (1924).

Where the vendee transferred the property to one of the two rival pre-emptors it was held that the doctrine of 'lis pendens' was applicable and the other pre-emptor was entitled to pre-empt a one-half share of the property on payment of one-half of the consideration. Bhagwan Sahai v. Nanak Chand (1927), 25; A.L.J.R., 479. Where the purchaser acquired the status of a co-sharer 'pendente lite' held the plaintiff was not deprived of his right to pre-empt—Rohan Singh v. Bhan Lal, 31 All., 530.

2 The right of pre-emption was not affected where the contract was dissolved. Bhodo Mohamed v. Radha Churn Bahi, 13 W.R., 332.

Where after the institution of a pre-emption suit the vendee sold the property back to the vendor, held that the pre-emptor was entitled to pre-empt the property,

an appeal is filed by the pre-emptor, then his title is perfected from the date of the decree of the highest Appellate Court.[1]

DEVICES.—

168. The right of pre-emption is defeated by various devices,[2] the best device is by the vendor reserving to himself a narrow strip of the land or house adjoining to that of the ***Shafi'-i-jar*** in question. However even by this device the right of ***Shafi'-i-sharik*** or ***khalit*** is not defeated.

DECREE OF COURT.—

169. When the Court decrees a claim to pre-emption,[3] it shall fix a day on or before which the pre-emptor shall pay the

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vide Tota Ram v. Gopal Singh, 16 A L.J.R., 505, Kidar Nath v. Bankey Bihari, 11 I.C., 645; Imami v. Allah Diya, 40 I.C., 767. However in Sheo Charan Singh v. Bhika (1911), 14 O. C., 156, it has been held that a re-sale to the vendor before the institution of the suit defeats the right of the pre-emptor. But under the Muslim Law the demands having been made the right of pre-emption cannot be defeated, provided of course that the vendee had taken possession of the property under the original sale. And happily the same Court in Manna Singh v. Behari Singh (1916), 19 O.C., 183, overruled 15 O.C., 156, citing S A., No. 191 of 1914 appended to the judgment. In S A. No. 191 of 1914, pre-emption was claimed in respect not of the first but of the sale, this veiw is also in consonance with the Muslim Law. Manna Singh's case second is an authority for the proposition that once a right of pre-emption has accrued it cannot be defeated by subsequent act of the vendee, except by the act of the pre-emptor or barred by the Law of Limitation. In Raj Narain v. Dunia Chand, 32 All., 340, it was suggested (p. 343) where there has been a re-sale by the original vendee, the pre-emptor must claim to pre-empt both sales.

§ 1 In Deokinandan v. Sri Ram 12 All., 234 (1889), Mahmood, J. was of opinion that the vendee was entitled to the profits accruing up to the date when the pre-emptor acquired possession of the property in accordance with the terms of decree. This view was approved by the Privy Council in Deonandan Prasad v. Ramdhari Chaudhri, 44 Ind., App. 80 (1916); 15 A.L.J.R., 375. In this case under a Subordinate Judge's decree the pre-emptors were in possession from 1900 to 1904. The High Court reversed the decree and the original vendee regained possession. The pre-emptors appealed to the Privy Council and succeeded. They recovered possession in 1909. Held that the original vendee was entitled to mesne profits between 1904 and 1909.

2 Vide The Muslim Law of Pre-emption by the present author pp. 40, 410, 416.

3 The Civil Procedure Code of 1908, First Schedule, Order XX, Rule 14.

A pre-emption decree required the pre-emptor to deposit the amount to the credit of the vendees within 30 days. The money was paid out of Court, but the

purchase-money, together with costs, if any, decreed against him. And the defendant shall delfver possession of the property to the pre-emptor, but that if the amount decreed is not paid, the suit shall be dismissed with costs.[1]

In case of rival claims to pre-emption, the Court shall direct equal distribution of property in favour of pre-emptors of equal degree, and if there are pre-emptors of the lower degree, then the claim of inferior pre-emptors shall not take effect, until the pre-emptors of the higher degree have failed to comply with the terms of the judgment and decree.

The pre-emption decree in virtue of the terms imposed on the pre-emptor becomes a decree in favour of the defendant, when the conditions imposed are not complied with, and it becomes final if the time allowed for preferring an appeal has expired.[2]

The pre-emption decree is a purely personal one and cannot be transferred, so as to entitle the transferee to obtain possession of the subject of pre-emption in execution of the decree.[3]

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vendee certified in Court about payment. Held that this was sufficient compliance with the decree. Sukhpal Singh v. Abdur Rahman, 19 A.L.J.R., 493 (vide also Ram Lagan Pande v. Muhammad Ishaq Khan, 18 A.L.J.R., 152 ; 42 All,, 181).

1 Money paid by the pre-emptor is considered no longer to be his money and so it cannot be attached by his creditors, Abdus Salam v. Wilayat Ali, 19 All., 256 (1897).

2 Gopal Das v. Mamman Kunwar, 5 A.L.J.R., 136.

In Hirdey Narain v. Alam Sings, 17 A.L.J.R., 892 ; 41 All., 47, it was held that after the decree becomes final no time for payment could be extended by any Court.

The property pre-empted is however subject to the encumbrance to which it was subject when sold by the vendor. Tejpal v. Girdhari Lal, 30 ; All., 130 (1908).

Under Anglo-Muslim Law there is difference if opinion whether a sale in execution of a decree gives rise to a right of pre-emption. For the affirmative vide Imam Ooddeen Sowdagar v. Abdul Sobhan 5 W.R. 169 (1866) where a part of the estate is sold in execution of a decree a co-sharer is entitled to pre-empt it. In the negative, vide Abdul Jalil v. Khellet Chunder Ghose 10 W.R., 165 because the pre-emptor could bid at the sale. And according to Brijnarain v. Kedar Nath 45 All 186 (1923) it seems the right of pre-emption arises if the property is sold by an official receiver or by an order of the Court.

Limitation for execution of the pre-emption decree—Art, 181 of the Limitation Act IX of 1908 applies. Chhedi v. Lalu, 24 All., 300.

Ramashai v. Gaya, 7 All. 107, Nadir Ali v. Wali 5, Lah. 486 (1924), Mehr Khan v. Ghulam, 2 Lah. 282 (1921).

CHAPTER X

§ 1. WAQF—CHARITABLE DEDICATIONS.

WAQF DEFINED.—

170. *Waqf* literally means "tying up", or "detention", and according to the accepted view it is detention of the property in the ownership of God,[1] the income thereof to be applied for charitable and pious purposes as recognised by the Muslim Law.

Under the Mussalman Wakf Validating Act VI of 1913, *waqf* means the permanent dedication by a person professing the Mussalman faith of any property for any purpose recognised by the Mussalman Law as religious, pious and charitable.

According to the Fatawa-i-Alamgiri, Kitab-ul-waqf the conditions or essentials for validity waqf are as follows :—[2]

WAQIF—ADULT, SANE.—

171. The *waqif endower,* must be an adult (major)[3] and sane person, and owner of the property to be dedicated,

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1 According to Imam Abu Hanifa the right of 'waqif', dedicator, continues in the dedicated property, that is, he is at liberty to resume it or transfer it, but this right will be extinguished after the Kazi (Court) has passed the decree. The decree may be obtained simply in a declaratory form. And according to his two disciples 'waqf' is the detention of the property in the implied ownership of God, though curiously the 'waqif' if he likes may continue to be in possession of the property in capacity of mutawalli, trustee, and may take benefit under the 'waqf.' The Fatawa accords with the view adopted by the two disciples, Sahibain.

2 For the essentials of a Shia 'waqf' vide Bibi Kaniz Zainab v. Mobarak Hossain 72 I.C. 748 (Pat. 1923) almost same as the Sunni Law.

3 Under Anglo-Muslim Law, minority terminates on completion of the eighteenth year, (and on attaining twenty one years).

SUBJECT OF WAQF.—

172. The subject of *waqf* is *aqar,* immoveable property.

The *waqf* of moveables is not lawful except of arms and beasts of burden, cattle and implements of husbandry as accessories to land, Korans dedicated in Mosques, and things sanctioned by custom.

It is submitted that *waqf* of money and modern forms of investment in joint stock companies and Government securities is also lawful.[1]

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1 This is an interesting point under Anglo-Muslim Law and in my opinion the Courts should without hesitation hold such 'waqf' as valid, Late Mr. Ameer Ali takes the same view (vide Mahomedan Law Vol. 1 pp. 176—183) that such 'waqfs' are absolutely valid. He says, "since the date of the Hedaya a 'waqf of money had come to be expressly recognised" and further, observes, "that under Hanafi Law the 'waqf' of Government securities, shares in companies, debentures and other stock is perfectly lawful and valid." The Durrul Mukhtar translated by Brij Mohan Dayal, p. 343 says, "and similarly it is valid to dedicate intentionally any moveable which people usually do dedicate for instance an axe and a hatchet, even dirhams and dinars. I say that Kazis have been ordered (by the Turkish Government) to hold as valid the 'waqf' of coins, as it is to be found in the dispatches of Mufti Abus-Saud." "In the foot notes of this work it is observed. "Opinion as to validity of appropriation of money is attributed in Khulasa to Ansari and in the Khaniah to Imam Zufur. The author of the Menahul Ghaffar says that that inasmuch as the appropriation has become very common in Turkish cities it comes under the dictum of Mohammad as to 'waqf' of moveables'—Ruddul Muhtar Vol. 2 p. 410."

There is some conflict in decisions of the Indian High Courts, it seems that some of decisions favour the view thatsuch 'waqf' of money or shares are unlawful. The earliest decision of the Calcutta High Court in Fathima v. Ariff Ismailjee Bham,9 C.L.R. 66 (1881) is an authority for the negative, then an unreported decision in the affirmative (Sakina Khanum v. Luddun Sahiba Reg. App. 110 of 1900. The latter case was dissented in an elaborate Judgment by Woodroffe J. who attempted to examine original authorities also, Kulsom Bibee v. Golam Hossein. 10 C.W.N. 449 (1905) Mr. Ameer Ali in his student's Handbook observes that the decision in Kulsoom Bibi is "quite erroneous." The Madras High Court in Kadir Ibrahim Rowther v. Mahomed Rahumad-ulla Rowther 33 Mad. 118 (1909) has held that the right to recover money under a decree cannot be made subject of 'waqf.' However the Allahabad High Court held in the affirmative and expressly dissents from 9. C.L.R. 66 vide Abu Sayid Khan v. Bakir Ali 24 All., 190 (1901). Again in Muhammad Ismail v. Muhammad Ishaq (All., 1921) 62. I.C. 904 43 All., 508.....a woman had made a will directing the sale proceeds of her property to be utilised for constructing a masjid, the heirs were given an option

OBJECTS OF WAQF—CY-PRES DOCTRINE.—

173. The object of *waqf* must be lawful under the Muslim Law,[1]

All works for advancement of religion, charity, education and those in interest of public utility are proper objects and ultimate application must be to objects not liable to become extinct, but if for some proper reasons and change of circumstances it is not possible to apply the *waqf* in the manner directed by the *waqif*, the Kazi (Court) may apply it according to *cy-pres* doctrine for similar[2] purposes as near as possible to the objects which failed or for the benefit of the poor.

It seems under Anglo-Muslim Law the following are valid objects of waqf,[3] as supported by judicial decisions.

(1) To provide an Imam for a Masjid to conduct prayers.[4]

(2) To perform Haj every year.[5]

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to retain the property and to erect a masjid of this value. This was held to be a 'waqf' of the value of the property as distinct from the property itself.

Again in Banubi v Narsingrao 31 Bom. 250 (1906) there is a suggestion that moveable property might validly be a subject of waqf vide also Advocate General of Bombay v. Yusuf Alli 84 I.C. 659 (Bom. 1924.) which supports this view. The Chief Court of Oudh holds the same view Yaqub Beg v. Rasul Beg (1922) 74 I.C. 517, on appeal to the Privy Council Rasul v. Yaqub Beg 87 I.C. 702 (P.C. 1924.), no conclusive opinion was expressed on this point.

Finally the words " any property" in sec. 2 (1) of the Mussulman Waqf Act VI of 1913 are without doubt wide enough to cover all moveable and immoveable property including the present forms of investments into stock and shares etc. As a matter of fact in the original draft of the Bill all these were mentioned, but for some reasons they were dropped. It should also be noted that the words " any property " are somewhat restricted in meaning by the following words of section 3 of the same Act. viz. "It shall be lawful.....to create a waqf which in all other respects is in accordance with the provisions of Mussulman Law."

1 A 'waqf' for an idol is void.

2 Kulsom Bibee v. Golam Hassein 10 C.W.N. 449 (1905). Salebhai v. Bai Safiabu (1912) 36, Bom., 111.

3 Hed. 240 Baillie Digest 566.

4 Abdu Rafey Khan v. Banni Begum, 15 I.C. 36 ; (1912). Mazhar Hussain v. Abdul Hadi. 33, All., 400 (1911). [Salary of Hafiz allowed].

5 Fatmabibi v. Advocate General 6, Bom., 42 (1881), Keetayan v. Mamannas 35 Mad. 681, (1912).

(3) To provide for a teacher of an educational institution.[1]

(4) For keeping *Tazias* in Muharram[2]

(5) For repairs and maintenance of *Imambaras*.[3]

(6) For observance of *Muharram*.[4]

(7) For ceremony of *kadam sheriff*.[5]

(8) For celebrating the birth of Ali,[6] the fourth Khalif, or of any other recognised saint.

(9) For providing lighting arrangements in *masjid*.[7]

(10) Reading the Koran in public[8] or in private houses.

(11) Celebrating the death anniversary *barsi* of the *waqif* and members of the family,[9] for the performance of fatiah and feeding the poor.[10]

Under the Muslim Law the following are also valid objects of waqf.[11]

(*a*) For the kindred of the House of Prophet, the descendants, of Ali and Fatima.

(*b*) Shrouds for the dead.

(*c*) for digging graves.

(*d*) providing funeral expenses.

(*e*) distribution of food to the poor.

(*f*) for the poor travellers.

(*g*) for purpose of Jihad religious war.

(*h*) works beneficial for the public, sinking wells or tanks erecting bridges etc.

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1 Vide (1) supra. Uuder the Muslim Law the teacher must be a poor person if rich he is not entitled to be supported by the 'waqf.'

2 Bibi Jan v. Kalle Hussain 31 All., 136; (1909). Sayid Ismail v. Hamedi Begum. 6 Pat. L.J. 218 (235) (1921). Ramanandan v. Vada 34 Mad. 12 affirmed in 40 Mad. 166 (P.C.) Mazhar Husain v.Abdul Hadi Khan 33, All., 400 (1911).

3 Vide, 4, Supra.

4 Ramchandan v. Fatima Begam 42, Cal., 933 (1915).

5 Phul Chand v. Akbar Yar Khan, 19 All., 211 (1896).

6 Vide 4,Supra.

7 Mazhar Husain 33, All., 400, (1911).

8 Mazhar Huisan 33, All., 400; Nizama-ud-din v. Abdul Gafar 17, Bom. I, but 'vide.' Assobai v. Noorbai 8, Bom. L.R. 245, (1905).

9 Vide supra, 31, All., 136; 34 Mad., 12 33, All., 400. 6 Pat. L.J. 218.

10 Vide 4 and 11 and as to what is Fatiah and urs, Fakhrud-din v. Kifayat-ul-lah 7 A.L.J.R., 1093, (1910),

11 Hed. 240. Baillie Digest 566, Tyabji 538.

The following objects have been held by the Courts as not religious, charitable or fit objects of waqf :—

(1) Reading Koran at tombs or graves.[1]

(2) Maintaining a private tomb[2] but for maintenance of a tomb of a saint is valid.[3]

The following are also not fit and proper objects of waqf by reason of vagueness and uncertainty.

(1) A *waqf* for benefit of mankind.[4]

(2) For inhabitants of a city and if they become extinct then ultimately for the poor.

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1 Kaleloola v. Nuseerudeen (1894) 18 Mad. 201, Zooleka Bibi v. Syed Zynul Abedin 6 Bom., L.R. 1058. (1904). Biba Jan v. Kalb Husais 31, All., 136 (1908).

2 Vide (1) Supra.

3 Futto Bibi v. Bharrut Lal 10 W.R. 299 (1868); Belroos Banoo Begam v. Asghar Ali (1875), 15, Beng. L.R. 167. Zinat Bibi v. Aimna 52 Punj. Ree, 421. (No. 107).

4 In the leading English case Morice v. The Bishop of Durham 10. Ves. 522, Lord Eldon observed, that a bequest "for such objects of benevolence or liberality as the executor should most approve of" was too vague to be enforced. Similarly in Blair v. Duncan (1902) A. C. 37, and in re Macduff (1896) 2 Ch. 463, a trust for charitable philanthropic purposes or such purposes as trustees may think proper is void for uncertainty. The same view has been held by the Privy Council in an Hindu case Runchordas v. Paravatibai 23, Bom. 753 (1899). The reason is obvious it will be in effect exempting the trustee from judicial control or if the Court is to direct the trustee as to what objects are good purposes, it will be exercising administrative functions and not judicial. Wilson says (Muhammadan Law p. 354.) "It is to make the so called 'waqf' in effect a bequest to the State—only that the state is to estimate the goodness of different purposes by a Muhammadan standard. If this is really Muhammadan Law, it is outside the province for that Law in British India." Late Mr. Ameer Ali strongly dissents from this view (Mahommedan Law Vol. 1 p. 325,) and Tyabji also disagrees (Muhammadan Law p. 596.)

The Bombay High Court has held a Waqf by Khoja Muslim to dharm as void for uncertainty vide Gangabai v. Thavar (1863) 1Bom H.C.R. 71. And the Punjab Chief Court in Shahab-uddin v. Sohan Lal (1907) Punj. Rec. no. 75. held a Waqf for such charitable objects as the trustees shuld think proper and which would cause bliss to waqif as void for uncertainty. On the other hand the Allahabad High Court has held in Mukarram v. Anjumanunnissa 06 45 All. 152 (1923) a waqf for fatiah and umur khair, (general charitable purposes, including for maintenance of poor as valid. The Bombay High Court in Abvocate General v. Jimbabhai has interpreted the word khairat, distribution in charity.

(3) That after the death of the *mutawalli* the pious residents of the town would look after the *waqf*[1]

(4) A *waqf* for the benefit of the rich alone or even both for the rich and poor.

WAQF—PERPETUITY.—

174. According to Imam Abu Hanifa and Muhammad *waqf* must expressly be in perpetuity and according to Imam Abu Yusuf if not expressly stated, it will be presumed to be in perpetuity. Under the Shia Law waqf cannot be temporary limited to a fixed period.[2]

COMPLETION OF WAQF.—

175. The *waqf* is complete when the decree has been passed by the Kazi (Court), or according to Imam Muhammad the *waqif* has delivered possession of the subject of waqf to the *mutawalli* trustee; but according to Imam Abu Yusuf mere declaration of *Waqf* is sufficient to establish it.

The Fatwa-i-Alamgiri adopts the view of Imam Muhammad and this opinion has been followed by the High Court of Allahabad, but the High Court of Calcutta has followed the opinion of Imam Abu Yusuf, and which has also been recently adopted by the High Court of Rangoon.[3]

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1 Muhammad Shafi v. Dost Muhammad 14 A,L.J.R., 895 where the 'waqif' provided that after the death of himself and his wife the pious residents of the town, rausai qasba, saiful khair and Ulmai deen Mahommad, Amil bil Hadis, should look after the 'waqf'. The plaintiff alleged that he was elected by such a class as 'mutawalli. The Court held the persons alleged to have appointed the plaintiff were an undefined uncertain, and fluctuating body of men.....the suit was not maintainable

2 Baillie I 561. Ballie 11, 218 and vide Sec. 173 Supra.

3 As regards delivery of possession in Doedem Jan Bibi v. Abdulla Barber Fulton 345 (1838) the opinion of Imam Abu Yusuf was preferred, and recently this view was accepted by the Rangoon High Court in Ma E Khin v Maung Sein (1924) 2 Rang. 495 88 I.C. 167. However the Allahabad High Court has followed Imam Muhammad in Muhammad Aziz Uddin v. The legal Remembrancer (1893) 15 All. 321. Vide also Muhammad Yunus v. Muhammad Ishaq 19 A.L.J.R. 380; 43 All. 487 where the waqif executed a deed of waqf of some land in favour of a school, but possession was not delivered subsequently he sold his property including this land to others. Held, there was no valid 'waqf' And again recently in Muhammad Shaffi v. Muhammad Abdul Aziz 49 All. 391 (1926). When the waqif constitutes

Under the Shia Law waqf is not complete unless possession of the subject of *waqf* is given either to the *mutawalli* or to the beneficiary.[1]

CONTINGENT WAQF.—

176. A *waqf* cannot be contingent suspended on any condition, *e.g.* a person says; "If my son comes, then my property will be a waqf for the benefit of the poor.[2]

The same is the view of Shia Law.[3]

FORM OF WAQF.—

177. A *waqf* may be made verbally or in writing. No special words are required, it is sufficient if the intention of the *waqif* is clearly ascertainable. Generally *waqf* is effected by the use

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himself the mutawalli, trustee, it is obvious there shall deemed to be a change of possession, from the waqif to the trustee, though in fact no actual delivery of possession takes place. The municipal or village records should however show waqif's possession as trustee and no logner as owner of the property. The following cases may be cited. As to evidence of mutation of names in revenue papers vide Abadi Begum v. Bibi Kaniz Zainab (P. C. 1927) 6 Pat 259. In Mohammad Zain Khan v Nurul Hasan Khan the waqif appointed himself as trustee, though there was no mutation yet the waqf was held to be valid. Some other cases are : Abdul Rajak v Jimabai 14. Bom. L. R. 295 (1911). Janjira v. Mahammad 49 Cal. 477 (1922) Abdul Jalil v. Abid Ullah 43 All 416. (1922). Tafazzul v. Majid Ullah 5 Lah. 59 (1924).

1 Baillie 11, 212. The Shia Law is strict on the question of delivery of possession vide Thakur Ram v. Saiyed Sadiq, 8, I.C. 1150 (Oudh 1910). [A case of waqif appointing himself as trustree].

2 The declaration of trust cannot be contingent on any uncertain event e.g., the death of the 'waqif' without issue vide Pathukutti v. Avathalakutti 13 Mad., 66, (1888)

3 As regards the Shia Law vide Baillie 11, 218. "If the appropriation is restricted to a particular time or made dependent on some quality of future occurrence it is void. In Syeda Bibi v. Mughal Jan 24, All., 231, (1902), it was stated in deed that it shall come into force from the date of its registration, the 'waqf' was held to be invalid. This view may now be qualified by the decision in Baqar Ali v. Anjumanara Begum 25, All., 236 (1903) over ruling Agha Ali Khan v. Altaf Hasan Khan 14, All., 429 (1892). F. B. containing an elaborate judgment of Mahmood J.

of the word *waqf* itself, or combined with the term *sadqa* or some suitable words denoting charity.[1]

Similarly under the Shia Law the use of the term *waqf* is not necessary for creation of *waqf*.[2]

WAQF BY USER.—

178. When certain property is used from almost time imemorial as *waqf* property, though there may be no evidence to establish when and how it was created as *waqf*, yet it will be deemed to be a proper *waqf* by user.[3]

WAQF INTER VIVOS OF TESTAMENTARY.—

179. A *waqf* may be made by act *inter vivos* or by will.[4] A testamentary *waqf* is only valid up to the extent of the legal third of the estate as in the case of bequest, it is void as to the excess unlese the heirs of the *waqif* give their consent. According to the *Hanafi* Law if one of the beneficiaries happens to be an heir of the endower, then his allotment will be divisible amongst all the heirs unless the other heirs give their consent.[5] Under the Shia Law that a testamentary *waqf** in favour of the heirs would be valid to the extent of the legal third without consent of other heirs.[6]

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1 The following are valid declarations of 'waqf.'

(a) "This my land is a sadqa perpetually endowed charity for the benefit of the poor."

(b) This my land is endowed for the poor.

(c) "This my land is 'waqf'." Then according to Imam Abu Yusuf the land would be a 'waqf' for the poor.

As to oral declaration of 'waqf ' vide Fakhur-ud-din v. Kefayat-ul-lah 7. A.L.J.R., 1095.

2 Saliqunnissa v. Mati Ahmad 25 All., 45 (1903).

3 Vide Court of Wards v. Ilahi Bakfh (1912) 40 Cal., 297 ; 40 I.A. 18. Sajjad Ali Khan v. Jagmohan Das 101 I.C. 563 (Oudh 1927) and Makhdum Hassan Baksh v. Ilahi Baksh 48 Punj., Rec. 83 (1913) (the latter is a case of a grave yard. There was no proof as to its dedication), but according to the Madras High Court there must be a public user of the burial ground vide Abdul Rahman v. Murugappa 83 I.C. 536 (Mad. 1923) Vide also Muhammad Hamid v. Mahmud (P.C. 1922) 77 I.C. 1009 a case of 'waqf' in regard to a Khankah though there was no deed.

4 Baillie I. 550, Hed. 2335.

5 Baboo Jan v. M. Nuroul Haq. 10 W. R. 375 (1868).

6 Baqar Ali v. Anjumanara Begum 25 All. 236 P. C. overruling 14. All. 429 (1892).

The Shia Law, as regards the legal third vide Ali Husain v. Fazal Husain 36 All. 431, (1914), where Shia authorities are discussed.

WAQF IN MARZ-UL-MAUT.—

180. A *waqf* made in *marz-ul-maut*, death-illness, unless assented to by the heirs is valid only to the extent of the legal third. If some of the heirs consent, then it will take effect in proportion to their shares. If the *waqif* recovers from that serious illness, then it was obviously not a mortal illness, and the *waqf* made by him is valid to the whole extent. The Shia Law is the same as the Sunni Law.[1]

STATUS OF WAQF PROPERTY.—

181. Upon the *waqf* becoming absolute, its sale or transfer is not permissible under the Law except under certain circumstances,[2] and it cannot be attached nor can it be inherited by the *waqif's* heirs,[3] and no member of the *waqif's* family can acquire a title to it by adverse possession.[4]

§ 2. THE WAQF ACT 1913.

THE LAW OF WAQF PRIOR TO WAQF ACT VI OF 1913.—

182. As interpreted by the Privy Council and the Indian High Courts,[5] it is essential to constitute a valid *waqf*, that the property should be substantially dedicated to charity. The *waqf*

A documentary Waqf is recognised but it should be noted that the Muslim Law insists on an oral declaration of waqf, it is indispensable under the Hanafi Law, and in its absence no waqf can take place. In fact it has been held by the Hanafi jurists that if a person executes a deed of waqf, waqf-nama but without making an oral declaration the property will not become waqf. It is essential that he should sign it and read it before attesting witnesses. This view has been stated with great emphasis by Karamat Husain J. in Fakhruddin Shah v. Kifayatullah 7 A.L.J.R. 1095. (1910) [authorities are cited.]

1 Vide Ali Husain v. Fazal Husain Khan 36 All. 431. (1914) Nazar Husain v. Raqfeeq Husain 8 A.L.J.R., 1104 (1911).

2 Vide the exercise of the power by Mutawalli with the sanction of the Court.

The Mutawalli, trustee, with the sanction of the Kazi, Court, may mortgage the property for repairs or payment of taxes, and can even sell a part of the 'waqf' property for these purposes.

3 Hed. 235. Jewn Doss Sahoo v. Kubeerooddeen (1840) 2 Moo. I.A. 390 ; Dayal Chand Mullick v. Keramat Ali (1871) 16 W. R. 116 ; Hidayatunnissa v. Afzal Husain (1870) 2 N. W. 420 (a Shia case). That the heirs cannot inherit vide Jaffar Mohiudin v. Aji Mohiudin 2 Mad. H. C. R. 19; Fergedo v. Mahomed Mudessur 15 W. R. 75 (1871).

4 Fokhruddin v. Kifayat Ullah 7 A.L.J.R 1095.

is not, however, invalid, simply by reason of the fact, that it contains some provisions in favour of the *waqif* himself or his descendants, provided it is such, that it cannot be construed as an aggrandisement for the benefit of the family, which would be the case if the *waqf* is not of a public nature or the amount set apart for charitable or religious purposes is absolutely insignificant. The ultimate gift must always be to charity, and it should not be too remote or illusory.[1]

THE TEXT OF THE MUSSULMAN WAQF ACT VI OF 1913.—

183. 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.

Whereas doubts have arisen regarding the validity of wakf created by persons professing the Mussulman faith in favour of

1 After the passing of the 'waqf' Act. VI of 1913, the question of the validity of private 'waqf' family settlements is no longer in dispute, nevertheless the history of the events which led to the passing of this enactment is interesting from a legal and academic point of view. The theory as propounded by the jurists and recently by late Mr. Ameer Ali in his work on the Muslim law and in his well known judgments, briefly is to the effect, that the creation of family 'waqf' is of itself a religious and charitable act under the Muslim Law. The cases in favour of private 'waqfs' are: Dosd Jaan Bibee v. Abdoolah Barber. Fulton 345 (1838), Bibee Kaneez Fatima v. Bibee Sahiba Jan 8 W.R. 313 (1867), Khojah Hossein Ali v. Shahzadee Hazara Begum 12 W.R. 344 (1869) Muzhurool Huq v. Puhraj Ditarey 13 W.R. 255 (1870). The cases against creation of private family 'waqf's are: Abdul Ganne Kasam v. Hussan Miya Rahimtullah 10 Bom., H.C. (1873) Mahomed Hamidullah Khan v. Lutful Huq 6 Cal., 744 (1881) Abdul Fata v. Rasamaya 22 Cal., 619 (1894) affirming on appeal Rasamaya v. Abdul Fata 18 Cal., 399 (1890), overruling Meer Mahomed Israil v. Sashti Churn Ghose 19 Cal., 214 (1892) and following Bikani Mia v. Shuk Lal Poddar 20 Cal., 116. (1892). Abdul Fata's case was followed by the Allahabad High Court in Muhammad v. Munnawar 21 All., 329 (1899). A reaction had however already set in by the decisions of the Bombay High Court which though condemning 'waqfs' as a prepetuity of the worst kind, nevertheless admitted their validity as to settlement in favour of the waqif's descendants, if there be an ultimate dedication to a charitable unfailing purpose, vide Fatima Btbi v. The Adovate General 6 Bom., 42 (1881): Amrutlal Kalidas v. Shajk Hussain 11 Bom., 493 (1887). Nizamuddin v. Abdul Gafar 13 Bom, 264 (1888) P.C. It wasnot until the decision of the Privy Council in Mujibunnissa v. Abdur Rahim 23 All., 233 (1900) that the qestion was free to some extent from doubt. The Privy Council observed, "the theory of the deed seems to be that the creation of family endowment is of itself a religious and meritorius Act..... It is superfluous

themselves, their families, children, and descendants, and ultimately for the benefit of the poor or for other religious, pious, or charitable

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at the present day to say that this is not the law." The same is in Muhammad Munawar Ali v. Rasulan Bibi 27 All. 320 (1900).

However we should note that this judicial interpretation of Muslim Law only applies to 'waqfs' created before the passing of the Mussulman 'waqf' Validating Act VI of 1913.

SOME OLD CASES.

(a) Abul Fata v. Rasamaya 22 Cal. 619 (1894) ; 22 I. A. 76. Two brothers executed a settlement of all their immoveable property "for the benefit of our sons and children and the members of our family from generation and in their absence for the benefit of the poor and beggars and widows and orphans. We two brothers take upon ourselves the management and supervision of the same in the capacity of mutawallis for such time as we may live..... ..." In this case it is clear the ultimate trust for the poor is too remote, it is in the nature of an aggrandisement for the benefit of the family. Thus it was held to be void. But now under section 4 of the 'waqf' Act VI of 1913 such a 'waqf' would be perfectly a valid 'waqf'

(b) Muzhurool Huq's v. Puhraj Ditarey 13 W. R. 255 (1870) A Muslim conveyed certain property to a mutawalli for the purpose of supporting a Mosque, to feed travellers, to give alms to mendicants, to educate the poor, and the remaining profits to defray expenses of the marriages, burials, and circumcisions of the members of the family of the first mutawalli. This was held to be a valid 'waqf' and it is obviously also valid under the 'waqf' Act VI of 1913.

(c) Mahomed Ahsanullah v. Amarchand Khandu 17 Cal. 498 (1899) 17 I. A. 28. A Muslim executed a deed dedicating his whole property for certain religious purposes "fisabiillah" defraying expenses of a Masjid, and schools, " in the manner mentioned below," and he made minute provision for the succession of his sons and other descendants to the office of mutawalli, and for the maintenance and support of his family with the power to the trustees to increase their own allowances and those of the family. And the deed contained no direction as to the application of the remaining income which would be left over in case of total failure of the waqif's descendants. It was held to be an invalid 'waqf' being in the nature of family aggrandisement, the gift to charity being illusory by reason of smallness of the amount.

(d) Mutu Ramanandan v. Yava Levvai Marakayar 31 Mad 12 (1910) confirmed on appeal by the Privy Council 40 Mad. 116 (1916) 44 I. A. 21.

Two Muslim executed a 'waqf' of their properties of the value of Rs. 20,000 in trust to apply an indeterminate (variable) portion for the performance of fatiah and to alms, the residue of the income for the benefit of the 'waqif's' sons and descendants. The acmount aquired for fatiah etc. was estimated to be about Rs. 600 per year, and the balance for the benefit of the family was about Rs. 900. The 'waqf' was held to be valid. Their Lordships observed, "These figures may vary. They are not fixed and unalterable. The income may fluctuate or decrease permanently. The paramount purpose of the grantors was evidently to provide for all the needs of those charities. It is the residue, which may be a dwindling sum that is given to the family."

purposes; and whereas it is expedient to remove such doubts; It is hereby enacted as follows :—

1. (1) This Act may be called the Mussulman *Wakf* Validating Act 1913.

(2) It extends to the whole of British India.

2. In this Act unless there is anything repugnant in the subject or context.

(1) *Wakf* means the permanent dedication by a person professing the Mussulman faith of any property for any purpose recognised by the Mussulman law as religious, pious or charitable,

(2) "Hanafi Mussulman" means a follower of the Mussulman faith who conforms to the tenets and doctrines of the Hanafi School of Mussulman Law.

Power of Mussulmans to create certain waqfs.

3. It shall be lawful for any person professing the Mussulman faith to create a wakf which in all other respects is in accordance with the provisions of Mussulman Law for the following among other purposes.

(a) for the maintenance and support wholly or partially of his family, children or descendants, and

(b) where the person creating a wakf is a Hanafi Mussulman, also for his own maintenance and support during his life-time or for the payment of his debts out of the rents and profits of the property dedicated :

provided that the ultimate benefit is in such cases expressly or impliedly reserved for the poor or for any other purpose recognised by Muhammadan Law as a religious, pious, or charitable purpose of a permanent character.

Wakfs not to be invalid by reason of remoteness of benefit to poor etc

4. No 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 is postponed until after the extinction of the family, children, or descendants of the person creating the wakf.

Saving of local and sectarian custom.

5. Nothing in this Act shall affect any custom or usage whether local or prevalent among Mussulmans of any particular class or sect.

THE EFFECT OF THE WAQF ACT VI OF 1913.—

184. According to the previous decisions of the Privy Council and the High Courts, the dedication to charity must be substantial, but under the *waqf* Act VI of 1913 this is not essential. Though it is required that the ultimate benefit must expressly or impliedly be reserved for the poor or for some charitable purpose, but the *waqf* will not be impaired by reason of remoteness of benefit to the poor, as was the case under the old law.[1]

The Mussulman wqkf validating Act VI of 1913 has been held not to be retrospective.[2] And it does not apply to *Sunnis* of other sects *viz.* of the *Shafii, Maliki*, or *Hambali* School of Muslim Law, nor does it apply to *Shia* Muslims.

Life interest :—

A Hanafi Muslim can reserve a life interest for himself under the *waqf* deed, and he may also provide for payments of his debts from the income of the *waqf* property.

According to the *Shia* Law if the *waqif* reserves the whole income, the *waqf* is absolutely void, and if he reserves a part of the income for himself, the *waqf* is invalid as to that part and valid as to the rest.[3]

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1 The doctrine of substantial dedication and invalidity for remoteness of benefit to the poor as expressed in Abul Fata v. Rasamaya 22 Cal. 619 (1894) is no longer law for 'waqfs' created after 7th March 1913.

2 Amir Bibi v, Aziza Bibi 39 Bom. 563 (1914) (Held not to be retrospective). Vide also Mutu Ramanandan v Vava Levvai Marakayar 34 Mad. 12 (1910) confirmed on appeal by the Privy Council 40 Ma . 116 (1916), 44 I. A 21. And vide Solehman Qadir v. Salimullah (P.C. 1922) 69 I. C 138. It has been held that it does not apply to a 'waqf' held to be invalid in a previous adjudication, Mahomed Bukah v. Deawan Ajman 43 Cal. 158. (1915)

Thus a Hanafi 'waqf' is valid even if the whole income is used for the benefit of the 'waqif' himself, vide Bismilla Begum v. Maharaja of Mahmudabad 102 I. C. 77 (Oudh 1927), however the ultimate benefit must be for the poor, or for a pious charitable purpose of a permanent nature, Mahmoed Bibi v. Sulaiman Ahmad 98 I.C. 838 (Mad. 1925.)

3 It is essential that a Shia Muslim must divest himself completely of ownership from the time of creation of 'waqf' vide Ali Raza v. Sanwal Das 41 All., 34 (1919). As to validity of 'waqf' partly valid partly invalid vide Haji Kalub v. Mehrum Bibi 4 N.W.P. 155 (1872). Hamid Ali v. Mujawar Hussain 24 All. 257.

A *Shia* Muslim may however create a life interest in favour of another person.[1]

§ 3. MUSHA, RESERVATION, REVOCATION, Etc.

WAQF OF MUSHA.—

185. The *waqf* of a known undivided share in a property capable of division is not lawful according to Imam Muhammad, but it is lawful according to Imam Abu Yusuf, and the latter opinion is adopted by the jurists.

The *waqf* of things that do not admit of division is lawful according to all jurists.[2]

It is agreed by the jurists that the *waqf* of *musha* whether the property be susceptible of division or not for a *masjid* or a burial ground is not lawful.

According to jurists if after appropriation of a waqf property, partition is subsequently effected, even then *waqf* would not become valid, but if the Kazi (Court) has declared a *waqf* of *musha* as valid, his decision will be operative simply by the force of the decree as in all judicial decrees.

RESERVATION OF POWER TO ALTER.—

186. After the *waqf* has been completed nothing can be altered unless the power to alter has been reserved when making it. The *waqif* may reserve the power to sell the subject of *waqf* and purchase another land as *waqf* property, or similarly exchange

1 As to life interest in favour of the wife, vide Muhammad Ahsan v Umardarz 28 All. 633 (1906).

2 This view was followed by the Chief Court, Burma in Khatiza Bibi v. Hajee Ahmed Ismail 61 I.C. 689. (1920). And in Hussein bhai Cassimbhai v. Advocate General of Bombay 57 I. C, 991 (Bom. 1920) two co-heirs relinquished their claims in favour of the third with regard to certain parcel, the latter made a 'waqf' of one-fourth of that property declaring herself mutawalli of that fourth. This was held to be a valid 'waqf'.

The same view is held by M. Clavel Droit Mussulman le 'Waqf' ou Habous d'apres la doctrine et la Jurisprudence Vol 1 p. 222. Vide also the Hedaya, Hamilton (Grady) p. 233.

the subject of *waqf* for some other property. These transactions can only be effected in strict compliance with the terms of the *waqf-nama*, deed and a trustee may be similarly empowered.[1]

But if a *waqf* is made subject to the reservation of a power to sell it and expend its proceeds for benefit of *waqif* or otherwise and not invest it or treat it as *waqf*, it would be void *ab initio*.[2]

RESERVATION OF OPTION.—

187. According to Imam Muhammad if the *waqf* is subject to an option it is not valid, but Abu Yusuf holds that a condition of option in favour of the *waqif* for three days only is valid.

There is consensus of opinion that if the *waqf* is made of a *masjid* subject to an option, the *waqf* would be valid and the option void.

DEFEASIBLE INTEREST.—

188. Under the Hanafi Law the interest given by *waqf* may be made defeasible, that is, on the happening of a certain event a beneficiary should cease to take under the *waqf*.[3] Under the Shia Law beneficiaries may be added, but cannot be excluded from the benefit given under the *waqf*.[4]

REVOCATION OF WAQF.—

189. A *waqf* after it has been validly completed cannot be revoked. According to Imam Muhammad a *waqf*, subject to an option in favour of the *waqif* to revoke it, is absolutely void, but if the subject of *waqf* were a *masjid* then according to Imam

1 If the 'waqif' reserves the right of changing the subject of 'waqf' of any other property at his pleasure, it is lawful according to Imam Abu Yusuf, but according to Imam Muhammad the 'waqf' is valid and condition is invalid. The opinion of Imam Abu Yusuf would be followed if there are circumstances justifying such a change in the interest of the 'waqf' itself which would be attached to the new property as a matter of course.

If the 'waqf' deed provides that the trustee is to be selected from certain class of persons the 'waqif' subsequently cannot appoint some other person, outside the class. Vide Advocate General v. Fatima Sultan Begum 9 Bom. H. R. 19 (1870). In support of this view late Mr. Ameer Ali also cites an authoritative illustration Mahommedan Law Vol. 1 341.

2 Fatima Bibi v. Advocate General of Bombay 6 Bom. 42 (1881).

3 Billie Digest I 589 ; Tyabji 571. 4 Baillie 11, 219 ; Tyabji 571.

Muhammad and Abu Yusuf the *waqf* is deemed to be valid, and only the option is void. Since Imam Abu Yusuf further holds that in every other case the option limited to three days only is valid, the *waqf* may be revoked within three days. However a testamentary *waqf* may be revoked by the *waqif* at any time before his death.[1]

WAQF LEASE—WAQF DEFEATING CREDITORS.—

190. It is essential that the *waqif* should possess the facility of disposition, that is, (*a*) in the case of lease of the property it is lawful to make *waqf* before the expiry of the term of the lease, but the lease would not become void, the *waqf* would operate on the termination of the lease.

(*b*) And in case of mortgage it is lawful to make *waqf* before redeeming it,[1] provided it is later on actually redeemed or the *waqif* dies leaving sufficient property to redeem it; but if he were to die leaving inadequate amount for purpose of redemption, then the property may be sold and the *waqf* is void.

Under Anglo-Muslim Law, a *waqf* created with a view to delay or defeat the rights of creditors may be avoided by any creditor so delayed or affected.[2]

SUCCESSION PER STIRPES.—

191. Contrary to the general principle of the Muslim Law of inheritance in case of *waqf* property, the succession among the beneficiaries is per stirpes and not per capita, and the males and females may take equal shares unless otherwise provided.[3]

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1 Vide Fatma Bibi v. Advocate General of Bombay 9 Bom. 42 (1881). (As to revocation and option), Assobai v. Noor bai (1906) 8 Bom. L. R. 245; Ashna Bibi v. Awaljadi 44 Cal. 698; Pathakitti v. Avathalathyku 13 Mad. 66. And Muhammad Ahsan v. Umardaraz 28 All. 663 (1906) (a testamentary 'waqf'.) A testamentary 'waqf' being a waqf by will is treated on the same footing as a bequest and as a matter of fact, it is not effective nor complete till the will is operative.

Vide Shahzadi v. Khaja Hossian 12 W.R, (1869) 498; Janjira v. Mahommad 49, Cal., 477 (1922).

2 Ramanandan v. Vada Levvai 34 Mad., 12 (1909).

3 Vide Macnaghten Principles and Precedents case VIII Q. 2. Certain illustrations are cited from Khizanatul Mooftieen and the Fatawa-i-Alamgiri. This view has been mentioned in Sayad Mahmoed Ali v. Sayad Gohar 6 Bom., 88 (1881), though the decision of the case was that it was not a valid 'waqf.' Vide also Gaffur Saheb v. Mossa Saheb, 17 I.C. 124 (1912).

INTERPRETATION OF WAQF.—

192. A *waqf* ought to be construed according to the intention of the *waqif*, and in comformity with usage in general which may be indicative of the wishes and directions of the *waqif*.

The following are general rules for interpretation :—

(*a*) The masculine gender used collectively includes females, unless it appears otherwise from the context.

(*b*) The term *awlad* includes males as well as females, but not descendants of females.[1]

(*c*) The term *ahfad* includes descendants of females as well as males.[2]

(*d*) The term *nasab* and *zari'at* includes all descendants near and remote whether male or female.

(*e*) The term *karabat* means the relatives within the prohibited degree, and its plural *akrabah* includes all relatives through a common ancestor the near and remote alike.

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1 The daughter's son is not included in the term aulad dar aulad or warisan vide, Abdul Gane Kasam v. Hussen Miya Rahmtulla 10 Bom, H.C.R. 7 (1873). Aulad means legitimate children Bhaiya Sher Bahadur v. Bhaiya Ganga Buksh. 41. I. A 1 (1913).

The Arabic term "awlad" and the persian term "farzandan" includes both sons and daughters and descendants in the male line but not in the female line. vide Hyaonnissa Mofukhir ol Islam, 1. S.D.A. 106 (1805).

2 The term "aulad va ahfad" in Sheik Karimodin v. Nawab Mia Syad Alamkhan 10 Bom. 119 (1889) was construed such as to allow the claim of a male tracing descent through four males and two females.

Macnaghten Principles and Precedents 342; Baillie Digest 570.

Vide Sircar's Muhammadan Law T.L.L. 1874 P. 131-133. A man said, (1) "This my land is Sadakah settled on my child (walad)" or (2)".....on my child and child of my child" or (3)".....upon my child, and child of my child, and child of the child of my child" In the first case after the first generation the waqf will be for the poor, similarly in the second case the produce will go to the poor after two generations and the third case is construed as a waqf for the benefit of his children for ever.

KHANKA—RELIGIOUS ORDER OF PRIESTHOOD.—

193. A *khanka* is a religious institution, and its head is a *sajada-nashin*, a successor to some well-known saint whose tomb is situated within the precincts of the *khanka* or close by. The *sajada-nashin* is generally the manager of the institution, and is entitled to administer its charities according to an approved or customary scheme for its distribution, wherein he himself may take a definite share with others.[1]

The celebration of the death anniversary of the saint whose successor he happens to be, is a necessary purpose of the institution, and instructions in religious matters and rules of life may also be imparted to all who visit or reside in the insitution.

A *sajada-nashin* may appoint his own successor, but a minor cannot be appointed to hold this office.[2]

Similarly a *takia* is a religious insitution and it may be duly endowed as valid *waqf*.[3]

PERPETUAL OBSEQUIES.—

194. Under Anglo-Muslim Law the maintenance of a tomb of an individual and the performance of *fatiah* etc., for the benefit of his soul is not a proper object of waqf, and the rule against perpetuities would invalidate such a dedication. However the performance of *fatiah* has been held to be a valid object, if the expenditure of money is for feeding of the poor. It seems it is valid to make a *waqf* for the maintenance of the tomb of a recognised saint.[4] And for the same reasons dedication to *Imambaras* has been held to be valid.

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1 Sajadanashin is entitled to the surplus income or a share in it vide Zooleka Bibi v. Syed Zainul Abedin 6 Bom., L.R. 1058 (1904) Muhammad Hamid v. Mian Mahmud 50 I.A. 92 (1923), 4 Lah., 15.

2 Piran v. Abdool Karim 19 Cal., 203. Secretary of State v. Mohiuddin 27 Cal., 674 (1900).

3 Hussain Bukah v. Gul Muhammad 6 Lah, 140 (1925) 88 I.C. 816.

4 It is submitted that at least under the custom prevalent in India 'waqf' even for the maintenance of a private tomb may be held to be valid.

In Khaleloola v. Nuseerudeen 18 Mad., 201 (1894) it was observed that building of substantial tombs and the reading of Koran at a tomb were not approved by the Muslim Law. The view taken by the Court was that it creates a perpetuity of the most useless description which would certainly be invalid under English Law. The

WAQF PARTIALLY VALID.—

195. When some property is made a *waqf* for purposes partly valid and partly invalid, the latter is invalid and would lapse to the *waqif* or his representatives, but *waqf* for the valid purpose will hold good under the Muslim Law.[1]

MASJID.—

196. A Muslim, lawful owner of some property may dedicate it for purposes of offering prayers, and similarly property may be dedicated for the requirements or otherwise to the *masjid*, and which would be treated on the same footing as the *waqf* of the masjid itself.

The *waqf* of the *masjid* is completed by the offer of prayer openly by the Muslims in a body, and according to some jurists even by the offering of a prayer by the Imam previously appointed

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case bears a close analogy to one in which a Roman Catholic had devised property for masses for the death, which has been held to be invalid in India on grounds of public policy irrespective of any territorial law, Colgan v. The Administrator General of Madras 15 Mad., 424 (1892). The Privy Council also has held a similar bequest in a will as invalid vide Yeap Cheah Neo v. Ong Cheng Neo L.R. 6 P,C. 381 (1875) (An appeal from the Strait Settlements) However it may be noted that in Ramanandan Chettiar v. Vada Levvai. 40 Mad. 116 (1916) the waqf was held to be valid and which had among other pious purposes the performance of the fatiah. In Sujjad Shah v. Shah Habit 53 I.C. 677 (Mad., 1919) in was held that 'urs,' anniversary ceremony, and 'fatiah' are valid objects if their performance entails the feeding of the poor, vide also Salebhai Abdul Kader v. Bai Saifiabu 36 Bom., 111 (1911).

In Biba Jan v. Kalb Husain 6 A.L.J.R , 115 (1909), where a Muslim Lady had made a 'waqf' for the following purposes, the celebration of the birth of Ali, expenses for keeping tazias in Muharram, for repairs of Imambaras and for celebrating the death anniversaries of dead persons it was held to be valid.

In Fakhruddin v. Kifayat Ullah 7 A.L.J R., 1095 (1910) Karamat Husain J. examined several authorities from a very strict orthodox point of view and some of his remarks are as follows ; " The fatiah and urs ceremonies in their popular sense are neither religious nor charitable in the sense of a charity for the benefit of the poor which they may claim as a matter of right. It therefore follows that a 'waqf' for the fateha or urs ceremonies in their popular sense cannot be a valid waqf (1097)".

1 Vide Mazhar Husain v. Abdul Hadi Khan 33 All., 400 (1911) certain remarks per Stanley J. at page 406.

by the *waqif*, though such an *Imam* may also happen to have the duty of *mua'zin*, call bearer, assigned to him.

The administration of the *masjid* is usually done under the supervision of the Kazi, Court, by the *mutawalli* or by a body of the Muslims interested in the *masjid*.

WORSHIP IN MASJIDS.—

197. A *masjid* is a place of worship and as such every Muslim is entitled to enter it for purposes of performing his devotions according to the ritual of his own school, and he is entitled to join in the congregational prayers, which are being offered in the *masjid* in the manner sanctioned by the Muslim Law.[1] The differences in the rituals of the four important *Sunni* schools *viz.*, the *Hanafi*, *Shafii* *Malaki* and *Hambali*, are not such as to prevent followers of one school from taking part in the congregational service of the other sect.[2]

Under Anglo-Muslim Law if a *masjid* is dedicated exclusively for the worship of a particular sect, the dedication of the building as *masjid* is valid, but the reservation is void, however it seems that a

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1 In Queen Empress v. Ramzan 7 All., 461 (1885) Mahmood J. based his dissentient Judgment upon mixed considerations of the meaning of the Indian Penal Code and the Muslim Eccelesiastical Law, and his observations were followed in Ataullah v. Azimullah 12 All., 494 (1889); Jangu v. Ahmadullah 13 All., 419 (1889).

2 The Hanafi practice is to say the word "amin" in a low soft voice absolutely inaudible and the Shafi practice is to say the same word "amin" in a loud tone. It has been held in the above cases that this fact should create no annoyance to others if it is simply with the intention of performing a religious obligation and not done maliciously. The Privy Council has upheld this view in Fazal Karim v. Maula Bukash 18 Cal, 448 (1891) In this case the Imam who conducted the prayers himself adopted the Shafii rituals, and the Hanafis were said to have no cause to complain. In my opinion it is a doubtful decision if the masjid was built by the Hanafis it was rather unfair for the Imam to adopt the Shafii rituals, the trustees of the masjid if any should have appointed another Imam, to conduct the prayers. There is some difference in allowing members of the service observing rituals of their school and in permitting the Imam to change over to a different school. The latter change is of a very drastic order. Some support for this view is to be found in the decision of the Patna High Court in Hakim Khalil Ahmad v Malik Israfi 2 Pat. L. J. 108 (1916) where dissenting Muslims the Kadianis though entitled to enter a mosque were held not entitled to pray behind an Imam of their own choice, since the masjid was always used by the Hanafi Muslims.

reservation for any community as trustees for having constructed the *masjid* is lawful.[1]

§ 4. ADMINISTRATION OF WAQF.

MUTAWALLI-TRUSTEE.—

198. (i) The administration and management of the *waqf* property is duly vested in one or more *mutawallis*,[2] trustees, who are usually nominated by the *waqif*.

(ii) (*a*) A trustworthy person whether male or female[3] could be appointed as *mutawalli* and the *waqif* is entitled to appoint himself or his descendants as a *mutawalli* of the dedicated property.

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1 A mosque is any dedicated place there need be no "minaret" vide. Maula Bukah v. Ammiruddin 1 Lah., 317 (1919) and the condition in favour of exclusive use of one sect is void, ibid, 1 Lah., 317.

In Ibrahim Esmael v Abdool Currim. 35 I.A. 151 (P.C. 1908) a masjid founded by all Muslims and was taken up exclusively by cutchi Muslims, subsequently it was restored to all Muslims non-cutchi as well as cutchi Muslims.

In Fazal Rahman v. Gulam Hossain 76 I.C. 788 (Rang 1923) a masjid was built by the Bengalis and they were given majority in the body of trustees

2 The mutawalli is considered as a manager of the waqf property the ownership of the waqf property is vested in God.

In Rustam Ali Khan v, Mushtaq Husein 42 All. 609 ; 47. I. A. 224 (1920). The Privy Council held that the mutawalli has no estate or interest in the waqf property, and as it does not transfer property to the mutawalli, the waqf deed requires no registration. Vide also Naram Das v. Haji Abdur Rahim (1919) 47 Cal. 866. Vidya v. Balusami 48 I.A. 302 (1921), 44. Mad. 831.

There may be one or more trustees vide Mahomed Ghaous Siddikh v. Sheik Moideen Siddikh 29 I.C. 849 (Mad. 1915).

If the management of the waqf has been given to undefined and fluctuating body of men such appointment is bad, but the Court may appoint some one in case of a public trust Muhammad Shafi v. Dost Muhammad 36 I. C. 204 (All., 1916).

As to the waqif as mutawalli, vide Muhammad Rustam Ali v. Mushtaq Hosein 47 I.A. 224. 42 All. 609. Advocate General v. Fatima (1872) 9 B. H. C. 19.

3 A female could be appointed as mutawalli, vide Wahid Ali v. Ashruff Hossain 8 Cal. 132 (1882) Khajeh Salim Ullah v. Abul Khair M. Mustfa 37 Cal. 263 (1909). Vide also Doe Dem Jaun Bebee v. Abdullah Barber (1838) 1 Fulton 345. In Munnawaru Begam v. Mir Mahapalli 41 Mad. 1033 (1918) it was held that a woman could hold the office of Head Mujavar of an Astan where some ceremonies were performed. In Shahar Banoo v. Aga Mahomed 34 Cal 118 (1906) a Babi woman was appointed to act as mutawalli of a Shia waqf by the Court, on appeal the Appellate Court set aside the order of appointment as being indiscreet though not invalid.

(*b*) A non-Muslim could also be appointed as *mutawalli*,[1] but if the *waqf* involves performance of some religious ceremony or duties (*e.g.* that of *Imam* in a *masjid*) then neither a non-Muslim nor a woman could be appointed to act as *mutawalli*.[2]

(iii) And as a general rule neither a minor nor a person of unsound mind can be appointed as *mutawalli*.[3] If the *mutawalli* appointed to succeed on the death of the first or other *mutawalli* happens to be a minor; the Court may appoint another person to discharge the duties pending the attainment of majority of the minor.

(iv) If no *mutawalli* has been appointed then according to Imam Abu Yusuf the *waqif* himself would be deemed to be the *mutawalli*,[5] but according to Imam Muhammad the *waqf* is void, the *Fatawa-i-Alamgiri* adopts the latter view. But it seems that a public *waqf* would not fail altogether if the public have actually

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1 Since a non-Muslim could be appointed as mutawalli it follows more so that a Shia could also be appointed mutawalli of a Sunni waqf, vide Dayal Chand Mullick v. Keramut Ali 16 W. R. 110 (1871).

2 A woman however could not hold the office where religious duties are to be performed, vide, Hussain Beebee v. Husain Sheriff 4 Mad. H. C. 23. Ibrambibi v. Hussain Sheriff 3 Mad. 95. (1880) But such appointment would be valid if the duties could be performed by a deputy vide Imam Bee v. Molla Khasim Saheb 37 I. C. 889 (Mad. 1916). In case of joint temporal and spiritual duties it is obvious that the latter cannot be performed by the woman, hence she can not be appointed as mutawalli at all, vide Ismailmiya v. Wahadani Begam 36 Bom. 308.

In terms of a waqf deed the Court can appoint mutawalli on an application Mahiuddin Chaudhury v. Aminuddin 72 I. C. 930 (Cal. 1922). The descendants have the first claim to appointment as trustees, vide Zulfikar Ali v. Nabi Baksh 80 I. C. 324 (Lah. 1924).

3 Vide Piran v. Abdool Karim 19 Cal. 203. (1891) Syed Hasan v. Mir Hasan 49 Mad. 941 (1917) the appointment of a minor as mutawalli was held to be void ab initio even if the question arose after his attaining majority. In Kaniz Zohra v. Mujtaba Hussain 77 I. C, 209. (Pat. 1923) it was observed that when it is required to make a selection or appoint a mutawalli a minor can be made a mutawalli.

4 In Khatun Begum v. Ejaz Ahmad 15 A. L. J. R. 132 it was observed that the Court may appoint some person to perform the duties until the minor comes of age and vide Faridun Seko v. Jehanura Begum 101 I. C. 104 (Cal. 1926), the acting mutawalli has the same rights as a permanent mtuawalli and no more

5 Ameer Ali thinks that the opinion of Imam Abu Yusuf should be preferred. (Mahommedan Law Vol. 1, 222.)

used the dedicated property, though no *mutawalli* was actually appointed.

POWERS OF MUTAWALLI TO MORTGAGE, SELL, LEASE ETC.—

199. (i) The *mutawalli* is entitled to do all reasonable acts justifiable and proper for the maintenance, protection and administration of the *waqf* property.

(ii) For payment of taxes or for necessary repairs[1] when no income is available for this purpose, the *mutawalli* may if empowered by the *waqf* deed, if not with the permission of the Court contract debts, or mortgage[2] the property or its produce, and he may even sell[3] a part of the *waqf* property for the same purpose. However no part of the property can be transferred for any other purpose, unless the removal of the thing sold is itself beneficial to the rest of the property, but the annual growth may always be disposed of, for it will be replaced in due course.

(iii) A *mutawalli* is not entitled to lease the *waqf* property in case of lands for a term exceeding three years, and with regard to leases of buildings for a year only; but if specially empowered or

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1 Repairs are a first charge on the income. Vide Moulvie Abdoolah v. Mussammat Rajesri Dossea (1846) 7 S. D. A. 268.

2 Apparently in Niami Chand v. Golam Hussein 37 Cal. 179 (1909) the Court went further and confirmed retrospectively a mortgage made under urgent necessity without its previous sanction. It is submitted that the permission of the Court should be obtained beforehand and not after the transaction. The authorities cited in 37 Cal. 179 conclusively favour this view.

3 As regards sale of the waqf property in Shama Churn Roy v. Abdul Kabeer (1898) 3 C W. N. 158, the sale was held to be void, and in Dayal Chand Mullick v. Keramat Ali (1871) 16 W. R. 116, the mutawalli was removed for unlawful transfer.

The application for obtaining permission for sale should be by a regular suit vide in re Halima Khatun 37 Cal. 870 (1910). But according to later decisions an application would suffice, Fakhrunnessa v. District Judge 47 Cal. 592 (1909), Habibar Rahman v. Saidunnissa 51 Cal. 331. 77 I. C 949. [These applications were for grant of leases.] If some money is advanced for any other than legitimate and proper purpose and needs of the waqf, the waqf properly is not chargeable at all, v de Abdur Rahim v. Narayan Das 71 I. C. 646 (P. C. 1923). But it is not for the vendee to see that the mutawalli has wisely exercised his discretion to sell the property vide Gulam Ali v. Sowlatoonnissa (1864) W. R. 242.

with the permission of the Kazi, Court, the period of lease may be for a longer period.[1]

(iv) The Mutawalli may with the permission of the Kazi, Court, increase[2] the allowances of persons required for the administration or for discharging the duties imposed by the *waqf*, if suitable persons cannot be engaged on the salaries fixed by the deed of *waqf*.

(vi) A *mutawalli* can sue a *co-mutawalli* to restrain him from wasting or transferring the *waqf* property.[3]

(v) The *mutawalli* may erect buildings on the *waqf* land or cultivate it, if it is beneficial to the *waqf* property, he may remove the part in ruins or injurious to the property.[4]

OFFICE OF MUTAWALLI, SUCCESSION AND TRANSFER.—

200. When a *mutawalli* dies or is removed by the Court, or declines to act as a trustee, or for some reason the office becomes vacant, then the new appointment may be effected thus.

(i) By the *waqif* if still alive.

(ii) By the lawful executor of the *waqif* if any;

(iii) And after the death of the *waqif* and of his executor the ***mutawalli*** may appoint his own successor by will, but such

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1 As regards leases vide Darymple v. Khoondkar S. D. A. 586 (1885). [A perpetual lease was upheld but here the property leased was not all waqf—a heritable estate burdened with certain trusts] In shoojat Ali v. Zumeerooddeen (1866) 3. W. R, 158. A lease in perpetuity at a fixed rent was held to be void. According to the doctrine of factum valet an improper lease may be held valid vide Golam Muhammad v. Akhoy Kumar. 32. I C. 205 (Cal. 1915). The tenant has no claim to compensation, Gajendra Nath Dey v. Athr Hossain 69 I.C. 7007. (Cal. 1922).

Under the Hanafi Law a mutawalli is held liable if he lets the property at an inadequate rent vide Baillie Digest 597. Ameer Ali Mahommedan Law Vol. 1. 379.

2 Vide Ameer Ali Vol. 1. 372.

3 Ali Hussain v. Muhammad Hussain 52. I.C. 628 (All. 1919).

4 Baillie Digest 595 "Trees in a vineyard cannot lawfully be sold when the fruit of the vines is not injured by their shade; and though it should be injured by their shade, they cannot be sold, if their fruit is more profitable than that of the vines; but if it be less profitable the trees may be cut down and sold. Trees which are not fruit bearing may also be cut down and sold whenever their shade is injurious to the fruit of the vineyard but not otherwise. But trees that shoot out a second or third time may be cut and sold, for they are like corn and fruit."

mutawalli will be entitled to receive emoluments after the order of the Court has been obtained.[1]

The *mutawalli* has no power to transfer the office while he is alive and is in sound health, unless so empowered by the deed of *waqf*, or by the order of the Court.[2]

(iv) And finally in default of all these the Court may appoint a *mutawalli* preferably a member of the *waqif's* family, a stranger is only to be appointed if no fit and proper person is found in the *waqif's* family.[3]

The office of *mutawalli* as a rule is not hereditary ;[4] but if it is conclusively established that the office of *mutawalli* in a particular *waqf* is hereditary, it is to be followed.

(v) Under Anglo-Muslim Law the right to office of *mutawalli* cannot be settled by reference to arbitration.[5]

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1 In Advocate general v. Fatima Sultan 9 Bom., H.C 19 (1972) the widow being an executrix was allowed to appoint a mutawalli subject to the Court's sanction.

2 Vide Khajeh Salim Ullah v. Abdul Khair 37 Cal., 263 (1909) where Muslim texts were considered a widow was held to have no power to renounce the office or appoint a successor. The court will not disregard waqif's directions except for benefit of waqf.

3 A descendant of the waqif is to be preferred unless his appointment is not in the interest of the waqf property, vide Shahar Banoo v. Aga Mahomed 34 Cal., 118 (1906) where the claim of a Shia woman who had become a Babi was passed over for being a Babi she might not take keen interest in the religious purposes of the waqf property.

4 The office of mutawalli is not hereditary Sayad Abdulla v. Sayad Zain 13 Bom., 555 (1889) ; Alimannessa v. Abdul Sobhan 43 Cal., 467. (1916) Phtamabi v. Haji Mussa 38 Mad , 491 (1915) (a custom for the mutawalli to nominate his successor).

In Akhtari Begum v. Diljan Begum 71 I.C 621 (P.C. 1922) the terms warissharai was construed to include the next heir, if immediate heir is for some reason disqualified (a Shia Case). And curiously in Mahammad Schammad v. Jainabi 96 I.C. 105 (Mad. 1925) the word heirs was construed not to include heirs of heirs.

Where the office is not hereditary a defacto mutawalli acquires title after the lapse of six years under Art. 120 sch. 1, Limitation Act 1908 Debendra Nath Mitra v. Sefatullah, 31 C.W.N. 184, and if the office is hereditary the period uuder the Limitation Act. Art 124 sched. 1, is 12 years ; Kassim Hassan v. Hazra Begum 60 I.C. 165 (Cal., 1920). Vide also Salim Ullah v. Abul Khair 37 Cal., 263.

5 The right to trusteeship cannot be settled by arbitration inasmuch as it is a public right, vide Muhammad Ibrahim Khan v. Ahmad Said Khan 32 All , 503 (1910). But except appointment of mutawalli and the validity of the waqf it seems everything else could be settled by reference to arbitration, Moazzam Ali v. Raza Ali. 81 I.C. 851 (All., 1924).

DEPUTY MUTAWALLI.—

201. Under Anglo-Muslim Law, the ***Mutawalli*** may validly appoint an agent or a deputy to assist him, and the powers thus delegated would lapse on his death or removal from office.[1]

PERSONAL DECREE.—

202. The *mutawalli* has no proprietary interest in the *waqf* property therefore the *waqf* cannot be attached or sold in execution of a personal decree against the *mutawalli*, but the remuneration due to the *mutawalli* it seems may be lawfully attached.

Similarly the office of the *mutawalli* cannot be attached, and the rents and profits also cannot be attached.[2]

DISCIPLINARY ACTION BY COURT.—

203. The Court besides sanctioning and approving of various acts to be done by the *mutawalli* may also take certain disciplinary action against the *mutawalli*. The *mutawalli* may be deprived wholly or partly of his remuneration or he may be ordered to file an account of his administration of the *waqf* property,[3] and can be held liable for any pecuniary advantage which he might have acquired in the capacity of *mutawalli*.

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1 The temporary withdrawal of the mutawalli from office and his entrustment of the work to another does not legally affect his own ultimate responsibility ; Ali Hussain v. Muhammad Hussain 52 I.C. 628 (All. 1919).

Thus the mutwalli may validly appoint a deputy for collecting rents and proceeds of the waqf property. Khajeh Salmullah v. Abul Khair 37 Cal., 263 ; Wahid Ali v Ashruff Hussain 8 Cal., 732 (1882) Sultan Ahmad v. Abdul Gani 46 Cal., 13 (1919).

Wahi ! Ali v. Ashmff Hussam (1882) 8 Cal., 732 (agent appointed) ; Mohooddin Ahmed v. Elahee Baksh 6 W.R. 277 (1866) (authority lapses).

2 Bishen Chan v. Nadir Hussain 15 Cal., 329, 15 I.A. 1 (1887 ; the Privy Council observed that the corpus of the estate cannot be touched nor can any specific portion of the corpus of the estate be held liable.

It is self evident that the office of mutawalli is not saleable chiefly on grounds of public policy,' Semble in Sarkum Abu Torab v. Rahman Bukash 24 Cal., 83 (1897).

As to rents and profits vide Shah Mahomed Naim v. Muhammad Shamsuddin 2 Luck 109 (Oudh 1926)

3 Imdad Hossein v. Mahomed Ali 23 W.R. 150 (ordered to give regular account) Mahomed Ismail Ariff v. Moola Dawood 13 Cal. 1085 (1916).

REMOVAL OF MUTAWALLI.—

204. The Kazi, Court, is only entitled to remove a *mutawalli* on proof of misfeasance or breach of trust or if it is ascertained that he is not a fit and proper person to hold his office.

The *waqif* has no power to remove a *mutawalli* in possession of the property, unless such power was reserved by him in the deed of *waqf*. According to Imam Abu Yusuf if it is not so stated expressly, it will be presumed to have been reserved, but according to Imam Muhammad if power is not expressly reserved the *waqif* cannot remove the *mutawalli*.[1]

REMUNERATION OF MUTAWALLI.—

205. The *mutawalli* is entitled to some reasonable remuneration whether he be himself the *waqif* or not. The remuneration may be the residue of the income of the waqf property after meeting all necessary expenses on purposes specified in the deed of *waqf*, or it may be a reasonable not excessive amount fixed by the *waqif* himself. However if no remuneration has been provided for the *mutawalli* in the deed of *waqf*, then the Kazi, Court, may fix a sum not exceeding one-tenth of the income of the whole property, and similarly if the remuneration fixed by the *waqif* is inadequate then the Court may increase it to one-tenth of the whole income.[2]

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1 The Fatwa accords with the view of Imam Muhammad and the Fatawa-i-Alamgiri also adopts the latter view. The High Court of Madras has followed Imam Muhammad vide Gulam Hussain Saib v. Aji Ajam Tadalah Saib 4 Mad. H. C. R 44. The Anglo-Shia Law is also to the same effect, Hidaitonnissa v. Afzul Hossein (1870) 2 N.W. 420 vide also Advocate General v. Fatima 9 Bom. H.C.R. 19 and Mahomed Kadir v. Sir Ghulam Mahomed (Mad. 1915) 28 I.C. 934, (removal by waqif.)

2 The fixed remuneration may amount to one-third of the income of the waqf property vide Jugatmoni Chodrani v. Romjani Bibee 10 Cal. 533. Sayid Ismail v. Hamedi Begum 6 Pat. L.J. 218 (1921) (The residue); As to one-tenth and customary allowance vide Mohiuddin v. Sayiduddin 20 Cal. 810 (1893).

In Ramanandan Chettiar v. Vava Levai 40 Mad. 116 (p. 122) the Court treated the petty salaries of mutawallis as remuneration for their trouble and as a part of the expenditure on the charitable objects.

THE WAKF ACT NO. XLII OF 1923.—[1]

206. 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.

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:—

Preliminary.

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 *mutawalli*;

(*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*) "*mutawalli*" 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

1 For Statement of Objects and Reasons, 'see' Gazette of India, 1921, Pt V, p. 182; and for Report of Select Committee, 'see ibid' 1923, Pt. V, p. 139. This Act is to ensure publication of proper accounts. It applies to a waqf admitted, if its existence is denied then the remedy lies under Sec. 5 (3) of the Charitable Religious Trusts Act XIV of 1920; Ali Mohammad v. Collector of Bhagalpur 101. I.C. 207 (Pat. 1927). Family waqfs do not come within the provisions of this Act.

to be the *mutawalli* of a *wakf*, and includes a *naib-mutawalli* or other person appointed by a *mutawalli* to perform the duties of the *mutawalli*, 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

(*e*) " *wakf* " means the permanent dedication by a person professing the Mussalman faith of any property for any purpose recognised 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,[1] 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.

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Statements of Particulars.

3. (*1*) Within six months from the commencement of this Act, every *mutawalli* shall furnish to the Court within the local limits of whose jurisdiction the property of the *waqf* of which he is the *mutawalli* is situated or to any one of two or more such Courts, a statement containing the following particulars, namely :—

Obligation to furnish particulars relating to wakf.

(*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 realisation of the income of the *wakf* property, based on such details as are available of any such expenses

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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 *mutawalli* 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 *mutawalli*, of the origin, nature and objects of the *wakf*.

(*3*) Where—

(*a*) *wakf* a 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,[1] 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,

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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

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the prescribed fee, the issue of an order requiring the *mutawalli* to furnish further particulars or documents.

(2) On such application being made, the Court may, 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 *mutawalli* an order requiring him to furnish such particulars or documents within such time as the Court may direct in the order.

Statement 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 thereafter within three months of the thirty-first day of March in every year, every *mutawalli* 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 *mutawalli* 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 accounts.

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 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,[1] 1913, or is a member of any institution or association the

VII of 1913.

1 General Acts, Vol. VII.

members of which have been declared under that section to be entitled to act as auditors of companies throughout British India ; or

(*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 *mutawalli* 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 Code of Civil Procedure,[1] 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 be upon him, fails to furnish such statement or document, as the case may be, in due

1 General Acts, Vol. VI.

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 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 ***mutawallis*** 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 inspections 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 Court 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 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.

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.

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§ 5. THE LAW IN BRITISH INDIA RELATING TO CHARITABLE ENDOWMENTS.

THE GENERAL ENACTMENTS.—

207. The following enactments relating to public trusts are applicable in British India, and it is submitted they also affect the Muslim Law of *waqf*.

(*a*) The Religious Endowments Act XX of 1863, s. 14.

(*b*) The Official Trustees Act II of 1913.

(*c*) The Charitable Endowments Act VI of 1890, ss. 2-8.

(*d*) The Code of Civil Procedure 1908, s. 92.

(*e*) The Charitable and Religious Trusts Act XIV of 1920.

(*f*) The Societies Registration Act XXI of 1860.

(*g*) The Indian Trustees Act XXVII of 1866.

THE ENDOWMENT ACT 1863.—

208. The Religious Endowments Act XX of 1863 specifically makes provisions relating to management of mosque, temple or religious establishment as regards right of succession to trusteeship, tenure of office etc.

THE OFFICIAL TRUSTEES ACT.—

209. Under the general Law, in British India, any person desiring to make a trust for charitable or otherwise except religious purpose may appoint under Act II of 1913 the official Trustee with his consent as trustee of the settlement. And the High Court may also appoint the official trustee to take charge of the trust, if no trustee acts or the trustees and beneficiaries are desirous that the official trustee should take over charge of the *waqf*. Where the official trustee is appointed by the deed of *waqf* he can receive remuneration fixed by the deed, and if he is appointed by the High Court, he may receive as his remuneration the commission fixed in s. 11 of the Act.[1]

THE CHARITABLE ENDOWMENTS ACT.—

210. Similarly under the Charitable Endowments Act 1890, the Treasurer of Charitable Trusts may be made responsible for applying the income in accordance with the scheme for the administration of the settled property.[2]

THE CIVIL PROCEDURE CODE 1908, SECTION 92.—

211. (i) "In the case of any alleged breach of any express or constructive trust created for public purpose of a chritable or religious nature or where the direction of the Court is deemed necessary for the administration of any such trust, the Advocate General, or two or more persons having an interest in the trust and having obtained the consent in writing of the Advocate General may institute a suit whether contentious or not in the principal Civil Court of original jurisdiction or in any Court empowered in that behalf by the Local Government within the local limits of whose jurisdiction the whole or any part of the subject-matter of the trust is situate to obtain a decree—

(*a*) removing any trustee;
(*b*) appointing a new trustee;
(*c*) vesting any property in a trustee;
(*d*) directing accounts and enquiries;

1 Vide The Official Trustees Act II of 1913, sections 8, 9, 10 and 11.
2 Charitable Endowments Act VI of 1890, sections 2-8.

(*e*) declaring what proportion of the trust property or of the interest therein shall be allocated to any particular object of the trust;

(*f*) authorising the whole or any part of the trust property to be let, sold, mortgaged or exchanged;

(*g*) settling a scheme; or

(*h*) granting such further or other relief as the nature of the case may require.

(2) Save as provided by the Religious Endowments Act 1863 no suit claiming any of the reliefs specified in sub-section (1) shall be instituted in respect of any such trust as is therein referred to except in conformity with the provisions of that sub-section.[1]

TRUSTS ACT XIV OF 1920.—

212. This is an Act to provide more effectual control over the administration of charitable and Religious Trusts. A suit may

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1 Section 92 of the Civil Procedure Code 1908 provides comprehensive rules for enforcement of charitable or religious trusts. Section 92 is substituted for old section 539 of the Civil Procedure Code of 1882 (as amended in 1888).

The following are old cases falling under section 539. The forms of relief mentioned in the section are strictly to be sought otherwise the permission of the Advocate General is not essential as was actually held in the following cases. Jawahar v. Akbar Hossein 7 All. 178 (F. B.); Kazi Hassan v. Sagun Balkrishna 24 Bom. 170; (1899) Muhammad Abdullah Khan v. Kallu 21 All. 187 (1899); Jamaluddin v. Mujtaba Husain 25 All. 631 (1903) and Dasondhay v. Muhammad Abu Nasar 33 All. 660 (1911).

The Legal Remembrancer or the Collector with the permission of the Local Government may institute the suit, Muhammad Azizuddin v. The Legal Remembrancer 15 All. 321 (1893).

In Saiyid Ali v. Ali Jan 35 All. 98 (1912) 11 A. L. J. R. 20, the Court observed that in case of a public waqf of a religious or charitable nature the suit for the removal of a mutawalli must lie under section 92 (1) of the Code of Civil Procedure 1908.

The mutawalli is liable to be removed if he has himself purchased the waqf property or unlawfully transferred the same or is guilty of wilful waste or gross neglect or is found to be not a fit and proper person, vide Joygunnessa Bibi v. Majibullah 81 I. C. 850 (Cal. 1923).

The Court will consider the interests of the public for whose benefit the waqf was made. It may vary any rule for general administration of waqf, if so required in the interest of the waqf management. Mahomed Ismail Ariff v. Ahmed Moola Dawood 43 I. A. (1916).

be brought against a *mutawalli* who denies the existence of the *waqf* under Sec. 5 (3) of Trusts Act XIV of (1920).[1]

THE SOCIETIES REGISTRATION ACT.—

213. Any Muslim society which has for its object the management of a public trust may lawfully be registered under the Societies Registration Act XXI of 1860, *e.g.* a *waqf* of a masjid and property attached to it or of any educational institution.

THE INDIAN TRUSTEES ACT.—

214. It seems that under the Trustees Act XXVII of 1866 the *mutawalli* may obtain permission for sale and mortgage of *waqf* property by an application only.

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1 If the existence of the waqf itself is in dispute or denied by the alleged mutawalli, then the case may be brought under sec. 5 (3) of the Charitable and Religious Trusts Act XIV of 1920. Ali Mohammad v. Collector of Bhagalpur 101 I.C. 207 (Pat. 1927.)

Under S. 3 any person interested in the trust can petition the Court and obtain an order directing the trustee to furnish particulars and S. 5 prescribes the procedure, and sub-section 3 of S. 5 requires that the trustee should institute within three months a suit for a declaration if he denies the existence of the trust and sub-section 4 provides that if no suit is instituted the Court shall itself proceed to decide the question.

CHAPTER XI

§ 1. SUCCESSION AND ADMINISTRATION.

215. The administration of a Muslim estate in British India may be effected under the Indian Succession Act XXXIX of 1925. (I. S. A.)[1]

ADMINISTRATOR —

216. I. S. A. s. 2.

Administrator means a person appointed by competent authority to administer the estate of a deceased person when there is no executor.

The administrator on appointment by a District Judge is granted letters of administration.[2]

LETTERS OF ADMINISTRATION.—

217. I. S. A. s. 218.

(1) If the deceased has died intestate and was a.....Muhammadan.....administration of his estate may be granted to any person who, according to the rules for distribution of

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1 This act is merely a consolidating Act amalgamating the Indian Succession Act X of 1865 and the Probate and Administration Act V of 1881.

The following Acts are also applicable to a limited extent.

(1) The Bombay Regulation Act VIII of 1827.

(2) The Administrator General and Official Trustees Act V of 1902.

(3) The Administrator Generals Act III of 1913.

2 The Court fee leviable on letters of administration is on a graduated scale fixed by each Province under the Court Fees Act 1870, under the Devolution Act XXXVIII of 1920.

The taking out of probate or letters of administration is not obligatory for the Muslims, vide Shaik Moosa v. Shaik Essa 8 Bom. 241 (1884), vide also Sir Mahomed Yusuf v. Hargovandas 47 Bom. 231. (1922).

the estate applicable in the case of such deceased, would be entitled to the whole or any part of such deceased's estate.

(2) When several such persons apply for such administration, it shall be in the discretion of the Court to grant it to any one or more of them.

(3) When no such person applies, it may be granted to a creditor of the deceased.

EFFECT OF LETTERS OF ADMINISTRATION.—

218. I. S. A. s. 220.

Letters of Administration entitle the administrator to all rights belonging to the intestate as effectually as if the administration had been granted at the moment after his death.

I. S. A. s. 221.

Letters of administration do not render valid any intermediate acts of the administrator tending to the diminution or damage of the intestate's estate.

I. S. A. s. 216.

After any grant of probate or letters of administration, no other than the person to whom the same may have been granted shall have power to sue or prosecute any suit, or otherwise act as representative of the deceased, throughout the province in which the same may have been granted until such probate or letters of administration has or have been recalled or revoked.

I. S. A. s. 211.

The executor or administrator, as the case may be, of a deceased person is his legal representative for all purposes and all the property of the deceased vests in him as such.

(2) When the deceased was a.....Muhammadan..... nothing herein contained shall vest in an executor or administrator any property of the deceased person which would otherwise have passed by survivorship to some other person.

WHO CANT BE ADMINISTRATOR.—

219. I. S. A. s. 236.

Letters of administration cannot be granted to any person who is a minor or is of unsound mind, nor unless the deceased

was a.....Muhammadan.....to a married woman without the previous consent of her husband.

WILL—LETTERS OF ADMINISTRATION.—

220. I. S. A. s. 228.

When a will has been proved and deposited in a Court of competent jurisdiction situated beyond the limits of the Province, whether within or beyond the limits of His Majesty's dominions, and properly authenticated copy of the will is produced, letters of administration may be granted with a copy of such copy annexed.

APPLICATION OF THE ASSETS [1].—

221. I. S. A. s. 319.

The executor or administrator shall collect, with reasonable diligence, the property of the deceased, and the debts that were due to him at the time of his death.

I. S. A. s. 320.

Funeral expenses to a reasonable amount, according to the degree and quality of the deceased, and death-bed charges including fees for medical attendance, and board and lodging for one month previous to his death, shall be paid before all debts.

I. S. A. s. 321.

The expenses of obtaining probate or letters of administration, including the costs incurred for or in respect of any judicial proceedings that may be necessary for administering the estate, shall be paid next after the funeral expenses and death-bed charges.

I. S. A. s. 322.

Wages due for services rendered to the deceased within three months next preceding his death by any labourer, artizan or

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These rules have apparently superseded the Hanafi Law. The Muslim Law gives priority to funeral expenses but treats death-bed charges like any other debts.

domestic servant shall next be paid, and then the other debts of the deceased according to their respective priorities (if any).

I. S. A. s. 323.

Save as aforesaid, no creditor shall 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.

I. S. A. s. 325.

Debts of every description must be paid before any legacy.

POWER OF TRANSFER RESTRICTED.—

222. I. S. A. s. 310.

If any executor or administrator purchases, either directly or indirectly, any part of the property of the deceased, the sale is voidable at the instance of any other person interested in the property sold.

I. S. A s. 307.

(1) Subject to the provision of sub-section (2) an executor or administrator has power to dispose of the property of the deceased vested in him under section 211, either wholly or in part, in such manner as he may think fit,[1]

(2) If the deceased was a.....Muhammadan.....the general power conferred by sub-section (1) shall be subject to the following restrictions and conditions, namely :—

(i) The power of an executor to dispose of immoveable property so vested in him is subject to any restriction which may be imposed in this behalf by the will appointing him, unless probate has been granted to him and the Court which granted the probate permits him by an order in writing, notwithstanding the restriction to dispose of any immoveable property specified in the order in a manner permitted by the order.

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1 Illustration to Section 307.

(i) The deceased has made a specific bequest of part of his property. The executor, not having assented to the bequest, sells the subject of it. The sale is valid.

(ii) The executor in the exercise of his discretion mortgages a part of the immoveable estate of the deceased the mortgage is valid.

(ii) an administrator may not, without the previous permission of the Court by which the letters of administration were granted—

(*a*) mortgage, charge or transfer by sale, gift, exchange or otherwise any immoveable property for the time being vested in him under section 211, or

(*b*) lease any such property for a term exceeding five years.

(iii) A disposal of property by an executor or administrator in contravention of clause (i) or clause (ii) as the case may be, is voidable at the instance of any other person interested in the property.

LIABILITY OF ADMINISTRATOR.—

223. I.S. A. s. 368.

When an executor or administrator misapplies the estate of the deceased, or subjects it to a loss or damage, he is liable to make good the loss or damage so occasioned.[1]

I. S. A. s. 369.

When an executor or administrator occasions a loss to the estate by neglecting to get in any part of the property of the deceased, he is liable to make good the amount.[2]

MORE THAN ONE ADMINISTRATORS.—

224. I. S. A. s. 311.

When there are several executors or administrators, the powers of all may, in the absence of any direction to the contrary, be

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1 Illustrations to section 368.

(i) The executor pays out of the estate an unfounded claim. He is liable to make good the loss

(ii) The deceased had a valuable lease renewable by notice which the executor neglects to give at the proper time. The executor is liable to make good the loss

2 Illustration to section 369.

The executor neglects to sue for a debt till the debtor is able to plead that the claim is barred by limitation and the debt is thereby lost to the estate. The executor is liable to make good the amount.

exercised by any one of them who has proved the will or taken out administration.[1]

I. S. A. s. 312.

Upon the death of one or more of several executors or administrators, in the absence of any direction to the contrary in the will or grant of letters of administration, all the powers of the office become vested in the survivors or survivor.

SUITS BY AND AGAINST ADMINISTRATOR.—

225. I. S. A. s. 305.

An executor or administrator has the same power to sue in respect of all causes of action that survive the deceased, and may exercise the same power for the recovery of debts as the deceased had when living.

I. S. A. s. 306.

All demands whatsoever and all rights to prosecute or defend any action or special proceeding existing in favour of or against a person at the time of his decease, survive to and against his executors or administrators;[2] except causes of action for defamation, assault as defined in the Indian Penal Code, or other personal injuries not causing the death of the party; and except also cases where, after the death of the party, the relief sought could not be enjoyed or granting it would be nugatory.[3]

NOTICE TO CREDITOR—THEIR RIGHTS.—

226. I. S. A. s. 360.

Where an executor or administrator has given such notices as the High Court may, by any general rule prescribe or, if no such rule has been made, as the High Court would give in an administration suit, for creditors and others to sending to him their claims

1 Illustrations to section 311.

(i) One of several executors has power to release a debt due to the deceased.

(ii) One has power to surrender a lease.

(iii) One has power to assent to a legacy.

2 A creditor of the deceased therefore can institute a suit against the executor or administrator as the case may be.

3 Illustrations to section 306

A sues for divorce. A dies. The cause of action does not survive to his representative.

against the estate of the deceased, he shall at the expiration of the time therein named for sending in claims, be at liberty to distribute the assets, or any part thereof, in discharge of such lawful claims as he knows of, and shall not be liable for the assets so distributed to any person of whose claim he shall not have had notice at the time of such distribution :

Provided that nothing herein contained shall prejudice the right of any creditor or claimant to follow the assets, or any part thereof, in the hands of the persons who may have received the same respectively.

REMOVAL OF ADMINISTRATOR.—

227. I. S. A. s. 263.

The grant of probate or letters of administration may be revoked or annulled for just cause.[1]

Explanation—Just cause shall be deemed to exist where—

(*a*) the proceedings to obtain the grant were defective in substance ; or

(*b*) the grant was obtained fraudulently by making a false suggestion, or by concealing from the Court something material to the case ; or

(*c*) the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant, though such allegation was made in ignorance or inadvertently ; or

(*d*) the grant has become useless and inoperative through circumstances ; or

(*e*) the person to whom the grant was made has wilfully and without reasonable cause omitted to exhibit an inventory or account in accordance with the provisions of Chapter VII of this Part, or has exhibited under that Chapter an inventory or account which is untrue in a material respect.

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1 Illustrations to section 263.

(i) The Court by which the grant was made had no jurisdiction.

(ii) The will of which probate was obtained was forged or revoked.

(iii) A has taken administration to the estate of B as if he had died intestate, but a will has since been discovered.

And perhaps removal may also be obtained under s. 73 of the Trusts Act 11 of 1882, by treating the executor or administrator as a trustee.

SUCCESSION CERTIFICATE.—

228. I. S. A. s. 372.

(1) Application for such a certificate shall be made to the District Judge by a petition signed and verified by or on behalf of the applicant in the manner prescribed by the Code of Civil Procedure (V of 1908), for the signing and verification of a plaint by or on behalf of a plaintiff, and setting forth the following particulars, namely:—

(*a*) The time of the death of the deceased,

(*b*) the ordinary residence of the deceased at the time of his death, and if such residence was not within the local limits of the jurisdiction of the Judge to whom the application is made, then the property of the deceased within those limits;

(*c*) the family or other near relatives of the deceased and their respective residences;[1]

(*d*) the right in which the petitioner claims;

(*e*) the absence of any impediment under 370 or under any other provision of this Act or any other enactment, to the grant of the certificate or to the validity there if it were granted; and

(*f*) the debts and securities in respect of which the certificate is applied for.

I. S. A. s. 373.

(1) If the District Judge is satisfied that there is a ground for entertaining the application, he shall fix a day for the hearing thereof and cause notice of the application and of the day fixed for the hearing.....

(2) When the Judge decides the right thereto to belong to the applicant, the Judge shall make an order for the grant of a certificate to him.[2]

LIABILITY OF CERTIFICATE HOLDER.—

229. I. S. A. s. 387.

No decision under this Part upon any question of right between any parties shall be held to bar the trial of the same question

1 Section 370 of the Indian Succession Act XXXIX of 1925.

2 The Court fee is determined under I. S. A. S. 379, under the Court Fees Act VII of 1870.

in any suit or in any other proceeding between the same parties and nothing in this part shall be construed to affect the liability of any person who may receive the whole or any part of any debt or security, or any interest or dividend on any security to account therefor to the person lawfully entitled thereto.

THE BOMBAY REGULATION VIII OF 1827.—

230. In the Bombay Presidency any claimant may instead of taking out probate or letters of administration or a succession certificate apply under regulation VIII of 1827 to the District Judge for recognition as heir or executor or legal administrator. The Court may grant recognition, and thereafter the holder of certificate may assume the management of the property, and may do all acts competent to a legal heir.[1]

PROBATE OR LETTERS OF ADMINISTRATION SUPERSEDE.—

231. I. S. A. s. 215.

(1) A grant of probate or letters of administration in respect of an estate shall be deemed to supersede any certificate previously granted under part X or under the Succession Certificate Act (VII of 1889) or Bombay Regulation No. VIII of 1827, in respect of any debts or securities included in the estate.

(2) When at the time of the grant of the probate or letters any suit or other proceeding instituted by the holder of any such certificate regarding any such debt or security is pending, the person to whom the grant is made shall, on applying to the Court in which the suit or proceeding is pending, be entitled to take the place of the holder of the certificate in the suit or proceeding.

Provided that, when any certificate is superseded under this section, all payments made to the holder of such certificate in ignorance of such supersession shall be held good against claims under the probate or letters of administration.

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1 The Court Fee is the same as for a probate in Bombay vide, Bombay Act I of 1923.

§ 2. THE RULES FOR SUCCESSION AND ADMINISTRATION APPLICABLE TO MUSLIMS IN BRITISH INDIA.

HEIRS AND THE ESTATE.—

232. (1) The whole estate of a deceased Muslim at the moment of his death vests in his heir one or more in specific shares and "such devolution is not contingent upon or suspended till payment of such debts." Though the estate devolves immediately upon the legal representatives, it is charged with the debts of the deceased, and the heirs are the persons through whom the property could be reached by the creditors to obtain satisfaction of the debts.[1]

The property in fact is assigned to the heirs by mutual consent or judicial authority after meeting funeral expenses, all debts and legacies, however if the distribution takes place before the payment of debts, then each heir becomes liable to each creditor of the deceased to the extent of the assets for a proportionate payment from his distinct share towards the discharge of the whole debt.

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1 This is the view taken by the High Courts in British India, vide Jafri Begam v. Amir Muhammad Khan 7 All. 822 (1885) F. B. "upon the death of a Muhammadan intestate, who leaves unpaid debts (whether large or small with reference to the value of his estate "the ownership of such estate devolves immediately on his heirs, and such devolution is not contingent upon, or suspended till payment of such debts." The Calcutta High Court in Amir Dulhin v Baijnath Singh 21 Cal. 331 (1894) observed that 'the estate of a deceased person devolves immediately upon his heirs, charged however, with his debts.....". vide also Bibi Hafsa v. Kaniz Fatma 96 I.C. (Pat. 1925). The contrary view was taken in Assamathem Nissa Bibee v. Lutchmeeput Singh 4. Cal. 142 (1878).

If the whole estate is in the hands of a single heir the creditors are entitled to have recourse to that particular heir only, Vide Hamir Singh v. Zakia 1 All. 57 (1875). And according to Pirthipal Singh v. Husaini Jan 4 All. 361 (1882) each heir is liable to proportionate payment of the debts with regard to his own share of the estate, vide also Ambashankar v. Sayad Ali 19 Bom 273 (1894) and Bussentram v. Kamaluddin 11 Cal. 421.

The Property vests in the heirs in specific shares analogous to tenants-in-common, Abdul Khader v. Chidambaram 32. Mad. 276 (1909); Abdul Majid v. Krishnamchariar 40 Mad. 243 (1917); Mahommad Ahmad v. Ansar Mahommad 56 I. C. 303 (Oudh 1920), and vide section 238, p. 180.

(ii) The claims of the creditors of the deceased is preferred to that of the creditors of any particular heir whose share is being taken in discharge of the debts of the deceased.[1]

(iii) However if there be an executor of the deceased, the property would vest in him and not in the heirs in specific shares, and he will be responsible for payment of debts etc.

Similarly if letters of administration have been granted the property would vest in the administrator and not in the heirs of the deceased.

(iv) The Muslim heir is not bound to bring a suit for its administration nor is he liable to bring a suit for partition, unless he desires to have his specific share which vested in him on the death of the deceased marked out and partitioned from the whole property. He can even sue for partition in a particular portion of the estate and not for general partition.

(v) A co-heir who obtains possession of the property of the deceased is in the position of a co-sharer and hence his possession of a co-sharer and hence his possession cannot be adverse to the other co-heirs in the absence of express ouster or denial of the title of other co-heirs.[2]

ALIENATION BY AN HEIR—CREDITOR'S RIGHTS.—

233. (i) An heir-apparent cannot lawfully transfer the mere possibility, chance of succession to a living person, nor can he renounce his expectant right,[3] but a legal heir to a deceased person is

1 It is obvious that the creditors of the deceased should be preferred to the creditors of the heir himself. Hence a claim of the widow for dower was preferred, it being against the deceased husband, vide Bhola Nath v. Maqbulunnissa 26 All. 28 (1903).

2 Vide Vazir v. Dwarkomal 79 I. C. 841 (Sindh 1922) and further the possession of one co-heir cannot be deemed to be adverse to other co-sharers unless there has been an explicit and clear denial of title, if so adverse possession can be pleaded, vide Mubarakunnissa v. M. Raza Khan. 79 I. C. 174 (All. 1924.)

3 Vide the Transfer of Property Act VI of 1882 S. 6 (a) Sumsoodin v. Abdul Husain 31 Bom. 165 (1906). Asa Beevi v. Karuppan Chetty 41. Mad. 365 (1917), Abdul Wahid v. Nuran Bibi, 11 Cal. 597, (1885); Hasan Ali v. Nazo 11 All. 456 (1889) Thus contingent right of inheritance cannot be surrendered or transferred for an heir-apparent has no such reversionary interest in the property "nemo est heres viventes"—a living person has no heir. Similarly he cannot validly re-

competent to transfer his own share by sale or mortgage even before distribution of the inheritance amongst the heirs, and a transferee, acting in good faith without notice of the debts, would get a good title, but if the transferee had notice of the debts, the creditor can follow the estate in the hands of the transferee, provided the assets in the hands of the heir are insufficient to discharge the debts. A secured creditor, such as a mortgagee, can always follow the property to recover his debt under the general law in British India.

(ii) A transfer of property by the heir during the pendency of a creditor's suit would be affected by the doctrine of *lis pendens*, and would be voidable at the instance of the successful creditor in the pending litigation.

Voluntary transfer by an heir in possession.—

(iii) In case of voluntary transfer by one or more of several heirs in possession of the inheritable estate, it being still undistributed, to a purchaser whether with or without notice of the rights of other co-heirs, the Calcutta High Court has held, that a *bona fide* purchaser or a mortgagee acquires a good title to the property both as against other co-heirs and the creditors of the deceased, unless it was already affected by *lis pendens*;[1] but according to the view

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nounce his expectant claim. Vide Macnaghten Precedents Inheritance Case 11; Khanum Jan, v. Jan Beebee 4 S. D. A. 210 (1827) (Bengal) and above noted cases 31 Bom. 165, 41 Mad. 365, (Kunhi Mamod v. Kunbi Moidin 19 Mad. 176 (1896), a contrary decision).

1 It is difficult to support the High Court of Calcutta, unless you accept the fiction that the alienor, heir, transferred the property in a representative character. The leading case is that of Land Mortgage Bank v. Bidyadhari 7. C.L.R. 460 (1879) following Bazayet Hossein v. Dooli Chand 4 Cal. 402. 5. I.A. 211 (1878), Mahomed Wajid v. Tayyuban 4 Cal. 402. "The creditor of a deceased Mahomedan cannot follow his estate into the hands of a bona fide purchaser for value, to whom it has been alienated by the heir-at-law, whether the alienation has been by absolute sale or by mortgage. But where the alienation is made during the pendency of a suit in which the creditor obtains a decree for the payment of his debt out of the assets of the estate which have come into the hands of the heir-at-law, the alienee will be held to take with notice, and be affected by the doctrine of 'lis pendens."

Vide, Yasin Khan v. Muhammad Yar Khan 19 All. 505 (1897), while a suit for the dower debt was pending on behalf of a Muslim widow, the heirs of her deceased husband mortgaged some property of the deceased. The widow's heirs obtained a decree. Held that this decree took priority over the mortgagee's decree and a sale held in execution thereof.

supported by judicial decisions *viz.* that the deceased's property vest in each heir in specific share in terms of his share of inheritance, it logically follows that such a transfer by an heir in possession of the entire property is voidable, it remains effective only as against the transferor and his interest in the property.[1]

Involuntary transfer by an heir in possession.—

(iv) If a creditor of the deceased sues the heir in possession, [2] the estate being still undistributed, without joining other heirs, and obtains a decree, and a sale is effected in execution of the decree of the entire property of the deceased in possession of that heir, then according to the Calcutta High Court, the sale will convey to the purchaser the interest of all the heirs of the deceased, although they were not parties to the suit, unless it is established that the debts were not due. However according to the majority of the High Courts the heirs who were not parties to the suit cannot be bound by it, with the result that the execution purchaser would

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1 Vide Naraindas v. Obhai 19 I. C. 911 (Sindh 1912) F.B.

The case of a transfer by an heir in possession may amount to a transfer by an ostensible owner which would apparently present some difficulty. Several Judicial decisions on section 41 of the Transfer of Property Act are conflicting. In Must: Mubarakunnissa v. Muhammad Raza 79. I.C. 174. (All. 1924). "Where a Muhammadan co-heir permits another co-heir to obtain possession of the entire property of the deceased and to get himself recorded in the revenue papers, as sole owner, and the latter makes an alienation of the property, the alienation cannot be avoided by the other co-heir, where it is found that the transferee acted in good faith and gave consideration for the transfer, and that there was no circumstances which could have put the transferee on enquiry." "The plaintiffs had by their conduct or omission allowed the defendants to get their names entered in the Revenue Papers. But if the transferee being aware of title of the original owner, omits to make further enquiry as to how that title passed from the original owner to the transferor, he is not entitled to uphold the transfer. Muhammad Sulaiman v. Sakina Bibi 69. I.C. 701. 20. A.L.J.R. 654, where a lady proceeded to Mecca leaving her house in charge of a relation. Three years later this person sold the house. The lady on her return sued for possession. Held that the manager could not be treated as ostensible owner within the meaning of Sec. 41. of Transfer of Property Act as the transferee took no reasonable care to ascertain facts, so she was not bound by the sale.

2 If there had been an executor or administrator the suit will lie against him by a creditor of the deceased.

acquire an interest proportionate to the share of the inheritance to which that heir was legally entitled.[1]

(v) If the estate has been distributed amongst the heirs, then the creditor is only entitled to recover from any heir an amount proportionate to his share of the inheritance towards payment of the debts of the deceased. The creditor cannot obtain a decree for the whole amount as against a particular heir.

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1 In Muttyajan v. Ahmed Ally 8 Cal. 370 (1882) followed in Amir Dulhin v. Baij Nath 21 Cal, 311 (1894). the Calcutta High Court came to this conclusion with great emphasis, that it embodies a salutary rule, disapproving some observations made by Mahmood J. in Jafri Begum v. Amir Muhammad 7 All. 822 (1885) where the learned Judge of the Allahabad High Court had closely examined some of the previous decisions of the Calcutta High Court notably Assamaathem Nissa Bibi v. Roy Lutchmeeput Singh 4 Cal. 142 and Muttyjan v. Ahmed Ally 8 Cal. 370, and with reference to the last case had observed thus : "Morris J with the concurrence of O'Kinealy J. went the length of laying down the broad rule that when the creditor of a deceased Muhammadan sues the heir in possession, and obtains a decree against the assets of the deceased, such a suit is to be looked upon as an administration-suit and those heirs of the deceased who have not been made parties cannot in the absence of fraud, claim anything but what remains after the debts are paid.... .....It seems to me that the nature of an administration suit is essentially different from an ordinary suit for money brought by a creditor of a deceased person against his heir," and further in course of his judgment Mahmood J. observed "....." To hold that a decree obtained by a creditor of a deceased against some of his heirs will bind also those heirs who were not parties to the suit, amounts to giving a judgment inter partes, or rather a judgment in personam the binding effect of a judgment in rem, which the law limits to cases provided for by s.41 of the Evidence Act. But our law warrants no such course, and the reason seems to me to be obvious. Mahomedan heirs are independent owners of their specific shares, and if they take shares subject to the charge of the debts of the deceased, their liability is in proportion to the extent of their shares. And once this is conceded, the maxim 'res inter alias acta alteri nocere non dabet,' apply without any such qualifications as might possibly be made in the case of Hindu co-heirs in a joint family." The Calcutta High Court in 21 Cal. 311 considered these remarks but preferred to follow its old rulings observing, "If the creditor of a deceased Mahomedan is to be confined to the recovery of a fractional portion of his claim, not withstanding that the assets may be wholly in the possession of the person through whom it is sought to enforce it, or is to be postponed until the estate has found its way into the hands of all the persons who are entitled to share in it as might frequently be the case, we can perceive that very great injustice might in many cases be perpetrated and a method sanctioned by which it would be easy to place obstacles in the way

(vi) The Bombay High Court dissenting from its previous ruling now agrees with the view taken by the High Court of Allahabad.[1]

The High Court of Madras seems now to be of the same opinion as the Allahabad High Court.[2] The later decision however refers to the case of voluntary transfer by an heir in possession which will not be binding on the other co-heirs or creditors.

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of realisation of the just obligations cast upon the estate.....it has been held by a judge of much experience that, when a person possesses himself of the assets of an intestate without having administered, a bill for an account of the specific assets he has received would lie against him as executor de son tort though there be no legal personal representative (Coote v. Whittington L.R. 15 Eq. 534 .....). And although the analogy may not be complete between the Mahomedan heir who is in possession of more than his share of the inheritance and the executor de son tort of English Law, it is yet sufficiently close to sustain comparison."

The two High Courts thus materially differ in their point of view, and perhaps it is too late to decide this point anew on the authority of original authorities, and since this question has also been treated from the point of view of general Law in England and in British India, it appears that the main point is whether the inheritance vests immediately in the heirs, or should we accept the theory of Roman lawyers "hereditatem dominam esse et defunct vicem obtinere" that the estate itself is owner and stands in the place of the deceased as remarked by Markby J. in 4 Cal. 142, the latter view advocating the vacant-succession theory has been given up even by the Calcutta High Court, hence we once more fall back on the immediate vesting theory, and thus the Allahabad view may be preferred. However such circumstances may actually occur which would make it that on grounds of equity an heir though no party to the decree should not be allowed to recover possession of his share from the auction-purchaser except on the conditions of paying his own share of the debt determined in reference to his specific share. This would be according to the maxim "He who seeks equity must do equity."

1 In Khursetbibi v. Keso 12 Bom. 101 (1887) The Bombay High Court followed the Calcutta High Court and it reaffirmed the same view in Davalava v. Bimaji 20 Bom. 338 (1895). It dissented from this view in Bhagirthibai v. Rosanbi (1919) 43 Bom. 412, and held that decree against one of several heirs is not binding on the other heirs, vide also the recent case of Lala Mia v. Manubibi 47 Bom. 712, (1923), 73 I.C. 246.

2 Similarly the old Madras case Pathummabai v. Vittil 26 Mad. 734 has been overruled by Abdul Majeeth v. Krishnamachariar 40 Mad. 243 (1915) F. B. If a co-heir in possession happens to be a guardian of other heirs, and sells the property in good faith to discharge ancestral debts etc., such a sale is valid. Hasan Ali v. Mehdi Husain 1 All. 533 (1877). This case has been disapproved of in 40 Mad. 243 supra.

The majority is thus clearly in favour of the view taken by the Allahaba High Court in Jafri Begum v. Amir Muhammad 7 All. 822.

CHAPTER XII

§ 1. LAW OF INHERITANCE—'ILM-UL-FARAIZ.

THE RIGHT OF INHERITANCE.—

234. The Muslim Law of inheritance, *'Ilm-ul-Faraiz*, prescribes the mode and manner of succession to a deceased Muslim. After incurring funeral expenses befitting the social status of the deceased, and after payment of his debts in full,[1] all legacies must be paid out of a third of what remains, and finally the whole of the residue is distributed amongst the heirs by right of inheritance. The distribution is effected among the blood relations of the deceased hereinafter mentioned, provided they be in existence at the time of the death of the deceased. The claimants must establish the cause of inheritance which is based upon near relationship, and there should be no impediment to inheritance, *e.g.*, the existence of a preferable heir or otherwise.

CONCEPTION OF PROPERTY.—

235. Under the Muslim Law, there is no distinction between ancestral and self acquired property, nor between real and personal property, and from mere fact of commensality, the heirs continuing to live together, no pre-sumption as to existence of joint family arises.[2]

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1 The Indian Succession Act XXXIX of 1925 has affected the Muslim Law of inheritance. Under both systems funeral expenses are to be paid first, while the Muslim law speaks about debts in general, the Succession Act (a) gives preference to death-bed charges including fees for medical attendance and board and lodgings for one month previous to the death of the deceased, (b) next the expenses for obtaining probate and letters of administration, (c) next wages due for services rendered to the deceased within three months next preceding his death by any labourer, artizan or domestic servants, (d) debts of every kind must be paid before legacies, and finally the residue is distributed amongst the lawful heirs of the deceased.

2 There is no joint family property vide Mohideen Bee v. Syed Mir Saheb 38 Mad. 1099 (1915), Hakim Khan, v. Gul Khan 8 Cal. 826 (1882), As to a partition suit vide Abdur Kader v. Bapubhai 23 Bom. 188 (1898).

DOCTRINE OF REPRESENTATION.—

236. There is no right of representation under the *Hanafi* Law. The heir is to be ascertained at the time of the death of the deceased, and a person cannot succeed as a representative of some one who had already predeceased the deceased.[1]

PRIMOGENITURE EXCLUSION OF SONS, DAUGHTERS.—

237. Under the *Hanafi* Law the rule of primogeniture is not recognised, all sons inherit equally along with the eldest son. But under Anglo-Muslim Law if a custom of strict primogeniture is established then it may be followed.[2] Under the *Shia* Law the eldest son is entitled to his deceased father's signet ring, sword, Koran, and garments provided there are also other assets besides these articles.

The daughters are also entitled to specific share of inheritance hereinafter mentioned, but under Anglo-Muslim Law if there is valid custom excluding daughters from inheritance, it would be followed.[3]

1 This appears to be a strict rule but it logically follows, since according to Muslim Law a person has not even an incohate right to the property of his ancestor until the death of that ancestor, if so there would possibly be no claim through such a deceased person who himself had no vested right.

The Holy Prophet himself had suffered from the application of this rule as his own father had predeceased his grandfather. The theory of representation under the Shia Law will be discussed later.

2 The rule of Primogeniture has been applied by the Courts in Mahomed Akul Beg v. M. Kayum Beg 25 W. R. 199 (1876); Ibrahim Ali Khan v. M. Ahsanullah Khan P. C. 39 Cal., 711 (1911) (the Kunjpura estate case).

The Oudh Estate Act I of 1869 Sec., 22 recognises the rule of Primogeniture for the taluqdars and prescribes comprehensive rules.

3 In Jammya v. Diwan 23 All. 20 (1900) evidence was held to be inadmissible to prove any custom inconsistent with the Muslim Law, "regarding succession, inheritance, marriage.....or any religious usage or institution" (s. 37 of Bengal Civil Courts Act XII of 1887). The same view was followed in Ismail Khan v. Imtiaz-ul-nissa 4 A.L.J.R. 793 (1907). However on appeal Muhammad Ismail Khan v. Lala Sheokmukh Rai 17 C.W.N. 97 (1912) the Privy Council overruled the view taken by the Allahabad High Court and held that evidence as to family custom should be taken. But my submission is that the view taken by the Allahabad High Court is correct and justifiable, and to hold it otherwise would amount to an interference with the Muslim personal Law. In Ali Asghar v. Collector of Bulandshahr 39 All. 574 (1917) evidence of such family custom was held admissible. And in Muhammad Kamil v. Must. Imtiaz Fatima 36 I.A. 210 (1908), the Privy Council held that where daughters are excluded by custom they should be treated as non-existent for determining shares of heirs.

THE HEIRS IN GENERAL.—

238. A number of blood relations of the deceased are entitled to participate in the inheritance simultaneously. They are divided into three distinct groups the *Zav-ul-Furuz*, the *Asabah*, the *Zav-ul-Arham*, and the other kinds of heirs follow next in order.

Zav-ul-Furuz, the Sharers.—

(*a*) The sharers are entitled to receive a fixed share allotted to them in a certain order of preference, and mode of succession.

Asabah, the Residuaries.—

(*b*) The Residuaries are those persons who inherit of what remains of the estate after the sharers have been satisfied, and if there should be no sharers, then they take the whole of the inheritance. And in the absence of the residuaries, the residue of the estate, after first distribution amongst the sharers, once more devolves upon them (sharers) in the fixed ratio of their specific shares.

Zav-ul Arham, the Distant Kindred.—

(*c*) The distant kindred are those relations of the deceased who are neither sharers nor residuaries. They are entitled to the residue in all cases where the sharers are not entitled to it.

Successor by contract.—

(*d*) In default of sharers, residuaries or distant kindred, the estate devolves upon the successor by contract if any, that is, a person with whom the deceased had made, a contract of clientship, *mawalat*.[1]

Acknowledged Kinsman.—

(*e*) Next in order of preference comes the fictitiously acknowledged kinsman, that is a person of unknown descent who has been

1 The conditions of the valid contract of clientship are as follows.—

(a) There should be declaration and acceptance.

(b) The declarant should have no heir by 'nasab' consanguinity, he should have attained puberty (majority) and he himself should be a person of "unknown descent."

(c) The acceptor inherits from the declarant provided at the time of the latter's death he has attained puberty (majority).

(d) All children of the declarant born after the contract enter into the 'mawalat, The Shafii school does not recognise mawalat.

acknowledged by the deceased not through himself but through another.[1]

Such acknowledgment is binding on the acknowledgor and if not withdrawn and he dies leaving no other heirs except such acknowledged kinsman, the estate would devolve upon him. And even as regards bequests exceeding the legal third, the acknowledgee consents is necessary to validate it.

Universal legatee.—

(*f*) The universal legatee is the person to whom the deceased has bequeathed the whole of his property by will, it is a case of universal succession to the *universitas juris* of the deceased. There being no heirs such a bequest is valid to the whole extent, and the rule of maximum legal third applicable to bequests is not here applicable.

Bait-ul-mal, Treasury.—Escheats to the Crown.—

(*g*) And finally and lastly in the absence of all above classes of heirs, the inheritance devolves upon the *Bait-ul-mal,* the public treasury for the benefit of all Muslims.

Under the *Shia* Law, there is no escheat to *Bait-ul-mal,* but the property is to be liquidated among the poor of the city.

In default of all the heirs and persons enumerated above and in British India in preference to the poor or to *Bait-ul-mal* there being no such public treasury in India, the whole property of a deceased Muslim escheats to the Crown.[2]

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1 The kinship may be acknowledged through the father or grandfather e.g., acknowledging a person to be his brother or paternal uncle. If a Muslim dies leaving a wife and no other heir except the acknowledged kinsman, then he will take the residue after deducting the wife's share.

In case of acknowledgment of a person as his brother, if the acknowledgor himself inherits, he would have to share with the acknowledged kinsman, as if with a real brother. Vide also Baillie 1 405.

2 The leading case is the Collector of Masulipatam v. Cavalry 8 Moo. I. A. 498 (1860) (a Hindu case) Where the Privy Council observed when it is made out clearly that by the law applicable to the last owner there is a total failure of heirs, then the claim to the land ceases (we apprehend) to be subject to any such personal law.....the law of escheat intervenes and private ownership not existing, the State must be owner as ultimate Lord."

The question came up before the Patna High Court in Khursaidi Begum v. Secretary of State 94 I.C. 433 (Pat. 1926) where it was raised under the

THE CAUSES OF INHERITANCE.—

239. There are three causes of inheritance.—

(*a*) Valid marriage, ***sabab,*** by reason of marriage, of these there are only two sharers namely the husband and the wife.

(*b*) ***Nasab,*** consanguinity, sharers by relationship, and of these there are ten sharers.

(*c*) ***Wala,*** fictitious relationship, special cause of inheritance of these there are several.[1]

THE NUMBER OF SHARERS.—

240. The total number of sharers is twelve only,[2] and four of them are of the male sex and eight are of the female sex.

CAUSE OF INHERITANCE	MALE SHARERS	FEMALE SHARERS
Sabab of Marriage.	1. Husband.	5. Wife.
Nasab, consanguinity.	2. Father. 3. True grandfather. 4. Half-brother by mother (uterine brother).	6. Mother. 7. True grandmother. 8. Daughter. 9. Son's daughter. 10. Full sister. 11. Half-sister by father (consanguine sister). 12. Half-sister by mother (uterine sister).

Shia Law, the Shia community of Gaya represented by their Anjuman had sued the Secretary of State. The Court held that the law of escheat prevailed.

1 i.e., Successor by Contract, Acknowleged kinsman universal legatee, Bait-ul-mal. Wala of Emancipation, is obsolete, in British India.

2 Of the twelve sharers five are always sharers viz., husband, wife, true grandmother, uterine brother, and sister. And the remaining seven sharers are sometimes sharers and sometimes residuaries. The following five heirs are never absolutety excluded by another heir ;—viz., (a) Husband (b) wife or wives (c) father (d) mother (e) child (son, or daughther) ; the remaining seven heirs are liable to be excluded as will be seen later on.

ORINGINAL KORANIC SHARERS.—

241. The following eight sharers are expressly mentioned in the Holy Koran, (1) Husband (2) Wife or wives (3) Daughter (son) (4) Full sister (5) Father (6) Mother (7 & 8) Uterine brother, and uterine sister.

The following four are secondary sharers. (9) Son's daughter (10) Consanguine sister, (11) True grandfather (2) True grandmother.

SHARERS CONVERTED INTO RESIDUARIES.—

242. The following sharers are liable to be converted into residuaries.

1. Father.
2. True grandfather.
3. Mother.
4. Daughter.
5. Son's daughter.
6. Full sister.
7. Consanguine sister.

The following general rules determine the conversion of sharers into residuaries.

(*a*) A female sharer is excluded from inheriting as a sharer and is converted into a residuary by one or more male residuaries of the same degree and consanguine relationship to the deceased.[1]

(*b*) The father and true grandfather are converted into residuaries in default of any descendants of the class of sharers or residuaries *i.e.* they inherit as residuaries in default of children—daughters, sons, son's son, of the deceased.

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1 The case of the father converting mother, into a residuary is a exception to this rule. The rule of conversion of these females into residuaries is with a view to give to the male member of the same degree and relationship a double share in accordance with the general principle of the law of inheritance.

e.g. The sons convert daughters into residuaries.

The son's son convert son's daughters into residuaries,

Table of Sharers that are under certain circumstances also residuaries.

Sharers.	When Sharers	When Residuaries.
1. Father ...	When there is a child or son's Child.	When there is no child nor son's child.
2. True grand father.	Ditto (in default of father.) ...	Ditto (in default of father.)
3. Mother ...	In all cases except vide next column.	When the father co-exists with mother and spouse only and there is no child, or son's child nor two or more brothers or sisters.
4. Daughter ...	When there is no son ...	When there is a son.
5. Son's daughter.	When there are no two or more daughters and there is no son's son of the same degree and no excluder.	When there is a son's son of the same degree. When there is a son's son of lower degree and she has been excluded.
6. Full sister...	When there is no full brother, nor daughter nor son's daughter and no excluder.	When there is a full brother. When there is a daughter or son's daughter and no excluder.
7. Consanguine sister.	When there is no consanguine brother nor daughter, nor son's daughter and no excluder.	When there is a consanguine brother. When there is any daughter or son's daughter and no excluder.

§ 2. THE TWELVE SHARERS.

FATHER.—

243. Where there is a son, or son's son, h.l.s. the father, takes one-sixth.

MOTHER.—

244. Where there are children, or son's children, h.l.s. or two or more brothers and sisters, the mother takes one-sixth.

Where there is no child or son's child h.l.s. the mother takes one-third, unless there be both a wife or husband and a father in which case she takes one-third of what remains after the share of the widow or widower has been satisfied.

Illustrations.

(i)	Widow	1/4	
	Mother	1/4	(1/3 of 3/4)
	Father	1/2	(as residuary)
(ii)	Husband	1/2	
	Mother	1/6	(1/3 of 1/2)
	Father	1/3	(as residuary)
(iii)	Widow	1/4	
	Mother	1/3	
	Father's father	5/12	(as residuary)
(iv)	Husband	1/2	
	Mother	1/3	
	Father's father	1/6	(as residuary)

HUSBAND.—

245. The share of the husband in his deceased wife's estate is one-fourth where there are children or son's children, and if there are no such heirs, he takes one-half.[2]

WIFE.—

246. The widow[3] takes one-eighth of the deceased husband's estate where there are children or son's children h.l.s and if there are no such issue then she takes one-fourth.

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1 As to its definition vide s 249 true grandmother.

2 The husband is entitled to take his share from the unpaid dower if any still unpaid.

3 The wife's dower if still unpaid would count as an ordinary debt, and must be paid before the assignment of the legal shares, otherwise she would recover the amount from the shares of all the legal heirs and would also contribute from her own share. This share given to the widow is in addition to her claim to the unpaid dower.

The share of two or more wives (not exceeding four) is precisely the same, *viz.* one-eighth or one-fourth to be divided equally between them.

TRUE GRANDFATHER*—

247. Whether there is a father, the true grandfather is excluded from participating in the inheritance.

Where there is a son, or son's son h.l.s. and no father the true grandfather takes one-sixth.

TRUE GRANDMOTHER.*—

248. True grandmothers are excluded from participating in the inheritance by the mother, and paternal grandmothers are excluded where there is a father.

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

False grandfather is any male ancestor between whom and the deceased a female intervenes.

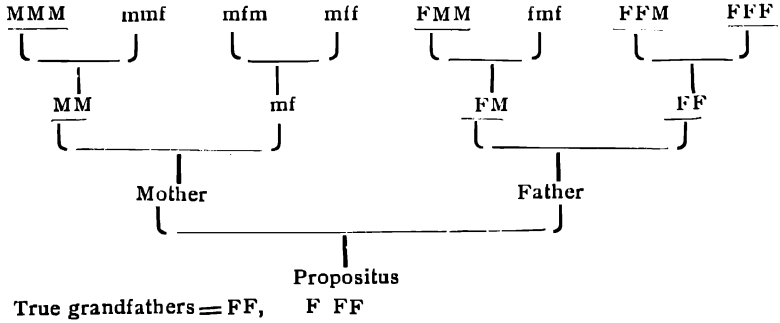
A true grandmother is a female ancestor between whom and the deceased no false grandfather intervenes.

A false grandmother is a female ancestor between whom and the deceased a false grandfather intervenes.

False grand parents cannot inherit as sharers nor as residuaries.

TABLE OF TRUE AND FALSE GRAND PARENTS.

The true grand parents are indicated by capital letters, the letters F (f) and M (m) stand for father and mother respectively.



True grandfathers = FF, F FF

True grandmothers = FM, MM, FFM, FMM, MMM

If F is dead then FF and on his default FFF take 1/6 share.

If F and M are dead F M, and MM will divide between them 1/6 but if F is alive he will exclude FM from taking and MM will take the whole one-sixth.

If FM and MM, are dead, then 1/6 will be divided between FFM, FMM, MMM.

However if MM is alive, she will take the whole one-sixth, the nearer in degree excluding the more remote.

Similarly paternal female ancestors h.h.s. except the father's mother are excluded by the grandfather.

The share of the maternal grandmother is one-sixth, and the same is the share of the paternal grandmother where there is no father. Two or more true grandmothers of equal degree divide the sixth equally. The grandmothers nearer in degree exclude the more remote.

DAUGHTER.—

249. The share of a single daughter is one-half where there is no son, and the maximum collective share of two or more daughters is two-thirds.[1]

SON'S DAUGHTER.—

250. Where there is one daughter only, the son's daughter takes one-sixth, but where there are two or more daughters, they take nothing.

Where there is no son, nor daughter, nor son's son, the son's daughters inherit as if in capacity of daughters and take two-thirds if they be two or more, and if there is a single son's daughter she takes one-half of the estate.

SISTER.—

251. Where there is no child or son's child h.l.s. and no father or true grandfather and no full brother, a single full sister takes one-half and if two or more they take two-thirds to be divided equally between them.

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1 If there is a son the daughter is not a sharer but a residuary, and the rule that the male sharers take double share would apply.

The son would convert the daughter into residuary and the latter would take a share equal to half of that is taken by the son, similarly if there is a son's son h.l.s. the son's daughter takes a share equal to half of that is taken by the former.

2 The brother (f or c. in sec. 252) converts the sister into a residuary, and the general rule double share to the male members applies.

CONSANGUINE SISTER.—

252. Where there is no child or son's child h.l.s. and no father or true grandfather, and there being neither full brother nor full sister nor consanguine brother, a single consanguine sister takes one-half, and if two or more they take two-thirds to be divided equally between them.

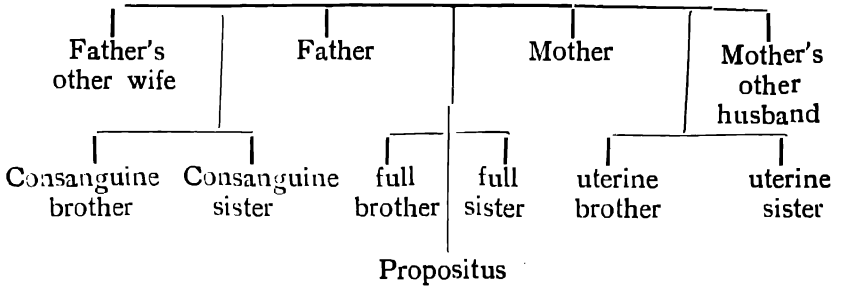
If there be only one full sister, she will take her half share leaving only the remainder of the maximum collective share (2/3-1/2=1/6) one-sixth for the consanguine sister whether one or more.

UTERINE SISTER—UTERINE BROTHER.—

253. Where there is no child or son's child or father or true grandfather, the uterine sister takes one-sixth and if two or more they take one-third.

The uterine brother under similar circumstances is entitled to 1/6 of the estate if there are two or more they are entitled to the maximum collective share 1/3 of the estate. In their case the males and females share equally.[1]

Table of Half-blood Relationship.



FIXED PORTIONS.—

254. The portion fixed by the Koran are six namely 1/2, 1/4, 1/8, 2/3, 1/3, and 1/6, the object of the Koran was to give

1 The uterine brothers and sisters are cognates and they succeed only as sharer and not as residuaries. Their children are distant kindred.

shares to the females who were excluded under the customary law in ancient Arabia.[1]

Table of Fixed Portion.

Fixed portion.	Of the sharers under certain circumstances.
1/2	Husband, daughter, son's daughter, full sister, consanguine sister.
1/4	Husband, wife.
1/8	Wife or wives.
2/3	Daughters, son's daughters, full or consanguine sisters.
1/3	Mother, uterine brothers or sisters.
1/6	Father, true grandfather, mother, grandmothers, one or more son's daughters, one or more consanguine sisters, uterine brother or sister.

JOINT SHARERS.—

255. In case of several individuals forming one group of sharers, the maximum collective share is to be divided equally among all of them. The following heirs are joint-sharers:—

Joint Sharers.

1. Wives two or more.
2. The grandmothers of the same degree.
3. Daughters two or more.
4. Son's daughters two or more
5. Full sisters ,,
6. Consanguine sisters ,,
7. Uterine brothers or sisters.

1 The Koran does not specifically mention the true grandfather or true grandmother, they are included under the term "parents" and the expression "female children" includes daughters, son's daughters, and the term "sisters" is deemed to mean full sisters and consanguine sisters.

THE TABLE OF SHARERS

Sharers.	Share.	Conditions under which the share is inherited.	Whether excluded or converted into a residuary.
1. Husband	1/4	When there is a child or son's child (h. l. s.)	Excluded by none.
	1/2	When there is no child or son's child h.l.s	
2. Wife one or more.	1/8	When there is a child or son's child (h. l. s.)	Excluded by none
	1/4	When no child or son's child	
3. Daughter	1/2	if one } when there is no son	Excluded by none.
	2/3	if two or more } when there is no son	
	R		Converted into a residuary if there is a son or two or more sons.
4. Son's daughter.	1/2	if one } when no son, or son's son or one or more daughters or higher son's daughter.	Excluded by son, or son's son of higher grade, also excluded by two or more daughters or by two or more sons' daughters of higher grade, or by one daughter together with two or more son's daughters of higher grade
	2/3	if two or more } when no son, or son's son or one or more daughters or higher son's daughter.	
	1/6	When there is a daughter or higher son's daughter.	
	R		Converted into a residuary by son's son of equal or even lower grade.
5. Father ...	1/6	When there is a son or son's son (h. l. s.)	Excluded by none.
	1/6 plus R.	When there are one or more daughters, son's daughters and there is no son nor son's son.	In this case the father is a sharer and also a residuary.
	R	When no child nor son's child (h. l. s.)	Converted into residuary in the absence of any child.

THE TABLE OF SHARERS—(*Continued.*)

Sharers.	Share.	Conditions under which the share is inherited.	Whether excluded or converted into a residuary.
6. Mother ...	1/6	When there is a child or son's child (h. l. s.) or two or more brothers or sisters whether full blood or half and whether they inherit or are excluded or there is a brother and sister and the father.	Excluded by none.
	1/3	When there is no child nor son's child and not more than one brother and sister.	
	1/3 of R	When there is a wife or husband and the father.	Converted into a residuary by the father.
7. True grandfather.	1/6	When there is a child or son's child (h. l. s.) and no father or nearer true grandfather.	Excluded by the father or nearer true grandfather.
	1/6 + R	When with daughters or only son's daughters.	
	R	When no child nor son's child	Converted into a residuary if there is no descendant sharer or residuary.
8. True grandmother.	1/6	When no mother and no nearer true grandmother.	Paternal true grandmother excluded by father or by a true grandfather. Any true grandmother is excluded by mother or by nearer true grandmother, whether paternal or maternal. Not a residuary.
9. Full sister.	1/2	If one } When no child or son's child (h.l.s.) or father or brother.	Excluded by son or son's son (h. l. s.) father or true grandfather. Also excluded as sharer by one or more daughters or son's daughters.
	2/3	If two or more } When no child or son's child (h.l.s.) or father or brother.	

THE TABLE OF SHARERS—(*Concluded.*)

Shares.	Sharer.	Condition under which the share is inherited.	Whether excluded or converted into a residuary.
	R		Converted into residuary by full brother, that is when with one or more full brothers subject to not being excluded or when with one or more daughters or son's daughters and no excluder the full sisters one or more become residuaries with daughters i.e. they take the residue after deducting the shares of daughters.
10. Consanguine sister.	1/2	If one } When no child or son's child (h. l. s.) or father or brother or full sister.	Excluded by son or son's son, father or true grandfather or by full brother or by full sister when she is a residuary.
	2/3	If two or more } When no child or son's child (h. l. s.) or father or brother or full sister.	
	1/6	When with one full sister only, (the sister takes 1/2 and consanguine sister takes (2/3—1/2 = 1/6.)	Also excluded by one or more daughters or son's daughters or by two or more full sisters.
	R		Converted into residuary by a consanguine brother. When there are one or more daughters, or son's daughters and no excluder.
11. 12. Uterine brother or sister.	1/6	If one } When no child or son's child (h. l. s.) or father, (h. h. s.)	Excluded by son or son's son, father or true grandfather, or daughter or son's daughter.
	1/3	If two or more } When no child or son's child (h. l. s.) or father, (h. h. s.)	Not a residuary.

§ 3. THE RESIDUARIES.

CLASSES OF RESIDUARIES.—

256. There are four classes of residuaries, and each of the preceding class must be exhausted before the next which is excluded, that is the first excludes, the second, the second excludes the third, and the third excludes the fourth.

Class I.

The "offspring" of the deceased *i.e.* his sons and son's sons, *h. l. s.*

Daughters and son's daughters when not sharers.

Class II.

The "root" of the deceased *i.e.* his father and true grandfather *h.h.s.*

Class III.

The "offspring" of the father of the deceased, *i.e.* brothers whether full or consanguine and their sons *h.l.s.*

Sisters whether full or consanguine when not sharers.

Class IV.

The offspring of the true grandfathers *i.e.* paternal uncles and great uncles and their male descendants in the male line.

CLASS I. RESIDUARIES.—

257. According to the Sirayiyah "The offspring of the deceased are his sons first, then their sons in how low a degree soever." Thus in the first instance the residue devolves on the son or sons together and along with daughter or daughters if any. The general rule that the male member takes the double share applies, a daughter thus takes one-half of the share of each son.

If there be no daughter or daughters the risidue is divided equally between the sons, and if alone he takes the whole property.

Similarly the son's daughter takes along with the son's son.

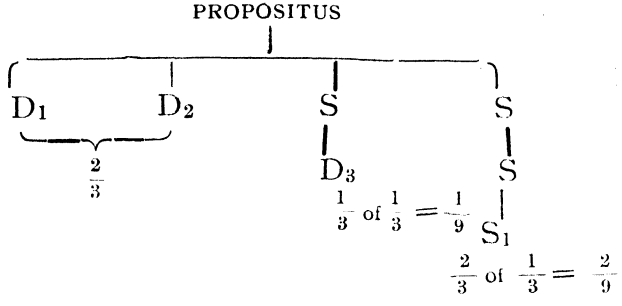
The case of son's daughters with a lower son.

The following problems may usefully be studied.

In this example the female descendant in a nearer degree divided the residue with lower son's son h. l. s. D stands for daughter. S stands for son.

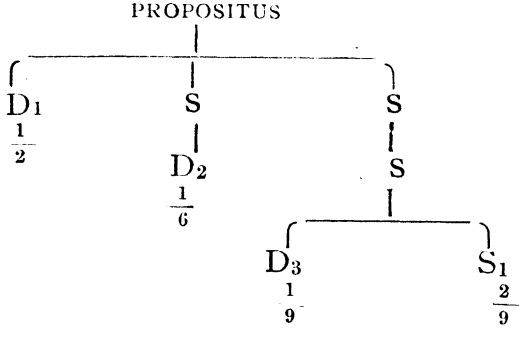
The heirs in the last line have survived the deceased.

(i)



The two daughters D_1 and D_2 exhaust the collective share 2/3, so D_3 if alone would take nothing, but here she shares with S_1 as residuary. $D_3 = 1/9$ $S_1 = 2/9$.

(ii)

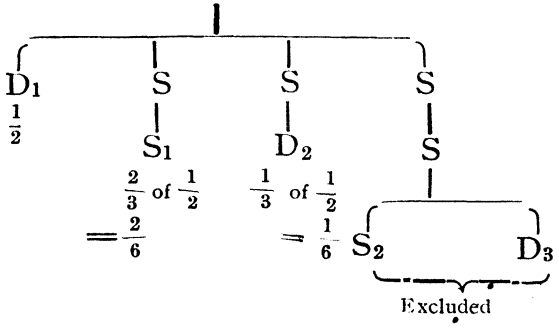


D_1 takes $\frac{1}{2}$

D_2 takes $\frac{1}{6}$ $\left(\frac{2}{3} - \frac{1}{2} = \frac{1}{6}\right)$ the remainder of the collective share.

D_3 and S_1 share the residue $D_3 = 1/9 : S_1 = 2/9$

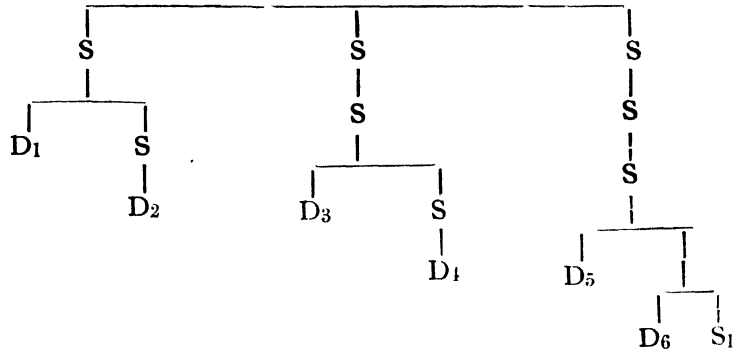
(iii)



D_1 takes $\frac{1}{2}$

S_1 takes $\frac{2}{3}$ of $\frac{1}{2} = \frac{2}{6}$ D_2 takes $\frac{1}{3}$ of $\frac{1}{2} = \frac{1}{6}$ S_2 and D_3 are excluded.

(iv) PROPOSITUS.

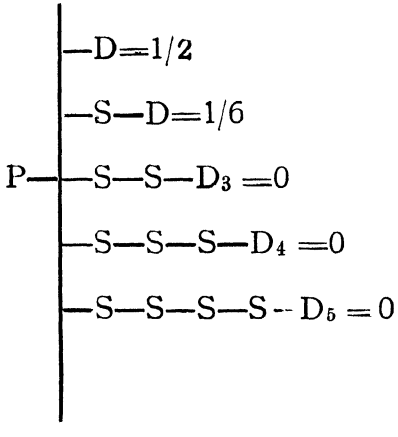


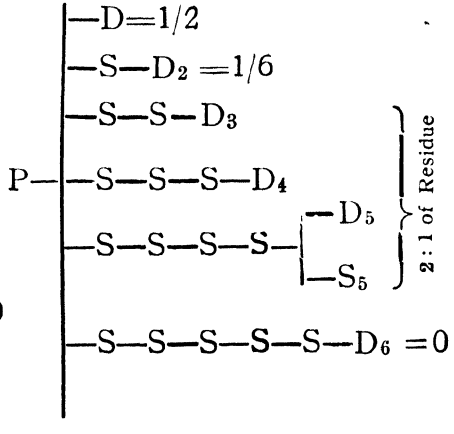
D_1 = S takes 1/2

D_2 and D_3 = take 1/6

D_4 D_5 and D_6 would get nothing if S_1 was not in existence, but now they are made residuaries and take the residue $\left(1-\frac{1}{2}-\frac{1}{6}=\frac{1}{3}\right)$ each taking 1/5 of 1/3 = 1/15, and S_1 takes 2/15.

The following two graphical illustrations will further explain the above proposition.





CLASS II OF RESIDUARIES.—

258. In absence of the first class of residuaries, the residue devolves on the second class consisting of the father or the true grandfather.

According to the Sirajiyah "Brothers and sisters whether full or consanguine are all excluded from participating in the inheritance by the father, and even by the true grandfather". This is the view according to Imam Abu Hanifa and *Fatwa* accords with it.

The authorities for and against the right of the true grandfather to exclude full or consanguine brothers and sisters are as follows:—

For—

(1) Hazrat Abu Bakr the first Khalif.

(2) Imam Abu Hanifa, the founder of the Hanafi School.

Against—

(3) Imam Abu Yusuf, } The two famous disciples of Imam
(4) Imam Muhammad } Abu Hanifa

(5) Imam Malik, the founder the Maliki School

(6) Imam Shafi, the founder of the Shafii School.

(7) The eminent jurist Zaid offers some suggestions giving a choice to the grandfather.

(*a*) to take one-sixth as a sharer, or

(*b*) to take as a residuary in capacity of a full brother or

(*c*) take one-third of the Residue.

e.g. *A Muslim dies leaving a true grandfather, a true grandmother, two brothers and a full sister the grandmother takes 1/6. The residue is 5/6 which according to Imam Abu Hanifa goes to the grandfather. According to Zaid he may elect to take 1/6 as a sharer or as a residuary with brother,* i.e. *2/7 of 5/6 = 5/21. (There being two brothers and one sister), or by the third alternative take 1/3 of 5/6 = 5/18 which will be better than 5/21 or 1/6.*

Illustration.

		According to Abu Hanifa	According to Zaid
True grandmother	=	1/6	1/6 = 3/18
True grandfather	=	5/6	2/3 of 5/6 = 10/18
Full sister	=	excluded	1/3 of 5/6 = 5/18

The case of the grandfather had caused a considerable difference of opinion among the eminent disciples of the Prophet. Here is a case known as the *Kharqa* which implies an unsettled point. The following are the surviving heirs, mother, grandfather and a sister.

(1) According to Abu Bakr, First

Khalif ...	Mother	1/3	Grandfather	2/3	Sister	excluded*	
,, Zaid	Mother	1/3	Grandfather	4/9	Sister	2/9	
,, Ali, Fourth Khalif ...	Mother	1/3	Grandfather	1/6	Sister	1/2	
,, Ibn Abbas ...	Mother	1/3	Grandfather	1/6	Sister	1/2	
	Mother	1/3	Grandfather	1/3	Sister	1/3	
,, Umar, Second Khalif	Mother	1/3	Grandfather	1/6	Sister	1/2	

(ii) Here is a case known as the Hamziyah.

	3 grandmothers	grand-father	full sister	consanguine sister	uterine sister
According to Abu Bakr & Ibn Abbas	1/6 (joint share)	5/6	excluded	excluded	excluded
According to Ali	1/6	1/6	1/2	1/6	excluded

CLASS III OF RESIDUARIES.—

259. In default of Class I and II of residuaries the residue devolves on the full brothers equally, and if there are full sisters then along with them, each sister taking half as much as each brother.

Similarly in default of full brothers and sisters the residue devolves upon the consanguine brothers and sisters in the same manner, the brother taking a double share.

Sister with daughter.—

In default of residuaries of I and II classes and there being no brothers but daughters or son's daughters excluding full or consanguine sisters from inheritance as sharers, such sister or sisters are entitled to take the residue in preference to remote heirs.

This case is the solitary exception to rule that no female is primarily a risiduary but only become so when co-existing with a male residuary.[1]

* This is according to the Hanafi Law.

1 Vide illustration (ii) p 205.

Brother's sons.—

In default of full or consanguine brother, and no sister taking as residuary under the preceding rule, the residue devolves on full brothers, sons to be divided equally between them, and it is immaterial whether they claim their rights through the same or different fathers.

Similary sons of consanguine brothers take the residue if there are no sons of full brothers.

And finally the residue devolves on sons of full or consanguine brothers' sons' sons *h.l.s.* in like order, the nearer degree excluding the more remote, and issue of full brothers excluding the issue of consanguine brothers in the same degree.

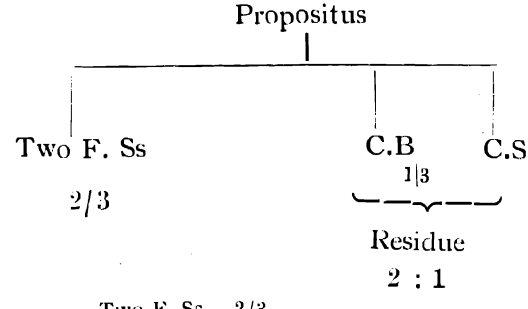
Rights of Collaterals

(i) Illustrations

F = Full B = brother

S = Sister C = Consanguine

Ss = Sisters

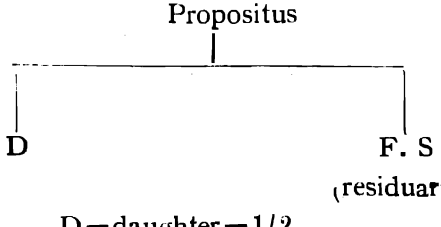


Two F. Ss = 2/3

C. B = 2/3 of 1/3 = 2/9

C. S = 1/3 of 1/3 = 1/9

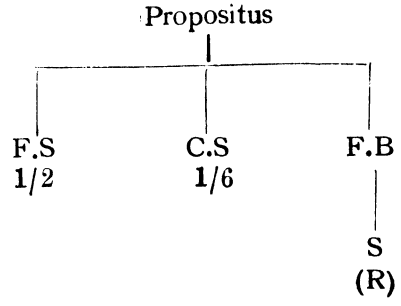
(ii)



D = daughter = 1/2

F. S = 1/2 as residuary.

(iii)

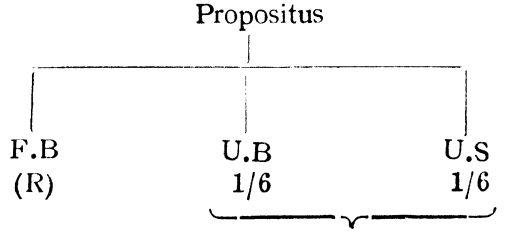


F. S. takes 1/2 = 3/6

C. S. = (2/3—1/2) = 1/6

F. B. S. = the residue = 2/6

(iv)



U. B. = uterine brother = 1/6

U. S. = „ sister 1/6

F. B. = Residue 2/3

CLASS IV OF RESIDUARIES.—

260. If there are no residuaries of class I, II & III the residue devolves on the offspring of the true grandfathers that is, on the paternal uncles, great uncles and their male descendants in the male line.

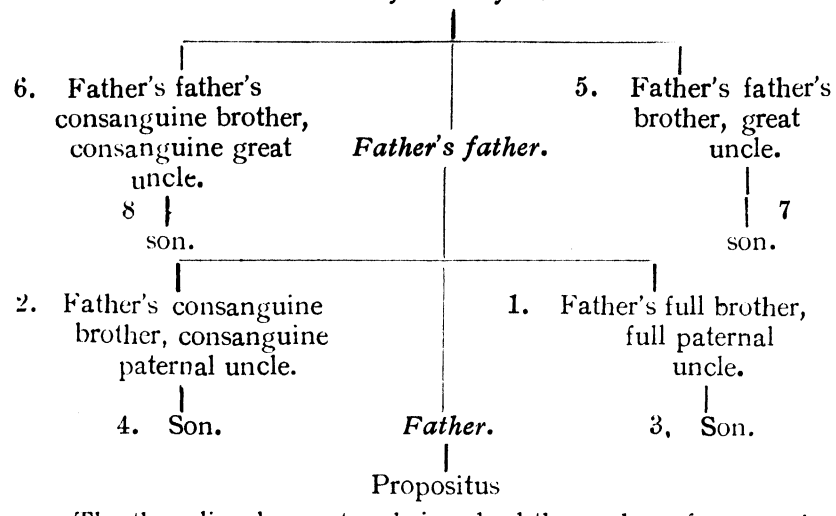
And finally in default of these the residue devolves on descendants of more remote true grandfathers.[1]

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1 In Mahomed Haneef v. Mahomed Masoom 21 W. R. 371 (1874) a succession certificate was granted under Act XXVII of 1860 to a person whose paternal ancestor in the fifth degree was related in the sixth degree to the deceased.

In Abdul Samad Sahib v. Chinnathambi Sahib 53 I. C. 873 (Mad. 1918) the true grandfather's descendants succeeded in preference to a daughter's son who belongs o the Distant Kindred class.

CLASS IV OF RESIDUARIES.



The three lineal ancestors being dead the order of succession is indicated by the figures 1—8.

JURISTIC CLASSIFICATION OF RESIDUARIES.—

261. The residuaries are of two kinds:

1. Residuaries by consanguinity, *nasab.*

2. Residuaries for special causes, this class may be taken to be obsolete in British India as the result of the abolition of the institution of slavery by Act V of 1843.[1]

Residuaries by nasab.—

The Residuaries by ***nasab*** are further subdivided into three classes (*a*) Residuaries in their own right, (*b*) Residuaries in another's right; (*c*) Residuaries together with another.

1 e.g. Those who succeed to the estate of a manumitted slave etc. The Slavery Act V of 1843 abolished slavery and removed all legal disabilities due to slavery. Vide Sayad Mir Ujmudinkhan v. Zia-ul-Nissa 6. I. A. 137 (1879), 3 Bom., 422 P.C. In this case a Rajput girl was purchased by the Nawab and she became the mother of a daughter while still a slave. She was later on emancipated and married by the Nawab. Her daughter was married in the Nawab's life time, and the respondents daughters were the issue of that marriage. A male heir of the Nawab claimed the Rajput lady's property to the disherision of her own natural heirs. Held by the Privy Council that by Act v. of 1843 the right if any of the Nawab's heirs was taken away and that the respondents were entitled to succeed to their grandmother.

(*a*) The first class consists of the male residuaries mentioned in the preceding section *viz.* "The offspring of the deceased or of the father or the true grandfather of the deceased," all in lineal male line, and also the "root" of the deceased, the father or true grandfather *h.h.s.*[1]

(*b*) Residuaries in another's right consists of four females namely daughter, sons's daughter, full sister, and half-sister by father (and in one exceptional case the mother[2] also) who are *prima facie* sharers, but are converted into residuaries, when they co-exist with one or more male residuaries of the same relationship to the deceased as the claimant in question.

e.g. *A daughter co-existing with a son is converted into a residuary by the later. A full sister co-existing with a full brother is converted into a resudiary by the latter.*

(*c*) Residuaries together with another are two female sharers *viz.* full sister, and half-sister by father who are converted into residuaries by another female sharer and thereby inherit together.

e.g. *A full sister co-existing with a son's daughter and not being excluded by any heir becomes residuary together with the son's daughter.*

LIST OF RESIDUARIES.

I. DESCENDANTS.—

1. Son or sons.

2. Sons' or sons sharing with daughters, if any, the son taking a double share.

3. Son's sons with son's daughters of equal degree, the former as usual taking a double share, son's son's sons *h.l.s.* the nearer in degree excluding the more remote.

---

1 e.g. The sons, son's sons h.l s. The father true grandfather h.h.s. and all male agnates collaterals.

2 When the mother co-exists with the father and there is a spouse of the deceased and there are no other heirs then after the share has been allotted to the spouse the father and the mother take the residue as residuaries.

4. Son's son's sons *h.l.s.* similarly shares with son's daughters of a higher degree or equal degree (son's son's daughter), the male as usual takes a double share, (this case is such that the female sharer in question would get nothing, and all remote son's son's sons and daughters h.l.s. are excluded.)

II. ASCENDANTS—

5. Father.

6. True grandfather, h.h.s. the nearer in degree excluding the more remote.

III. NEAR COLLATERALS—DESCENDANTS OF FATHER.—

7. Full brothers.

8. Full brother with full sister if any, taking a double share.

9. Consanguine brothers;

10. Consanguine brother similarly sharing with consanguine sister if any, in like manner.

11. Full sister where thare is no full brother or any nearer residuary and with one or more daughters or son's daughters, takes the residue if any still not exhausted.

12. Consanguine sister where there is no full or consanguine brother, or any nearer residuary, and with one or more daughters or son's daughters takes the residue if any still not exhausted.

13. Full brother's son's *h.l.s.* the nearer in degree excluding the more remote.

14. Consanguine brother's sons.

15. Full brother's son's sons.

16. Consanguine brother's son's sons.

17. Then follow remoter male descendants of full brother's son's sons, and consanguine brother's son's sons in like manner.

IV. DESCENDANTS OF TRUE GRANDFATHERS *h.h.s.*—

18. Full paternal uncle.

19. Consanguine paternal uncle.

20. Full paternal uncle's son *h.l.s.*

21. Consanguine paternal uncle's son,

22. Full paternal uncle's son's son.

23. Consanguine paternal uncle's son's son.

24. Then follow descendants of full paternal uncle's son's son and consanguine paternal uncle's son's son in like order.

Similarly in like order male descendants of more remote true grandfathers *ad infinitum*.

§ 4. EXCLUSION OF SHARERS

EXCLUSION OF SHARERS.—

262. Of the twelve sharers five are never liable to be excluded from participating in the inheritance but the other seven sharers are liable to be excluded from the inheritance by presence of some preferable heirs.

Sharers not liable to be excluded.	Sharers liable to be excluded.
1. Husband.	1. True grandfather.
2. Wife, (wives).	2. True grandmother.
3. Father.	3. Son's daughter.
4. Mother.	4. Full sister.
5. Daughter.	5. Consanguine sister.
	6. Uterine brother.
	7. Uterine sister.

The following general principles determine the rules for exclusion of sharers.

(*a*) A sharer is excluded by any person through whom he is related to the deceased, and who may participate as a residuary.

e.g. The father excludes the true grandfather, full sisters, or consanguine sisters.

(*b*) All collateral sharers are excluded by a lineal male decendant or ascendent who can also take as a residuary.

e.g. The son excludes, full sisters, consanguine sisters, uterine brothers and sisters.

(*c*) A remoter sharer is excluded by nearer residuary who is such that would convert such equally nearer sharer into residuaries.

e.g. Son and son's son h.l.s. in nearer degree exclude son's daughters in a lower degree.

(*d*) A half-blood sharer is excluded by a full-blood residuary who is such that would convert such full-blood sharers into residuaries.

e.g. Consanguine sisters are excluded by full brothers as the latter would convert the full sisters into residuaries

A female full-blood, sharer excludes a half-blood female sharer when the former inherits as a residuary.

e.g. A Muslim dies leaving a daughter, full sister, and a consanguine sister, the latter is excluded by the full sister since she takes as a residuary with the daughter.

EXCLUSION AS SHARERS.—

263. There are three sharers who are excluded without forfeiting their residuary title, and they would inherit if not excluded by other residuaries.

1. Son's daughter.
2. Full sister.
3. Consanguine sister.

The following general principles determine the rules of exclusion as sharers.

Collaterals.—

(*a*) All descendants of the parents of the deceased are excluded by one or more lineal descendants of the deceased.

e.g. Full sisters, consanguine sisters, are excluded as sharers by one or more daughters or son's daughters [they may inherit as residuaries with the daughters]

(*b*) The nearer sharers exclude the more remote sharers, they having taken the maximum collective share fixed for that class.

e.g. Son's daughters are excluded as sharers by two or more daughters or two or more son's daughters of a higher degree or there being one daughter or son's daughter with one or more nearer son's daughters. [Son's daughters may inherit as residuaries with son's sons of the same or a lower degree]

(*c*) Half-blood sharers are excluded by full-blood sharers of the same degree and who exhaust the maximum collective share fixed for that class[1]

e.g. Consanguine sisters are excluded by two or more full sisters.

1 If the collective share is not exhausted, there being only one such sharer the half-blood sharer would take the residue.

Table of exclusion as sharers.

The sharers	Exclusion as sharers
1. Son's daughter	Excluded as sharer by two or more daughters or son's daughters of a higher degree, or by one daughter together with one or more son's daughters of a higher degree or by one nearest son's daughter together with one or more nearer son's daughters.
2. Full sister ...	Excluded as sharer by one or more daughters or son's daughters.
3. Consanguine sister	Excluded as sharer by one or more daughters or son's daughters or by two or more full sisters.

There are two sharers who when excluded as sharers are absolutely excluded, for they are not residuaries at all.

1. True grandmother
2. Uterine brother and uterine sister.

The true grandmother (paternal or maternal) is excluded by the mother or nearer true grandmother on that side.

The uterine brothers aud sisters are excluded by one or more child, daughters or son's daughters and as they are not residuaries it means their absolute exclusion.

EXCLUSION BY CONVERSION INTO RESIDUARIES.—

264. In case of three sharers, the father, mother, and daughter exclusion as sharers by conversion into residuaries does not mean absolute exclusion, for they inherit as residuaries, but other sharers, may be absolutely excluded by co-existing residuaries.[1]

1 As regards conversion of sharers into residuaries vide sec. 242 ante P. 190.

Table of absolute exclusion of sharers.

Sharers.	When absolutely excluded.
1. True grandfather.	Absolutely excluded by the father or a nearer true grandfather.
2. True grandmother.	A true grandmother excluded by the mother, a nearer true grandmother. Paternal true grandmother excluded by the father or by a true grandfather through whom she is related to the deceased.
3. Son's daughter.	Absolutely exlcuded by son, or son's son of a higher degree.
4. Full sister.	Absolutely excluded by son, or son's son, father, or true grandfather.
5. Consanguine sister.	Ditto and absolutely excluded by full brother or by full sister being a residuary.
6. Uterine brother. } 7. Uterine sister. }	Absolutely excluded by son or son's son, father, or true grandfather. Also excluded by daughter or son's daughter.

PARTIAL EXCLUSION.—

265. There are five sharers who are sometimes entitled to a maximum share and sometimes to a minimum share owing to co-existence of other heirs.

Table of partial exclusion of sharers.

Sharers.	Share.	Share reduced.	Under what circumstances.
1. Husband.	1/2	1/4	When there is a child or son's child.
2. Wife.	1/4	1/8	Ditto.
3. Mother.	1/3 of the whole.	1/6	When there is a child, or son's child or two or more brothers or sisters.
		1/3 of the Residue.	Ditto and when there is the father and a spouse of the deceased
4. Son's daughter if one if two or more.	1/2 2/3	1/6	When there exists one daughter or son's daughter of a higher degree and is not excluded, nor converted into residuaries.
5. Consanguine sister if one if two or more.	1/2 2/3	1/6	When thre is only one full sister and not excluded, nor converted into residuaries.

§ 5. GENERAL RULES OF INHERITANCE.

THE FUNDAMENTAL RULES.—

266. The right of inheritance of the heirs is generally determined by the following considerations.

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

(ii) A person related to the deceased through any person shall not inherit while that person is alive.

(iii) There is no representation.

(iv) The strength of consanguinity determines preference.

(v) If the degree of relationship is equal then as a general rule a male sharer takes double the portion of a female sharer of the same degree.

e.g. a son cannot inherit from his grandfather while the father is alive.
e.g A full-blood relation is preferred to a half-blood.

PRIMARY HEIRS AND THEIR SUBSTITUTES.—

267. The following are the primary heirs; and their substitutes.

Primary heirs :—(1) The child, male or female. (2) The father. (3) The mother. Their substitutes :—(*a*) Child of a son *h.l.s.* (*b*) True grandfather. (*c*) True grandmother.

The primary heirs succeed first and in their default their substitutes inherit the property. The substitutes also exclude all those persons, excluded by the primary heirs. The husband, and the wife are also primary heirs and always inherit.

e. g. If there is a surviving daughter and a son's daughter the former would take 1/2 and the latter 1/6. This may be taken as an exception to the rule.
e. g. the son's child also excludes full brothers or sisters as does the son.

PREFERENCE AMONGST HEIRS.—

268. The heirs by *nasab* are subdivided into sharers and residuaries. This classification however does not denote priority of one class over the other so as to exclude that class. No sharer excludes residuaries, in fact all sharers are not entitled to inherit together at one and the same time, some sharers are liable to be excluded by the presence of a sharer or even by a residuary, and again some of the sharers are converted into residuaries and thereby are excluded from receiving their fixed shares.

The primary heirs always inherit.

(*a*) The heirs by marriage the husband or the wife.

(*b*) The heirs by consanguinity *viz.* the son or sons, daughter or daughters, father and mother.

Sharers and Residuaries.—

Under the Hanafi system the order is Descendants, Ascendants, and Collaterals. The following general principles determine the order of succession among the sharers and residuaries.

1. As a general rule proximity is determined by the degree of claimants' relationship to the deceased whose property is to be distributed. The strength of consanguinity is another test to determine priority. That is those of the full-blood exclude those of the half-blood. Similarly a nearer residuary excludes the more remote and a residuary of the full-blood excludes a residuary of the half-blood of the same degree.

2. In case of conflict between sharers and residuaries (*a*) a nearer residuary excludes a remoter sharer if the latter is related to the deceased through the former, (*b*) or if the former was either a descendant or an ascendant and the latter was a collateral only, (*c*) or the latter is converted into a residuary.

Illustrations.

(i) A son or son's son excludes a full sister, or a half-sister by father.

(ii) A true grandfather excludes paternal true grandmothers as they are related through him, and under clause (b) he excludes full sisters or half sisters by father.

(iii) A son converts a daughter into a residuary.

3. (*a*) A nearer sharer excludes the more remote, if the latter is related to the deceased through the former who is such that under certain circumstances would take the whole inheritance as a residuary.

(*b*) or the former is a descendant or such an ascendant who under certain circumstances would take the whole inheritance as a residuary, and the latter is a collateral.

(*c*) if the nearer and remoter sharers claim the same Koranic share, and if the former takes the whole share under certain circumstances, the latter would be excluded, but if the former takes the minimum share under certain circumstances, the latter would take the difference between the maximum and the minimum shares allotted.

Illustrations.

(i) A father excludes the true grandfather [this case falls under 3 (a) and also 3 (c)].

(ii) A father excludes the full sister (collateral).

(iii) Two or more daughters exclude the son's daughters, but a single daughter does not exclude the son's daughter (here the two daughters had taken the maximum share viz. 2/3 and there is nothing left for the son's daughters to take, but a single daughter, who is entitled to 1/2 only, enables the son's daughter to take the difference viz. 2/3—1/2 = 1/6.)

4. A nearer sharer does not exclude a remote residuary, here the sharer takes his share first and the residue if any devolves upon the remoter residuary.

Similarly a full-blood sharer never excludes a half-blood residuary.

5. (*a*) Full-blood sharers exclude half-blood sharers if the half-blood sharers are of the same class and claim the same share, and they have taken the maximum share, if not the difference would be given to the half-blood sharer

Illustrations.

Two or more full sisters exclude a half-sister by father and they take the maximum share 2/3, but one full sister does not exclude the half-sister by father, as she takes the share 1/2 leaving 1/6 for the half-sister (2/3—1/2 = 1/6).

(*b*) A full-blood residuary under the following circumstances excludes a half-blood sharer, namely the former would convert into residuary a full-blood sharer of the same class as the half-blood sharer in question.

e.g. a full brother excludes the half-sister by father as he would convert the full sister into a residuary.

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§ 6. THE DOCTRINE OF INCREASE AND RETURN.

THE DOCTRINE OF INCREASE.—

269. The doctrine of increase, *'awl*, applies when it is found out that the sum total of the fractions to which several sharers are entitled exceeds unity, then they must all abate rateably. The doctrine of increase operates by increasing the common denominator of the fractions to the total of all the numerators. The numerators are left unchanged, thereby each share is rateably reduced.

Illustrations.

(*a*) A woman dies leaving her husband and two sisters of the whole blood.

Husband	... 1/2=3/6	reduced to	...	3/7
Two full sisters	... 2/3=4/6	„	...	4/7
	7/6			1

(*b*) A woman leaves her husband, her mother and a full sister.

Husband	... 1/2=3/6	reduced to	...	3/8
Mother	... 1/3=2/6	„	...	2/8
Full sister	... 1/2=3/6	„	...	3/8
	8/6			1

(*c*) A woman dies leaving her husband, two full sisters, uterine brother and mother.

Husband	... 1/2=3/6	reduced to	3/9
Two full sisters	... 2/3=4/6	„	4/9
Uterine brother	... ... =1/6	„	1/9
Mother	... ... =1/6	„	1/9
	9		1

(*d*) A woman dies leaving the following heirs.

Husband	... 1/2=3/6	reduced to	3/10
Two full sisters	... 2/3=4/6	„	4/10
Two uterine brothers and two sisters	... 1/3=2/6	„	2/10
Mother	... ... =1/6	„	1/10
	10/6		1

(*e*) A man dies leaving a widow, mother and a full sister.

Widow	... 1/4=3/12	reduced to	...	3/13
Mother	... 1/3 =4/12	„	...	4/13
Full sister	... 1/2=6/12	„	...	6/13
	13/12			1

(*f*) A person dies leaving a widow, two full sisters, one uterine sister and mother.

Widow	... 1/4=3/12	reduced to	... 1/5
Two full sisters	... 2/3=8/12	...	... 8/15
Uterine sister	... 1/6=2/12	...	... 2/15
Mother	... 1/6=2/12	...	... 2/15
	15/12		1

(*g*) A person dies leaving the following heirs.

Wife	1/4=3/12	reduced to	3/17
Two full sisters ...	2/3=8/12	„	8/17
Two uterine sisters ...	1/3=4/12	„	4/17
Mother ...	1/6=2/12	„	2/17
	17/12		1

(*h*) A person leaves his wife, two daughters, father and mother.[1]

Wife...	... 1/8=3/24	reduced to 3/27
Two daughters	... 2/3=16/24	... 16/27
Father	... 1/6=4/24	... 4/27
Mother	... 1/6=4/24	... 4/27
	27/24	1

Rule of Change of Denominators.—

Thus it will be seen that according to the doctrine of increase, the common denominators that are liable to be increased are as follows:—

Denominators.	Increased up to what limit.
6	7, 8, 9 or 10
12	13, 15 or 17
24	27 only
2, 3, 4, and 8,	not necessary to be increased at all.

1 This case is known as mimberiya, answered by Ali from the pulpit.

Denominator	6	increased to	7	*vide*	illustration	(*a*)	page	218
,,	,,	,,	8	,,	,,	(*b*)	,,	,,
,,	,,	,,	9	,,	,,	(*c*)	,,	,,
,,	,,	,,	10	,,	,,	(*d*)	,,	,,
,,	12	,,	13	,,	,,	(*e*)	,,	,,
,,	,,	,,	15	,,	,,	(*f*)	,,	219
,,	,,	,,	17	,,	,,	(*g*)	,,	,,
,,	,,	,,	27	,,	,,	(*h*)	,,	,,

THE DOCTRINE OF RETURN.—

270. The doctrine of return, *rad*, applies when after assigning shares to all sharers, there is a surplus, and there being no residuary the residue reverts to the sharers in proportion to their respective shares, this is known as the Return.

The sharers who are entitled to the Return are seven only, one male and seven females. *viz.* uterine brother, or sister, daughter, son's daughter, full sister, consanguine sister, mother and the paternal grandmother. If there be one of such persons only the whole surplus is given to that particular heir.

The Return to sharers.

Sharers not ordinarily entitled to return.[1]	Sharers by *nasab* entitled to return.[2]
1. Husband. 2. Wife (wives).	1. Mother. 2. True grandmother. 3. Daughter. 4. Son's daughter. 5. Full sister. 6. Consanguine sister. 7. } Uterine brother or sister. 8. }

1 If there are no other sharers or residuaries or distant kindred, then the husband or wife take the residue by return.

2 The return may take place to one, two or three of the above mentioned sharers but not to more than three.

Thus the mother (or grandmother), the daughter (or son's daughter) or the sister (full or consanguine together with uterine) take the residue in default of male agnates, and where the daughter or sister are not co-existing. This includes eight sharers, the husband and the wife are excluded from the Return, and the father or the true grandfather are residuaries, so when they co-exist with sharers there is no "Return" at all.

Illustrations.

(*a*) A person dies leaving a wife and a sister.

Wife...	... 1/4	
Widow	... 3/4	(1/2 as sharer and 1/4 by Return)

(*b*) A woman dies leaving her husband and a daughter

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

(*c*) A person dies leaving the mother, daughter and son's daughter

Mother	... 1/6=1/6	increased to 1/5
Daughter	... 1/2=3/6	... 3/5
Son's daughters	... 1/6=1/6	... 1/5
	5/6	1

(In this case the share of each sharer is rateably increased. The process is by decreasing the denominators of each sharer so as to make it equal to the sum of the numerators).

(*d*) A person dies leaving the mother, full sister and uterine brother.

Mother	...	=1/6	increased to ... 1/5
Full sister	...	1/2=3/6	,, ... 3/5
Uterine brother	...	=1/6	,, ... 1/5
		5/6	1

(*e*) A person dies leaving his wife, daughter and mother

Wife	...	1/8	... 4/32
Mother	... 1/6	increased to	1/4 of 7/8=7/32
Daughter	1/2=3/6	,,	3/4 of 7/8=21/32
	4/6		1

Here after assigning the share to the wife the residue is 7/8 which is to be distributed between mother and daughter in the ratio of 1:3 in proportion to their fixed shares, *viz.* 1/4 of 7/8 and 3/4 of 7/8 respectively. This is a simple method. The other process would be as follows :—

Wife ...	...	1/8=3/24
Mother	...	1/6=4/24
Daughter	...	1/2=12/24
	Total ...	19/24, Residue being 5/24

The residue is now to be distributed again between the mother and the daughter in the proportion 1 : 3.

Mother would ultimately receive	1/6+(1/4 of 5/24)=7/32
daughter	1/2+(3/4 of 5/24)=21/32

(*f*) A woman dies leaving her husband mother and daughter.

Husband	...	1/4	... 4/16
Mother	...	1/6 increased to	1/4 of 3/4=3/16
Daughter	... 1/2=3/6	,,	3/4 of 3/4=9/16
	4/6		1

(Here after assigning the share to the husband the residue is 3/4, which is distributed between the mother and daughter in the ratio 1:3 in accordance with their original fixed shares.)

Denominator Six.—

In applying the doctrine of Return it will be seen that the denominator 6 is reduced to 2, 3, 4 or 5.

Illustrations.

A person dies leaving the following heirs only.

(*a*) True grandmother	...		1/6 increased to	1/2
Uterine sister ...	...		1/6 ,,	1/2
			2/6	1
(*b*) True grandmother	...	1/6 =	1/6 increased to	1/3
2 uterine sisters	...	1/3 =	2/6 ,,	4/3
			3/6	1

(*c*) Mother		1/6 increased to	1/4
Sons's daughter	... 1/2 = 3/6	„	3/4
	4 6		1
(*d*) Full sister ...	... 1/2 = 3/6	increased to	3/5
Consanguine sister	... 1/6	„	1/5
Uterine sister	... 1/6	„	1/5
	5/6		1

The above rule is followed in initial application even when the heirs co-exist with either the husband or the wife, who are not entitled to the Return.

ILLUSTRATIONS.—

A person dies leaving the following heirs.

(i) Wife ...	...	...	1/4 = 2/8
Uterine brother	1/6	1/2 of R = 1/2 of 3/4	= 3/8
Uterine sister ...	1/6	1/2 of R = 1/2 of 3/4	= 3/8
	2/6	6 reduced to 2	1
(ii) Wife ...	...	...	1/4
Uterine brother ...	1/6	1/3 of R. = 1/3 of 3/4	= 1/4
Uterine sister ...	1/6	1/3 of R. „	= 1/4
Mother ...	1/6	1/3 of R. „	= 1/4
	3/6	6 reduced to 3.	1
(iii) Husband ...	...	... 1/4	= 4/16
Mother	1/6	1/4 of R. = 1/4 of 3/4	= 3/16
Daughter	1/2 = 3/6	3/4 of R. = 3/4 of 3/4	= 9/16
	4/6	6 reduced to 4.	1
(iv) Wife ...	...	... 1/8	= 5/40
Mother	1/6	1/5 of R. ... 1/5 of 7/8	= 7/40
Two son's daughters	2/3 = 4/6	4/5 of R. ... 4/5 of 7/8	= 28/40
	5 6	6 reduced to 5.	1

ORDER OF DEVOLUTION OF RETURN.—

271. The Return devolves in the following order :

(*a*) To the Residuaries

(*b*) In default of (*a*) to the sharers[1]

(*c*) In default of (*a*) and (*b*) to the Distant Kindred

(*d*) In default of (*a*), (*b*) and (*c*) to the heir by marriage[2]

SUCCESSION OF SHARERS AND RESIDUARIES.—

272. The sharers and residuaries succeed briefly in the following manner.

(*a*) The sharers and residuaries may succeed jointly.

or

(*b*) The sharers only may succeed wholly exhausting the estate or there being no residuaries taking the residue by return,

or

(*c*) The residuaries alone may succeed, there being no conversion of sharers into residuaries, or even by excluding remoter sharers.

GENERAL ORDER IN BRITISH INDIA.—

273. 1. (*a*) The sharers by marriage ; (*b*) along with those sharers by consanguinity who are not excluded.

2. The Residuaries taking the residue if any or taking the whole estate in default of (1)

3. In default of No. (2) the residue devolves upon the sharers by consanguinity in proportion to the original fixed shares.

4. In default of sharers by consanguinity and residuaries, the residue devolves upon the Distant kindred.

In default of all these the residue devolves upon the sharers by marriage and next on the successor by contract if any, the acknowledged kinsman, the universal legatee and finally it escheats to the Crown.

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1 Vide Macnaghten Precedents Inheritance Cases 71 73, 74. Gujjadur Pershad v. Shaikh Abdullah, 11 W. R. 220 (1869).

2 The wife or husband has no claim as against the Distant Kindred, vide Mahomed Noor Bukhsh v. M. Hamedool Haq, 5 W. R. 23 (1866). Koonari v. Dalim 11 Cal. 14 (1884), but as against the State they are entitled to the surplus, vide Mahomed Arshad v. Sajida 3 Cal. 702 (1878), Soobhance v. Bhetun 1 S. D A. (1811) an old case decided in accordance with the fatawa

SIMPLE ILLUSTRATIONS.

The left hand column indicates the surviving heirs to the deceased.

1.	Mother	1/6	
	Son	5/6	as residuary.
2.	Mother	1/6	
	Son's son	5/6	as residuary.
3.	Mother	1/3	
	Father	2/3	as residuary.
4.	True grandmother ...	1/6	
	Son or Son's son	5/6	as residuary.
5.	True Paternal grandmother ...		excluded.
	Father		All.
6.	Full sister	1/2	
	Husband	1/2	
7.	Full sister		excluded.
	Son or son's son ...		All.
8.	Husband	1/2	
	Full brother	1/2	as residuary.
9.	Husband	1/2	
	Father	1/2	as residuary.
10.	Wife	1/8	
	Son or son's son... ...	7/8	as residuary.
11.	Son		All as residuary.
	Son's son		excluded.
12.	Father		All as residuary.
	True grandfather ...		excluded.
13.	Daughter ...	1/2=3/6	increased to 3/4
	Mother ...	1/6=1/6	,, 1/4

14. Daughter ... 1/2=3/6 increased to 3/4
Son's daughter 1/6=1/6 „ 1/4

15. Wife ... 1/8 =5/40
Two daughters 2/3 increased to (4/5 of 7/8 R.)=28/40
Mother ... 1/6 „ (1/5 of 7/8 R.)=7/40

15. Husband ... 1/2=3/6 reduced to 3/7
Full sister ... 1/2=3/6 „ 3/7
Consanguine sister ... 1/6=1/6 „ 1/7

17. Husband ... 1/4=3/12 reduced to 3/13
Mother ... 1/6=2/12 „ 2/13
Two daughter's 2/3=8/12 „ 8/13

18. Widow ... 1/4=3/12 „ 3/13
Two consanguine sisters 2/3=8/12 „ 8/13
Mother ... 1/6=2/12 „ 2/13

19. Husband ... 1/4 ... =9/36 } as sharers.
Mother ... 1/6 ... =6/36 }
Son ... 2/3 of 7/12 R.=14/36 } as residuaries.
Daughter ... 1/3 of 7/12 R.= 7/36 }

20. Husband ... 1/2 =9/18 } as sharer.
Mother ... 1/6 =3/18 }
Brother ... 2/3 of 1/3 R.=2/9=4/18 } as residuaries.
Sister ... 1/3 of 1/3 R.=1/9=2/18 }

21. Husband ... 1/4 as sharer=3/12
Daughter ... 1/2 „ =6/12
Son's daughter 1/6 „ =2/12
Full sister ... as residuary=1/12

22. Husband ... 1/4 as sharer=3/12
Two daughters 2/3 „ =8/12
Full sister ... as residuary =1/12

23. Wife ... 1/4 as sharer=3/12
Mother ... 1/3 as sharer =4/12
Paternal uncle as residuary =5/12

24. Full sister ... 1/2 as sharer.
Son's son of true grand father ... 1/2 as residuary.

25. Husband ... =1/2=3/6 reduced to 3/9
Mother ... =1/6=1/6 „ 1/9
Full sister ... =1/2=3/6 „ 3/9
Consanguine sister ... =1/6=1/6 „ 1/9
Uterine sister =1/6 =1/6 „ 1/9

26. Two true grandmothers ... =1/6 Joint share.
Grandfather ... =5/6 As residuary.
Full sister ... Excluded.
Consanguine sister Excluded.

27. Two wives ... 1/4= joint share 1/8 each.
Two true grandmothers 1/6= „ 1/12 „
Two paternal uncles 7/12= as residuary 7/24 „

28. Wife ... ... 1/8=6/48
True grandmother ... 1/6=8/48
Two daughters (joint share) ... 2/3=32/48
Full brother ... 1/2 of 1/24 R.=1/48
Two full sisters ... 1/2 of 1/24R.=1/48=1/96 each.

29. Father ... 1/6
Mother 1/6
Two daughters ... 2/3=4/6
Son's son, Son's daughter } There is no residue left.

30. Full sister ... 1/2 as sharer=9/18
Uterine brother ... 1/6 „ =3/18
Uterine sister ... 1/6 „ =3/18
Consanguine brother ... 2/3 of 1/6 R.=2/18 } as resi-
Consanguine sister ... 1/3 of 1/6 „ =1/18 } duaries

31. Wife ... 1/8 = 3/24
Son ... ... 2/3 of 7/8 R. =14/24
Daughter ... 1/3 of 7/8 „ = 7/24
Two sisters ... excluded.
Two brothers ... excluded.

32. Two daughters ... 2/3 (joint share) =6/9
Son's son ... 2/3 of 1/3 R. =2/9
Son's daughter ... 1/3 of 1/3 „ =1/9

33. Husband ... 1/4=3/12 reduced to 3/15
Father ... ... 1/6=2/12 „ 2/15
Mother ... ... 1/6=2/12 „ 2/15
Two daughters ... 2/3=8/12 „ 8/15

34. Father ... ... 1/6 as sharer.
Mother ... 1/6 „
Daughter ... 1/2=3/6 „
Son's daughter ... 1/6 „

35. Wife ... ... 1/4 „
Sister ... 1/2=2/4 „
Brother's son ... 1/4 as residuary.

LIST OF THE DISTANT KINDRED.

I. DESCENDANTS OF THE DECEASED.[1]

1. Daughter's children and their descendants.
2. Children of son's daughters and their descendants,

II. ASCENDANTS OF THE DECEASED.[2]

3. False grandfathers h.h.s.
4. False grandmothers h.h.s.

III. DESCENDANTS OF PARENTS.[3]

5. Full brothers' daughters and their decendants.
6. Consanguine brothers' daughters and their descendants.
7. Uterine brothers' children and their descendants.
8. Daughters of full brothers' sons h.l.s. and their descendants.
9. Daughters of consanguine brothers' sons h.l.s. and their descendants.
10. Sisters' (whether full consanguine or uterine) children and their descendants.

IV. DESCENDANTS OF IMMEDIATE GRANDPARENTS (TRUE OR FALSE):—

11. Paternal aunts, Father's full sisters and mother's full brothers and sisters i.e., maternal uncles and aunts.
12. Father's consanguine sister's and mother's consanguine brothers and sisters.
13. Paternal aunt's descendants, maternal uncle's and aunt's descendants.
14. Uterine brothers and sisters of father and mother.
15. Full paternal uncles' daughters, and their descendants.
16. Consanguine paternal uncles' daughters and their descendants.
17. Uterine paternal uncles and their children and their descendants.
18. Full paternal uncles' sons' daughters and their descendants.
19. Consanguine paternal uncles' sons' daughters and their descendants.
20. Descendants of remoter ancestors h.h.s. true or false.

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1 e.g. S D D, S D S = son's daughters' children.
D S S, D S D = grand children of daughters.
D S S S, D S S D = daughters' great grand children.

2 M F. mother's father.
F M F, M M F parents' maternal grandfathers.
M F F, M F M mother's paternal grandparents.

3 The order of succession is as follows.

(a) Full brothers' daughters and full sisters' children or consanguine brothers' daughters and consanguine sisters' children. } with { (b) uterine brothers and sisters' children.
Next in order.
(c) Full brothers' sons' daughters.
Consanguine brothers son's daughters.
(d) Grandchildren of (a) with grand children of (b)

THE DISTANT KINDRED.

274. The Distant kindred are those blood relations who are neither sharers nor residuaries.

There are four classes of "Distant kindred".

I. Descendants.

II. Ascendants.

III. Descendants of parents.

IV. Descendants *h.l.s.* of ascendants *h.h.s.*

The Distant kindred may also conveniently be classified into six groups.

1. Descendants of the deceased.

2. Ascendants of the deceased.

3. Descendants *h.l.s.* of the brothers and sisters of the deceased.

4. Uncles and aunts of the deceased.

5. Descendants *h. l. s.* of uncles and aunts of the deceased.

6. Uncles and aunts of the ascendants of the deceased and their issue.

SUCCESSION OF THE DISTANT KINDRED.—

275. The distant kindred are entitled to succeed in two cases (*a*) when there is no sharer or residuary then they are entitled to take the whole estate, or (*b*) when there is the husband or wife only, they take the residue after deducting the share of the spouse.

The rules.—

(1) The general rule that the nearer degree excludes the more remote is applicable to the distant kindred also.

e.g. the daughter's son or daughter's daughter would exclude all other Distant kindred.

(2) Of persons equal in degree, the descendants of sharer's or residuaries are preferred.

e.g. Son's daughter's daughter or son is preferred to daughter's daughter's daughter or son.

Imam Muhammad's system.[1] —

(3) Among the distant kindred equal in respect of propinquity and the condition of their roots, Imam Muhammad proposes a system to examine the sex of the roots and the number of the branches, that is, when tracing the line of descent a difference of sex first appears in the roots, then assign to the male member a portion double that of the female ancestor, by taking account of the claimants descended from that root, for each male root will be considered to be as many males as the claimants descended from that root, and each female root will similarly be considered as many females as are descended from her. Finally what is allotted to the male roots is collected together and is distributed to their descendants. Similarly what is allotted to the female roots is collected together and is distributed to their descendants.

If however in tracing descent there appears a further difference of sex in the pedigree at a lower stage, then what has been allotted to the male or female roots in the higher stage is again assigned and redistributed in the lower stage, and this operation is continued until the actual claimants are finally reached.

In distribution the general rule double portion to the male members is followed. And this method also involves a complicated scheme of succession by representation.

Imam Abu Yusuf's system.—

Imam Abu Yusuf takes no notice of difference of sex in the roots of intermediate ancestors. According to him the sexes of the actual claimants should be taken into consideration in distributing the estate, and very often adopting this method, the result is exactly the opposite to the distribution effected according to Imam Muhammad's system.[1]

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1 The method of distribution proposed by Imam Abu Yusuf has not been adopted by the Hanafi jurists. The Sirajyah adopts Imam Muhammad's system.

CLASS I—DISTANT KINDRED.—

276. The following is the order of succession among the Distant Kindred of the first class.

(*a*) Daughters' children

(*b*) Sons' daughters' children

(*c*) Daughters' grand children

(*d*) Sons' sons' daughters' children

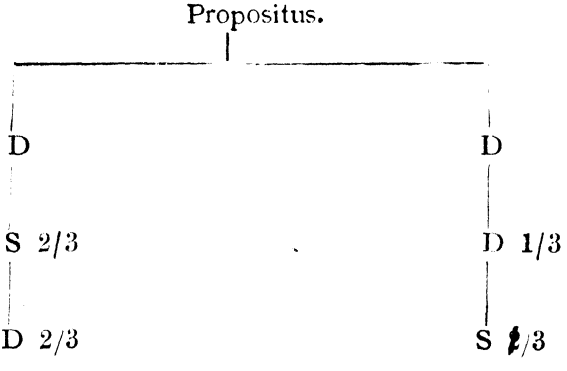
(*e*) Daughters' descendants h. l. s. and sons' daughters' descendants h. l. s. in like order.

Illustrations.

A person dies leaving heirs as shown in the following tables, and only the heirs in the last line have survived the deceased.

D=Daughter.
S=Son.

(i)



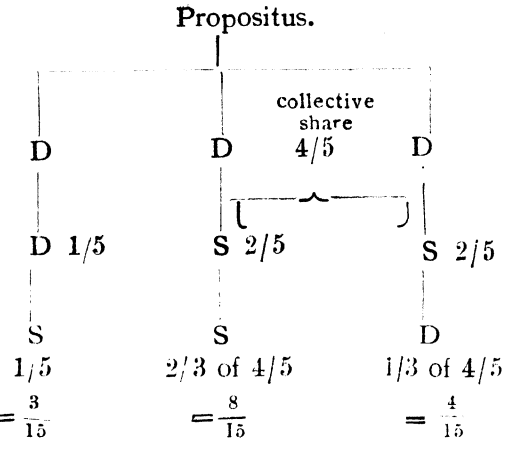
Here the ancestors differ in their sexes in the second line of descent, and there being only one claimant in each line a double share to the male member is assigned at this point and which descends to their claimants respectively.

D S D, daughter's son's daughter 2/3.
D D S, daughter's daughter's son 1/3.

According to Imam Abu Yusuf:—

D S D will take 1/3.
D S ,, 2/3.

(ii)

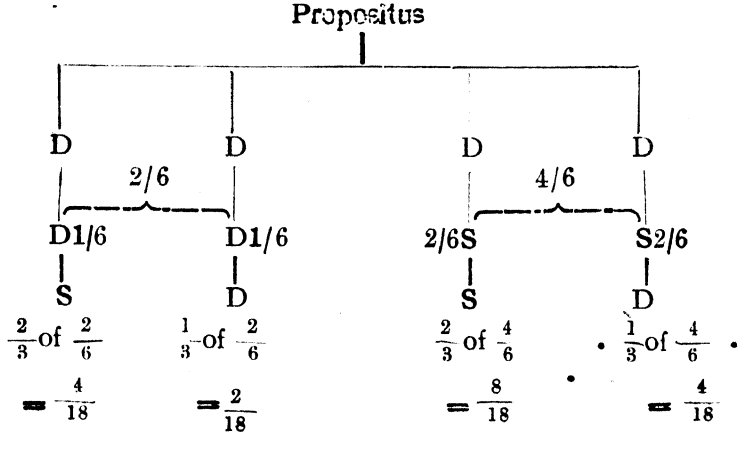


In this case the ancestors differ in their sexes in the second line and there being only one claimant in each line of descent a double share is assigned to the male members at this point and what has been allotted to the male roots (in this case 2/5 each) is collected together (4/5) and is distributed to their descendants, a double share is again assigned to the male members.

D D S=1/5 3/15.
D S S=2/3 of 4/5=8/15.
D S D=1/3 of 4/5=4/15.

According to Imam Abu Yusuf :— D D S=2/5.
D S S=2/5.
D S D=1/5.

(iii)



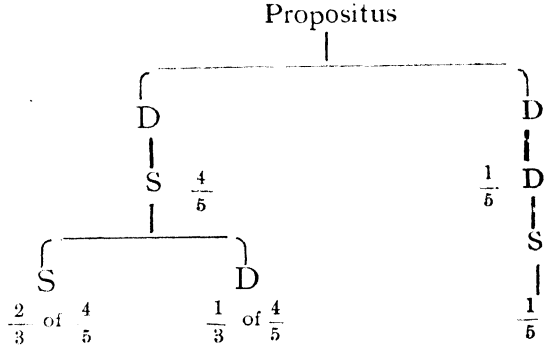
Here also the ancestors differ in their sexes, in the second line and there being only one claimant in each line of descent a double share is assigned to the male members, at this point and what has been allotted to the male roots and female roots *i.e.* 2/6 and 4/6 respectively is distributed to their descendants, a double share is again assigned to their male descendants.

D D S=4/18 D S S=8/18.
D D D=2/18 D S D=4/18.

According to Imam Abu Yusuf :—

D D S=2/6 D S S=2/6.
D D D=1/6 D S D=1/6.

(iv)

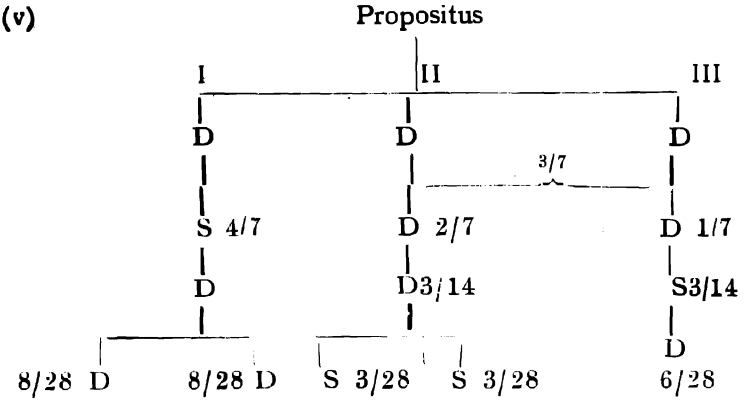


In this case the ancestors differ in their sexes in the second line of descent, and there being two claimants in one line and only one claimant in the other line of descent, the male root in the second line would count as two males, because of the two descendants (irrespective of the fact that one of them is a female member), and thus distribution in the second line would be 4/5 and 1/5 respectively, the final distribution is in the same manner as in the previous examples.

D S S=2/3 of 4/5=8/15.
D S D=1/3 of 4/5=4/15.
D D S=1/5 =3/15.

According to Imam Abu Yusuf :— D S S=2/5.
D S D=1/5.
D D S=2/5.

(v)



Here the ancestors differ in their sexes in the second line and there being two claimants in the first line of descent they would count as two males and the two claimants in the second line of descent would count as two females, the distribution in the second line would be D S=4/7 ; D D=2 7 ; D D 1/7.

Now 4/7 is inherited by the descendants in the first line equally.

D S D D=2/7 each =8/28

D S D D=2/7 each =8/28

The collective share of D D of the second line II and D D of the third line III is $\left(\frac{2}{7} + \frac{1}{7} = \frac{3}{7}\right)$ and this is to be redistributed to their descendants. There is a further difference of sex between the roots in this collective group in the third descent.[1] The above operation is again to be repeated. There are two male claimants in the second line, but they would be counted as two females, and the only one claimant in the third line would be counted as a male.

Thus D D D=1/2 of 3/7=3/14

D D S=1/2 of 3/7=3/14

And the final distribution to their respective descendants would be

D D D S=1/2 of 3/14=3/28.

D D D S=1/2 of 3/14=3/28.

D D S D=3/14=6/28

According to Imam Abu Yusuf :—

D S D D=1/7.

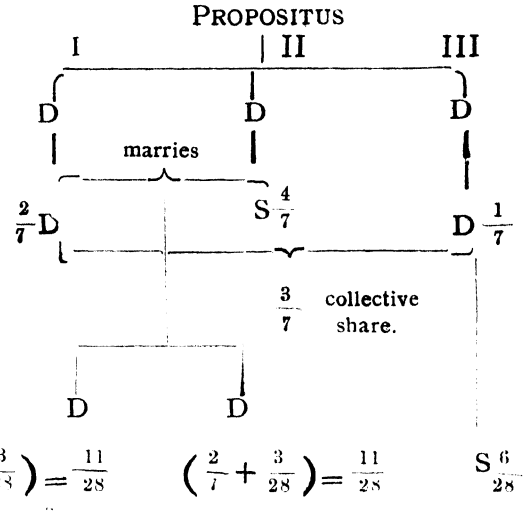
D S D D=1/7.

D D D S=2/7

D D D S=2/7.

D D D D=1/7.

(vi)



Here the ancestors differ in their sexes in the intermediate line of descent, and there are two claimants in the first line I of pedigree and two in the second line II of pedigree, but in the former capacity they count as females and in the latter as male members. Hence, the distribution at this stage is as follows :—

I D D=2/7.
II D S=4/7.
III D D=1/7.

Now the share of D S, 4/7 is inherited by his heirs directly 2/7 each, *i.e.* D S D=2 7; D S D=2 7.

The shares of D D (I) and D D (III) is collected together 2/7+2/7=3 7 and is redistributed to their descendants as follows.

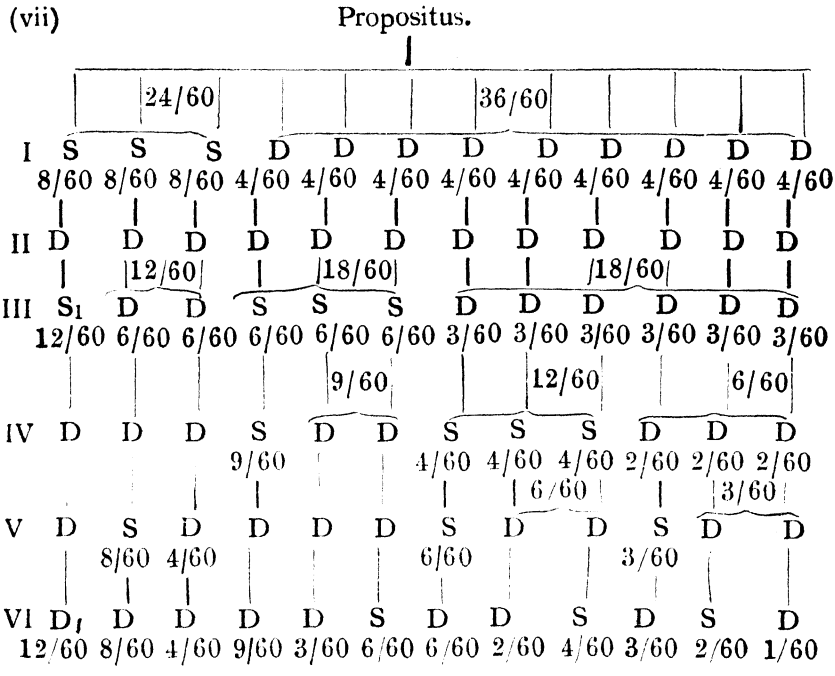
I & II { D D D=1/4 of 3/7=3/28.
I & II { D D D=1/4 of 3/7=3/28.

III { D D S=2/4 of 3 7=6/28.

Thus finally because of the marriage of their parents the daughters in the first and second lines inherit in two different capacities, each taking $\frac{2}{7}+\frac{3}{28}=\frac{11}{28}$ each

D=11/28.
D=11/28.
S= 6/28.

(vii)



This is a famous illustration given in the Sirajiyah, though not worked out in full, I have made an attempt to arrange it so that at a glance the distribution of shares may be seen.

In Column I the distribution to each son would be 2/15 and to each daughter 1/15 or on the basis of 60 as denominator it would be 8/60 and 4/60 respectively, the three sons taking 24/60 and nine daughters 36/60.

In column II there is no difference of sex at all.

In column III the ancestors differ in their sexes.

S_1 takes 1/2 of 24/60=12/60 which descends to D_1 there being no change of sex in this line of descent.

D and D take 1/4 of 24/60=6/60 each.

And as regards the descendants of daughters, the three sons take 18/60 and six daughters, take 18/60.

---

1 In this case 60 is the L. C. D. We could also work it on the basis of 2/15 and 1/15.

In column IV the ancestors differ in their sexes in cases of some of the heirs, and the descendants of sons and daughters are again dealt with separately, the result is as indicated in the chart. In column V the distribution is similarly effected and finally the result is stated in column VI *viz.* 12, 8, 4, 9, 3, 6, 6, 2, 4, 3, 2, 1, respectively.[1]

The general rule of double share to male members applies throughout.

According to Imam Abu Yusuf the distribution would be as follows 2/15 to each son and 1/15 to each daughter.

CLASS II—DISTANT KINDRED.—

277. If there are no Distant Kindred of the first class, the whole estate or the residue would devolve upon the second class of Distant Kindred.

The following general rules determine the order of succession.

(*a*) The nearer in degree exclude the more remote.

e.g. The mother's father excludes the father's mother's father.

(*b*) Among heirs of the same degree those related through sharers or residuaries are preferred, but according to some jurists no such preference is allowed.

(*c*) The heirs on the paternal side take a double share to that of the heirs on the maternal side. That is 2/3 and 1/3 respectively.

(*d*) A male member is entitled to a share double that of a female, and members of the same sex share equally.

e.g. Mother's father's father takes 2/3 and mother's father's mother takes 1/3 of the estate.

(*e*) The special rule of Imam Muhammad as regards the difference of sexes in the ancestors, etc., as stated in the case of first class of Distant Kindred is also applicable.

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1 A. Rumsey (Inheritance, p. 93) has worked out this chart using letters a b. c..,r etc. in a different manner.

CLASS III—DISTANT KINDRED.—

278. If there is no Distant Kindred of the first or second class the estate devolves upon Distant Kindred of the third class. This class consists of the descendants of the brothers and sisters of the deceased.

The following general rules determine the order of succession.

(*a*) The nearer in degree exclude the more remote.

(*b*) Among heirs of the same degree those related through residuaries exclude those related through a Distant Kindred.

e.g The full brother's son's daughter excludes full sister's daughter's son, because full brother's son is a residuary.

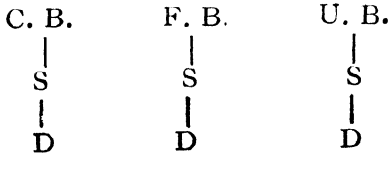
(*c*) According to the Sirajiyah among those equal in degree distribution between the heirs is effected by "considering the branches and the roots" that is by assigning to the roots share with reference to number of the claimants in their own line of descent respectively in accordance with Imam Muhammad's system.

(*d*) In the case of issue of uterine brothers or sisters, difference of sex is not taken into consideration in the intermediate roots nor in the claimants, they all share equally.

Illustrations.

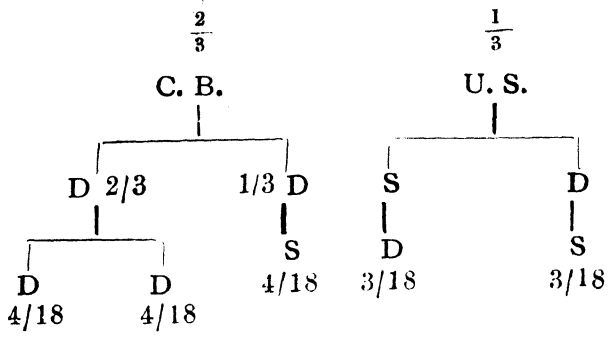
F = Full B = Brother.
C = Consanguine U = Uterine.

(i)



In this example the full-brother's son's daughter F. B. S. D. excludes uterine brother's son's daughter U. B. S. D. according to the rule "among claimants of equal degree those related through a residuary exclude those related through a Distant Kindred." And further as the heirs of full-blood exclude those of half-blood on the father's side, consanguine brother's son's daughter C.B. S. D. is also excluded. Hence F. B. S. D. is alone entitled to the whole property.

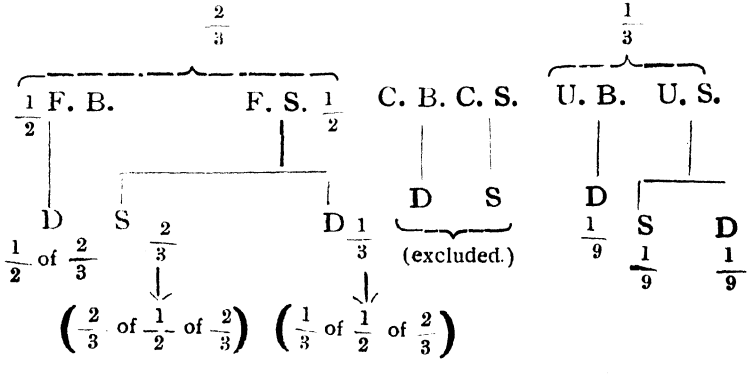
(ii)



The uterine sister has two branches, and 1/3 is the legal share which is taken equally by them 1/2 of 1/3 = 1/6 each. The residue 2/3 devolves upon the consanguine brother, and one of the two intermediate daughters has two branches, while the other has only one branch, hence the distribution is 2/3 and 1/3 respectively which devolves upon their descendants.

C.B. D.S. = 1/3 of 2/3 = 2/9 = 4/18
C.B. D.D. = 1/2 of 2/3 of 2/3 = 2/9 = 4/18
C.B. D.D. = „ „ = 2/9 = 4/18
U.S. S.D. = 1/6 ... = 3/18
U.S. D.S. = 1/6 ... = 3/18

(iii)



In this example all claimants are equally near to the deceased and are related through residuaries or sharers. The legal share of

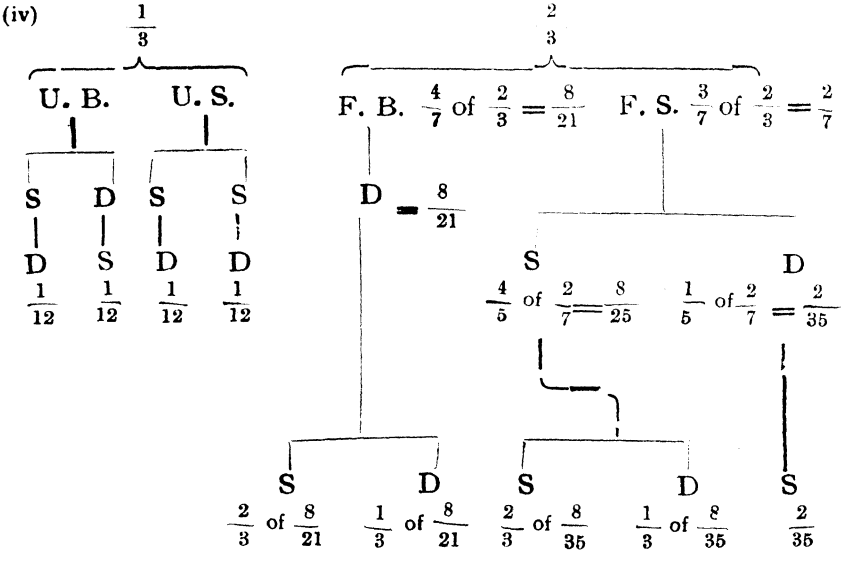
two are more uterine brothers and sisters is 1/3 and is equally allotted to their branch, the residue 2/3 goes to the full-brothers and sisters.

The full-blood heirs exclude the half-blood heirs, therefore, descendants of consanguine brother and sister take nothing.

The full-sister F.S. having two branches takes equally with F.B. who has only one branch, and their shares go to their branches respectively and the rule of double portion to male applies.

F. B. D. = 1/2 of 2/3 = 1/3 = 3/9.
F. S. S. = 2/3 of 1/2 of 2/3 = 2/9.
F. S. D. = 1/3 of 1/2 of 2/3 = 1/9.
U. B. D. 1/3 of 1/3 = 1/9.
U. S. S. „ = 1/9.
U. S. D. „ = 1/9.

(iv)



The legal share of uterine brother and sister = 1/3 and the grand children of the uterine brother and sister will divide 1/3 equally between them each taking 1/4 of 1/3 = 1/12 = 105/1260

U.B.S.D. = 1/12 U.S.S.D. = 1/12.
U.B.D.S. = 1/12 U.S.S.D. = 1/12.

The residue 2/3 devolves upon full brother and sister.

The full brother F.B. has two branches and the full sister F.S. has three branches therefore, the distribution would be F.B. (two males) 4/7, and F.S. (three females) 3/7 which would devolve on their descendants respectively, the rule double portion to the male members would also apply.

F.B. D.S.=2/3 of 4/7 of 2/3 = 16/63=320/1260.

F.B. D.D.=1/3 of 4/7 of 2/3 = 8/63 =160/1260.

As regards the full sister's descendants the roots in the second line also differ and F. S. S. has two branches F. S. D. has only one branch, hence the distribution is F. S. S. (two males) 4/5 and F. S. D. (one female) 1/5 which devolves on their own descendants respectively, the male taking a double portion.

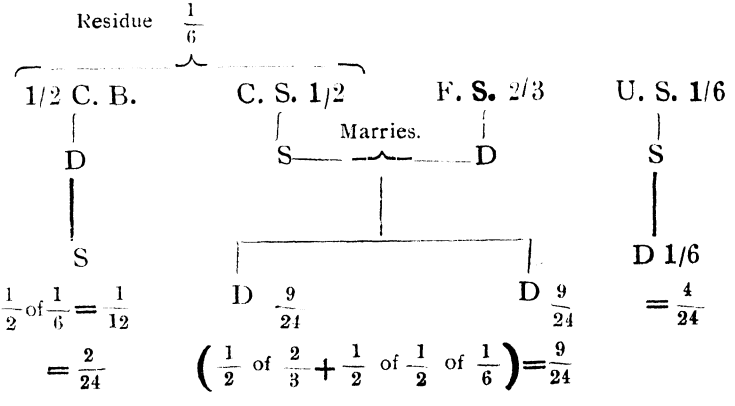
F. S. S. S.=2/3 of 4/5 of 3/7 of 2/3 =16/105=192/1260.

F. S. S. D.=1/3 of 4/5 of 3/7 of 2/3 = 8/105=96/1260.

F. S. D. S.=1/5 of 3 7 of 2/3 = 2/35= 6/105=72/1260.*

Illustrations

(v)



In this example F.S. full sister has two branches and she would therefore take 2/3 (two females' legal shares) which would devolve upon her descendants equally.

The uterine sister would take 1/6 which would devolve upon her only branch D.

The residue 1/6 would devolve upon the residuaries consanguine brother and sister. Here the consanguine brother has only one

*The least common denominator is 1260.

branch and the consanguine sister has two branches, therefore they take equally, and this would descend to their descendants respectively. Because of the marriage of C. S. S. and F. S. D. their descendants inherit in two different capacities, from C. S. and F. S. respectively.

From F. S. and C. S. :—

C. B. D. S. = 1/2 of 1/6 = 1/12 = 2/24.
F. S. D. D. + C. S. S. D. = 1/2 of 2/3 + 1/2 of 1/2 of 1/6 = 9/24.
F. S. D. D. + C. S. S. D. = „ + „ = 9/24.
U. S. S. D. = 1/6 = 4/24.

CLASS IV—DISTANT KINDRED.—

279. If there be no Distant Kindred of class I, II, or III the estate would devolve upon the Distant Kindred of the fourth class.

The following general rules determine the order of succession,

(*a*) The paternal relations together take a double share to that taken by the maternal relations. That is 2/3 is taken by the paternal side and 1/3 by the maternal side.

(*b*) Those of the full-blood exclude those of the half-blood by the father or mother and those of the half-blood on the father's side exclude those of the half-blood by the mother.

(*c*) If the claimants are equal in some respects, *i.e.* in degree, and relationship, then the issue of residuaries are preferred.

(*d*) Among equal claimants distribution is effected by considering the sex of the roots and the number of the branches in accordance with Imam Muhammad's scheme of distribution.

(*e*) As regards ascendants of uncles and aunts of the deceased and their descendants those related through a nearer ancestor exclude those related through a remote ancestor. And among those related through the same ancestor the nearer exclude the more remote.

(*f*) If the claimants are equal in degree and relationship the issue of a residuary is preferred.

(*g*) The general rule that a male member takes a share double to that of a female is also applicable.

TABLE OF UNCLES AND AUNTS.

Paternal Side 2/3.	Share.	Maternal Side 1/3.	Share.
1. Father's full sister (Paternal aunt).	2/3	{ Mother's full brother	2/3 of 1/3
		{ „ „ sister. (maternal uncle and aunt).	1/3 of 1/3
2. Father's consanguine sister.	2/3	{ Mother's consanguine brother.	2/3 of 1/3
		{ Mother's consanguine sister.	1/3 of 1/3
3. { Father's uterine brother.	2/3 of 2/3	{ Mother's uterine brother.	2/3 of 1/3
{ Father's uterine sister.	1/3 of 2/3	{ Mother's uterine sister.	1/3 of 1/3
4. Father's full brother's daughter ...		{ Mother's full brother's children.	
5 Father's full sister's children ...		{ „ „ sister's children.	
6. Father's consanguine brother's daughter		{ Mother's consanguine brother's and	
7. Father's consanguine sister's children ..		{ sister's children.	
8. { Father's uterine brother's children ...		{ Mother's uterine brother's.	
{ „ „ sister's childre n ...		{ and sister's children.	

The claimants are stated in order of priority 1—8. The bracket { denotes that these heirs have inter se no priority. It should be noted that no heir on the paternal side excludes any claimant on the maternal side who is within the same generation.

Father's full sister	= Paternal aunt.
Father's half-sister by mother	= Father's uterine sister.
Father's half-brother by mother	= Father's uterine brother.
Father's half-brother by father	= Father's consanguine brother.
Father's half-sister by father	= Father's consanguine sister.
Mother's full brother	= Maternal uncle.
Mother's full sister	= Maternal aunt.

Mother's half-sister-by mother	= Mother's uterine sister.
Mother's half-brother-by mother	= Mother's uterine brother.
Mother's half-brother-by father	= Mother's consanguine brother.
Mother's half-sister-by-father	= Mother's consanguine sister,

As regards the descendants of the brothers and sisters of the grandparents, the allotment of paternal side 2/3 and maternal side 1/3 is further subdivided, and in case of each higher generation it would again be subdivided. The descendants take what is allotted to their own ancestors.

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.

Illustrations.

Uncles and aunts.—

The heirs in the left hand column are the only surviving claimants.

1. Father's full-sister = 2/3
   Mother's half-sister-by-mother = 1/3

2. Father's full sister = 2/3
   Father's uterine sister (excluded by father's full sister).
   Mother's full brother = 2/9
   Mother's full sister = 1/9

3. Father's half-sister-by father = 2/3
   Mother's full sister = 1/3

4. 2/3 { Father's half-brother by mother = 2/3 of 2/3 = 4/9
   Father's half-sister by mother = 1/3 of 2/3 = 2/9
   1/3 { Mother's full brother = 2/3 of 1/3 = 2/9
   Mother's full sister = 1/3 of 1/3 = 1/9

5. 2/3 { Father's half-sister-by-mother = 2/3
   1/3 { Mother's half-brother-by father = 2/3 of 1/3 = 2/9
   Mother's half-sister-by father = 1/3 of 1/3 = 1/9

6. Father's full sister's son = 2/3

   Mother's half-sister's daughter = 1 3

7. Father's full brother's daughter = 2/3

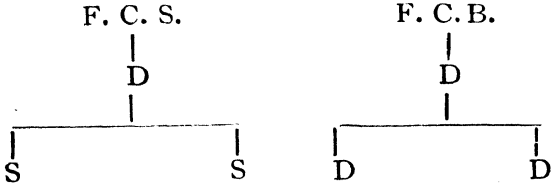
   Mother's half-sister's daughter = 1/3

Issue of a residuary.—

8. F. C. S. = Father's consanguine sister

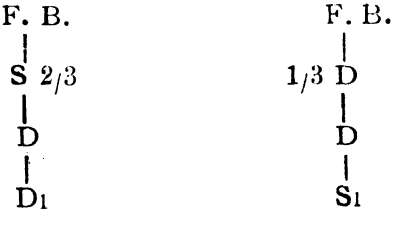
   F. C. B. = Father's consanguine brother

   D = Daughter S = Son.



In this example F. C. B. is a residuary but F. C. S. is not a residuary, since the descendants of a residuary are preferred they alone take the whole estate.

9. F. B. = Father's full brother.



Here in the first line the ancestors differ in their sexes and S takes 2/3, D takes 1/3 which devolves upon their descendants respectively.

D1 = 2/3.

S1 = 1/3.

SIMPLE ILLUSTRATIONS.

DISTRIBUTION ACCORDING TO IMAM MUHAMMAD.—

1. Daughter's son 2/3
   Daughter's daughter ... 1/3
2. Two sons of daughter ... 4/5 each 2/5
   Daughter's daughter ... 1/5
3. Daughter's son's daughter ... 1/2=3/6
   Daughter's daughter's son ... 1/3=2/6
   Daughter's daughter's daughter ... 1/6=1/6
4. Daughter's daughter's son ... 3/15
   Daughter's son's son ... 8/15
   Daughter's son's daughter ... 4/15
5. 2/3 { Uterine brother's daughter ... 1/9 each
   Uterine sister's son ... 1/9 „
   Uterine sister's daughter ... 1/9 „
   2/3 { Full brother's daughter ... 1/2 of 2/3 = 1/3=3/9
   Full sister's son ... 2/3 of 1/2 of 2/3=2/9
   Full sister's daughters ... 1/3 of 1/2 of 2/3=1/9
6. Uterine brother's daughter ... 1/6
   Uterine sister's son ... 1/6
   Full sister's son ... ... 1/2=3/6
   Consanguine brother's daughter 1/6
7. 2/3 { Full paternal aunt ... 2/3=6/9.
   Cansanguine paternal aunt ... excluded.
   1/3 { Full maternal uncle ... 2/3 of 1/3=2/9
   Full maternal aunt ... 1/3 of 1/3=1/9
8. Consanguine paternal aunt ... 2/3
   Full maternal aunt... ... 1/3
9. 2/3 { Uterine paternal uncle ... 2/3 of 2/3=4/9
   Uterine paternal aunt ... 1/3 of 2/3=2/9
   1/3 { Full maternal uncle ... 2/3 of 1/3=2/9
   Full maternal aunt ... 1/3 of 1/3=1/9
10. 1/3 { Uterine brother's sister's daughter each 1/12=3/36
   Uterine brother's daughter's son ... „ 1/12=3/36
   Uterine sister's sister's daughter ... „ 1/12=3/36
   Uterine sister's sister's daughter ... „ 1/12=3/36
   2/3 { Full brother's daughter's son... 2/3 of 2/3=4/9=16/36
   Full brother's daughter's daughter ... 1/3 of 2/3=2/9=8/36

§ 8. THE SHIA LAW OF INHERITANCE

THE HEIRS IN GENERAL.—

280. There are three classes of heirs under the Shia Law.

(1) The heirs by marriage.

(2) The heirs by *nasab*, consanguinity

(3) Heirs by *wala* special cause.

The first class excludes the second, and the second excludes the third.

(*1*) *The heirs by marriage.*—

The husband and the wife.

(*2*) *The heirs by nasab.*—

The heirs be *nasab* are subdivided into three classes.

I. (i) Parents.
(ii) Children, issue, h. l. s.

II. (i) Grandparents h.h.s. (true and false).
(ii) Brothers and sisters or their descendants h.l.s.

III. Brothers and sisters of ancestors, that is, paternal and maternal uncles and aunts of the deceased and of his parents and grandparents h. h. s. and their descendants h. l. s.

(*3*) *Heirs by wala.*—

Under the Shia Law there are three kinds of heirs by *wala*.

(i) Heirs by *wala* of emancipation.

(ii) Heirs by *wala* of patronage

(iii) Heirs by *wala* of *Imamat*.

The first two are obsolete in British India since the passing of the Slavery Act V of 1843.

In default of heirs by marriage and *nasab* the estate is vested in the *Imam*, the spiritual head of the community and according to some it is to be utilised for the benefit of the poor, which can now be done by Imam's representatives the *mujtahids*, or by the community itself. In British India it seems that the law of escheat would prevail as against the claims of the community.[1]

1 Vide Sec. 238 page 188.
Khursaide Begum v. Secretrary of State 94. I. C. 433 (Pat. 1926)

THE SHARERS.—

281. Under the Shia Law there are nine original sharers *zufarz* of these the following three are always sharers, husband, wife, and mother and the other six are sometimes heirs by relation, *"Zu-qarabat."*

The descendants of sharers are also sharers.

Cause of inheritance	Male sharers	Female sharers
Sabab of marriage	1 Husband	4 Wife
Nasab, consanguinity...	2 Father 3 Half-brother by mother (uterine brother)	5 Mother 6 Daughter 7 Full sister 8 Half-sister by father (consanguine sister) 9 Half-sister by mother (uterine sister)

Of the nine sharers the husband and wife are heirs by affinity, and the mother, father, daughter are the heirs of the first class, and full sister, consanguine sister, uterine brother or sister belong to the second class. There are no sharers in the third class of heirs at all.

THE TABLE OF SHARERS.

Sharers.	Share.	Conditions under which the share is inherited.	Whether excluded or converted into Residuaries.
1. Husband ...	1/4	When there is a descendant male or female h.l.s.	Not excluded.
	1/2	When there is no issue.	
2. Wife ...	1/8	When there is a descendant male or female h.l.s.	Not excluded.
	1/4	When there is no issue.	
3. Father ...	1/6	When there is a descendant male or female h.l.s.	Not excluded.
	R.		When there is no issue.

TABLE OF SHARERS.—*concluded.*

Sharers.	Share.	Conditions under which the share is inherited.	Whether exlcuded or converted into Residuaries.
4. Mother ...	1/6	When there is a descendant male or female h.l.s.	Not excluded.
		When there are two brothers, or one brother and two sisters, or four sisters (full or consanguine) co-exisiing with the father.	
	1/3	When there is no issue nor two or more brethren.	
5. Daughter...	1/2	If one. When there is no son.	Not excluded.
	2/3	If two or more. When there is no son.	
	R.		When there is a son (one or more).
6. Full sister...	1/2	If one. When there is no parent or descendant or full brother or father's father.	Excluded by parent or descendant or father's father.
	2/3	If two or more. When there is no parent or descendant or full brother or father's father.	
	R.		When there is a full brother.
7. Consanguine sister.	1/2	If one. When there is no parent, or descendant, or full brother, or sister or consanguine brother or father's father.	Excluded by parent, or descendant etc.
	2/3	If two or more. When there is no parent, or descendant, or full brother, or sister or consanguine brother or father's father.	
	R.		When there is a consanguine brother.
8 & 9 Uterine brother or sister.	1/6	If one. When there is no parent or descendant and no maternal grandparent.	Excluded by parent or descendant.
	1/3	if two or more. When there is no parent or descendant and no maternal grandparent.	
	R.		When there are maternal grandparents 1/3 is divided between them and the grand-parents.

EXCLUSION OF SHARERS.—

282. The general principle of exclusion is based on well-known general rules :—

(i) Proximity of the ancestor.

(ii) Proximity of the claimants,

(iii) The strength of consanguinity.

TABLE OF EXCLUSION.

Sharers	Whether excluded
1 Husband ...	Nos. 1—5 not excluded at all.
2 Wife ...	
3 Father ...	
4 Mother ...	
5 Daughter ...	
6 Full sister ...	Excluded by parents or issue.
7 Consanguine sister	Ditto and also by full sister or full brother.
8 Uterine brother or 9 Uterine sister ...	Excluded by parents or issue.

THE HEIRS BY RELATION.—

283. The heirs by relation, *Zu-qarabat*, are of two classes:—

(*a*) The following sharers are under certain circumstances also heirs by relation (1) Father, (2) Daughter, (3) Full sisters, (4) consanguine sisters, (5 & 6) and uterine brothers and sisters.

(*b*) The real heirs by relation, *zu-qarabat*, consist of the following consanguine relations.

(*a*) The sons and the children of sons h. l. s. and of daughters.

(*b*) The grand-parents h. h. s.

(*c*) Full brothers.

(*d*) Consanguine brothers.

(*e*) Full or consanguine brother's issue h. l. s.

(*f*) Brothers and sisters of the ancestors h. h. s. and their issue h. l. s.

The descendants h. l. s. of residuaries are also residuaries.

JURISTIC CLASSIFICATION OF RESIDUARIES.—

284. The relations *zu-qarabat* may be classified into two groups.

I. Directly related to the deceased.

(*a*) Original residuaries.

II. Representatively related to the deceased.

(*b*) Representative sharers.

(*c*) Representative residuaries.

(A) The following are original residuaries directly related to the deceased.

(1) The father when there is no descendant,

(2) The daughter when there is no son.

(3) The sons in their own rights.

(B) The following are representative sharers, that is, those related through a sharer, and thereby inheriting the fixed allotted share in a representative character under certain circumstances.

(*a*) Maternal grand-parents.

(*b*) Uterine brothers and sisters.

(*c*) Maternal Uncles and aunts and their descendants.

(*d*) The daughter's children.

(*e*) The decendants of full or consanguine sisters.

(*f*) The descendants of uterine brother's and sisters.

(C) The following are representative residuaries, that is, relations related through an original residuary, and thereby inheriting the portion of the residue of the original residuary.

(*a*) Descendants of sons.

(*b*) Descendants of daughters co-existing with son's son of the same grade.

(*c*) Paternal grand-parents and their descendants.

(*d*) Full brothers or consanguine brothers and their descendants.

(*e*) Full sisters or consanguine sisters and their descendants.

(*f*) Brothers and sisters of the father and of paternal ancestors and their descendants.

THE TABLE OF RESIDUARIES.

Heirs.	Kind of Residuaries.	Under what circumstances.
1. Father ...	Original residuary ...	When there is no issue.
2. Daughter ...	,, ,, ...	When there are sons
3. Sons ...	,, ,, ...	In their own right.
4. Maternal grandparents.	Relations of the mother. Representative sharers.	In default of issue take 1/3 of the estate.
5. Uterine brothers and sisters.		When they co-exist with maternal grandparents, they take 1/3 with the grandparents,
6. Brothers and sisters of the Mother and their descendants.		They are consanguine heirs of the third class, and take 1/3 as representing mother.
7. The descendants of daughters.	Representative sharers ...	In default of the son's descendants of the same degree the issue of a single daughter takes 1/2 and those of two or more take 2/3.
8. The descen- & dants of full 9. sisters or Consanguine sisters.	,,	In default of dercendants of brothers of the same degree and in default of paternal grandparents the issue of one sister takes 1/2 and if two or more 2/3.
10 The descen- & dants of 11. uterine brothers and sisters.	,, ...	In default of maternal grandparents the issue of an uterine brother or sister take 1/6 and those of two or more take 1/3 and with maternal grandparents they divide the mother's share 1/3.
12. Descendants of sons h.l.s.	Representative residuaries ...	They are always residuaries.
13. Descendants of daughters h.l.s.	,, ,, ...	When with son's descendants of the same degree.

THE TABLE OF RESIDUARIES.—*concluded.*

Heirs.	Kind of Residuaries.	Under what circumstances.
14. Paternal grandparents.	Relations through the father. Representative residuaries.	When there is no father and they divide the residue with full brothers or consanguine brothers.
15. Full brothers or consanguine brothers their descendants.		When there is no father they divide the residue with paternal grandparents.
16. Full sisters or consanguine sister or their descendants.		When co-existing with paternal grandparents or with brother (f or c) or their descendants of the same degree.
17. Brothers and sisters of the father or of paternal ancestors and their descendants.		These are residuaries in the right of the father.

DISTRIBUTION BETWEEN SHARERS AND RESIDUARIES.—

285. The sharers at first take their respective shares and if are also residuaries then the residue goes to them, but if the residuaries are alone then they are entitled to the whole property.

The representative sharers and representative residuaries take the portion of original sharers or residuaries through whom they are related to the declared. Similarly their descendants the remoter representatives take *per stirpes* in like order.

The descendants of sharers succeed as sharers, and of residuaries succeed as residuaries.

Illustrations.

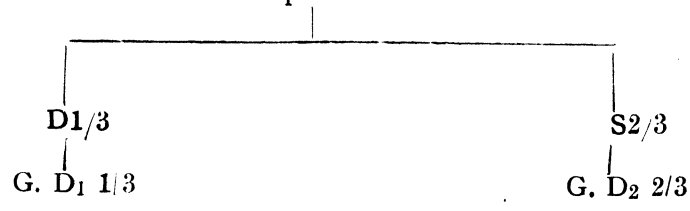
(i) Children h. l. s. of a son take the portion of their father.

(ii) Children of the daughter take the share of that daughter.

(iii) The grandchildren of a son or daughter take the portion of the son or daughter 'per stirpes'

Distribution per stirpes.—

(i)



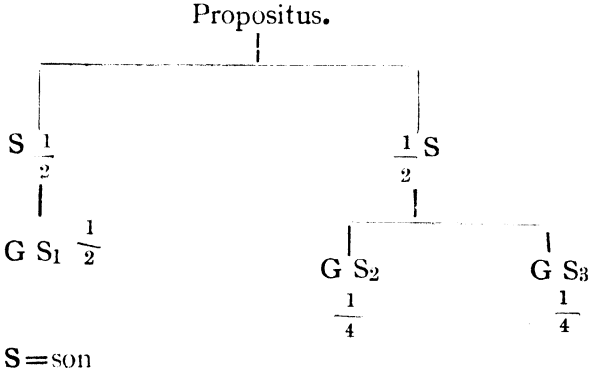
D=Daughter G. D.=Granddaughter.
S =Son

A Shia Muslim dies leaving two granddaughters G D_1 and G D_2 from a pre-deceased daughter and a son.

G. D_1 inherits her mother's share = 1/3
G. D_2 „ „ father's share = 2/3

Under the Hanafi Law G. D_2 is a sharer and would take the whole property.

(ii)



S=son
G. S.=Grandson

A Shia Muslim dies leaving G. S_1 a grandson from one son and G. S_2, G. S_3 grandsons from another son. Their respective fathers inherit one-half each which descends to their issue.

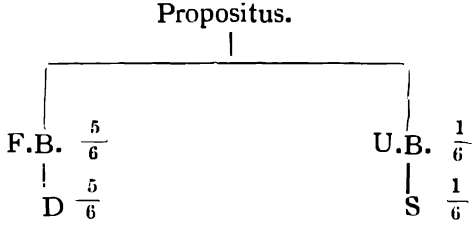
that is G. S_1 lakes 1/2
G. S_2 „ 1/4 } 1/2
G. S_3 „ 1/4 }

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1 Under the Hanafi Law the division is 'per capita' i.e. per claimants } G. S_1 =1/3, G. S_2 =1/3, G. S_3 =1/3

The descendants of brethern paternal or maternal take the portion of the brother's or sister's ***per stirpes.***

(iii)



D = Daughter S = Son

F. B. = Full brother, a residuary[1]

U B. = Uterine brother, a sharer

F. B. D. = 5/6 as a residuary

U. B. S. = 1/6 as a sharer

(iv)

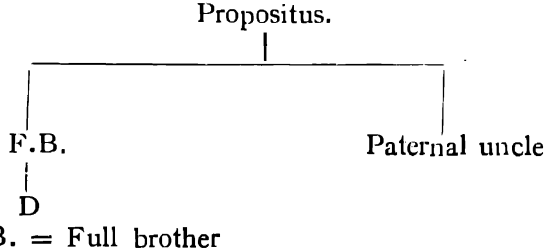


F. F. = Father's father

D. S. = Daughter's son

Under the Shia Law D. S. takes the whole property being an heir of the first class.[2]

(v)



F. B. = Full brother

Under the Shia Law F.B.D. being an heir of the second class takes the whole property[3]

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1 Under the Hanafi Law, F.B.D. and U.B.S. are distant kindred of the third class and F. B. D. will take 5/6 U. B. S. „ 1/6

2 Under the Hanafi Law, F. F. would take the whole property D. S. being a distant kindred.

3 Under the Hanafi Law, the full paternal uncle would take the whole property excluding F. B. D. a distant kinded.

§ 9. DISTRIBUTION AMONG HEIRS UNDER SHIA LAW.

HEIRS BY MARRIAGE.—

286. The husband or the wife is never excluded[1] but inherits along with other heirs. Their fixed shares are not liable to be reduced.[1]

CHILDLESS WIFE.—

287. If the widow has no child or the child was born and died in the life-time of her husband, she is entitled to take one-fourth share in the personal estate including the value of household effects, buildings and trees, but she cannot inherit out of the land, immoveable property, belonging to her deceased husband.[2]

MUTA WIFE.—

288. A temporary marriage in *muta* form does not entitle either party to inherit *inter se*, unless they had expressly agreed to this effect, at the time of *muta* marriage.[3]

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1 In the first instance it is not liable to be increased by application of the doctrine of return, but if there are no heirs to take the residue the husband can take the surplus, but the wife is in no case entitled to the surplus under the Shia Law. The Imam now the State is preferred to her. Ameer Ali however thinks that in default of heirs she should get the surplus.

2 Ballie II. 295.

Sahibzadee Begum v. Himmnt 14 W. R. 125 (1870). Umdutoonissa v. Aslo 20 W. R. 297 (1873). Umardaz Ali v. Wilayat Ali 19 All. 169 (1896). Mir Ali Hussain v. Sajuda Begam 21 Mad 27 (1897). Aga Mahomed v. Koulsom Beebee 25 Cal. 9 (1897). Parbati v. Muzaffar Ali 34. All. 289 (1921). Shaukat Ali v. Anwar-ul-Haq 55 I.C. 745 (Lah. 1920) Durga Das v. M. Nawab Ali 48 All. 557 (1926). (The widow takes a fourth share in the proceeds of the sale of the buildings).

3 Under the Shia Law there are two kinds of marriages (1) permanent (2) temporary. The "muta" marriage is for a fixed definite period of time, it is dissolved on the eflux of the term, but may be re-newed by mutual consent. There is a dower also. The number of muta wives is unlimited. In case of muta marriage contracted for a long period say 99 years, it can be dissolved according to some jurists by making a gift of the unexpired portion of the term to the wife. The consent of the wife is not essential for acceptance of the gift of the term, the dower however would become due immediately. According to some jurists there is no divorce except by the Zihar mode in case of muta form of marriage. As to

CLASS I—HEIRS.—

289. The first class of heirs as stated consists of :—

(*a*) Parents (father and mother)

(*b*) Descendants h.l.s.

These heirs are entitled to inherit along with the husband or wife. The following rules govern the order of distribution

(i) The nearer excludes the more remote.

(ii) Sons if alone are residuaries and are entitled to take the whole estate.

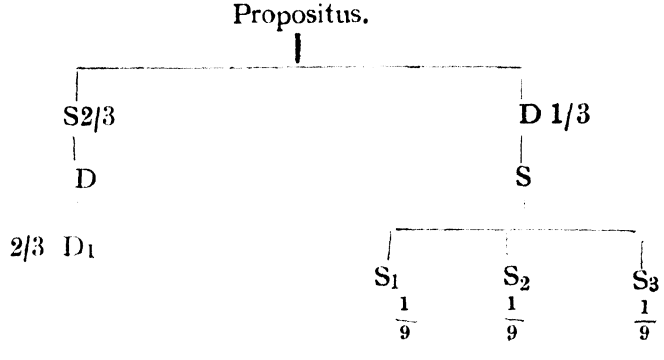
The daughters if alone are sharers, and when co-existing with son's, they become residuaries, and the rule of double share to male members would apply.

(iii) In default of sons and daughters their descendants of equally near degree take *per stirpes* that is the portion of the person through whom they are descended. In this sense the doctrine of representation is recognised by the Shia Law.[1]

Illustrations.

S=son D=daughter

(i)



muta marriage vide Luddan Sahiba v. Miza Kamar Kadr. 8 Cal. 736 (1882); Mohomed Abid Ali Kumar Kadar v. Luddim Sahibe 14 Cal. 276, (1886) where the husband gave away the unexpired term and then sued in a Civil Court for a declaration that the relation of husband and wife had terminated and that she was not entitled to maintenance.

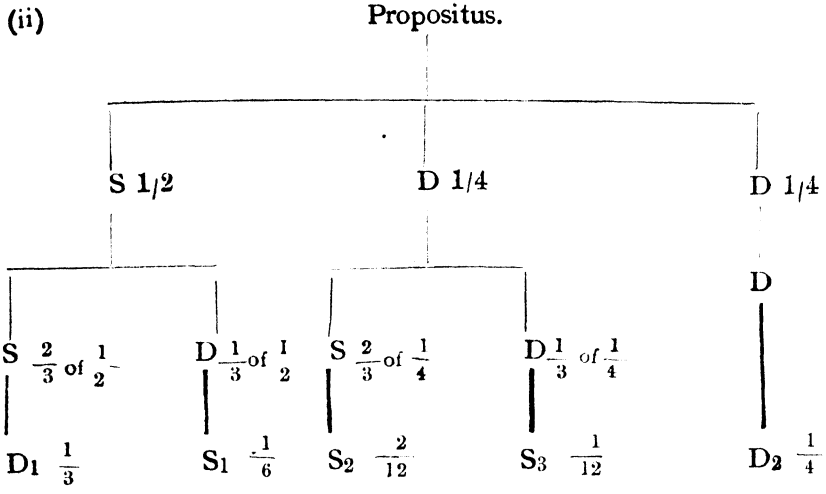
1 It is equally applicable in the ascending line. Vide Sec. 290.

In the first line S and D take 2/3 and 1/3 respectively which devolves upon their own descendants.

D_1 takes 2/3

S_1 , S_2 , S_3 ,= 1/9 each (all together 1/3)

(ii)

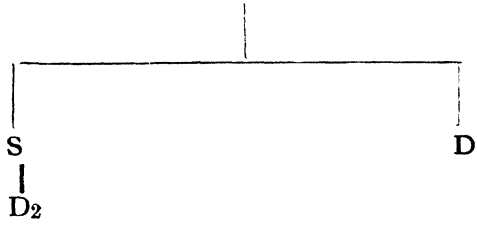


In the first line the distribution is 1/2 and 1/4 each to one son and two daughters respectively, which devolves upon their respective descendants subject to the rule of double share to male members. The distribution is thus effected by applying the rule of double share to male members with that of succession by representation.

D_1 takes 1/3, =4/12 S_2 takes 2/12 D_2 takes 1/4=3/12

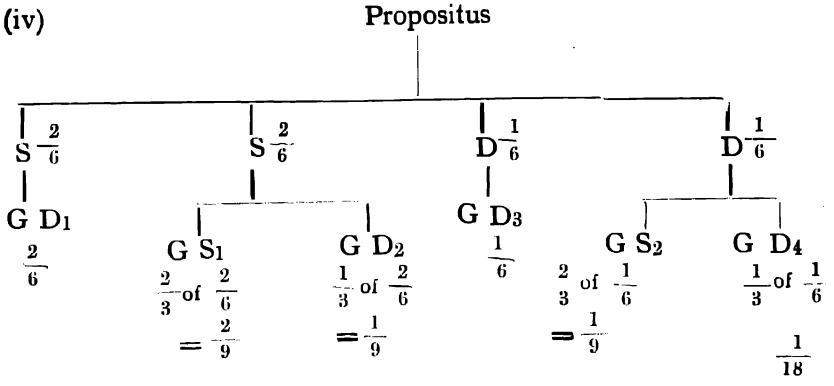
S_1 „ 1/6, =2/12 S_3 „ 1/12

(iii)



In this example the daughter D_1 is the nearest living descendant and therefore under the Shia Law takes the entire property.

(iv)



The respective issue of sons and daughters inherit their shares as indicated in the chart, and the rule of double share to the male members and succession by representation applies.

Thus the distribution is as follows:—

G D_1 = 2/6 = 6/18
G S_1 = 2/9 = 4/18
G D_2 = 1/9 = 2/18
G D_3 = 1/6 = 3/18
G S_2 = 1/9 = 2/18
G D_4 = 1/18 = 1/18

Parents.—

(i) If the father and mother co exist, the mother's share is 1/6 or 1/3 as the case may be (*vide* the Table of Sharers), and the father takes the residue. But if there is the mother only and no father, she takes 1/3 and if there is the father only and no mother, he takes the residue.

(ii) In case of parents co-existing with the male descendants of the deceased the father takes 1/6 and the mother takes 1/6 as her share, but if co-existing with the daughters or their issue, they all inherit as sharers.[1]

CLASS II—HEIRS—

290. The second class of heirs consists of :—

(*a*) Grandparents h.h.s. related through the father or mother.

(*b*) Brothers and sisters full or half and their descendants h.l.s.

1 This is subject to general rule about increase or return of surplus.

Thus there will be three alternative modes of succession.

(*a*) Grandparents alone.

(*b*) Grandparents with brothers and sisters or their descendants.

(*c*) Brothers and sisters or their descendants alone.

General Rules of Succession of Grandparents.—

(i) The "nearer in degree excludes the more remote."
e.g. *Mother's mother excludes father's father's father.*

(ii) The grandparents on the mother's side are representative sharers on behalf of the mother, and take 1/3, and the grandparents on the father's side are representative residuaries and take the residue, and the general rule of double share to the male members applies. The residue may comprise the whole estate.

(iii) The remote grandparents succeed in default of near grandparents and take by representation analogous to that of ***per stirpes*** as applicable in the case of descendants. That is they take the portion of the immediately related grandparent, and in case of several claimants through the same grandparent, they divide the portion of the immediate grandparents.

(iv) The rule of double share to a male applies to remote grandparents, if no female intervenes between them and the deceased, and if a female intervenes, they divide equally without distinction of sex.

(v) In case of grandparents of the same sex the division is made equally *per capita.*

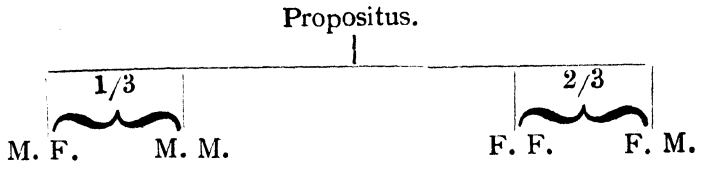
Illustrations.

***Grandparents** alone* :—

(i) Father's father = 2/3.
Mother's mother = 1/3.

(ii) Maternal grandmother = 1/3.
Paternal grandmother = 2/3.

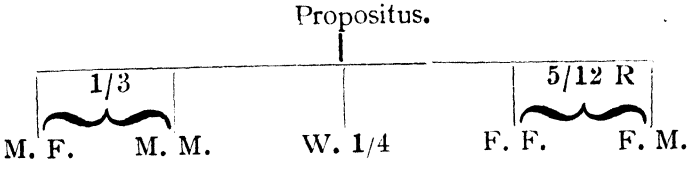
(iii)



2/3. { F. F. Father's father ... 2/3 of 2/3=4/9=8/18.
F. M. Father's mother ... 1/3 of 2/3=2/9=4/18.

2/3. { M. F. Mother's father ... 1/2 of 1/3=1/6=3/18.
M. M. Mother's mother... 1/2 of 1/3=1/6=3/18.

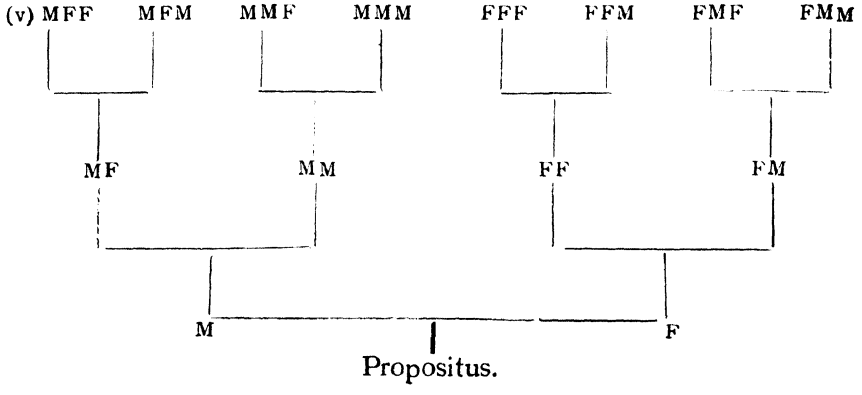
(iv)



After assigning to the wife 1/4 and to mother's relations 1/3, the residue 5/12 goes to the father's relations. The distribution is thus as follows :—

	W. takes	... 1/4 ...	= 9/36
1/3	M. F. Mother's father	... 1/2 of 1/3 = 1/6	= 6/36
	M. M. Mother's mother	... 1/2 of 1/3 = 1/6	= 6/36
Residue 5/12	F. F. Father's father	... 2/3 of 5/12=10/36	=10/36
	F. M. Father's mother	... 1/3 of 5/12= 5/36	= 5/36

(v)



M=Mother F=Father.

M F F, F M F, M M F, and M M M are sharers related through the mother, and therefore take 1/3, and divide it equally

1/4 of 1/3=1/12 each. The residue 2/3 is taken by F F F, F F M, F M F and F M M which is divided in the first instance in the proportion of 2 : 1, between father's father's relations and father's mother's relations, *i.e.* 2/3 of 2/3=4/9 and 1/3 of 2/3=2/9 respectively. the collective share 4/9 is again assigned subject to the general rule of double share to the male members. The collective share of 2/9 would be equally divided as a grandmother intervenes in that line.

Thus the distribution is as follows :—

2/3 { 4/9 { F F F ... 2/3 of 4/9 =8/27 = 32/108.
F F M ... 1/3 of 4/9 =4/27 = 16/108.
2/9 { F M F ... 1/2 of 2/9 = 1/9 = 12/108.
F M M... 1/2 of 2/9 = 1/9 = 12/108.

1/3 { M F F ... 1/4 of 1/3 = 1/12= 9/108.
F M F ... „ „ = „ = 9/108.
M M F ... „ „ = „ = 9/108.
M M M... „ „ = „ = 9/108.

Grandparents with brothers and sisters.—

When grandparents co-exist with brothers and sisters the paternal grandmother and grandfather take as would a full-brother and sister, and the maternal grandparents as uterine brother or sister.

The mother's parents and half brethren by mother, if any divide their collective share of 1/3 equally *per capita.*

The father's parents and full or half-brothers by father divide the residue, the father's portion *per capita,* subject to the rule of double share to the male members. All general fundamental rules are also applicable.

Illustrations.

(i) Paternal-grandfather ... 2/3 (as full-brother)
Full-sister ... 1/3

(ii) 1/3 { Uterine brother ... 1/6
Maternal grandmother ... 1/6 (as uterine sister)

Two full-sisters ... 2/3

(iii) 1/3 { Maternal grand-mother ... 1/9 (as uterine sister).
Uterine brother ... 1/9
Uterine sister ... 1/9

1/3 2/3 { Paternal grandfather ... 1/3 (as consanguine brother
Paternal grandmother ... 1/6 „ „ sister
Consanguine sister ... 1/6

(iv) 1/3 { Mother's father ... 1/2 of 1/3=1/6=3/18
Mother's mother ... 1/2 of 1/3=1/6=3/18

2/3 { Father's father ... 2/6 of 2/3=4/18 (as full brother)
Father's mother ... 1/6 of 2/3=2/18 (as full sister)
Full brother ... 2/6 of 2/3=4/18
Full sister ... 1/6 of 2/3=2/18

(v) Paternal grandfather ... 1/2 (as full-brother)
Full-brother's son ... 1/2 by representation his father's share.

Brothers and sisters alone.—

The succession of full or half-brothers and sisters is also effected under the general fundamental rules, as regards propinquity, nearness of relationship, and strength of consanguinity etc., *e.g.* the full-blood excludes half-blood by the father, but half-relations by the mother are not excluded.

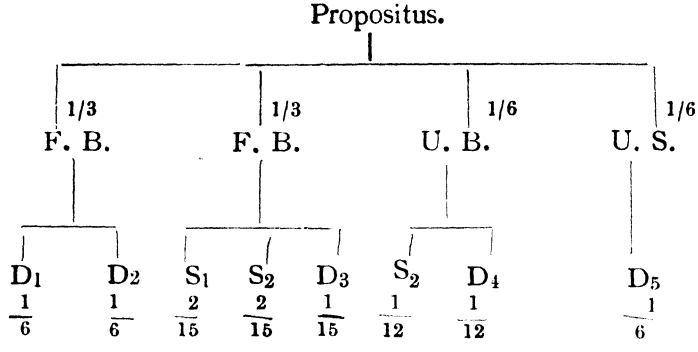
Illustrations.

(1) Husband ... 1/2.
Full-sister ... 1/2.
(2) Wife ... 1/4.
Full-brother ... 3/4 (as residuary).
(3) Husband ... 1/2 = 3/6.
Full-brother ... 2/3 of R = 2/3 of 1/2 = 2/6.
Full-sister ... 1/3 of R = 1/3 of 1/2 = 1/6.
(4) Daughter of half-sister by mother = 1/6 (her mother's share).
Daughter of full sister = 1/2 + 2/6 Residue = 5/6.*
Son of half-brother by father = excluded by full sister's daughter.
(5) Son of half-brother by mother = 1/6 (her mother's share).
Son of full sister = 1/2 + 2/6 Residue = 5/6.*

* The daughter in (4) and son in (5) first take their mother's share 1/2 and also the residue.

As regards the descendants of brothers and sisters they would take according to the principle of representation.

(6)



F. B. Full-brother U. B. Uterine brother U. S. Uterine sister.

We first assign the shares to brothers and sisters, which descends to their descendants and the rule of double share to the male members applies, and the uterine relatives inherit equally.

$D_1 = 1/6 = 30/180$	$D_3 = 1/15 = 12/180$
$D_2 = 1/6 = 30/180$	$S_2 = 1/12 = 15/180$
$S_1 = 2/15 = 24/180$	$D_4 = 1/12 = 15\ 180$
$S_2 = 2/15 = 24/180$	$D_5 = 1/6 = 30/180$

CLASS III—HEIRS.—

291. In default of the first and second class of heirs the estate devolves on the third class of heirs which consist of the brothers and sisters of the ancestors of the deceased and their descendants.

The following is the order of priority among the heirs.

(1) Paternal and maternal uncles and aunts of the deceased and next their descendants h.l.s.

(2) Paternal and maternal uncles and aunts of the parents of the deceased and next their descendants h.l.s.

(3) Remoter uncles and aunts of the remote ancestors and next their descendants h.l.s.

All those related through a nearer ancestor are preferred, and again among the claimants the nearer exclude the more remote the

exception being the case of full paternal uncle's son co-existing with a consanguine uncle.[1]

(*a*) Those of the full-blood exclude those of the half-blood related through the same ancestor.

(*b*) The brothers or sisters of the mother are the representative sharers and those of the father are representative residuaries.

Rules of Distribution.—

(*a*) Assign 2/3 of the estate to the paternal side and 1/3 to the maternal side.

(*b*) Assign to uterine paternal or maternal uncles and aunts if any 1/3 and if only one then 1/6.

(*c*) The rule of double share to the male members is applicable to the relations on the paternal side.

(*d*) In default of the maternal side the paternal side is entitled to the whole and ***vice versa.***

(*e*) The distribution among the descendants of uncles and aunts is ***per stirpes,*** in accordance with the doctrine of representation, the heirs take their parents' shares.

Illustrations.

A person dies leaving the following heirs :—

1. Husband = 1/2
   Maternal aunt = 1/3
   Paternal uncle = residue 1/6
2. Full paternal uncle = 2/3
   Maternal aunt = 1/3
3. Full paternal uncle = 2/3
   Full „ aunt = 1/3

---

1 The preference given by the Shia jurists to father's full brother's son over the consanguine uncle is perhaps due to their respect for Ali the fourth Khalif. Hazrat Ali was son of Abu Talib of the full paternal uncle of the prophet and Hazrat Abbas was his consanguine uncle. Hazrat Ali is regarded as the first rightful successor to the Holy Prophet. Hence this case of preference of the paternal uncle's son to the consanguine uncle.

4. 2/3 { Full paternal uncle 5/6 of 2/3 = 5/9 = 10/18
Consanguine paternal uncle excluded
Uterine paternal uncle 1/6 of 2/3 = 1/9 = 2/18

1/3 { Full maternal uncle 5/6 of 1/3 = 5/18
Consanguine maternal uncle excluded
Uterine maternal uncle 1/6 of 1/3 = 1/18

Here the first distribution on the paternal and maternal side was 2/3 and 1/3 respectively, half-blood relations are excluded by full-blood relations and by applying ordinary rules of distribution and computation the estate is distributed as above.

5. *Full paternal uncle 2/3
„ „ aunt 1/3

6. 2/3 { Full paternal uncle 2/3 } 2/3 of 2/3 of 2/3 = 8/27 = 16/54
„ „ aunt 1/3 } 2/3 of 2/3 of 1/3 = 4/27 = 8/54
Uterine „ uncle 1/2 } 1/3 of 2/3 of 1/2 = 1/9 = 6/54
„ „ aunt 1/2 } „ „ = 1/9 = 6/54

1/3 { Uterine maternal uncle 1/2 of 1/3 = 1/6 = 9/54
Uterine maternal aunt 1/2 of 1/3 = 1/6 = 9/54

7. 2/3 { Full paternal uncle 2/3 } 2/3 of 2/3 of 2/3 = 8/27 = 32/108
Full paternal aunt 1/3 } 2/3 of 2/3 of 1/3 = 4/27 = 16/108
Consanguine „ uncle excluded
Uterine „ „ 1/2 } 1/3 of 2/3 of 1/2 = 1/9 = 12/108
Uterine „ aunt 1/2 } „ „ = 1/9 = 12/108

1/3 { Full maternal uncle 1/2 } 5/6 of 1/3 of 1/2 = 5/36 = 15/108
Full „ aunt 1/2 } „ „ = 5/36 = 15/108
Consanguine „ „ excluded
Uterine „ uncle 1/6 of 1/3 = 1/18 = 6/108

---

* According to the rule of distribution (e) the maternal side takes the whole in default of paternal side and the uterine relations inherit equally

Case of double Inheritan ce.

C. B. F. B. U. S. U. B.

Intermarry

S

Propositus.

C = Consanguine F = Full U = Uterine.
B = Brother S = Sister.

C. B. and U. S. intermarry and leaving a son who also dies leaving F. B. and U. B.

F. B. is doubly related to S as his consanguine paternal uncle and also as his uterine maternal uncle.

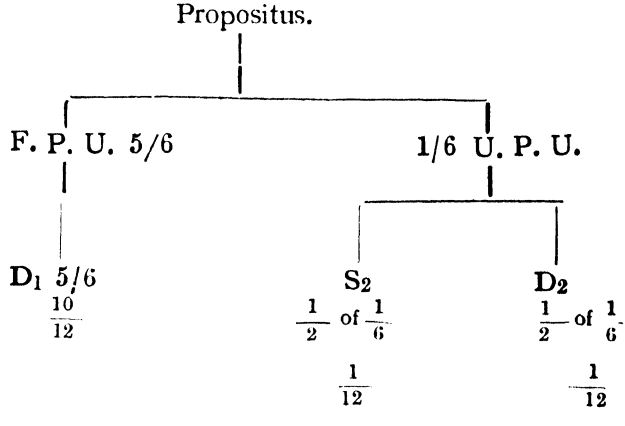
2/3 { F. B. as consanguine paternal uncle 2/3 = 12/18

1/3 { F. B. as uterine maternal uncle 1/6 of 1/3 = 1/18
1/3 { U. B. as full „ aunt 5/6 of 1/3 = 5/18

Thus F. B. takes in all 2/3 + 1/18 = 13/18

Descendants of uncle and aunts :—

(*a*)



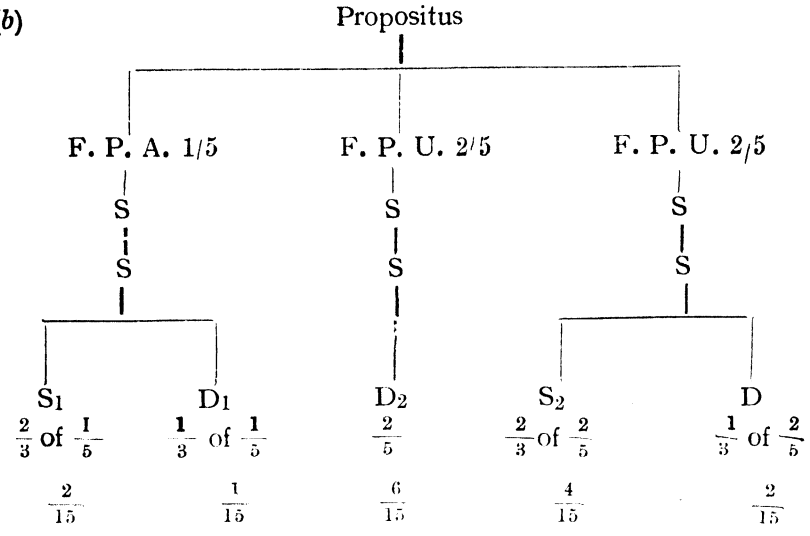
F. P. U. = Full paternal uncle...5/6 Residue
U. P. U. = Uterine „ „ ...1/6 Legal share

$D_1 = 5/6 = \frac{10}{12}$

$S_2 = \frac{1}{2}$ of $\frac{1}{6} = \frac{1}{12}$

$D_2 = \frac{1}{2}$ of $\frac{1}{6} = \frac{1}{12}$

(*b*)



F. P. A.—Full paternal aunt = 1/5
F. P. U.— ,, ,, uncle = 2/5
F. P. U.— ,, ,, ,, = 2/5
} which descends to their descendants

$S_1 = \frac{2}{3}$ of $\frac{1}{5} = \frac{2}{15}$

$D_1 = \frac{1}{3}$ of $\frac{1}{5} = \frac{1}{15}$

$D_2 = \frac{2}{5} = \frac{6}{15}$

$S_2 = \frac{2}{3}$ of $\frac{2}{5} = \frac{4}{15}$

$D_3 = \frac{1}{3}$ of $\frac{2}{5} = \frac{2}{15}$

§ 10. DOCTRINE OF INCREASE AND RETURN UNDER SHIA LAW.

DOCTRINE OF INCREASE.—

292. Under the Shia Law if the sum total of the shares exceed unity, then the shares of the spouse, father, mother (and maternal representative sharers), and uterine brother and sisters remain unaffected, but the fraction in excess of unity is deducted from the share of the daughters, full or consanguine sisters.

Illustrations.

(i) Husband ... 1/4 = 3/12
Father ... 1/6 = 2/12
Mother ... 1/6 = 2/12
Daughter* ... 1/2 = 6/12 reduced to 6/12 − 1/12 = 5/12

(Excess = 1/12) 13/12

(ii) Husband ... ... 1/4 = 3/12
Mother ... ... 1/6 = 2/12
Two daughters ... 2/3 = 8/12 reduced to 8/12 − 1/12 = 7/12

(Excess = 1/13) 13/12

(iii) Widow ... ... 1/8 = 3/24
Father ... ... 1/6 = 4/24
Mother ... ... 1/6 = 4/24
Two daughters 2/3 = 16/24 reduced to 16/24 − 3/24 = 13/24

(Excess = 3/24) 27/24

(iv) Husband ... ... 1/2 = 3/6
Two full sisters ... 2/3 = 4/6 reduced to 4/6 − 1/6 = 3/6

(Excess = 1/6) 7/6

(v) Husband ... ... 1/2 = 6/12
Two uterine brothers 1/3 = 4/12
Two full sisters ... 2/3 = 8/12 reduced to 8/12 − 6/12 = 2/12

(Excess = 6/12) 18/12

The result would be the same if there were instead of two full sisters two consanguine sisters.

(vi) Husband ... ... 1/2 = 6/12
Uterine sister ... 1/6 = 2/12
Consanguine sister 1/2 = 6/12 reduced to 6/12 − 2/12 = 4/12

(Excess = 2/12) 14/12

* If there were two daughters they would take 2/3 = 8/12 and the excess in this case would be 3/12 which would be reduced from 8/12 − 3/12 = 5/12, or 5/24 each.

DOCTRINE OF RETURN—

293. After assigning shares to the sharers if there is a surplus, residue, still in hand, and there are no residuaries entitled to inherit (*i.e.* of the class of the sharers) the residue reverts to the sharers in proportion to their respective shares.

Exception.—

(*a*) The husband or widow is not entitled to the return if there is a consanguine heir, but if there is no other heir the husband is entitled to the residue in preference to the Crown. The surplus would escheat to the Crown if there is a wife only, for she is never entitled to the return.

(*b*) The mother is not entitled to the return if there co-exist the father, two brothers, or one brother and two sisters, or four sisters whether of full or half-blood by the father.

(*c*) Uterine brothers and sisters are not entitled to the return if there co-exist a full sister, but they share in the residue along with a consanguine sister.

SIMPLE CASES

(i)	Father ...	... 1/6 = 1/6	increased to 1/4
	Daughter	... 1/2 = 3/6	... 3/4
		4/6	1
(ii)	Mother ...	... 1/6	increased to 1/4
	Daughter	... 1/2 = 3/6	... 3/4
		4/6	1
(iii)	Father ...	... 1/6	increased to 1/5
	Mother ...	... 1/6	... 1/5
	Daughter ...	... 1/2 = 3/6	... 3/5
		5/6	1

EXCEPTION (*a*)

(iv)	Wife	...	... ...	1/8=5/40
	Father	1/6	increased to (1/5 of R.)	1/5 of 7/8=7/40
	Mother	1/6	... (1/5 of R.)	1/5 of 7/8= 7/4
	Daughter	1/2=3/6	... (3/5 of R.)	3/5 of 7/8=21/40
		5/6		1
(v)	Husband	...	... ...	1/4=4/16
	Father	1/6	increased to (1/4 of R.)	1/4 of 3/4=3/16
	Daughter	1/2=3/6	... (3/4 of R.)	3/4 of 3/4=9/16
		4/6		1

EXCEPTION (*b*)

(vi)	Mother	1/6	...	(not entitled to return)=4/24
	Father	1/6	increased to (1/4 of R.)	1/4 of 5/6=5/24
	Daughter	1/2=3/6	... (3/4 of R.)	3/4 of 5/6=15/24

Two full brothers (excluded heirs of the second class).

EXCEPTION (*c*)

(vii)	Uterine brother	... 1/6	... ...	1/6
	Uterine sister	... 1/6	... ...	1/6
	Full sister*	1/2=3/6+1/6	by return	=4/6
		5/6		1
(viii)	Uterine sister	... 1/6	... ...	1/6
	Full sister	1/2=3/6+2/6	by return	5/6
		4/6		1

* If there were only an uterine sister and a consanguine sister the latter would participate in the residue along with the uterine sister as follows :—

Uterine sister	...	... 1/6	increased to 1/4
Cons : sister	...	...1/2=3/6	„ „ 3/4
		4/6	1

§ 11. IMPEDIMENTS TO SUCCESSION

294. According to the Sirajiyah there are four impediments to succession.

(i) Slavery.
(ii) Homicide.
(iii) Difference of religion.
(iv) Difference of country.

SLAVERY.—

295. That the fact of slavery of the claimant is an impediment to succession has now become obsolete in British India by the Slavery Act V of 1843.[1]

HOMICIDE.—

296. Under the *Hanafi* Law intentional or unintentional homicide of the proprietor by claimant is a valid impediment to inheritance, and under the Shia Law, it is an impediment only if it be intentional, if it is unintentional or justifiable it is not a bar to succession.

Under the *Hanafi* Law homicide by an infant or a person of unsound mind or in the course of war or when inflicting punishment under the law is not a valid impediment.

DIFFERENCE OF RELIGION.—

297. A non-Muslim is not entitled to inherit from a Muslim, and a Muslim also cannot inherit from a non-Muslim by birth.

Apostate.—

Under the Muslim Law if an apostate from Islam has died, then his estate devolves on his Muslim heirs,[2] but he himself cannot inherit from his Muslim relations, however under Anglo-Muslim Law he is entitled to inherit and *vice versa*. The caste Disabilities Removal Act XXI of 1850 has removed the disabilities of an apostate heir to inherit whether from a Muslim or from a non-Muslim by birth or by apostasy. The Act says, "So much

1 Vide Ujmuddin v. Zialulnissa 3 Bom. 422 (1879).

2 According to some jurists and also the Shafii jurists the acquisition of an apostate after his apostacy, goes to the Bait-ul-mal.

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 property, or may be held in any way to impair or affect any right of inheritance, by reason of his or her renouncing or having been excluded from the communion of any religion, or being deprived of estate, shall cease to be enforced as law in the Courts of the East India Company and in the courts established by Royal Chapter within the said territories."[1]

DIFFERENCE OF COUNTRY.--

298. It still appears that a non-Muslim by birth would be excluded from inheriting from a Muslim as provided by the Muslim Law.

Under the Shia Law want of Islam on the part of the claimant is an only bar to inheritance, that is, the property of any deceased person whether a Muslim or non-Muslim can be inherited by a Muslim heir.

Under the Muslim Law, Muslims though owing different allegiance are entitled to succeed to each other, but non-Muslim residents domiciled in a Muslim State are not so entitled. In the modern International Law, this involves the question of allegiance, nationality, and domicile and under Anglo-Muslim Law an alien enemy of the British Government cannot inherit the property of any British subject including Indian Muslims.[2]

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1 Vide Khunni Lal v. Gobind Krishna Narain 33 All. 356 (1911), and S. 9 of the Bengal Regulation Act of 1832.

In Vaithilinga Odayar v. Ayyathorai Odayar 40 Mad. 118 (1917), the court held that the Act XXI of 1850. does not benefit the descendants of converts, thus dissenting from Bhagwant Singh v. Kallu 11 All. 100.

If a person apostatises and dies, then curiously according to Abdul Gaffar v. Ma Piva Shin (Rang. 1926) 98 I.C-155. his Muslim father cannot inherit, but under the Muslim Law he is entitled to inherit.

2 Vide the Aliens Act 1905 5 Edw 7. C. 13 and the Aliens Restriction Act 1914. 4 and 5 Geo. 5-C-12.

§ 12. MISCELLANEOUS CASES.

299. The following special cases may be considered.

1. Rights of heirs in the womb.
2. Transfer of vested inheritance owing to the death of an heir.
3. Missing heirs.
4. Hermaphrodite heirs.
5. Persons dying together.
6. Succession with reference to death-illness, *Marzul-Maut,*
7. Rights of insane, blind or deformed persons.
8. Rights of illegitimate children.

RIGHTS OF HEIRS IN THE WOMB.—

300. (*a*) A child in the womb of its mother, will be entitled to inherit, if born alive,[1] in case its father is living, within the minimum period of gestation,[2] and in case of divorce of its mother or death of the father, if born within the maximum period[3] of gestation allowed by the Sunni Law, or the Shia Law.

(*b*) A child born dead does not inherit both under the Sunni and the Shia Law, but under the Hanafi Law, if intentional violence has been done to the mother, then the child will be presumed to have been born alive.

If the child is born alive and dies subsequently, then its own heirs inherit from it.

The effect of the birth of a child.—

A child on birth may affect the existing heirs in several ways:—

(*a*) It may absolutely exclude all the existing heirs or some of the heirs.

(*b*) it may reduce the shares of existing heirs by application of the doctrine of increase or it may deprive the heirs of the return.

---

1 If born alive, that is, if the greater part of the body came out, it shall inherit, and it is considered sufficient if it came with its head and the whole of its breast, or with its feet upto its navel. The existence of life is made out by a voice, weeping, or any little movement of the body.

2 Vide Ch. IV Secs. 55 & 56, p. 49.

(*c*) The sex of the child born would determine its own heritable right as sharer or as residuary, and would accordingly affect other existing heirs.

(*d*) It may merely be an addition to an existing class of heirs and may take along with them.

Child as Excluder.—

If thile chd in womb may possibly be an absolute excluder of all existing heirs, then the estate is not to be distributed, until its birth, but if it cannot be an absolute excluder, then a preliminary distribution may be effected, considering the possibility of the child being a male or a female, and the smallest shares may be given to the existing heirs reserving the remainder for final distribution after the birth of the child on ascertaining its sex.

Illustrations.

(i) A person dies leaving a full brother's pregnant widow and a brother's son's son.

In this example if a male child is born within the lawful period of gestation it would absolutely exclude brother's son's son and would take the entire property, and if a female child is born, she would be a distant kindred, and would take nothing as against the brothers' son's son. Therefore the estate cannot be distributed, until the birth of the child.

(ii) A person dies leaving a pregnant wife and a full brother.

In this example if a male child is born, it would exclude the brother and partially exclude its own mother, and if a female is born it would reduce the residue of the brother. Hence it is not a case of absolute exclusion, therefore the heirs, the wife and the brother may be given the smallest possible shares respectively on basis of their own right of inheritance.

The following are the possibilities:—

		Wife.	Child.	Full brother.
I.	If a son is born ...	1/8	7/8	0
II.	If a daughter is born ...	1/8	1/2	Residue 3/8
III.	If a child is born dead or is under the law held to be illegitimate	1/4=2/8	0	3/4=6/8

Thus on examining these shares, we find that the wife's smallest share is 1/8, and that of the brother is zero. Consequently the wife may take 1/8, and the residue 7/8 will not be distributed, till the birth of the child. And if a son is born he will take 7/8, but if a daughter is born, she will take 1/2 leaving 3/8 for the brother, and if a dead child is born or is declared illegitimate, and thus is not entitled to inherit, the wife will get 1/8 more to make up her legal share 1/4 and the residue 6/8 (3/4) will go to the brother as a residuary.

(iii) A person dies leaving a pregnant wife, his father and mother. This is also a case of birth of a partial excluder :—

The following are the possibilities :—

	Wife	Child.	Father.	Mother.
I. If a son born ...	1/8	Residue	1/6	1/6
	3/24	13/24	4/24	4/24
II. If a daughter is born ...	1/8	1/2	1/6 + R. (1/24)	1/6
	3/24	12/24	5/24	4/24
III. If a dead child is born ...	1/4	0	=2/3 of R.	1/3 of R.
			2/3 of 3/4	1/3 of 3/4
			6/12	3/12
	6/24	0	12/24	6/24

Thus the wife may take ... 3/24
Father ,, ... 4/24 } The smallest shares.
Mother ,, ... 4/24

And the residue 13/24 will not be distributed, till the birth of the child, thereafter the final distribution will take place, and according to the sex of the child the shares will be affected.

DEVOLUTION OF VESTED INHERITANCE.—

301. According to the Muslim Law on the death of a person his eatate vests immediately in the lawful heirs in terms of their legal portions. Thus every case of inheritance under the Muslim Law is a case of vested inheritance, though actual distribution might

not have taken place at all. Such an heir may die before the actual distribution of the estate, and the share, though undivided, which had vested in him, would be inheritable by his own heirs. This devolution of vested inheritance, owing to the death of the heir is known as ***munaskhat***. The other heirs may also be heirs to the deceased heir, if so, they would inherit in both capacities, it would be a case of " repeated inheritance" sometime a case of double or threefold devolution of inheritance.

The general rules of distribution would be applicable, that is, first assign shares to the original claimants including the dead heir, and thereafter distribute the estate vested in the dead heir to his own heirs.

(1) A person X dies leaving a son, a daughter, and a consanguine brother.

Before the distribution of the estate the son dies leaving the above heirs namely the sister and the consanguine uncle.

	Son.	Daughter.	Consanguine uncle.
I. Distribution on X's death ...	2/3	1/3	0 excluded
II. Distribution on the Son's death ...		1/2	1/2 as residuary.
Distribution in terms of son's estate (2/3) ...		1/2 of 2/3	1/2 of 2/3
It is a case of double inheritance, I and II		1/3	1/3
		1/3+1/3	0+1/3
		2/3	1/3

Thus the daughter takes 2/3 and the consanguine uncle 1/3

MISSING PERSONS, AND HEIRS.—

302. A "missing person" is a person who cannot be traced at all, his whereabouts being unknown, it being uncertain whether he is living or dead.

No one can succeed to the estate of a missing person, until his death is established or a certain period has elapsed. Under the

old Muslim Law, the period was ninety years from the date of the birth of the missing person, and according to some jurists it is four years from the date of missing. This is also the Maliki Law and the period under the Shafii Law is seven years, and under the Shia Law it is ten years. Under Anglo-Muslim Law it would be governed by the Indian Evidence Act. (Sections 2, 107 and 108), which provides thus:—"When the question is whether a man is alive or dead, and it is proved that he has not been heard of for seven years by those who would naturally have heard of him if he has been alive, the burden of proving that he is alive is shifted to the person who affirms it."[1]

Missing heir.—

A missing heir cannot inherit, unless he reappears within the period of presumption of life as stated above. Under the Muslim Law his share of inheritance is reserved, in case he should present himself, and after the expiry of the period, the reserved portion would be distributed again.

Illustration.

A person leaves two daughters, a missing son and a son's son.

		Two daughters.	Missing son.	son's son.
I.	If the missing son is alive	1/2	1/2	0
		3/6	3/6	0
II.	„ „ is dead	2/3	0	1/3
		4/6	0	2/6

The two daughters may take 3/6, but nothing can be given to son's son, and residue 3/6 will be reserved, if the son presents himself within the period he takes 3/6, if not the daughters will again take 1/6 and the residue 2/6 will go to the son's son.

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1 As to missing persons and heirs.
Vide. Mazhar Ali v. Budh Singh 7 All. 297.
Jafri Begum v. Amir Muhammad 7 All. 822.
Moolla Cassim v. Moolla Abdur Rahim 32 I. A. 177, 33 Cal. 173.

HERMAPHRODITE HEIRS.—

303. A person whose sex is doubtful is known as hermaphrodite. A hermaphrodite is entitled to the smallest share that he would get as a male or a female.[1] Hence it is to be seen on two different computations what share could be assigned to such a person.

(i) A person dies leaving a husband, father, mother and a herma-phrodite.

	Husband.	Father.	Mother.	Hermaphrodite.
If the hermaphrodite is taken as a female person	1/4	1/6	1/6	1/2
Reduced to unity by the doctrine of increase ...	3/13	2/13	2/13	6/13
If the hermaphrodite is taken as a male person	1/4	1/6	1/6	5/12 R.

Now 5/12 is smaller than 6/13, therefore here the hermaphrodite inherits as a male person.

(ii) According to the Sirajiyah if a man leaves a son a daughter and an hermaphrodite, the hermaphrodite will take the share of a daughter, it being the smallest allotment.

PERSONS DYING TOGETHER.—

304. If two persons die together and it cannot be established who died first, then under the Hanafi Law the death is presumed to be simultaneous, and the one cannot inherit from the other, their estate would be inheritable by their own descendants.

Shia Law.—

Under the Shia Law in case of mutual succession of persons dying together in some accident, two or more series of computations should be made, with regard to their respective heirs, as claimants to one of such persons and finally the said computations are to be added up to make the final allotment.

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1 According to Ibn Abbas a hermaphrodite is entitled to a moiety of the two shares that is half of the shares of a male and a female member.

Illustration

A Muslim dies together with his son in some accident, leaving his wife and mother. The father and the son have left Rs. 2400 each.

I First computation assuming that the father died before the son	Wife	Mother	Son	
	1/8	1/6	17/24	residue
	3/24	4/24	17/24	
	Rs. 300	Rs. 400	Rs. 1700	

II Second computation assuming that the the father died after the son.	Son's Mother	Grandmother	Father
	1/3	0	2/3
	Rs. 800	0	Rs. 1600

Now from the first computation 17/24 or Rs. 1700 devolves exclusively on the son's mother, and from the second computation 2/3 or Rs. 1600/- father's share would devolve on the wife and the grandmother in the ratio of 1 : 3

Wife		Mother
1/4	:	3/4
Rs. 400		Rs. 1200

Thus the final result is adding up shares assigned to the wife *i.e.* son's mother Rs 300 + Rs. 1700 + Rs. 800 + Rs. 400 = 3200 and to the mother *i.e.* son's grandmother Rs. 400 + 0 + 0 + Rs. 1200 = Rs. 1600

SUCCESSION—DEATH ILLNESS.—

305. If a person pronounces divorce, in death illness *marz-ul-maut* and dies during his wife's *iddat*, then under Hanafi Law, the wife is entitled to inherit from him, but she will not be entitled to inherit if she herself had asked her husband to repudiate her irrevocably or she obtains a *khula* divorce, or exercises the option of puberty or obtains divorce by reason of her husband's impotency.

The wife is also entitled to inherit if the husband makes *ila*, or *lian* while in *marz-ul-maut*. However if the wife were to die before her husband, the latter would not be entitled to inherit from her, as he has forfeited his right, by his own voluntary act of repudiation.

If the wife abandons Islam during her death illness, and dies during *iddat*, her husband would be entitled to inherit from her.

Under Shia Law, if a woman is divorced by her husband in his death-illness, her right of inheritance continues for one year, and she will inherit from him, if her husband dies within one year from date of divorce, provided also that the woman remains unmarried during this period of time, and if the woman were to die first, her husband cannot inherit from her, as is the case under the Hanafi Law.

Under the Shia Law, if a man in death illness marries and dies, without consummating the marriage, his wife shall not inherit from him, but if the wife were to die in his life-time he would inherit from her. And if a woman in death-illness marries and her husband were to die in her life-time, she shall inherit from him, though the marriage was not consummated, and if the woman dies first and before consummation, the husband would inherit from her.[2]

INSANE, BLIND, DEFORMED PERSONS.—

306. Under the Muslim Law insanity, blindness or any form of bodily disability is not a bar to inheritance.[3]

ILLEGITIMATE CHILD.—

307. Under the *Sunni Hanafi Law* an illegitimate child does not inherit from the father, it inherits from the mother and her relations and they inherit from him,[4] but under the *Shia* Law such a child is not entitled to inherit from the mother or her relations nor do they inherit from him.[5]

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1 As to what is marz-ul-maut vide Sec. 51. Pp. 45 and 46.

2 Under the Hanafi Law marriage in death-illness is allowed but the husband cannot fix more than the proper dower.

Ballie Digest 11, 340, 341.

3 Vide Mahar Ali v. Amani 2 B.L.R.A.C. 306. (1869).

4 Bafatum v. Bilaiti Khanum 30 Cal. 683 (1903) A Muslim woman dies leaving her husband and an illegitimate son of her full sister, the husband takes 1/2 and the illegitimate son 1/2 as a distant kinsman.

5 Sahebzadee Begum v. Himmut Bahadoor 12 W. R. 512 on review 41. W. R. 125 (1870).

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Abbreviations

Agra—Agra High Court Reports.
All—Indian Law Reports, Allahabad Series.
A. L. J. R.—Allahabad Law Journal Reports.
A. W. N.—Allahabad Weekly Notes.
Bom —Indian Law Reports Bombay Series.
B. L. R.—Bengal Law Reports.
B. H. C.—Bengal High Court Reports.
Cal.—Indian Law Reports, Calcutta Series.
C. L. R.—Calcutta Law Reports
C. W. N.—Calcutta Weekly Notes.
I. C.—Indian Cases.
In. A.—Indian Appeals.
Lah.—Indian Law Reports, Lahore Series.
Luck.—Indian Law Reports Lucknow Series.
Moo. I. A.—Moore's Indian Appeals.
N. W.—North Western Provinces High Court Reports.
O. C.—Oudh Cases Reports.
Pat. L. J.—Patna Law Journal.
Perry O. C.—Perry's Oriental Cases.
P. R.—The Punjab Records.
Rang.—Indian Law Reports, Rangoon Series.
S. D. A.—Sudder Dewanny Adawlat.
W. R.—Weekly Reporter.
F. B.—Full Bench.
h. h. s.—how high soever.
h. l. s.—how low soever.
P. C.—Privy Council.

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