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PRINCIPLES

OF

MAHOMEDAN LAW

BY

THE RIGHT HONOURABLE
SIR DINSHAH FARDUNJI MULLA, Kt.,
C.I.E., M.A., LL.D.

FOR SOMETIME LAW MEMBER OF THE COUNCIL OF THE GOVERNOR-GENERAL OF INDIA, AND JUDGE OF THE HIGH COURT OF BOMBAY; TAGORE LAW LECTURER, 1929, JOINT EDITOR, "POLLOCK AND MULLA'S INDIAN CONTRACT ACT," AND "MULLA AND PRATT'S INDIAN STAMP ACT"; AUTHOR OF "PRINCIPLES OF HINDU LAW"; "COMMENTARIES ON THE CODE OF CIVIL PROCEDURE", "COMMENTARIES ON THE INDIAN REGISTRATION ACT"; ETC.

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PREFACE TO THE TENTH EDITION.

IT is surprising to find how the number of cases on Mahomedan law has been growing every year. From 1929 to 1932 there have been no less than one hundred and forty cases including both authorized and unauthorized series. Many new points have been decided, and many doubtful points settled. The law of Gifts, Wakfs, Dower, Divorce, Acknowledgment of Paternity and Guardianship has been fast growing in importance, and the chapters dealing with these subjects have been almost wholly rewritten. The cases have been brought up to December 1932, and references are given throughout to Indian Cases and All-India Reporter.

The writer acknowledges gratefully the assistance rendered to him in bringing out this edition by B. K. Desai, Esq., Advocate (O.S.), High Court, Bombay ; K. S. Shavaksha, Esq., Middle Temple, Barrister-at-Law ; A. A. A. Fyzee, Esq., M.A., (Cantab.), Middle Temple, Barrister-at-Law; and B. D. Mehta, Esq., Advocate (A.S.), High Court, Bombay.

January, 1933.

D. F. M.

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PRINCIPLES OF

MAHOMEDAN LAW.

CHAPTER I.

INTRODUCTION OF MAHOMEDAN LAW INTO BRITISH INDIA.

1. **Administration of Mahomedan law.**—The Mahomedan law is applied by Courts in British India to Mahomedans not in all, but in some matters only. The power of Courts to apply Mahomedan law to Mahomedans is derived from and regulated partly by Statutes of the Imperial Parliament and mostly by Indian legislation (*a*).

For Statutes, see sec. 6; for Acts, see secs. 7 to 13.

2. **Extent of application.**—As regards British India, the rules of Mahomedan law fall under three divisions, namely :—

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

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

(iii) those which are not applied at all, though the parties are Mahomedans, such as the Mahomedan Criminal Law, and the Mahomedan law of Evidence.

The only parts of Mahomedan law that are applied by Courts in British India to Mahomedans are those mentioned in cls. (i) and (ii). In other respects, the Mahomedans in British India are governed by the general law of British India.

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

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3. Matters expressly enumerated.—The rules of Mahomedan law that have been *expressly* directed to be applied to Mahomedans are to be applied except in so far as they have been altered or abolished by legislative enactment.

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

4. Matters not expressly enumerated.—No rules of Mahomedan law that have not been expressly directed to be applied to Mahomedans can be applied if they have been abolished either expressly or by implication by legislative enactment.

Thus the rules of the Mahomedan law of Pre-emption are nowhere expressly directed to be applied to Mahomedans In places where those rules are applied to Mahomedans, they are applied on the ground of justice, equity and good conscience (sec 178) They are not applied to Mahomedans in Oudh and in the Punjab, for there are *Special Acts* relating to pre-emption for Oudh and the Punjab, and those Acts apply to Mahomedans also (sec. 179).

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

5. Justice, equity and good conscience.—The rules referred to in sec. 2, cl. (ii), may not be applied if they are in the opinion of the Court opposed to justice, equity and good conscience. But the rules referred to in cl. (i) of that section, that is, rules that have been *expressly* directed by the Legislature to be applied to Mahomedans, must be applied though they may not in the opinion of the Court conform with justice, equity and good conscience. See sec. 28A.

Thus the rules of the Mahomedan law of Pre-emption come under sec 2, cl (ii), and they are not applied by Courts in the Madras Presidency on the ground that they are *opposed to* justice, equity and good conscience, inasmuch as the law of Pre-emption places restrictions upon the liberty of transfer of property by requiring the owner to sell it in the first instance to his neighbour. The High Courts of Bombay and Allahabad, on the other hand, have applied the Mahomedan law of Pre-emption to Mahomedans, with this remarkable result that the notion of "justice, equity and good conscience" held by those Courts differs from that held by the Madras High Court (*b*). See sec. 178 below.

As regards rules which the Courts have been *expressly* directed to apply to Mahomedans, they must of course be applied regardless of considerations of justice, equity and good conscience. Thus the rules of the Mahomedan law of Marriage have been expressly

(*b*) *Ibrahim* v. *Muni* (1870) 6 M H.C. 26.

directed to be applied to Mahomedans in Bengal, the United Provinces and Assam (sec. 7). One of those rules is that a divorce pronounced by a husband is valid, though pronounced under compulsion (sec. 234). Hence the Courts of British India will not be justified in refusing to recognize such a divorce, though it may be opposed to their notions of justice, equity and good conscience (*c*).

6. Mahomedan law in Presidency-towns.—(*1*) As to the Presidency-towns of Calcutta, Madras and Bombay, it is enacted by the Government of India Act, 1915, sec. 112 [5 and 6 Geo. 5, ch. 61] as follows :—

"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 having the force of law, decide according to that personal law or custom, and when the parties are subject to different personal laws or customs having the force of law, decide according to the law or custom to which the defendant is subject."

The effect of this section is that the law to be applied in the matters aforesaid is to be the Mahomedan law if both parties are Mahomedans. Similarly, when a dealing takes place between two parties of whom one is a Hindu and the other a Mahomedan, and a suit is brought in respect of that dealing by the Hindu against the Mahomedan, the dispute between them is to be decided according to the Mahomedan law (*d*). But that law cannot be applied in either case if it has been altered or abolished by legislative enactment [see notes below].

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

Earlier statutes.—Provisions similar to those in sub-sec. (1) were contained in the East India Company Act, 1870, sec. 17 [21 Geo. 3, ch. 70], which applied to the Supreme Court at Calcutta, and the East India Act, 1797, sec. 13 [37 Geo. 3, ch. 142], which applied to the Recorder's Courts at Madras and Bombay. These Acts as well as the High Courts

(*c*) *Ibrahim* v. *Enayetur* (1869) 4 B L R A.C 13.
(*d*) *Azim Un-Nissa* v. *Dale* (1871) 6 Mad. H C. 455, 475 ; West and Buhler's Digest of Hindu Law, p. 6

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Acts of 1861, 1865 and 1911 have been repealed and re-enacted by the Government of India Act, 1915. But the repeal does not affect the validity of any charter or letters patent under those Acts [Government of India Act, 1915, sec. 130].

Law to be administered in cases of inheritance, succession, contract and dealing between party and party.—This may be repealed or altered by the Governor-General in Council; see the Government of India Act, 1915, sec. 131, and the fifth schedule to the Act. In fact the Mahomedan law of contract has been almost entirely superseded by the Indian Contract Act, 1872, and other enactments, and this was done in the exercise of the power given to the Governor-General in Council by the Indian Councils Act, 1861. The latter Act has been repealed and to a large extent re-enacted by the Government of India Act, 1915 (*e*). As regards interest, it is doubtful whether the Mussulman rule prohibiting usury has been repealed by the Usury Laws Repeal Act 28 of 1855 (*f*). The point arose in a recent Privy Council case, but it was not decided (*g*). See sec. 65 of the Government of India Act, 1915, and cls. 19 and 44 of the letters patent of the High Courts for Calcutta, Madras and Bombay.

Law to which the defendant is subject.—It is provided by the latter portion of sec. 112 of the Government of India Act, that when the parties are subject to different personal laws, the dispute between them is to be decided according to the law to which the defendant is subject. But these words do not mean this, that where a Hindu purchases land from a European which is subject to his wife's claim for dower, and a suit is brought by the wife against the Hindu purchaser to enforce her right, the Hindu purchaser can resist her claim on the ground that the Hindu law does not recognize dower. The Hindu purchaser is in no better position than a European purchaser would be, simply because the Hindu law recognizes no rule of dower (*h*).

7. In Bengal, the United Provinces and Assam.—As to Bengal, the United Provinces and Assam, except such portions of those territories as for the time being are not subject to the ordinary civil jurisdiction of the High Courts, it is enacted that the Civil Courts of those Provinces shall decide all questions relating to "succession, inheritance, marriage or any religious usage or institution," by the Mahomedan law in cases where the parties are Mahomedans, except in so far as such law has, by legislative enactment, been altered or abolished. In cases not mentioned above nor provided for by any other law for the time being in force the decision is to be according to justice, equity and good conscience.

This is the substance of the Bengal, N.-W.F.P. and Assam Civil Courts Act XII of 1887, sec. 37, as read with the Bengal and Assam Laws Act, 1905, secs. 2 and 3.

Custom.—Custom binding inheritance in a particular family has long been recognized in India (*i*). Hence evidence is admissible to prove a family custom of succession

(*e*) See *Madhub Chunder* v. *Rajcoomar* (1874) 14 B. L. R 76; *Nobin Chunder* v. *Romesh Chunder* (1887) 14 Cal 781

(*f*) *Ram Lal* v. *Haran Chandra* (1869) 3 B L R (O C.) 130 [not abrogated]; *Mia Khan* v. *Bibijan* (1870) 5 B. L. R. 500 [abrogated].

(*g*) *Hamira Bibi* v *Zubaida Bibi* (1916) 43 I A. 294, 300, 38 All. 581, 587-588, 36 I C. 87.

(*h*) *Sarkies* v. *Prosonomoyee* (1881) 6 Cal. 794, 805-806 [21 Geo. 3, Ch. 70, s. 17.] See also *Azim Un-Nissa* v. *Dale* (1871) 6 Mad H. C. 455, 474-475 [37 Geo. 3, Ch 142, s. 13]; *Lakshmandas* v. *Dasrat* (1880) 6 Bom. 168, 183-184; *Mahomed* v. *Narayan* (1916) 40 Bom 258, 368, 368, 32 I. C. 939

(*i*) *Abdul Hussein* v. *Sona Dero* (1918) 45 Cal. 450, 460, 45 I. A. 10, 14, 43 I. C. 306; *Roshan Ali Khan* v. *Chaudhri Asghar Ali* (1930) 57 I. A. 29, 5 Luck. 70, 121 I. C. 517, ('30) A. PC. 35 [widows succeed only to a life-estate].

at variance with the Mahomedan law, though there may be no express recognition of custom as in the Act cited above (*j*). But the burden of proof in such a case lies upon the party who sets up the custom (*k*). The custom must be an ancient and invariable custom, and it must be proved by clear and unambiguous evidence (*l*). It may be proved by instances, or by wajib-ul-araiz but not by *a priori* methods (*m*). As to the evidentiary value of a wajib-ul-arz, see the undermentioned cases (*n*).

Justice, equity and good conscience.—This expression has been interpreted by the Privy Council to mean the rules of English law so far as they are applicable to Indian society and circumstances (*o*).

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

Custom.—See notes to s. 7 above.

Justice, equity and good conscience.—See notes to s. 7 above.

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

Note that not a single topic of Mahomedan law is *expressly* enumerated in this section. So much, therefore, of Mahomedan law as is administered to Mahomedans by Courts in the Mufassal of Bombay, is administered as a matter of justice, equity and good conscience. As to this last expression, see notes to s. 7 above.

Usage.—Evidence may be given under this section of a custom excluding women from any share in the inheritance of a paternal relation (*p*). The High Court of Bombay gave effect to a usage prevailing in the Presidency of performing rites and ceremonies at the graves of deceased Mahomedans, and granted an injunction at

(*j*) *Muhammad Ismail* v. *Lala Sheomukh* (1913) 15 Bom. L. R. 76, 17 C. W. N. 97, 18 I.C. 571 [P. C.]; *Ali Asghar* v. *Collector of Bulandshahr* (1917) 39 All. 574, 40 I. C 753.

(*k*) *Abdul Hussein* v. *Sona Dero* (1918) 45 Cal. 450, 45 I. A. 10, 43 I. C. 306, approving *Daya Ram* v. *Sohel Singh* (1906) Punj. Rec. No. 110.

(*l*) *Muhammad* v. *Shaikh Ibrahim* (1922) 49 I. A. 119, 45 Mad. 308, 67 I. C. 115, ('22) A. PC. 59 [exclusion of females among Lubbai Mahomedans of Coimbatore].

(*m*) *Muharram Ali* v. *Barkat Ali* (1931) 12 Lah. 286, 125 I. C. 886, ('30) A. L. 695.

(*n*) *Uman Parshad* v. *Gandharp Singh* (1887) 14 I. A. 127; *Balgobind* v. *Badri Prasad* (1923) 50 I. A. 196, 45 All. 413, 74 I. C. 449, ('23) A. PC. 70; *Roshan Ali Khan* v. *Chaudhri Asghar Ali* (1930) 57 I. A. 29, 5 Luck. 70, 121 I. C. 517, ('30) A. PC. 35.

(*o*) *Waghela* v. *Shekh Masludin* (1887) 11 Bom. 551, 561, 14 I. A. 89, 96.

(*p*) *Abdul Hussein* v. *Sona Dero* (1918) 45 Cal. 450 45 I. A. 10, 43 I. C. 306.

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the suit of the Mahomedan residents of Dharwar restraining the purchaser of a graveyard from obstructing them in performing religious ceremonies at the graveyard (*q*). See notes to s. 7 above.

10. In the Punjab and the N.-W. F. Province.—As to the Punjab and the North-Western Frontier Province, it is enacted by the Punjab Laws Act IV of 1872, s. 5, and the North-Western Frontier Regulation VII of 1901, ss. 27 and 28, 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 which is not contrary to justice, equity or good conscience, and has not been, by this or any other enactment, altered or abolished, and has not been declared to be void by any competent authority ;

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

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

Custom.—"As regards Mahomedans, prostitution is not looked on by their religion or their laws with any more favourable eye than by the Christian religion and laws" Accordingly the Chief Court of the Punjab refused to recognize a custom of the Kanchans which aimed at the continuance of prostitution as a family business, and the decision was upheld by the Privy Council on appeal (*r*). See notes to s. 7 above.

Justice, equity and good conscience.—See notes to s. 7 above.

10A. In Ajmer-Merwara.—The provisions of the Ajmer-Merwara Laws, Regulation III of 1877, ss. 4 and 5, are almost to the same effect as the Punjab Laws Act IV of 1872 [s. 10 above].

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

(*q*) *Ramrao* v. *Rustumkhan* (1901) 26 Bom. 198. | I. A. 193.
(*r*) *Ghasiti* v. *Umrao Jan* (1893) 21 Cal. 149, 20 |

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

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

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

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

Custom.—See notes to s. 7 above.

Justice, equity and good conscience.—See notes to s. 7 above. See also ss. 5 and 28A.

13. In Burma.—As to Burma, it is enacted by the Burma Laws Act XIII of 1898, s. 13, that all questions regarding succession, inheritance, marriage, or any religious usage or institution, shall be decided, in cases where the parties are Mahomedans, by the Mahomedan law, except in so far as such law has by enactment been altered or abolished, or is opposed to any *custom* having the force of law. In cases not specifically mentioned above nor provided for by any other enactment for the time being in force, the decision is to be according to justice, equity and good conscience.

Custom.—See notes to s. 7 above.

Justice, equity and good conscience.—See notes to s. 7 above.

CHAPTER II.

CONVERSION TO MAHOMEDANISM.

Ss. 14, 15

14. Who is a Mahomedan.—Any person who professes the Mahomedan religion, that is, acknowledges (1) that there is but one God, and (2) that Mahomed is His Prophet, is a Mahomedan (*s*). Such a person may be a Mahomedan by birth or he may be a Mahomedan by conversion (*t*). It is not necessary that he should observe any particular rites or ceremonies, or be an orthodox believer in that religion; no Court can test or gauge the sincerity of religious belief (*u*). It is sufficient if he professes the Mahomedan religion in the sense that he accepts the unity of God and the prophetic character of Mahomed.

"If one of the parents of an infant be a believer, the construction of law is in favour of the Islam of the infant": Baillie, II, 265 (Shia law); *Hedaya*, 64 (Sunni law). But this presumption may be rebutted by general conduct and surrounding circumstances. Thus an illegitimate son of a Hindu by a Mahomedan woman, who is brought up as a Hindu and married to a Hindu girl in the Hindu form of marriage, may well be regarded as a Hindu, though his mother was a Mahomedan (*v*).

A person born a Mahomedan remains a Mahomedan until he renounces the Mahomedan religion (*w*). The mere adoption of some Hindu forms of worship does not amount to such a renunciation (*x*).

15. Conversion to Mahomedanism and marital rights.—(*1*) The conversion of a Hindu wife to Mahomedanism does not *ipso facto* dissolve her marriage with her husband. She cannot, therefore, during his lifetime, enter into a valid contract of marriage with any other person. Thus if she, after conversion to Mahomedanism, goes through a ceremony of marriage with a Mahomedan, she will be guilty of bigamy within the meaning of s. 494 of the Indian Penal Code (*y*).

(*2*) In *Skinner* v. *Orde* (*z*), a Christian man, married to a Christian wife, declared himself a Mahomedan, and went through a ceremony of marriage with another woman. The

(*s*) *Narantakath* v *Parakkal* (1922) 45 Mad. 986, 71 I C 65, ('23) A. M. 171 [Ahamadees are not apostates from Islamism], *Hakim Khalil* v. *Malik Israfi* (1917) 2 Pat L. J. 108, 37 I C. 302 [Ahamadees are not apostates from Islamism], *Queen-Empress* v. *Ramzan* (1885) 7 All. 461; *Ata-Ullah* v. *Azim-Ullah* (1890) 12 All. 494.

(*t*) *Abraham* v. *Abraham* (1863) 9 Moo. I. A. 195, 243.

(*u*) *Abdool Razack* v. *Aga Mahomed* (1894) 21 I. A 56, 64.

(*v*) *Bhaiya Sher Bahadur* v *Bhaiya Ganga Bakhsh Singh* (1914) 41 I. A. 136 All. 101, 22 I. C 293.

(*w*) *Bhagwan Bakhsh* v. *Drigbijai* (1931) 6 Luck. 487, 132 I. C. 779, ('31) A. O. 301.

(*x*) *Azima Bibi* v. *Munshi Shamalanand* (1912) 17 C.W N. 121, 40 Cal. 378, 17 I. C. 758.

(*y*) *Government of Bombay* v. *Ganga* (1880) 4 Bom. 330; In the Matter of *Ram Kumari* (1891) 18 Cal. 264; *Mst. Nandi* v *The Crown* (1920) 1 Lah. 440, 59 I. C. 33.

(*z*) (1871) 14 Moo. I. A. 309.

Privy Council agreed with the High Court in thinking that the marriage was of doubtful validity.

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

The question referred to in sub-sec. (3) arose in a Privy Council case (*a*), where two persons, both Mahomedans, espoused Christianity, and married in Christian form. Afterwards they reverted to Mahomedanism and went through a form of marriage a second time according to the Mahomedan law. The question arose whether the marriage having first taken place in the Christian form, it could be dissolved by the husband by giving a *talak* (divorce) to the wife as a Mahomedan could do. Their Lordships held on the facts that the divorce was not proved, and they expressed no opinion as to whether, if the divorce were proved, it would have been valid.

See sec. 237, "Apostasy from Islam and dissolution of marriage."

15A. Conversion to Mahomedanism and rights of inheritance.—In the absence of a custom to the contrary [see secs. 16 and 17], succession to the estate of a convert to Mahomedanism is governed by the Mahomedan law (*b*).

According to the Mahomedan law, a Hindu cannot succeed to the estate of a Mahomedan. Therefore if a Hindu, who has a Hindu wife and children, embraces Mahomedanism, and marries a Mahomedan wife and has children by her, his property will pass on his death to his Mahomedan wife and children, and not to his Hindu wife or children (*c*).

16. Khojas and Cutchi Memons.—In the absence of proof of special usage to the contrary, Khojas and Cutchi Memons in the Bombay Presidency are governed in matters of succession and inheritance, not by the Mahomedan, but by the Hindu law (*d*).

Khojas and Cutchi Memons were originally Hindus. They became converts to Mahomedanism about 400 years ago, but retained their Hindu law of inheritance and succession as a customary law. Hence the Hindu law of inheritance and succession is applied to them on the ground of custom. This custom is so well established among them that if any member of either of these communities sets up a usage of succession opposed to the Hindu law of succession, the burden lies upon him to prove such

(*a*) *Skinner* v. *Skinner* (1897) 25 Cal. 537, 25 I. A. 34.

(*b*) *Mitar Sen Singh* v. *Mazbul Hasan Khan* (1930) 57 I. A. 313, 35 C. W. N. 89, 128 I. C. 268, ('30) A. PC. 251; *Chedambaram* v. *Ma Nyein Me* (1928) 6 Rang. 243, 111 I. C. 2, ('28) A. R. 179; *Bhagwan Bakhsh* v. *Drigbijai* (1931) 6 Luck. 487, 132 I. C. 779, ('31) A. O. 301.

(*c*) (1928) 6 Rang. 243, 111 I. C. 2, ('28) A. R. 179, *supra*.

(*d*) *Khojas and Memons' Case* (1847) Perry's O. C. 110; *Hirbai* v. *Gorbai* (1875) 12 Bom. H.C. 294 [Khojas]; *Abdul Cadur* v. *Turner* (1884) 9 Bom. 158 [Cutchi Memons], *Mahomed Sidick* v. *Haji Ahmed* (1885) 10 Bom. 1 [Cutchi Memons]; *Moosa Haji Joonas* v. *Haji Abdul Rahim* (1905) 30 Bom. 197; *Saboo Sidick* v. *Ally Mahomed* (1904) 30 Bom. 270; *Jan Mahomed* v. *Datu* (1914) 38 Bom. 449, 22 I. C. 195; *Mangaldas* v. *Abdul* (1914) 16 Bom. L. R. 224, 23 I. C. 565.

Ss. 16-16B

usage (*e*). Where, however, Cutchi Memons migrate from India and *settle among Mahomedans*, as in Mombasa, the presumption that they have adopted the Mahomedan custom of succession should be readily made (*f*).

Cutchi Memons Act.—It is now provided by sec. 2 of the Cutchi Memons Act 46 of 1920 and the Cutchi Memons Amendment Act 34 of 1923, that any person who satisfies the prescribed authority—

(a) that he is a Cutchi Memon and is the person whom he represents himself to be;

(b) that he is competent to contract within the meaning of section 11 of the Indian Contract Act, 1872, and

(c) that he is resident in British India,

may by declaration in the prescribed form and filed before the prescribed authority declare that he desires to obtain the benefit of this Act, and thereafter the declarant and all his minor children and their descendants will in matters of succession and inheritance be governed by the Mahomedan law.

This Act governs the succession to the estate of the declarant. It does not affect the right of the declarant himself to succeed as a Cutchi Memon to the property of another Cutchi Memon who has signed no such declaration (*g*).

16A. Testamentary power of Cutchi Memons.—(*1*) A Mahomedan cannot by will dispose of more than one-third of his property without the consent of his heirs [s. 104]. But a Cutchi Memon may dispose of the whole of his property by will; this is founded on custom (*h*).

(*2*) A Cutchi Memon will is to be construed by the rules of Hindu law relating to wills (*i*).

Sub-Sec. (1).—There is hardly any doubt that a custom similar to that among the Cutchi Memons of Bombay exists also among the Khojas of Bombay.

Sub-Sec. (2).—Thus if a Cutchi Memon will contains a contingent bequest, the bequest will be void if the will is to be construed by the Mahomedan law, but valid if it is to be construed by the Hindu law.

16B. Halai Memons.—Halai Memons domiciled in Bombay are governed in all respects by the Mahomedan law (*j*).

Halai Memons of Porbandar in Kathiawar follow in matters of succession and inheritance Hindu law and not Mahomedan law, differing in that respect from Halai Memons of Bombay. It was so held in the undermentioned case upon evidence of custom among Halai Memons in Porbandar (*k*).

(*e*) *Abdurahim* v *Halimabai* (1915) 43 I A 35, 39, 18 Bom L. R 635, 639, 32 I C. 413, *Hirbai* v. *Gorbai* (1875) 12 B H. C 294, 305; *Rahimatbai* v *Hirbai* (1877) 3 Bom 34; *In re Haji Ismail* (1880) 6 Bom. 452, *Azhabai* v. *Hari Tyeb* (1882) 9 Bom 115; *Mahomed Sidick* v. *Haji Ahmed* (1885) 10 Bom. 1, *In the goods of Mulbai* (1866) 2 B. H C 276. The Hindu law as to joint family property does not apply to Cutchi Memons, *Haji Oosman* v. *Haroon* (1923) 47 Bom. 369 88 I. C. 862, ('23) A B 148.

(*f*) (1915) 43 I. A. 35, 18 Bom. L R. 635, 32 I. C. 413, *supra*.

(*g*) *Abdulsakur* v. *Abubakkar* (1930) 54 Bom. 358, 127 I. C. 401, ('30) A.B 191

(*h*) *Advocate-General* v *Jimbabai* (1915) 41 Bom. 181, 31 I. C. 106; *Advocate-General* v. *Karmali* (1903) 29 Bom. 133, 148-149

(*i*) *Abdulsakur* v. *Abubakkar*, *supra*, dissenting from *dicta* to the contrary in *Advocate-General* v. *Jimbabai*, *supra*.

(*j*) *Khojas and Memons' Case* (1847) Perry's O. C. 110, 115; *Khatubai* v. *Mahomed Haji Abu* (1923) 50 I. A. 108, 47 Bom. 146, 72 I. C. 202, ('22) A. PC. 414, affmg. (1918) 43 Bom. 647, 51 I. C 513.

(*k*) (1923) 50 I. A. 108, 47 Bom 146, 72 I. C. 202, ('22) A. PC. 414, *supra*.

17. Sunni Bohras of Gujarat: Molesalam Girasias of Broach.—The Sunni Bohra Mahomedans of Gujarat (*l*), and the Molesalam Girasias of Broach (*m*), are governed by the Hindu law in matters of succession and inheritance.

These communities also were originally Hindus, and became subsequently converts to Mahomedanism. The Sunni Bohras of Gujarat must not be confounded with the Bohras of Bombay who are Shias. See sec. 20 below.

17A. Lubbais of Coimbatore.—There is no custom among the Lubbai Mahomedans of the Sunni Sect in the Coimbatore District excluding females from inheritance (*n*).

The Lubbai Mahomedans of Coimbatore were originally Tamil-speaking Hindus who subsequently became converts to Mahomedanism, but there was not sufficient evidence in the case to show that they had retained the Hindu rule excluding females from succession

(*l*) *Bai Baiji* v *Bai Santok* (1894) 20 Bom 53
(*m*) *Fatesangji* v *Harisangji* (1894) 20 Bom 181
(*n*) *Muhammad Ibrahim* v *Shaikh Ibrahim* (1922) 49 I A 119, 54 Mad 398, 67 I C 115, ('22) A PC 59, reversing (1916) 39 Mad 664, 30 I C. 806.

CHAPTER III.

MAHOMEDAN SECTS AND SUB-SECTS.

Ss. 18-22

18. Sunnis and Shias.—The Mahomedans are divided into two sects, namely, the Sunnis and the Shias.

There is another class of Mahomedans called Motazilas. It is not clear whether they form an independent sect, or they are an offshoot of the Shia sect.

The Cutchi Memons of Bombay and Halai Memons belong to the Sunni sect. See secs 16, 16A and 16B above.

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

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

Presumption as to Sunnism.—The great majority of the Mahomedans of this country being Sunnis, the presumption will be that the parties to a suit or proceeding are Sunnis unless it is shown that the parties belong to the Shia sect (*o*). But the Shia law is not foreign law. It is part of the law of the land, and so no expert evidence can be led to prove it as in the case of foreign law (*p*).

20. Shia sub-sects.—The Shias are divided into three sub-sects, namely, the Athna-Asharias, the Ismailyas and the Zaidyas.

There are two divisions of Athna-Asharias, namely, (1) Akhbari, and (2) Usuli.

The Khojas and the Bohras of Bombay belong to the Ismailya sub-sect. See secs. 16, 16B and 17.

21. Each sect governed by its law.—The Mahomedan law applicable to each sect or sub-sect is to prevail as to litigants of that sect or sub-sect (*q*).

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

22. Change of sect.—A Mahomedan male or female who has attained the age of puberty, may renounce the doctrines of the sect or sub-sect to which he or she belongs, and adopt

(*o*) *Bafatun* v. *Bulaiti Khanum* (1903) 30 Cal. 683, 686.
(*p*) *Aziz Bano* v. *Muhammad* (1925) 47 All. 823, 891 C. 690, ('25) A. A. 720.
(*q*) *Deedar Hossein* v. *Zuhoor-oon-Nissa* (1841) 2 M.I.A. 441, 477.

the tenets of the other sect or any other sub-sect, and he or she shall thenceforth be subject to the law of the new sect or sub-sect (*r*).

23. Marriage between Shia male and Sunni female—wife's status not affected.—A Sunni woman contracting marriage with a Shia does not thereby become subject to the Shia law (*s*).

The same proposition, it would appear, holds good in the case of the marriage of a Shia female with a Sunni male. See sec. 199A.

(*r*) *Hayat-un-Nissa* v *Muhammad* (1890) 12 All 290, 17 I A 73 (change of sect), *Muhammad* v *Gulam* (1864) 1 B H. C 236 (change from Shafeiism to Hanafism).

(*s*) *Nasrat* v. *Hamidan* (1882) 4 All. 205.

CHAPTER IV.

SOURCES AND INTERPRETATION OF MAHOMEDAN LAW.

Ss. 24-26

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

Kiyas is reasoning by analogy Abu Hanifa, the founder of the Hanafi sect of Sunnis, frequently preferred it to traditions of single authority The founders of the other Sunni sects, however, seldom resorted to it (*u*)

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

Thus where a passage of the Koran (Sura II, vv. 241-242) was interpreted in a particular way both in the *Hedaya* (a work on the Sunni law) and in the *Imamia* (a work on the Shia law), it was held by their Lordships of the Privy Council that it was not open to a Judge to construe it in a different manner (*v*)

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

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

It is a rule of Mahomedan law that a gift in perpetuity is not valid unless it is a gift to *charity*. Is a gift by a Mahomedan to his own *children and their descendants* a gift to charity? No—was the answer given by a majority of the Full Bench of the Calcutta High Court in *Bikani Mia* v. *Shuk Lal* (*x*). Yes—was the answer given by Ameer Ali, J., in a dissenting judgment, relying on the following precept of the Prophet Mahomed "A pious offering to one's *family* to provide against their getting into want is more pious than giving alms to the beggars. The most excellent form of *sadakah* (charity) is that which a man bestows upon his own family." Referring to the judgment of Ameer Ali, J., their Lordships of the Privy Council observed in a later case (*y*), that it was not safe in determining what was the rule of Mahomedan law on a particular subject to rely upon abstract precepts taken from the mouth of the Prophet without

(*t*) Morley, Introd. ccxxvii
(*u*) *Ib* p ccxxxvii
(*v*) *Aga Mahomed Jaffer* v. *Koolsom Beebee* (1897) 25 Cal 9, 18, 24 I A 196, 204.
(*w*) 1902) 25 All. 236, 254, 30 I A. 94.
(*x*) (1893) 20 Cal. 116
(*y*) *Abul Fata* v *Rasamaya* (1894) 22 Cal 619, 631, 632, 22 I A. 76, 86, on appeal from (1891) 18 Cal. 399.

knowing the context in which those precepts were uttered. Their Lordships further observed that the rule of Mahomedan law on the subject was that which was laid down by the majority of the Full Bench, and that the new rule of law sought to be deduced from the precept of the Prophet by Ameer Ali, J., was not one that would conduce to justice. A wakf in favour of children and descendants is now declared to be legal by the Mussalman Wakf Validating Act VI of 1913, *provided* there is an ultimate gift to charity. See secs. 159-161 below.

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

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

It is a general rule of interpretation of the Hanafi law that where there is a difference of opinion between Abu Hanifa and his two disciples, Abu Yusuf and Imam Muhammad, the opinion of the disciples prevails (*a*). Where there is a difference of opinion between Abu Hanifa and Imam Muhammad, that opinion is to be accepted which coincides with the opinion of Abu Yusuf (*b*). When the two disciples differ from their master and from each other, the authority of Abu Yusuf is generally preferred (*c*). But these rules are not inflexible.

Where there is a conflict of opinion, and no specific rule to guide the court, the court ought to follow that opinion which is most in accordance with justice, equity and good conscience (*d*).

28A. Rules of equity.—The rules of equity and equitable considerations commonly recognized in Courts of Chancery in England are not foreign to the Mussulman system, but are in fact often referred to and invoked in the adjudication of cases under that system (*e*).

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

(*a*) *Agha Ali Khan* v *Altaf Hasan Khan* (1892) 14 All. 429, 448, *Abdul Kadir* v. *Salima* (1886) 8 All. 149, 166-167.

(*b*) (1886) 8 All. 149, p. 162, *supra*.

(*c*) *Kulsom Bibee* v *Golam Hossein* (1905) 10 C. W N. 449, 488 *Khajah Hossein* v. *Shahzadee* (1869) 12 W. R. 344, 346, affmd. in (1869) 12 W. R 498. See also s 151 below. In *Muhammad* v. *The Legal Remembrancer* (1893) 15 All. 321, 323, it was held that the opinion of Imam Muhammad should be preferred to that of Abu Yusuf, the Court thinking (though erroneously) that it was so laid down by the Full Bench in *Bikani Mia* v. *Shuk Lal* (1893) 20 Cal 116.

(*d*) *Aziz Bano* v *Muhammad* (1925) 47 All. 823, 89 I. C. 690, ('25) A. A. 720 [difference in Shia authorities].

(*e*) *Hamira Bibi* v. *Zubaida Bibi* (1915) 43 I.A. 294, 301-302, 38 All. 581, 582, 36 I.C. 87. See *Hedaya*, Book XX, p. 334, "Of the Duties of the Kazee."

CHAPTER V.

SUCCESSION AND ADMINISTRATION.

[Prior to the Indian Succession Act, 1925, the two principal Acts in force in British India relating to the administration of the estate of deceased persons were the Indian Succession Act, 1865, and the Probate and Administration Act, 1881. The Indian Succession Act, 1865, applied to Europeans, Parsis, East Indians and to all Natives of India other than Hindus, Mahomedans and Buddhists. The Probate and Administration Act applied to Hindus, Mahomedans and Buddhists. Both these Acts have been repealed by the Indian Succession Act, 1925, and their provisions re-enacted in that Act.]

S. 29

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

The order set forth above is in accordance with the provisions of the Indian Succession Act, 1925, secs. 320-323 and sec. 325. As regards item No. (5), it is to be noted that a Mahomedan cannot by *will* dispose of more than one-third of what remains of his property after payment of his funeral expenses and debts, unless the heirs consent thereto [s. 104].

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

The person primarily entitled to administer the estate of a deceased Mahomedan, that is, to apply it in the manner set forth in the section, is the *executor* appointed under his will. If the deceased left no will, the person entitled to administer his estate would be the person to whom letters of administration are granted. Such a person is called *administrator*. The persons primarily entitled to letters of administration are the *heirs* of the deceased: Indian Succession Act, 1925, s. 218. In the absence of an executor or administrator, the persons entitled to administer the estate are the *heirs* of the deceased.

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

30. Vesting of estate in executor and administrator.—The executor or administrator, as the case may be, of a deceased Mahomedan, is, under the provisions of the Indian Succession Act, 1925, sec. 211, his legal representative for all purposes, and all the property of the deceased vests in him as such. The estate vests in the executor, though no probate has been obtained by him (*g*).

But since a Mahomedan cannot dispose of by will more than one-third of what remains of his property after payment of his funeral expenses and debts, and since the remaining two-thirds must go to his heirs as on intestacy unless the heirs consent to the legacies exceeding the bequeathable third, the executor, when he has realized the estate, is a bare trustee for the heirs as to two-thirds, and an active trustee as to one-third for the purposes of the will; and of these trusts, one is created by the Act and the probate irrespective of the will, the other by the will established by the probate (*h*).

The first paragraph is a reproduction of the provisions of sec. 211 of the Indian Succession Act, 1925. An executor under the Mahomedan law is called *wasi*, derived from *wasiyyat* which means a will. But though the Mahomedan law recognized a *wasi*, it did not recognize an administrator, there being nothing analogous in that law to "letters of administration." A *wasi* or executor under the Mahomedan law was merely a *manager* of the estate, and no part of the estate of the deceased *vested* in him as such. As a *manager* all that he was entitled to do was to pay the debts and distribute the estate as directed by the will. He had no power to sell or mortgage the property of the deceased, not even for the payment of his debts. The first time this power was conferred upon him was by the Probate and Administration Act, 1881. Under sec. 4 of that Act, the whole of the property of a Mahomedan testator vested in his executor, and it does so now under sec. 211 of the Indian Succession Act, 1925. The property vests in the executor *even if no probate has been obtained.* As a result of the *vesting* of the estate in the executor, he has the power to dispose of the property vested in him in due course of administration, a power which he did not possess before the Probate and Administration Act, 1881; see sec. 90 of that Act, now sec. 307 of the Indian Succession Act, 1925.

31. Devolution of inheritance.—Subject to the provisions of secs. 29 and 30, the whole estate of a deceased Mahomedan if he has died intestate, or so much of it as has not been disposed of by will, if he has left a will (s. 104), devolves on his heirs *at the moment of his death*, and the devolution is not

(*g*) *Venkata Subamma* v. *Ramayya* (1932) 59 I.A. 112, 55 Mad. 443, 136 I. C. 111, ('32) A PC. 92 [a case of a Hindu will, which applies also to a Mahomedan will]; *Shemail* v. *Ahmed Omer* (1931) 33 Bom. L.R. 1056, ('31) A.B. 533; *Mahomed Yusuf* v. *Hargovandas* (1923) 47 Bom. 231, 70 I.C. 268, ('22) A. B. 392, *Sakina Bibee* v. *Mahomed Ishak* (1910) 37 Cal. 839, 8 I.C. 655, is no longer good law.

(*h*) *Kurrutulain* v. *Nuzhat-ud-dowla* (1905) 33 Cal. 116, 128, 32 I.A. 244, 257.

Ss. 31, 32

suspended by reason merely of debts being due from the deceased (*i*). The heirs succeed to the estate as tenants-in-common in specific shares (*j*).

Mahomedan law does not recognize representation—The theory of representation is not known to the Mahomedan law. Under its provisions the estate of a deceased person devolves upon his *heirs at the moment of his death*. There is no intermediate vesting in any one, such as an executor or administrator, as under the Indian Succession Act (*k*)

Limitation for suit by an heir for recovery of his share—As stated above, the heirs succeed to the estate as tenants-in-common in specific shares. When the heirs continue to hold the estate as tenants-in-common without dividing it, and one of them subsequently brings a suit for recovery of his share, the period of limitation for the suit does not run against him from the date of the death of the deceased, but from the date of express ouster or denial of title, in other words, it is art 144 of Sch I to the Limitation Act, 1908, that applies, and not art 123 (*l*)

Administration suit—Any heir or creditor of the deceased may bring a suit for the administration of the estate : he is not bound to bring a suit for partition (*m*).

32. Alienation by an heir of his share before payment of debts. - (*1*) Any heir may, even before distribution of the estate, transfer *his own* share [see s. 37], and pass a good title to a *bona fide* transferee for value, notwithstanding any debts that might be due from the deceased (*n*) [ills. (a) and (c)].

The transfer must be one for value, that is, for a consideration, *e g*, a sale or a mortgage, as distinguished from a gift

(*2*) A *sale* of the share of an heir in execution of a decree passed against him at the suit of his creditors amounts to a "transfer" within the meaning of sub-sec. (1), and will pass a good title to the purchaser in execution [ill. (b)], but not a simple money decree not followed by a sale in execution (*o*).

(*3*) If the share transferred by an heir is a share in *immovable property* forming part of the estate of the deceased,

(*i*) *Jafri Begam* v *Amir Muhammad* (1885) 7 All 822, *Muhammad Awais* v *Har Sahai* (1885) 7 All. 716.

(*j*) *Abdul Khader* v *Chidambaram* (1909) 32 Mad. 276, 278, 3 I C. 876, *Abdul Majeeth* v. *Krishnamacharar* (1917) 40 Mad 243, 254, 40 I C. 210. See also cases cited in foot-note (*l*) below.

(*k*) *Amir Dulhin* v. *Baij Nath* (1894) 21 Cal. 311, 315.

(*l*) *Ghulam Mohammad* v *Ghulam Husain* (1932) 59 I A 74, 54 All. 98, 136 I.C. 454, ('32) A. PC. 81 ; *Kallangowda* v. *Bibishaya* (1920) 44 Bom. 943, 58 I.C. 42, *Nurdin* v *Bu Umrao* (1921) 45 Bom. 519, 59 I.C 780, ('21) A.B 56 ; *Bai Jivi* v *Bai Bibanbee* (1929) 31 Bom. L.R. 199, 118 I C 785, ('29) A.B. 141, *Mussammat Jano* v *Narsingh Das* (1930) 11 Lah 29, 117 I C. 803, ('29) A.L 549, *Ma Bi* v. *Ma Khatoon* (1929) 7 Rang. 744, 121 I C. 785, ('30) A R. 72 ; *Rustam Khan* v *Janki* (1929) 51 All. 101, 111 I C 809, ('28) A A. 467.

(*m*) *Essafally* v. *Abdeali* (1921) 45 Bom. 75, 59 I C. 396, ('21) A.B. 424.

(*n*) *Bazayet Hossein* v. *Dooli Chund* (1878) 5 I. A. 211, 4 Cal. 402 ; *Wahidunnissa* v. *Shubrattun* (1870) 6 Beng. L. R. 54 ; *Land Mortgage Bank* v. *Bidyadhari* (1880) 7 Cal. L. R. 460.

(*o*) *Bhola Nath* v. *Maqbul-un-Nissa* (1903) 26 All. 28, commenting on *Yasin Khan* v. *Muhammad* (1897) 19 All. 504.

and the transfer is made *during the pendency of a suit* by the widow of the deceased for her dower, in which a decree is passed creating a *charge* on the estate for the dower debt, the transferee will take the share of the heir *subject to the charge* (*p*), but not if the decree is a simple money decree (*q*) [ill. (d)]. See Transfer of Property Act, 1882, sec. 52, and s. 223 below.

Illustrations.

[(a) A Mahomedan dies leaving several heirs After his death *the whole body of heirs* sell the whole of his estate without paying his debts *After the sale*, a creditor of the deceased obtains a decree against the heirs for his debt, and applies for execution of the decree by an attachment and sale of the property in the hands of the purchaser. He is not entitled to do so. The reason is that a creditor of a deceased Mahomedan cannot follow his estate into the hands of a *bona fide* purchaser for value · *Land Mortgage Bank* v *Bulyadhari* (1880) 7 Cal L R 460 (with facts somewhat altered).

(b) A Mahomedan dies leaving two sisters as his only heirs After his death, *C*, a creditor of the deceased, obtains a decree against the sisters for his debt Subsequently a creditor *of the sisters* obtains a decree against them for his debt, and the property of the deceased come to their hands is sold in execution of the decree to *P* In this case *C* is not entitled to attach the property in the hands of *P* in execution of his decree *Wahidunnissa* v *Shubrattun* (1870) 6 Beng L R 54 (with facts slightly altered).

Note—In the case in ill (a), the sale was by private treaty In the case in ill (b), it was in execution of a decree Both these sales stand on the same footing. In both the cases the purchaser was a *bona fide* purchaser for value.

(c) A Mahomedan dies leaving a widow and a son A large sum of money is due to the widow for her dower. [A dower is a debt, and the widow is to that extent a creditor of the estate of her deceased husband She is not, however, a secured creditor (s 223)] The son mortgages his share in the estate to *M*, without paying the dower debt. *After the mortgage*, the widow obtains a decree against the son, who is in possession of the whole estate for the dower debt, and attaches the son's share in execution of the decree The mortgagee then obtains a decree against the son on the mortgage for sale of the son's share mortgaged to him. The share is sold in execution of the decree, and purchased by *P*. The mortgage having been made before the attachment, *P* is entitled to recover the son's share free from the attachment. *Bazayet Hossein* v *Dooli Chund* (1878) 5 I. A. 211, 4 Cal 402.

Note—In the cases in ills (a) and (b), the sale was by all the heirs of their shares. In the case in ill. (c), the sale is only by one of the heirs.

(d) A Mahomedan died leaving three widows and a son He left considerable property both movable and immovable. After his death, the widows brought a suit against the son, who was in possession of the whole estate, for an administration of the estate of the deceased, and for payment of the dower debt out of the estate A decree was passed in the suit directing the son to render an account of the properties of the deceased come to his hands, and providing for payment of the dower *out of the properties*. (This was not a *simple money decree*, but a decree creating a *charge* on the properties for the dower debt). The widows then applied for execution of the decree. *Pending execution*, (which is the same thing as *pending the suit*), the son mortgaged his share to *M* *M* sued

(*p*) *Mahomed Wajid* v *Bazayet Hossein* (1878) 5 I. A. 211, 223-224, 4 Cal. 402.
(*q*) *Bhola Nath* v. *Maqbul-un-Nissa* (1903) 26 All 28; *Abdul Rahman* v. *Inayati Bibi* ('31) A. O. 63, 130 I C. 113.

Ss. 32-36

the son on the mortgage, and obtained a decree for sale of the share mortgaged to him. The share was sold in execution of the decree to *P* who purchased with notice of the decree. Upon these facts the Privy Council held that *P* took the share *subject to the decree* in favour of the widows: *Mahomed Wajid* v. *Bazayet Hossein* (1878) 5 I. A. 211, 223-224, 4 Cal. 402.

Note.—If the mortgage had been effected *before* the suit, it would not have been affected by the decree: *Bazayet Hossein* v. *Dooli Chund* (1878) 5 I. A. 211, 4 Cal. 402.]

33. Extent of liability of heirs for debts.—Each heir is liable for the debts of the deceased to the extent only of a share of the debts proportionate to his share of the estate (*r*).

[A Mahomedan, who is indebted to *C* in the sum of Rs. 3,200, dies leaving a widow, a son and two daughters. The heirs divide the estate without paying the debt, the widow taking 1/8, the son taking 7/16, and each daughter 7/32. *C* then sues the widow and the son for the *whole* of the debt due to him from the deceased. The widow is liable to pay only (1/8×3,200)=Rs. 400, and the son (7/16×3,200)=Rs. 1,400; they are not liable for the whole debt: *Pirthi Pal Singh* v. *Husaini Jan* (1882) 4 All. 361]

34. Distribution of estate.—Since the estate devolves on the heirs at the moment of the death of the deceased, they are at liberty to divide it at any time after the death of the deceased. The distribution is not liable to be suspended until payment of the debts.

It was stated in two Allahabad cases (*s*), and also in a Calcutta case (*t*), relying on some passages in the *Hedaya*, that the estate could not be distributed if it was insolvent. In a later Allahabad case (*u*), however, Mahmood, J., observed that the translation of the said passage was only a loose paraphrase of the original Arabic, and expressed the opinion that the estate may be distributed even if it is insolvent.

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

36. Suit by creditor against heirs.—If there be no executor or administrator, the creditor may proceed against the *heirs* of the deceased, but there is a conflict of opinion as to whether a decree obtained by a creditor against some of the heirs of the deceased is binding on the other heirs.

According to the decisions of the High Court of Calcutta, any creditor of the deceased may sue any one of the heirs who

(*r*) *Pirthi Pal Singh* v. *Husaini Jan* (1882) 4 All 361, *Ambashankar* v *Sayad Ali* (1894) 19 Bom. 273, *Bussunteram* v. *Kamaluddin* (1885) 11 Cal 421, 428; *Abbas Naskar* v. *Chairman, District Board, 24-Parganas* (1932) 59 Cal. 691; *Ramcharan* v. *Hanifa Khatun* ('32) A. A. 591.

(*s*) *Hamir Singh* v *Zakia* (1875) 1 All 57, 59, [F B]; *Pirthi Pal Singh* v. *Husaini Jan* (1882) 4 All. 361, 366

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

(*u*) *Jairi Begam* v. *Amir Muhammad* (1885) 7 All. 822, 838

is in possession of the *whole or any part* of the estate, without joining the other heirs as defendants, to recover the *entire* debt, and the Court may in such a suit pass a decree for the sale, not only of the share of that particular heir in the estate, but of all the assets of the deceased that are in his possession. Where such a decree is passed, and a sale is effected in execution of the decree, the sale will pass to the purchaser not only the interest of that particular heir in the property, but the interests of the other heirs also (including minors), though they were not parties to the suit (*v*), unless the decree was obtained by fraud, or was taken by consent (*w*) [ills. (a) and (b)]. These decisions proceed on the view that a creditor's suit is an administration suit, and any heir in possession of the estate represents the estate for the purpose of the suit. In a recent case, however, the same High Court held that the above decisions could only apply if the heir who was sued was in possession of the estate on behalf of the other heirs, but not if he held the estate on his own behalf (*x*).

The High Court of Bombay in some cases (*y*) held the same view as the Calcutta High Court did in its earlier decisions, though on different grounds, but with this difference that a decree against an heir in possession bound the other heirs only if he was in possession of the *whole* estate [ills. (c) and (d)]. But this view has been disapproved in recent cases, and it has been held that a sale in execution of a decree passed against an heir in possession in a creditor's suit does not pass to the purchaser the interest of those heirs in the estate who were not parties to the suit even if the heir against whom the decree was passed was in possession of the *whole* estate (*z*) [ill. (e)]. This coincides with the view taken by the High Court of Allahabad.

In *Pathummabi* v. *Vittil* (*a*), the High Court of Madras followed the earlier rulings of the Bombay High Court, but that decision may now be taken to be no longer good law, having regard to the adverse criticism of that case by

(*v*) *Muttyyan* v. *Ahmed Ally* (1882) 8 Cal 370, *AmirDulhin* v. *Bavj Nath* (1894)21 Cal 311.
(*w*) *Assamathem* v. *Roy Lutchmeeput Singh* (1878) 4 Cal 142, 155.
(*x*) *Abbas Naskar* v. *Chairman, District Board, 24-Parganas* (1932) 59 Cal 691.
(*y*) *Khursetbibi* v. *Keso Vinayek* (1887) 12 Bom. 101 : *Davalava* v *Bhimaji* (1895) 20 Bom. 338, followed in *Virchand* v *Kondu* (1915) 39 Bom. 729, 31 I.C. 180 [mortgage-decree]
(*z*) *Bhagirthibai* v. *Roshanbi* (1919) 43 Bom. 412, 51 I C 18, dissenting from 12 Bom. 101, and 20 Bom 338, *supra*, *Shahasaheb* v *Sadashiv* (1919) 43 Bom 575, 581, 51 I C 223 [mortgage suit], dissenting from (1915) 39 Bom 729, 31 I C 180, *supra*; *Lala Miya* v. *Manubibi* (1923) 47 Bom 712, 73 I C. 246, ('23) A B 411
(*a*) (1902) 26 Mad. 734, 738.

S. 36 Abdur Rahim, J., in *Abdul Majeeth* v. *Krishnamachariar* (*b*), who preferred the view taken by the Allahabad High Court.

According to the rulings of the Allahabad High Court, a decree relative to his debts passed in a contentious or non-contentious suit against only such heirs of a deceased Mahomedan debtor as are in possession of the whole or part of his estate, binds each defendant to the extent of his share in the estate (*c*), but it does not bind the other heirs who, by reason of absence or any other cause, are out of possession, so as to convey to the purchaser, in execution of such a decree, the interests of such heirs as were not parties to the decree. But if they sue for a declaration that the sale is not binding on them, and it is proved that the debts have been paid out of the proceeds of the sale, they ought to be put on terms as a matter of equity, and required to pay their proportionate share of the debt before they are granted the declaration sued for (*d*) [ills. (f) and (g)].

The Chief Court of Oudh has taken the same view as that taken by the Allahabad High Court (*e*).

Illustrations.

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

(b) A Mahomedan dies leaving a widow and other heirs. A suit is brought by a creditor of the deceased against the widow alone who is in possession of *part* of the estate. The other heirs are not necessary parties, and the creditor is entitled to a decree not only against the share of the widow in the estate, but the entire assets which have come into her hands and which have not been applied in the discharge of the liabilities to which the estate may be subject at her husband's death: *Amir Dulhin* v. *Baij Nath* (1894) 21 Cal. 311.

Note.—As to the cases cited in ills. (a) and (b), it was pointed out by the High Court of Calcutta in a recent case that the defendants in those cases were in possession of the estate on behalf of *all* the heirs; otherwise the only decree that the creditor would be entitled to would be a decree for a *proportionate* share of the debt: *Abbas Naskar* v. *Chairman, District Board, 24-Parganas* (1932) 59 Cal. 691.

(c) A Mahomedan woman, Khatiza, dies leaving a minor son and a daughter. After her death a suit is brought by a creditor of the deceased "against Khatiza, deceased, represented by her minor son represented by his guardian" (*f*), and a decree

(*b*) (1917) 40 Mad 243, 255, 257, 40 I C 210
(*c*) *Dallu Mal* v. *Hari Das* (1901) 23 All 263, 265
(*d*) *Jafri Begam* v. *Amir Muhammad Khan* (1885) 7 All 822, *Muhammad Awais* v. *Har Sahai* (1885) 7 All 716; *Hamir Singh* v. *Zakia* (1875) 1 All 57 See also *Muhammad Allahdad* v. *Muhammad Ismail* (1888) 10 All. 239
(*e*) *Amir Jahan* v. *Khadim Husain* ('31) A.O. 253, 132 I C. 75.
(*f*) This form of suit, which was at one time common in the Mofussil of Bombay, has been recently disapproved of by the Bombay High Court.

is passed in that form. The deceased was entitled to a share in a *Khoti Vatan*, and "the right, title, and interest of Khatiza" in that share is sold in execution of the decree. The purchaser acquires a title unimpeachable by the daughter, though she was not a party to the suit or to the subsequent proceedings in execution: *Khurshetbibi* v. *Keso Vinayek* (1887) 12 Bom. 101 (*g*). [No reference was made in the judgment to the Calcutta cases cited above nor to the Allahabad cases cited in ill. (c)].

(d) A Mahomedan dies leaving a widow, a minor son, and two daughters. After his death a suit is brought by a mortgagee from the deceased against the son as represented by his guardian and mother, claiming possession of the land mortgaged to him as owner under a *qahan lahan* clause in the mortgage. The widow is in possession of the estate, and a decree *ex parte* is passed directing her to deliver possession of the land to the mortgagee, and he is accordingly put in possession. The decree binds the daughters though they were not parties to the suit, and they are not entitled to redeem the mortgage as against the mortgagee or a purchaser from him. *Davalata* v. *Bhimaji* (1895) 20 Bom. 238.

(e) A Mahomedan dies leaving a widow and a daughter. After his death *C*, a creditor of the deceased, sues the widow for the recovery of a debt due to him and a decree is passed in his favour for Rs. 327 to be recovered out of the estate of the deceased. In execution of the decree, the right, title and interest of the deceased in a house is sold and it is purchased by *P*. The daughter, who was not a party to the suit, subsequently sues *P* to recover by partition her share in the house. *Held*, disapproving the cases cited in ills. (c) and (d), that the daughter, *not being a party to C's suit*, was not bound by the decree passed in the suit, and that the sale did not pass her interest in the house to *P*, and that she was entitled to recover her share in the house: *Bhagirthibai* v. *Roshanbi* (1919) 43 Bom. 412, 51 I.C. 18. [In this case the widow against whom the decree was obtained was in possession of the whole house, see p. 427 of the report, lines 27-28.]

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

(g) A creditor of a deceased Mahomedan obtains a money decree against an heir of the deceased in possession of the estate, and attaches certain immovable property forming part of the estate in execution of the decree. The value of the immovable property exceeds the share of the defendant. According to the Allahabad High Court, the defendant is entitled to object to the attachment and sale of the right and interest of the other heirs who were not parties to the suit, upon the ground that as regards them he is in possession of the property as trustee: *Dallu Mal* v. *Hari Das* (1901) 23 All. 263.]

37. Alienation by one of several heirs for payment of debts.—One of several heirs of a deceased Mahomedan, though he may be in possession of the whole estate of the

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

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deceased, has no power to alienate the shares of his co-heirs, not even for the purpose of discharging the debts of the deceased. If he sells any property in his possession forming part of the estate of the deceased, though it may be for payment of the debts of the deceased, such sale operates as a transfer only of his interest in the property. It is not binding on the other heirs or the other creditors of the deceased (*h*).

It has been so held by a Full Bench of the Madras High Court overruling *Pathummabi* v. *Vittil* (*i*), an earlier decision of the same High Court, and dissenting from the Allahabad decision in *Hasan Ali* v. *Mehdi Husain* (*j*).

As to ostensible ownership, see *Mubarak-un-Nissa* v. *Muhammad* (*k*), a case unde sec. 41 of the Transfer of Property Act, 1882.

38. Recovery through Court of debts due to the deceased.—No Court shall pass a decree against a debtor of a deceased Mahomedan for payment of his debt to a person claiming on succession to be entitled to the effects of the deceased or to any part thereof, or proceed, upon an application of a person claiming to be so entitled, to execute against such a debtor a decree or order for the payment of his debt, except on the production, by the person so claiming, of a probate or letters of administration evidencing the grant to him of administration to the estate of the deceased, or a certificate granted under sec. 31 or sec. 32 of the Administrator-General's Act, 1913, and having the debt mentioned therein, or a succession certificate granted under Part X of the Indian Succession Act, 1925, and having the debt specified therein, or a certificate granted under the Succession Certificate Act, 1889, or a certificate granted under Bombay Regulation VIII of 1827, and, if granted after the first day of May, 1889, having the debt specified therein.

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

This section reproduces the provisions of sec. 214 of the Indian Succession Act, 1925.

Probate and Letters of Administration.—It is not necessary in the case of a Mahomedan will that the executor should obtain probate of the will to establish his right as such in a Court of Justice [Indian Succession Act, 1925, sec. 213 (2)] (*l*). Nor is it necessary

(*h*) *Abdul Majeeth* v. *Krishnamachariar* (1917) 40 Mad. 243, 40 I.C. 210 [F.B]; *Sukur* v. *Asmot* (1923) 50 Cal. 978, 79 I.C. 491, ('24) A.C. 384. See *Gulam Gore* v. *Shriram* (1919) 43 Bom. 487, 51 I.C. 79 [sale of equity of redemption by one of the heirs—suit for redemption by other heirs—limitation].

(*i*) (1902) 26 Mad. 734.

(*j*) (1877) 1 All. 533.

(*k*) (1924) 46 All. 377, 79 I.C. 174 ('24) A.A. 384.

(*l*) *Venkata Subamma* v. *Ramayya* (1932) 59 I.A. 112, 55 Mad. 443, 136 I.C. 111, ('32) A. PC. 92; *Shaik Moosa* v. *Shaik Esse* (1884) 8 Bom. 241, 255.

where a Mahomedan has died intestate that his heirs should obtain letters of administration to establish their right to any part of the property of the deceased in a Court of Justice [Indian Succession Act, 1925, sec. 212 (2)]. But where a suit is brought to recover a *debt* due to the deceased, the Court shall not pass a decree except on production of probate or of letters of administration or a certificate as mentioned in this section.

Recovery of debts through Court.—It must be observed that the rule laid down in the present section applies only where a debt due to the deceased is sought to be recovered *through a Court.* A debtor of a deceased person *may* pay his debt to the executor, though he may not have obtained probate, or, where he has died intestate, to his heirs even if they have not taken out letters of administration or a certificate, and such payment will operate as a discharge to the debtor. But payment of a debt by a debtor to one of several heirs does not discharge the debt as to all (*m*).

It may also be noted that where a debt is sought to be recovered by *legal proceedings*, it is not necessary that the plaintiff should have obtained either a probate or letters of administration or a certificate *before the date of the institution of the suit.* It is enough if he produces the grant *before the passing of the decree* (*n*).

Debt.—A suit by one member of a family to recover his share of the family property from the other members is not a suit to recover a "debt" (*o*). A suit asking for a personal decree against the mortgagor in respect of a mortgage is a suit for a "debt." But there is a conflict of opinion as to whether a suit for sale of the mortgaged property is a suit for a "debt." The High Court of Allahabad has held that it is (*p*). The High Courts of Calcutta (*q*), Bombay (*r*), and Madras (*s*), have held that it is not.

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

(1) the Indian Succession Act, 1925 ;
(2) the Administrator-General's Act, 1913 ; and
(3) Bombay Regulation VIII of 1827.

Such of the provisions of the Administrator-General's Act as apply to Mahomedans come into operation when a Mahomedan dies leaving assets within the local limits of the ordinary original civil jurisdiction of the High Court of Calcutta, Madras or Bombay. In such a case, the Court may, upon the application of any person interested in the assets, direct the Administrator-General to apply for letters of administration of the effects of the deceased, if the applicant satisfies the Court that such grant is necessary for the protection of the assets (see sec. 10 of the Act, and also sec. 11).

(*m*) *Pathummabi* v. *Vuttil* (1902) 26 Mad. 734, 739 Cf. *Sitaram* v. *Shridhar* (1903) 27 Bom. 292. See also *Ahmsa Bibi* v. *Abdul Kader* (1901) 25 Mad. 26, 39.

(*n*) *Chandra Kishore* v. *Prasanna Kumari* (1910) 38 Cal. 327, 33 I.A. 7, 9 I.C. 122.

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

(*p*) *Fateh Chand* v. *Muhammad* (1894) 16 All. 259.

(*q*) *Mahomed Yusuf* v. *Abdur Rahim* (1900) 26 Cal. 839.

(*r*) *Nanchand* v. *Yenawa* (1904) 28 Bom. 630.

(*s*) *Palaniyandi* v. *Veerammal* (1905) 29 Mad. 77.

CHAPTER VI.

INHERITANCE—GENERAL RULES.

Ss. 40-42

40. Heritable property.—There is no distinction in the Mahomedan law of inheritance between movable and immovable property or between ancestral and self-acquired property.

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

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

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

42. Principle of representation.—According to the Sunni law, the expectant right of an heir-apparent cannot pass by succession to his heir, nor can it pass by bequest to a legatee under his will (*w*). According to the Shia law, it does pass by succession in the cases specified in s. 80 below.

[*A*, a Sunni Mahomedan, has two sons, *B* and *C*. *B* dies in the lifetime of *A*, leaving a son *D*. *A* then dies leaving *C*, his son, and *D*, his grandson. The whole of *A*'s property will pass to *C* to the entire exclusion of *D*. It is not open to *D* to contend that he is entitled to *B*'s share as representing *B*: *Moolla Cassim* v. *Moolla Abdul* (1905) 33 Cal. 173, 32 I. A. 177.]

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

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

(*u*) *Abdool* v *Goolam* (1905) 30 Bom 304

(*v*) *Hasan Ali* v. *Nazo* (1889) 11 All. 456, 458

(*w*) *Abdul Wahid* v. *Nuran Bibi* (1885) 11 Cal. 597, 607, 12 I. A. 91. Macnaghten, p. 1 s. 9.

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

43. Transfer of spes successionis : Renunciation of chance of succession.—The chance of a Mahomedan heir-apparent succeeding to an estate cannot be the subject of a valid transfer or release (*y*).

Illustration.

[*A* has a son *B* and a daughter *C*. *A* pays Rs. 1,000 to *C*, and obtains from her a writing whereby in consideration of Rs. 1,000 received by her from *A*, she renounces her right to inherit *A*'s property. *A* then dies, and *C* sues *B* for her share (one-third) of the property left by *A*. *B* sets up in defence the release passed by *C* to her father. The release is no defence to the suit, and *C* is entitled to her share of the inheritance, as the transfer by her was a transfer merely of a *spes successionis*, and, as such, inoperative. But *C* is bound to bring into account the amount received by her from her father. *Sumsuddin* v. *Abdul Husein* (1906) 31 Bom. 165; *Banoo Begum* v. *Mir Abed Ali* (1908) 32 Bom. 172, 174-175.]

The rule of Mahomedan law that an heir cannot renounce his right to inherit is not different from the law under the Transfer of Property Act, 1882, s. 6 (a). That section provides that "the chance of an heir-apparent succeeding to an estate, the chance of a relation obtaining a legacy on the death of a kinsman, or any other mere possibility of a like nature, cannot be transferred."

A husband gives immovable property to his wife in lieu of her dower, and agrees not to claim any share of it as her heir on her death. Is the agreement valid and binding on the husband? The High Court of Allahabad has held that it is binding on the husband (*z*).

44. Life-estate and vested remainder.—(*1*) *Sunni law.*—Gift.—Under the Sunni law, "an *amree* or life-grant is nothing but a gift and a condition; and the condition is invalid; but a gift is not rendered null by involving an invalid condition" (*Hedaya*, 489). Thus if a gift is made by a Sunni Mahomedan of his property to *A* for life, the condition that *A* shall enjoy only the income of the property for life is void, and *A* will take an absolute interest in the property as if no condition were attached to it. Similarly, a gift of property to *A* for life, and after his death to *B*, is in its legal effect a gift to *A* absolutely, and *B* takes nothing under the gift [ill. (a)]. See s. 138 below.

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

(*y*) *Khanum Jan* v. *Jan Beebee* (1827) 4 Beng. S. D. A. 210; *Sumsuddin* v. *Abdul Husein* (1906) 31 Bom. 165; *Asa Beevi* v. *Karuppan* (1918) 41 Mad. 365, 46 I. C. 35, dissenting from *Kunhi* v. *Kunhi* (1896) 19 Mad. 176. See also *Hurmat-ool-Nissa Begum* v. *Allahdia Khan* (1871) 17 W. R. 108 [P. C.].

(*z*) *Nasir-ul-Haq* v. *Fayyaz-ul-Rahman* (1911) 33 All. 457, 9 I. C. 530.

S. 44 (2) *Family settlement.*—A life-estate may be created by an agreement in the nature of a family settlement, whether such agreement is preceded by litigation or not, but "the creation of a life-estate does not seem to be consistent with Mahomedan usage, and there ought to be very clear proof of so unusual a transaction" [ills. (b) and (c)]. Such an agreement is from its very nature a transaction for a consideration, and it must be distinguished from a pure *hiba* or gift mentioned in sub-sec. (1) above.

(3) *Hiba-bil-iwaz.*—The rule stated in sub-sec. (1) above does not apply to a *hiba-bil-iwaz* [ill. (d)]. As to *hiba-bil-iwaz*, see s. 141 below.

(4) *Shia law.*—The Shia law allows the creation of a life-estate and a vested remainder [ill. (e)].

(5) *Wakf.*—Both under the Sunni and the Shia law life-estates may be created by wakf: see s. 160.

Note.—According to the English law, when an estate is given to *A* for life, and the remainder to *B*, *A* takes an interest in the estate for life, and *B* takes a vested remainder. As *B* takes a *vested* interest, he can dispose of his interest by transfer *inter vivos* or by will On his death intestate his interest will pass to his heirs, even if he predeceases *A*. The same is the rule of Shia law, as held by Jenkins, C J, and Heaton, J, in *Banoo Begum*'s case cited in ill. (e). In two other cases, however, Beaman, J., expressed the opinion that the Arabic texts relied upon in *Banoo Begum*'s case did not support the conclusion reached in that case, and observed that an estate for life and a vested remainder were unknown to the Shia law as much as to the Sunni law (*a*).

Illustrations.

[(a) *A* makes a gift of his house to *B* for life, and after his death to *C*. According to the Sunni law, *B* takes an absolute interest in the house. *C* takes nothing. See cases cited in sec. 138 below. According to the Shia law, *B* takes an estate for life and *C* takes the remainder: see ill (e) below.

(b) The first Privy Council case in which the question arose as to the validity of a life-estate under the Sunni law was *Humeeda* v. *Budlun* (1872) 17 W. R. 525. It was a case of an arrangement between a mother and her son. The High Court held that the effect of the arrangement was to vest certain property in the mother for life, and that after her death it was to devolve on the son by way of remainder. But this decision was reversed by the Privy Council on appeal. As to the view taken by the High Court their Lordships said: "The creation of such a life-estate does not seem to be consistent with Mahomedan usage, and there ought to be very clear proof of so unusual a transaction." This decision was followed by the same tribunal in *Abdul Wahid* v. *Nuran Bibi* (1885) 11 Cal. 597, 12 I. A. 91, in which the facts were almost similar. In that case their Lordships said: "Such an interest (that is, a vested remainder) does not seem to be recognized by the Mahomedan law." And later on they said that it would be opposed to Mahomedan law to hold that the compromise created a vested interest in the son which passed to his heirs on his death in the lifetime of the mother.

(*a*) *Jannabai* v. *Sathna* (1910) 34 Bom. 604, 612-3, 6 I. C. 513; *Cassamally* v. *Currimbhoy* (1911) 36 Bom. 214, 253-4, 12 I. C. 225.

(c) A Hanafi Mahomedan made a will whereby he provided that after his death his wife should be the owner of the properties specified in the will, but without power to alienate it, and that on her death the properties should devolve on his nephews. On the same day he executed a writing by which he declared that he would continue to remain in possession of the properties so long as he lived. After about 11 years, he executed a deed by which, after reciting the will and the said writing, he provided as follows: "but as I want to avoid any difficulty to my wife in obtaining possession over the whole property after me, I, therefore, by means of this document have made a gift without consideration of my entire property detailed below subject to the condition that, out of the entire property mentioned in the deed of gift she shall remain in possession of shares worth Rs. 5,000 with power to make at her pleasure any sort of alienation like mortgage, sale or gift in respect thereof and that, as to the rest worth Rs. 10,000, she shall not possess any power of alienation, but she shall remain in possession thereof for her lifetime. After the death of the donee the entire property gifted away by this document shall revert to the donor's collaterals, namely,.....and those heirs of mine shall become owners with full proprietary power, and the own heirs of the donee lady shall not inherit the same, and the donee and my aforesaid heirs have accordingly agreed and consented to this. I have put the lady donee in possession of the property gifted to her." The subordinate Judge held that the deed was in the nature of a family settlement, and that the wife took an absolute interest in one-third only of the property. On appeal, Mr. Wazir Hasan, one of the Judicial Commissioners, took the view that the transaction was one for a consideration, and the wife was entitled to a life interest in the property, with a power of alienation over a third thereof. On appeal to the Privy Council their Lordships were of opinion that the deed afforded clear proof that the donor intended to make and did make a gift of a life interest only in the property together with a power of alienation in respect of a third thereof, and held, "basing their decision on the terms of the deed," that the conclusion arrived at by Mr. Wazir Hasan was correct: *Amjad Khan* v. *Ashraf Khan* (1929) 56 I. A. 213, 4 Luck. 305, 116 I. C. 405, ('29) A.PC.149.

(d) A Sunni Mahomedan granted a mukarrari lease of certain property at an annual rent of Re. 1 to his second wife with a condition that if she died childless, it should go to his son by his predeceased wife. The second wife had no child. While the grantor was still alive, a decreeholder attached the interest of the son by the predeceased wife under the deed, and after the grantor's death the interest of the son was sold. The question arose whether the interest given to the son under the deed was liable to be attached. It was held by the Privy Council that the son took under the deed a definite interest like what is called in English law a vested remainder, only that it was liable to be displaced in the event of their being a son of the grantor by his second wife, and that it was not a mere expectancy or a mere contingent or possible right, and it was therefore liable to be attached and sold in execution of the decree. No reference appears to have been made either in the argument of counsel or in the judgment to any rule of Mahomedan law on the subject. The case, it would appear, was one of a *hiba-bil-iwaz*, the *iwaz* being the rent payable by the donee: *Umes Chunder Sircar* v. *Zahoor Fatima* (1890) 17 I.A. 201.

(e) It was provided by a consent decree in a suit to which the parties were Shia Mahomedans that a certain house should be held and enjoyed by *A* for her life, and that after her death it should be sold and the sale proceeds divided among her step-sons. It was held that *A* took a life interest in the house, and the step-sons took a definite interest like what is called in English law a vested remainder: *Banoo Begum* v. *Mir Abed Ali* (1908) 32 Bom. 172; *Siraj Hussin* v. *Mushaf Hussin* (1921) 21 O. C. 321, 49 I. C. 58. The question whether a vested remainder is recognized by the Shia law was raised in *Muhammad Raza* v. *Abbas Bandi Bibi* (1932) 59 I. A. 236, 137 I. C. 321, ('32) A. PC. 138, but it was not decided as the document to be construed in that case was a compromise of a suit, and therefore one for a consideration.]

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45. Vested inheritance.—A "vested inheritance" is the share which vests in an heir at the moment of the ancestor's death. If the heir dies before distribution, the share of the inheritance which has vested in him will pass to such persons as are his heirs at the time of his death. The shares therefore are to be determined at each death (*b*). See sec. 31 above.

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

See Macnaghten, p 27, sec. 96, Rumsey's Mahomedan Law of Inheritance, ch ix; Rumsey's *Al Sirajiyyah*, 43-44.

46. Joint family and joint family business.—(*1*) When the members of a Mahomedan family live in commensality, they do not form a joint family in the sense in which that expression is used in the Hindu law (*c*). Further, in the Mahomedan law, there is not, as in the Hindu law, any presumption that the acquisitions of the several members of a family living and messing together are for the benefit of the family (*d*). But if during the continuance of the family, properties are acquired in the name of the managing member of the family, and it is proved that they are possessed by all the members jointly, the presumption is that they are the properties of the family, and not the separate properties of the member in whose name they stand (*e*).

(*2*) If after the death of a Mahomedan his adult sons continue their father's business, and retain his assets in the business, they will be deemed to stand in a fiduciary relation to the other heirs of the deceased, and liable to account as such for the profit made by them in the business (*f*). If after the death of the sons the business is continued by their sons or by other heirs, they also will be liable to account on the same footing (*g*).

(*3*) Members of a Mahomedan family carrying on business jointly do not constitute a joint family firm in the sense

(*b*) *Mst Jawai* v *Hussain Bakhsh* (1922) 3 Lah 80, 67 I C 154, ('22) A.L 298

(*c*) *Hakim Khan* v. *Gool Khan* (1882) 8 Cal 826; *Suddurtonnessa* v *Majada Khatoon* (1878) 3 Cal. 694, *Abdool Adood* v *Mahomed Mukmul* (1884) 10 Cal. 562· *Abdul Khader* v *Chidambaram* (1908) 32 Mad. 276, *Abdul Samad* v *Bibijan* (1925) 49 Mad L. J 675, 91 I.C. 618, ('25) A.M. 1149

(*d*) *Abdul Kadar* v *Bapubhai* (1898) 23 Bom. 188, *Mahamad Amin* v *Hasan* (1906) 31 Bom 143, *Mohideen Bee* v *Syed Meer* (1915) 38 Mad 1099, 1101, 32 I C 1002. See also *Isap Ahmed* v. *Ibhramji* (1917) 41 Bom 588, 612-613, 41 I C 761

(*e*) *Aminaddin* v *Tajudin* (1922) 59 Cal 541, 138 I C. 761, ('32) A. C. 538.

(*f*) *Soudagar* v. *Soudagar* (1931) 54 Mad. 543, 135 I C. 357, ('31) A. M. 553.

(*g*) *Shukrulla* v. *Mt. Zuhra* ('32) A. A 512.

in which that expression is used in the Hindu law so as to attract the legal incidents of such a firm (*h*).

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

(*2*) Homicide under the Shia law is not a bar to succession unless the death was caused intentionally.

Rumsey's *Al Sirajiyyah*, 14, Baillie, II, 266, 369.

Impediments to inheritance.—The *Sirajiyyah* sets out four grounds of exclusion from inheritance, namely, (1) homicide, (2) slavery, (3) difference of religion, and (4) difference of allegiance. Homicide, as an impediment to succession, is dealt with in the present section. The second impediment was removed by the enactment of Act V of 1843 abolishing slavery (*i*), and the third by the provisions of Act XXI of 1850 which abolished so much of any law or usage as affected any right of inheritance of any person by reason of his renouncing his religion. The bar of difference of allegiance disappeared with the subversion of the Mahomedan supremacy

A person incapable of inheriting by reason of any of the above disqualifications is considered as not existing, and the estate is divided accordingly. But he does not exclude others from inheritance (*Sir.* 27-28) Thus if *A* dies leaving a son *B*, a grandson *C* by *B*, and a brother *D*, and if *B* has caused the death of *A*, *B* is totally excluded from inheritance, but he does not exclude his son *C*. The inheritance will devolve as if *B* were dead, so that *C*, the grandson, will succeed to the whole estate, *D* being a remote heir.

47A. Exclusion of daughters from inheritance by custom or by statute.—Where daughters are excluded from inheritance either by custom (*j*) or by statute (*k*), they should be treated as non-existent, and the shares of the other heirs should be calculated as they would be in default of daughters.

Watan Act, 1886 (*Bombay*).—Thus if a Mahomedan watandar dies leaving a widow, a daughter, and a paternal uncle, the daughter is not entitled under the Act to any interest in the watan lands, she being postponed in the order of succession. The lands are divisible between the widow and the paternal uncle as if the daughter were non-existent so that the widow will take 1/4, and the uncle the residue, 3/4. The widow will take only a life-interest in her share. If the daughter were not excluded, she would have taken 1/2, the widow 1/8, and the uncle the residue, 3/8. The rule of Mahomedan law stated in the note to ill. (e) to sec. 50 does not apply to such a case.

(*h*) See *Solema Bibi* v. *Hafez Mahammad* (1927) 54 Cal. 687, 104 I. C 833, ('27) A C 836.
(*i*) *Ujmudin Khan* v. *Zia-ul-Nissa* (1879) 6 I. A. 137, 3 Bom. 422.
(*j*) *Muhammad Kamil* v. *Imtiaz Fatima* (1908 36 I. A 210.
(*k*) *Aminabi* v *Abasaheb* (1931) 55 Bom 401, 132 I C. 892, ('31) A. B. 266.

CHAPTER VII.

HANAFI LAW OF INHERITANCE.

Works of authority: Al Sirajiyyah and Al Sharifiyyah.—The principal works of authority on the Hanafi Law of Inheritance are the *Sirajiyyah*, composed by Shaikh Sirajuddin, and the *Sharifiyyah*, which is a commentary on the *Sirajiyyah* written by Sayyad Shariff. The *Sirajiyyah* is referred to in this and subsequent chapters by the abbreviation *Sir.*, and the references are to the pages of Mr. Rumsey's edition of the Translation of that work by Sir William Jones, as that edition is easily procurable. See also Sale's Translation of the Koran, pp. 60, 61 and 80.

A.—Three Classes of Heirs.

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

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

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

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

Sir. 12-13. The first step in the distribution of the estate of a deceased Mahomedan, after payment of his funeral expenses, debts, and legacies, is to allot their respective shares *to such of the relations as belong to the class of sharers and are entitled to a share.* The next step is to divide the residue (if any) among *such of the residuaries as are entitled to the residue.* If there are no sharers, the residuaries will succeed to the whole inheritance. If there be neither sharers nor residuaries, the inheritance will be divided among *such of the distant kindred as are entitled to succeed thereto.* The distant kindred are not entitled to succeed so long as there is any heir belonging to the class of sharers or residuaries. But there is one case in which the distant kindred will inherit with a sharer, and that is where the sharer is the wife or husband of the deceased. Thus if a Mahomedan dies leaving a wife *and* distant kindred, the wife as sharer will take her share which is 1/4 and the remaining three-fourths will go to the distant kindred. And if a Mahomedan female dies leaving a husband *and* distant kindred, the husband as sharer will take his share 1/2, and the other half will go to the distant kindred. To take a simple case: *A* dies leaving a mother, a son and a daughter's son. The mother as *sharer* will take her share 1/6, and the son as *residuary* will take the residue 5/6. The daughter's son, being one of the class of *distant kindred*, is not entitled to any share of the inheritance.

The question as to which of the relations belonging to the class of sharers, residuaries, or distant kindred, are entitled to succeed to the inheritance depends, on the circumstances of each case. Thus if the surviving relations be a father and a father's

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

Sharers.	Normal Share: of one.	Normal Share: of two or more collectively (*a*).	Conditions under which the normal share is inherited.	*This column sets out*— (A) Shares of Sharers Nos. 3, 4, 5, 8 and 12 as varied by special circumstances; (B) Conditions under which Sharers Nos. 1, 2, 7, 8, 11 and 12 succeed as Residuaries.
1. FATHER	1/6	..	When there is a child or child of a son h.l.s.	[When there is no child or child of a son h.l.s., the father inherits as a residuary : see Tab. of Res., No. 3.]
2. TRUE GRANDFATHER .. [sec. 49, cl. (a)]	1/6	..	When there is a child or child of a son h. l. s., and no father or nearer true grandfather.	[When there is no child or child of a son h.l.s., the Tr. G.F. inherits as a residuary, provided there is no father or nearer Tr. G. F. : see Tab. of Res., No. 4.]
3. HUSBAND	1/4	..	When there is a child or child of a son h.l.s.	1/2 when no child or child of a son h.l.s.
4. WIFE (*b*)	1/8	1/8	When there is a child or child of a son h.l.s.	1/4 when no child or child of a son h.l.s.
5. MOTHER	1/6	..	(a) When there is a child or child of a son h.l.s., *or* (b) when there are two or more brothers or sisters, or even one brother *and* one sister, whether full, consanguine or uterine.	1/3 when no child or child of a son h.l.s., and not more than one brother or sister (if any); but if there is also wife or husband *and* the father, then only 1/3 of what remains after deducting the wife's or husband's share.
6. TRUE GRANDMOTHER .. [sec. 49, cl. (c)].	1/6	1/6	*A. Maternal*—when no mother, and no nearer true grandmother either paternal or maternal. *B. Paternal*—when no mother, no father, no nearer true grandmother either paternal or maternal, and no intermediate true grandfather.	
7. DAUGHTER	1/2	2/3	When no son	[With the son she becomes a residuary : see Tab. of Res., No. 1.]
8. SON'S DAUGHTER h.l.s. .. [sec. 49, cl. (f)].	1/2	2/3	When no (1) son, (2) daughter, (3) higher son's son, (4) higher son's daughter, or (5) *equal son's son* (*c*).	When there is only one daughter, or higher son's daughter but no (1) son, (2) higher son's son, or (3) *equal son's son*, the daughter or higher son's daughter will take 1/2, and the son's daughter h.l.s. (whether one or more) will take 1/6, [*i.e.*, 2/3—1/2]. [With an equal son's son she becomes a residuary ; see Tab. of Res., No. 2.]
e.g.,				
(*i*) SON'S DAUGHTER	1/2	2/3	When no (1) son, (2) daughter, or (3) *son's son* ..	When there is only one daughter, the son's daughter (whether one or more) will take 1/6, if there be no son or *son's son*. [With the son's son she becomes a residuary : see Tab. of Res., No. 2.]
(*ii*) SON'S SON'S DAUGHTER ..	1/2	2/3	When no (1) son, (2) daughter, (3) son's son, (4) son's daughter, or (5) *son's son's son.*	When there is only one daughter or son's daughter, the son's son's daughter (whether one or more) will take 1/6, if there be no (1) son, (2) son's son, or (3) *son's son's son*. [With the son's son's son she becomes a residuary : see Tab. of Res., No. 2.]
9. } UTERINE BROTHER *OR* 10. } SISTER.	1/6	1/3	When no (1) child, (2) child of a son h.l.s., (3) father, or (4) true grandfather.	
11. FULL SISTER	1/2	2/3	When no (1) child, (2) child of a son h.l.s., (3) father, (4) true grandfather, or (5) *full brother.*	[With the full brother she becomes a residuary : see Tab of Res., No. 5.]
12. CONSANGUINE SISTER ..	1/2	2/3	When no (1) child, (2) child of a son h.l.s., (3) father, (4) true grandfather, (5) full brother, (6) full sister, or (7) *consanguine brother.*	But if there is only one full sister and she succeeds as a sharer, the consanguine sister (whether one or more) will take 1/6, provided she is not otherwise excluded from inheritance. [With the consanguine brother she becomes a residuary : see Tab. of Res., No. 7.]

(*a*) The collective share is always divided *equally* among those to whom it is allotted.

(*b*) A Mahomedan can have as many as four wives at a time.

(*c*) If there be a *son's son* and a *son's son's daughter*, the former is a *higher* son's son in relation to the latter. If there be a *son's son's son* and a *son's daughter* the former is a *lower* son's son in relation to the latter. And if there be a *son's son* and a *son's daughter* or a *son's son's son* and a *son's son's daughter*, the former is an *equal* son's son in relation to the latter, both being equally removed from the deceased.

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

49. Definitions :—

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

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

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

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

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

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

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

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

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

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

B.—Sharers.

50. Sharers.—After payment of funeral expenses, debts, and legacies, the first step in the distribution of the estate, of a deceased Mahomedan is to ascertain which of the surviving relations belong to the class of sharers, and which again of these are entitled to a share of the inheritance, and, after this is done, to proceed to assign their respective shares to such of the sharers as are, under the circumstances of the case, entitled

S. 50 to succeed to a share. The first column in the accompanying table (p. 33A) contains a list of Sharers; the second column specifies the normal share of each sharer; the third column specifies the conditions which determine the right of each sharer to a share, and the fourth column sets out the shares as varied by special circumstances.

Illustrations.

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

Father, Husband and Wife.

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

Mother.

(d)	*Mother* ..	1/3	
	Father	2/3	(as residuary)
(e)	*Mother* ..	1/6	(because there are *two* sisters)
	Two sisters	..	(excluded by father)
	Father	5/6	(as residuary)

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

It is stated in the *Sirajiyyah* (p. 28) that "A person excluded may, as all the learned agree, exclude others, as, if there be two brothers or sisters or more, on whichever side they are, they do not inherit with the father of the deceased, yet they drive the mother from a third to a sixth." This instance is split into ills. (e) and (g). Ill. (q) is another instance of the same rule. It is taken from Baillie's Digest, Part I, p. 706. The above rule does not apply where a particular heir is excluded by custom or statute: See s. 47A above.

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

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

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

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

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

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

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

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

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

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

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

True grandfather and true grandmother.

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

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

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

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

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

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

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

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

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

Note.—This illustration is taken from Baillie, 706. The father's mother, though she is excluded by the father, excludes the mother's mother's mother. This proceeds upon the rule that one who is excluded may himself exclude others wholly or partially. See note to ill. (o): in that case the exclusion of the mother by the sister was partial, for she *did* take a share, namely, 1/6. In the present case, however, the exclusion of the mother's mother is entire. It need hardly be stated that if the deceased had not left the father's mother, the mother's mother's mother would have taken 1/6, for being a true *maternal* grandmother, she is not excluded by the father.

Daughters and Sons' daughters h. l. s.

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

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

respective fathers, but in their own right as grand-daughters of the deceased. The same principle applies to the case of son's sons, brothers' sons, uncles' sons, etc. See Table of Residuaries. S. 50

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

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

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

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

Sisters.

(v)	*Mother*	1/6	
	2 *full sisters*	2/3	(each taking 1/3)
	C. sister		(excluded by full sisters)
	U. sister (*or* u. brother) ..	1/6	
(w)	2 *full sisters* (*or* c. sisters)	2/3	(each taking 1/3)
	2 *u. sisters* (*or* u. brothers)	1/3	(each taking 1/6)
(x)	*Full sister*	1/2	
	2 *c. sisters*	1/6	(each taking 1/12)
	U. brother .. .. .. }	1/3	(each taking 1/6)
	U. sister .. .. .. }		

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

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

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

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

Illustrations.

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

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

(b)	*Husband*	1/2=3/6	reduced to	3/7
	Full sister	1/2=3/6	,,	3/7
	C. sister	1/6=1/6	,,	1/7
		7/6		1
(c)	2 *full sisters*	2/3=4/6	reduced to	4/7
	2 *u. brothers* (each taking 1/6)	1/3=2/6	,,	2/7
	Mother	1/6=1/6	,,	1/7
		7/6		1
(d)	*Husband*	1/2=3/6	reduced to	3/8
	2 *full sisters*	2/3=4/6	,,	4/8
	Mother	1/6=1/6	,,	1/8
		8/6		1
(e)	*Husband*	1/2=3/6	reduced to	3/8
	Full sister	1/2=3/6	,,	3/8
	3 *u. sisters* (each taking 1/9)	1/3=2/6	,,	2/8
		8/6		1

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(f)	*Husband*	1/2=3/6 reduced to	3/9
	2 *full sisters*	2/3=4/6 ,,	4/9
	2 *u. sisters and* 1 *u. brother* (each taking 1/9)	1/3=2/6 ,,	2/9
		9/6	1
(g)	*Husband*	1/2=3/6 reduced to	3/9
	Full sister	1/2=3/6 ,,	3/9
	2 *u. sisters and* 2 *u. brothers* (each 1/12)..	1/3=2/6 ,,	2/9
	Mother	1/6=1/6 ,,	1/9
		9/6	1
(h)	*Husband*	1/2=3/6 reduced to	3/10
	2 *full sisters*	2/3=4/6 ,,	4/10
	3 *u. sisters and* 5 *u brothers* (each 1/24)..	1/3=2/6 ,,	2/10
	Mother	1/6=1/6 ,,	1/10
		10/6	1
(i)	*Widow*	1/4=3/12 reduced to	3/13
	2 *c. sisters*	2/3=8/12	8/13
	Mother	1/6=2/12	2/13
		13/12	1
(j)	*Husband*	1/4=3/12 reduced to	3/13
	Mother	1/6=2/12 ,,	2/13
	2 *daughters*	2/3=8/12 ,,	8/13
		13/12	1
(k)	*Husband*	1/4=3/12 reduced to	3/13
	Mother	1/6=2/12 ,,	2/13
	Daughter	1/2=6/12 ,,	6/13
	Son's daughter	1/6=2/12 ,,	2/13
		13/12	1
(l)	*Widow*	1/4=3/12 reduced to	3/13
	Mother	1/3=4/12 ,,	4/13
	Full sister	1/2=6/12 ,,	6/13
		13/12	1
(m)	*Widow*	1/4=3/12 reduced to	3/15
	2 *full sisters*	2/3=8/12 ,,	8/15
	2 *u. sisters*	1/3=4/12 ,,	4/15
		15/12	1

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

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

C.—Residuaries.

52. Residuaries.—If there are no Sharers, or if there are Sharers, but there is a residue left after satisfying their claims, the whole inheritance or the residue, as the case may be, devolves upon Residuaries in the order set forth in the annexed table (p. 40A).

Illustrations.

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

No. 1. Sons and daughters.

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

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

TABLE OF RESIDUARIES IN ORDER OF SUCCESSION—Sunni Law.

I.—*DESCENDANTS :*

1. **SON.**

   Daughter takes as a residuary with the son, the son taking a double portion.

2. **SON'S SON h. l. s.**—the nearer in degree excluding the more remote. Two or more sons' sons inherit in equal shares. **Son's daughter h. l. s.** takes as a residuary with an *equal* son's son. If there be no *equal* son's son, but there is a *lower* son's son, she takes as a residuary with him, *provided she cannot inherit as a sharer* [see ill. (k)]. In either case, each son's son h. l. s. takes double the share of each son's daughter h. l. s.

   Note.—When the son's daughter h. l. s. becomes a residuary with a *lower* son's son, and there are son's daughters h. l. s. equal in degree with the *lower* son's son, she shares equally with them, as if they were all of the same grade [see ill. (m)].

II.—*ASCENDANTS :*

3. **FATHER.**

4. **TRUE GRANDFATHER h. h. s.**—the nearer in degree excluding the more remote.

III.—*DESCENDANTS OF FATHER :*

5. **FULL BROTHER.**

   Full Sister—takes as a residuary with full brother, the brother taking a double portion.

6. **FULL SISTER**—In default of full brother and the other residuaries above-named, the full sister takes the residue *if any*, if there be (1) a daughter or daughters, or (2) a son's daughter or daughters h. l. s., or even if there be (3) *one* daughter *and* a son's daughter or daughters h. l. s. See *Sir.* pp. 24-25.

7. **CONSANGUINE BROTHER.**

   Consanguine sister—takes as a residuary with consanguine brother, the brother taking a double portion.

8. **CONSANGUINE SISTER**—In default of consanguine brother and the other residuaries above-named, the consanguine sister takes the residue, *if any*, if there be (1) a daughter or daughters, or (2) a son's daughter or daughters h. l. s., or even if there be (3) *one* daughter *and* a son's daughter or daughters h. l. s. See *Sir.* pp. 24-25.

9. **FULL BROTHER'S SON.**

10. **CONSANGUINE BROTHER'S SON.**

11. **FULL BROTHER'S SON'S SON.**

12. **CONSANGUINE BROTHER'S SON'S SON.**

    Then come remoter male descendants of No. 11 and No. 12, that is, the son of No. 11, then the son of No. 12, then the son's son of No. 11, then the son's son of No. 12 and so on in like order.

IV.—*DESCENDANTS OF TRUE GRANDFATHER h. h. s.:*

13. **FULL PATERNAL UNCLE.**

14. **CONSANGUINE PATERNAL UNCLE.**

15. **FULL PATERNAL UNCLE'S SON.**

16. **CONSANGUINE PATERNAL UNCLE'S SON.**

17. **FULL PATERNAL UNCLE'S SON'S SON.**

18. **CONSANGUINE PATERNAL UNCLE'S SON'S SON.**

    Then come remoter male descendants of Nos. 17 and 18, in like order and manner as descendants of Nos. 11 and 12,

MALE DESCENDANTS OF MORE REMOTE TRUE GRANDFATHERS—in like order and manner as the deceased's paternal uncles and their sons and sons' sons.

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

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

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

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

Note.—The residue in the above case is 1—(1/4+1/6)=7/12. If there were two sons and three daughters, each son would take 2/7 of 7/25=1/6, and each daughter 1/7 of 7/12=1/12.

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

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

Note.—Where there is a son's son, the son's daughter cannot inherit as a sharer but she inherits as a residuary with him. Similarly, a son's son's daughter cannot inherit except as a residuary when there is a son's son's son.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

No. 3. Father.

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

Note.—Here the father inherits as a sharer. See Table of Sh., No. 1.

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

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

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

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

No. 4. True Grandfather h. h. s.

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

Nos. 5 & 7. Brothers and sisters.

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

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

Full brother (*y*) .	2/3	(as residuary)
Full sister .	1/3	(as residuary)
Con sister .. .	0	(excluded by full brother)

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

(r)	*Daughter* (*or* son's daughter h.l s.)	1/2	(as sharer)
	Full sister	1/2	(as residuary No. 6)
	Brother's son	0	(excluded by full sister who is a nearer residuary)

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

(s)	2 *daughters* (*or* son's daughters h. l. s.)	2/3	(as sharers)
	Full sister	1/3	(as residuary No. 6)

(*y*) *Abdul Karim* v *Mst. Amat-ul-Habib* (1922) 3 Lah. 397, 70 I. C. 205, ('23) A. L. 121.

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(t)	2 *daughters* (z)	2/3	(as sharers)	
	Husband	1/4	(as sharer)	
	Full sister	1/12	(as residuary No. 6)	
	Father's pat. uncle's son	0	(excluded by full sister who is a nearer residuary)	
(u)	*Daughter*	1/2	(as sharer)	
	Son's daughter	1/6	(as sharer)	
	Full sister	1/3	(as residuary No. 6)	
(v)	*Daughter*	1/2	(as sharer)	
	Son's daughter	1/6	(as sharer)	
	Mother	1/6	(as sharer)	
	Full sister	1/6	(as residuary No. 6)	
(w)	*Daughter*	1/2	(as sharer)	
	Son's daughter	1/6	(as sharer)	
	Husband	1/4	(as sharer)	
	Full sister	1/12	(as residuary No. 6)	
(x)	*Daughter*	1/2	(as sharer)=6/12	reduced to 6/13
	Son's daughter	1/6	(as sharer)=2/12	,, 2/13
	Husband	1/4	(as sharer)=3/12	,, 3/13
	Mother	1/6	(as sharer)=2/12	,, 2/13
	Full sister	0	(excluded)	
		13/12		1

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

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

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

Other Residuaries.

(y)	*Full sister*	1/2	(as sharer)
	C. sister	1/6	(as sharer)
	Mother	1/6	(as sharer)
	Brother's son	1/6	(as residuary)
(z)	*Widow*	1/4	(as sharer)
	Mother	1/3	(as sharer)
	Pat. uncle	5/12	(as residuary)
(aa)	*Full sister* (a)	1/2	(as sharer)
	Pat. uncle's sons	1/2	(as residuaries)

(z) *Meherjan* v. *Shajadi* (1899) 24 Bom. 112. | 278, 69 I. C. 1000, ('22) A.L. 406.
(a) *Mst. Ghulam* v. *Nur Hasan* (1922) 3 Lah.

Sir. 18-21, and 23-26. Some of the important points involved in the Table of Residuaries are explained in the notes appended to the illustrations. S. 52

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

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

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

S. 52 **Female residuaries.**—There are two more points to be noted in connection with female residuaries, which are stated below:

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

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

Principles of succession among Sharers and Residuaries.—It will be seen from the Tables of Sharers and Residuaries that certain relations entirely exclude others from inheritance. This proceeds upon the following principles laid down in the *Sirajiyyah* in the part headed "Of Exclusion"—

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

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

It will have been seen that the daughter, though she is nearer in degree, does not exclude the brother's son or his son. Thus if the surviving relations be a daughter and a brother's son, the daughter takes 1/2, and the brother's son takes the residue. The reason is that the daughter in this case inherits as a *sharer*, and the brother's son as a *residuary*, and the principle laid down above applies only *as between relations belonging to the same class of heirs*. The above principle may, therefore, be read thus: "*Within the limits of each class of heirs*, the nearer in degree excludes the more remote."

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

(3) After stating the two principles mentioned above, the *Sirajiyyah* (p. 28) goes on to say that "a person excluded may, as all the learned agree, exclude others." See ills. (e), (g) and (q) to sec. 50 above, and the note to ill. (e).

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There are five heirs that are *always* entitled to some share of the inheritance, and they are in no case liable to exclusion. These are (1) the child, *i.e.*, son or daughter, (2) father, (3) mother, (4) husband, and (5) wife (*Sir.* 27). These are the most favoured heirs, and we shall call them, for brevity's sake, Primary Heirs. Next to these, there are three, namely, (1) child of a son, h. l. s., (2) true grandfather h. h. s. and (3) true grandmother h. h. s. These three are the *Substitutes* of the corresponding primary heirs. The husband and wife can have no substitute. The following two lines indicate at a glance the primary heirs and their substitutes :—

Primary heirs ..	Child.	Father.	Mother.
Substitutes ..	Child of a son h. l. s.	Tr. GF.	Tr. GM.

The right of succession of the substitutes is governed by the following rules .—

(1) No substitute is entitled to succeed so long as there is the corresponding primary heir. To this there is an exception, and that is when there is no son, but a daughter and a son's daughter in which case the daughter takes 1/2, and the son's daughter (though a substitute) takes 1/6 see Tab. of Sh , No. 8

(2) The child of a son h l. s. is always entitled to succeed, when there is no child.

(3) The Tr GF. is always entitled to succeed, when there is no father.

(4) The mother's mother is always entitled to succeed, when there is no mother. The father's mother is always entitled to succeed, if there be no mother and no father.

(5) All relations who are excluded by primary heirs are also excluded by their substitutes Thus full and consanguine sisters and uterine brothers and sisters are excluded by the *child* and the *father* They are also excluded therefore by the *child of a son h l s* and by the true *grandfather* (*b*).

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

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

Exception.—Neither the husband nor wife is entitled to the *Return* so long as there is any other heir, whether he be a Sharer or a Distant Kinsman. But if there be no other heir, the residue will go to the husband or wife, as the case may be, by *Return.*

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

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Illustrations.

(a) A Mahomedan dies leaving a widow as his sole heir. The widow will take 1/4 as sharer, and the remaining 3/4 by *Return*. *The surplus 3/4 does not escheat to the Crown : Mahomed Arshad* v. *Sajida Banoo* (c) ; *Bafatun* v. *Bilaiti Khanum* (d) ; *Mir Isub* v. *Isab* (e).

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

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

(c)	*Husband* ..	1/4
	Daughter	3/4 (1/2 as sharer and 1/4 by Return)
(d)	*Wife* .	1/4
	Sister (f or c)	3/4 (1/2 as sharer and 1/4 by Return)
(e)	*Wife* ..	1/8
	Son's daughter	7/8 (1/2 as sharer and 3/8 by Return)
(f)	*Mother*	1/6 increased to 1/4
	Son's daughter	1/2 =3/6 ,, 3/4
		4/6 1

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

(g)	*Father's mother* ..	} 1/6	increased to	1/5 (each taking 1/10)
	Mother's mother ..			
	2 *daughters* .	2/3=4/6	,,	4/5
		5/6		1
(h)	*Mother* ..	.. 1/6	increased to	1/5
	Daughter .. .	1/2=3/6	,,	3/5
	Son's daughter .	1/6	,,	1/5
		5/6		1
(i)	*Father's mother*	} 1/6	increased to	1/5
	Mother's mother			
	Full sister .. .	1/2=3/6	,,	3/5
	C. sister	1/6	,,	1/5
		5/6		1

(c) (1878) 3 Cal. 702.
(d) (1903) 30 Cal. 683.
(e) (1920) 44 Bom. 947, 58 I. C. 48

(j)	*Full sister*	1/2	=3/6 increased to	3/5	
	C. sister	1/6	„	1/5	
	U. sister	1/6	„	1/5	
		5/6		1	
(k)	*Mother*	1/6	increased to	1/5	
	Full sister	1/2=3/6	„	3/5	
	U. brother	1/6	„	1/5	
		5/6		1	
(l)	*Husband*	1/4			= 4/16
	Mother . ..	1/6	increased to	1/4 of (3/4)	= 3/16
	Daughter	1/2=3/2	„	3/4 of (3/4)	= 9/16
		11/12			1

Note.—In this and in ills. (m) to (r), it will be observed that either the husband or wife is one of the surviving heirs. Since neither the husband nor wife is entitled to the Return when there are other sharers, his or her share will remain the same, and the shares of the others will be increased by reducing them to a common denominator, and then decreasing the denominator of the original fractional share so as to make it equal to the sum of the numerators, and multiplying the new fractional shares thus obtained by the residue after deducting the husband's or wife's share. Thus in the present illustration the shares of the mother and daughter, when reduced to a common denominator, are 1/6 and 3/6 respectively. The total of the numerators is 1+3=4, and the new fractional shares will thus be 1/4 and 3/4 respectively. The residue after deducting the husband's share is 3/4, and the ultimate shares of the mother and daughter will therefore be 1/4 of 3/4=3/16 and 3/4 of 3/4=9/16 respectively.

(m)	*Wife*	1/8			= 4/32
	Mother	1/6	increased to	1/4 of (7/8)	= 7/32
	Daughter	1/2=3/6	„	3/4 of (7/8)	= 21/32
		19/24			1
(n)	*Wife*	1/8			= 5/40
	Mother	1/6	increased to	1/5 of (7/8)	= 7/40
	2 sons' daughters	4/6	„	4/5 of (7/8)	= 28/40
		23/24			1
(o)	*Husband*	1/2			= 2/4
	U. brother	1/6	increased to	1/2 of (1/2)	= 1/4
	U. sister	1/6	„	1/2 of (1/2)	= 1/4
		5/6			1
(p)	*Wife*	1/4			= 2/8
	U. brother	1/6	increased to	1/2 of (3/4)	= 3/8
	U. sister	1/6	„	1/2 of (3/4)	= 3/8
		7/12			1

S. 53

(q)	*Wife*	1/4			=	4/16
	Full sister	1/2=3/6	increased to	3/4 of (3/4)	=	9/16
	C. sister	1/6	„	1/4 of (3/4)	=	3/16
		11/12				1
(r)	*Wife*	1/4			=	1/4
	U. brother	1/6	increased to	1/3 of (3/4)	=	1/4
	U. sister	1/6	„	1/3 of (3/4)	=	1/4
	Mother	1/6	„	1/3 of (3/4)	=	1/4
		9/12				1
(s)	*Husband*	1/2				
	Daughter's son	1/2				

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

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

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

Sir. 37-40.

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

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

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

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

(*f*) See *Koonari* v. *Dalim* (1884) 11 Cal. 14.

(*g*) Rumsey's Moohummudan Law of Inheritance, 164.

D.—Distant Kindred.

Ss. 54, 55

54. Distant Kindred.—(*1*) If there be no Sharers or Residuaries, the inheritance is divided amongst Distant Kindred.

(*2*) If the only sharer be a husband or wife, and there be no relation belonging to the class of Residuaries, the husband or wife will take his or her full share, and the remainder of the estate will be divided among Distant Kindred.

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

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

(*2*) The following is a list of Distant Kindred comprised in each of the four classes :—

I. Descendants of the deceased :—

1. Daughter's children and their descendants.
2. Children of son's daughters h. l. s. and their descendants.

II. Ascendants of the deceased :—

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

III. Descendants of parents :—

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

S. 55 IV. Descendants of *immediate* grandparents (true or false) :—

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

and

descendants of *remoter* ancestors h. h. s. (true or false).

(*3*) The order of precedence among Distant Kindred in each class and the rules by which such order is determined are given in secs. 56 to 66.

Sir. 44-46. The *Sirajiyyah* does not enumerate all relations belonging to the class of Distant Kindred, but mentions only some of them Hence it was thought at one time that "distant kindred" were restricted to the specific relations mentioned in the *Sirajiyyah*. But this view has long since been rejected as erroneous, and it is now firmly established that all relations who are neither sharers nor residuaries are distant kindred (*h*).

Class I of Distant Kindred.

Difference between doctrines of Imam Muhammad and Abu Yusuf.—When we come to Distant Kindred, we find that there are two sets of rules for each class, one for determining the order of succession, and the other for determining the shares. In each class we have first to determine which of the relations are entitled to succeed ; this is done by applying certain rules which are called Rules of Exclusion After so doing, we have to assign shares to those relations, this is done with the help of certain other rules.

It is when we come to the class of Distant Kindred that we find a remarkable difference of opinion between Abu Yusuf and Imam Muhammad, the two great disciples of Abu Hanifa. The doctrine of Abu Yusuf is every simple, but unhappily it has not been accepted by the Hanafi Sunnis in India. It is the doctrine of Imam Muhammad that is followed in India, and this doctrine is much too complicated (*i*). Moreover, the doctrine of Imam Muhammad is followed by the author of the *Sirajiyyah*, and apparently by the author of the *Sharifiyyah* (*j*). The *Fatawa Alamgiri* does not express any preference either way (*k*). The High Court of Calcutta has also expressed its preference for the opinion of Imam Muhammad (*l*). Since the opinion of Abu Yusuf is not followed in India, we have confined ourselves in the following sections to the doctrine of Imam Muhammad, and the difference between the two systems is pointed out in the notes. It must not, however, be supposed that the two systems differ in all respects and at all

(*h*) *Abdul Serang* v *Putee Bibi* (1902) 29 Cal 738.
(*i*) Macnaghten, p. 9 (footnote); Baillie's Moohummudan Law of Inheritance, p. 92, Rumsey's Moohummudan Law of Inheritance, p. 65'; Ameer Ali, Vol. II, p 78.
(*j*) *Sir.* 49-50 ; *Shar.* 95.
(*k*) Baillie, 716, 717.
(*l*) *Akbar Ali* v. *Adar Bibi* (1931) 58 Cal 888 130 I.C. 873, ('31) A. C. 155.

stages. So long as the intermediate ancestors do not differ in their sexes or blood, there is no difference at all between the two systems. The difference comes in only in those cases where the intermediate ancestors are— Ss. 55, 56

(i) of *different sexes* as where some are males and others in the same generation are females; or where they are

(ii) of *different blood*, as where some are of whole blood and others in the same generation are of half blood.

Abu Yusuf declines to take any notice of the sex or blood of *intermediate ancestors*, or, as they are called "roots". According to him, regard should be had to the sex and blood of the *actual claimants*, or, as they are called, "branches". The result is that according to his doctrine, the property is to be divided in the same manner as is done among son's sons and son's daughters as residuaries, that is to say, *per capita*, each male claimant taking a share double that of each female claimant.

According to Imam Muhammad, regard should be had not only to the sex and blood of the actual claimants, but also of the intermediate ancestors.

Where the intermediate ancestors differ in their *sexes*, the two systems differ as to the *shares* to be allotted to the claimants. This difference in the shares manifests itself when claimants are *descendants*, whether they be descendants of the deceased as in class I or of brother and sisters as in class III, or of uncles and aunts as in class IV.

Where the intermediate ancestors differ in *blood*, the two systems differ as to the *order* of succession. This difference in the order of succession manifests itself in class III when the surviving relations happen to be the descendants some of full or consanguine brothers or sisters, and some of uterine brothers or sisters. It cannot manifest itself in class I and class II, for there can be no difference of blood among the intermediate ancestors in those classes. Nor can it manifest itself in class IV, where the claimants are the descendants of uncles and aunts.

Before we proceed further, we may observe that among *Residuaries* there cannot be any difference of blood or sex among intermediate ancestors as it may be among *Distant Kindred*.

56. Rules of exclusion.—The first class of Distant Kindred comprises such of the descendants of the deceased as are neither Sharers nor Residuaries. The order of succession in this class is to be determined by applying the following two rules in order [*Sir.* 47]:—

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

Sir. 7. Thus a daughter's son or a daughter's daughter is preferred to a son's daughter's daughter. The daughter's son and the daughter's daughter are the nearest distant kindred, and they exclude all other distant kindred.

Rule (2).—Among claimants in the same degree of relationship, the children of Sharers and Residuaries are preferred to those of Distant Kindred.

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

Ss. 57, 58

57. Order of succession.—The rules set forth in section 56 lead to the following order of succession among Distant Kindred of the first class :—

(1) Daughters' children.
(2) Sons' daughters' children.
(3) Daughters' grandchildren.
(4) Sons' sons' daughters' children.
(5) Daughters' great-grandchildren and sons' daughters' grandchildren.
(6) *Other descendants of the deceased in like order.*

Of the above groups each in turn must be exhausted before any member of the next group can succeed.

Note that No. (1) belongs to the second generation, Nos. (2) and (3) to the third generation, and Nos. (4) and (5) to the fourth generation. No. (2) excludes No. (3) by reason of sec. 56, rule (2). For the same reason No. (4) excludes No. (5).

58. Allotment of Shares.—After ascertaining which of the descendants of the deceased are entitled to succeed, the next step is to distribute the estate among them. The distribution in this class is governed by the following rules :—

Rule (1)—If the intermediate ancestors *do not differ* in their sexes, the estate is to be divided among the claimants *per capita* according to the rule of the double share to the male [*Sir.* 47].

Illustrations.

(*a*)	Daughter's son . .	2/3	
	Daughter's daughter . .	1/3	
(*b*)	Daughter's son's son . .	2/3	
	Daughter's son's daughter . .	1/3	
(*c*)	2 sons of daughter *A* . . .	4/5	(each taking 2/5)
	1 daughter of daughter *B* . .	1/5	

Note.—To divide the estate *per stirpes* is to assign 1/2 to the two sons, and 1/2 to the daughter, that being the portion of their respective parents, *A* and *B*.

(*d*)	2 sons of a daughter's daughter *A* . .	. .	4/6 (each 2/6 or 1/3)
	2 daughters of a daughter's daughter *B*	. .	2/6 (each 1/6)

Note.—To divide the estate *per stirpes* is to assign 1/2 to the two sons and 1/2 to the two daughters.

Doctrine of Abu Yusuf.—The distribution will be the same according also to Abu Yusuf. In each of the above cases it will be seen that the sexes of the intermediate ancestors are the same. But if the claimants be a daughter's *daughter's* son and a daughter's *son's* daughter, the case is one in which the intermediate ancestors differ in their sexes. In such a case also, according to Abu Yusuf, the rule to be followed is Rule (1), so that the former, being a male, will take 2/3 and the latter, being a female,

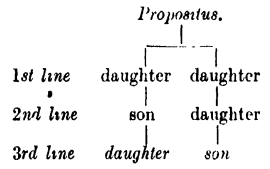
will take 1/3; the reason being that according to Abu Yusuf regard is to be had solely to the sexes of the *claimants* (see "Difference between doctrines of Imam Muhammad and Abu Usuf" p. 52). According to Imam Muhammad, regard should be had also to the sexes of the *intermediate ancestors*, and the distribution is to be made according to Rule (2) below, which, it will be seen, is a distribution *per stirpes*, though not entirely such as in the Shia law. S. 58

Rule (2)—If the intermediate ancestors *differ* in their sexes, the estate is to be distributed according to the following rules [*Sir.* 48-50] :—

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

Illustration.

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



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

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

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

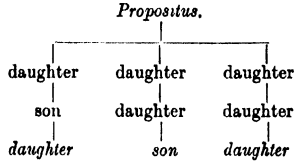
Note.—Where the deceased leaves descendants in the *fourth or remoter* generation the rule of the double share to the male is to be applied in *every successive line* in which the intermediate ancestors differ in their sexes. See ill. (b) to sub-rule (c) below.

(b) The next case is where there are three or more claimants, each claiming through a different line of ancestors. Here again, the rule is to stop at the first line in which the sexes of the intermediate ancestors differ, and to assign to each

S. 58 male ancestor a portion double that of each female ancestor. But in this case the individual share of each ancestor does not descend to his or her descendants as in the preceding case, but the collective share of all the male ancestors is to be divided among all the descendants claiming through them, and the collective share of all the female ancestors is to be divided among their descendants, according to the rule, as between claimants in the same group, of a double portion to the male.

Illustrations.

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



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

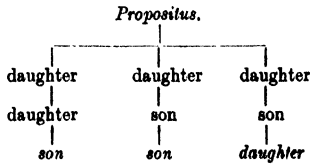
daughter's son .. . 1/2
daughter's daughter . 1/4
daughter's daughter .. 1/4 } 1/2 (collective share of female ancestors.)

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

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

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

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



[In the preceding illustration we had one male and two females in the first line in which the sexes differed. In the present case, we have one female and two males in that line.] S. 58

First ascertain what is the line of descent in which the sexes first differ. That line is the second line of descent.

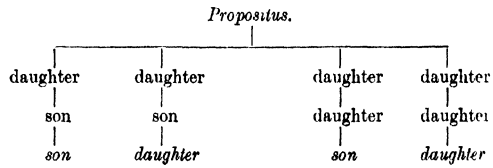
Next, assume the relations in that line to be so many children of the deceased and determine their shares upon that footing. The shares therefore will be, daughter's daughter 1/5, and each daughter's son 2/5, the collective share of the two daughters' sons being 4/5. Assign the 1/5 of daughter's daughter to her son.

Lastly, divide the 4/5 of the two male ancestors between their descendants as if they were children of one ancestor, assigning a double portion to the male descendant. Thus, the daughter's son's son takes $2/3\times4/5=8/15$, and the daughter's son's daughter $1/3\times4/5=4/15$. Thus we have

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

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

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



Here the ancestors first differ in their sexes in the second line, and in that line we have two males and two females. The collective share of the two males is 4/6, and that of the two females is 2/6. The 4/6 of the daughters' sons will be divided between the daughter's son's son and the daughter's son's daughter, the former taking $2/3\times4/6=8/18$, and the latter $1/3\times4/6=4/18$. The 2/6 of the daughter's daughters will be divided between the daughter's daughter's son and the daughter's daughter's daughter, the former taking $2/3\times2/6=4/18$, and the latter $1/3\times2/6=2/18$. Thus we have

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

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

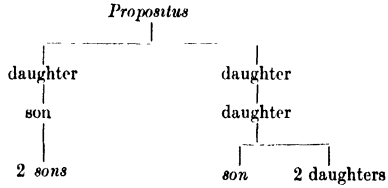
Note.—When a person dies leaving descendants in the *fourth or remoter* generation "the course indicated in the [above rule] as to the first line in which the sexes differ is to be followed equally in any lower line ; but the descendants of any individual or group, once separated must be kept separate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

(*m*) Rumsey's Moohummudan Law of Inheritance, pp. 68-69.

S. 58 (c) The last case is when there are two or more claimants claiming through the same intermediate ancestor. In such a case, there is this further rule to be applied, namely to count for each such ancestor, if male, as many males as there are claimants claiming through him, and, if female, as many females as there are claimants claiming through her, irrespective of the sexes of the claimants.

Illustrations.

(a) A Mahomedan dies leaving 5 great-grandchildren as shown in the following diagram :-



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

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

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

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

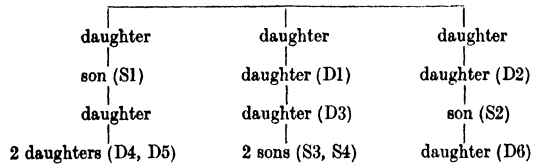
According to Abu Yusuf, the shares will be as follows :—

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

Note—When the deceased leaves descendants in the *fourth or remoter* generation, the process indicated in the above rule is to be applied as often as there may be occasion to group the sexes. See the next illustration.

(b) *Note*—The following case taken from the *Sirajiyyah* illustrates the combined operation of sub-rules (a), (b) and (c), when the claimants belong to the *fourth* generation. See notes at the end of sub-rule (a) and sub-rule (b), and the note at the end of ill. (a) above.

A Mahomedan dies leaving 5 descendants in the fourth generation as shown in the following diagram [*Sir.* 49]:— Ss. 58, 59



Here the sexes first differ in the second line. S1 having two descendants among the claimants will count as two males or four females. D1 having two such descendants will count as two females. D2 having one such descendant only will count as one female. The estate will therefore be divided into 7 parts as follows :—

S1 = 4/7 ;
D1 = 2/7 }
D2 = 1/7 } 3/7 (collective share of female ancestors).

S1 being by himself, his share 4/7 will pass to his two descendants D4 and D5 in equal moieties, each taking 2/7.

The collective share 3/7 of D1 and D2 will descend to their *immediate* descendants D3 and S2 ; and here D3 having two descendants among the claimants will count as two females, and S2 having one such descendant only will count as one male, or two females. Hence the collective share 3/7 will be divided into 4 parts as follows :—

$$D3 = 2/4 \times 3/7 = 3/14,$$

$$S2 = 2/4 \times 3/7 = 3/14.$$

The share of D3 will pass to her two descendants S3 and S4, each taking 3/28. The share of S2 will pass to his descendants D6. The ultimate shares will therefore be—

D4 = 2/7 ; D5 = 2/7 ; S3 = 3/28 ; S4 = 3/28 ; D6 = 3/14.

According to Abu Yusuf, the shares will be as follows —

D4 = 1/7 ; D5 = 1/7 ; S3 = 2/7 ; S4 = 2/7 , and D6 = 1/7.

Class II of Distant Kindred.

59. Order of succession.—(*1*) If there be no distant kindred of the first class, the whole estate will devolve upon the mother's father as being the nearest relation among Distant Kindred of the second class [see rule (1) below].

(*2*) If there be no mother's father the estate will devolve upon such of the false ancestors in the third degree as are connected with the deceased through sharers, namely, the father's mother's father and the mother's mother's father, and of these two, the former, as belonging to the paternal side, will take 2/3, and the latter, as belonging to the maternal side, will take 1/3 [see rules (2) and (3) below].

Note that the father's mother and the mother's mother are sharers.

Ss. 59, 60

(3) If there be none of these, the estate will devolve upon the remaining false ancestors in the third degree, namely, the mother's father's father and the mother's father's mother. And as these two belong to the same (maternal) side, and as the sexes also of the intermediate ancestors are the same, the former, being a male, will take 2/3, and the latter, being a female, will take 1/3 according to sec. 58, rule (1) [*Sir.* 51-52].

Note that the two ancestors mentioned in sub-sec. (3) are both related to the deceased through a distant kinsman, namely, mother's father.

Rules of succession.—Succession among Distant Kindred of the second class is governed by the following rules :—

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

Rule (2).—Among claimants in the same degree, those connected with the deceased through sharers are preferred to those connected through distant kindred.

Rule (3).—If there are claimants on the paternal side as well as claimants on the maternal side, assign 2/3 to the paternal side, and 1/3 to the maternal side. Then divide the portion assigned to the paternal side among the ancestors of the father, and the portion assigned to the maternal side among the ancestors of the mother, in each case according to the rules contained in sec. 58.

Doctrine of Abu Yusuf.—It is not clear whether when the sexes of the intermediate ancestors differ, there is the same difference of opinion between the two disciples as there is in class I. Anyhow, no such difference can arise until ancestors in the fourth degree are reached.

Class III of Distant Kindred.

60. **Rules of exclusion.**—If there be no Distant Kindred of the first or second class, the estate devolves upon Distant Kindred of the third class. This class comprises such of the descendants of brothers and sisters as are neither sharers nor residuaries. The order of succession in this class is to be determined by applying the following three rules in order [*Sir.* 52-54] :—

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

Thus the children of brothers and sisters exclude the grandchildren of brothers and sisters.

Rule (2).—Among claimants in the same degree of relationship, the children of Residuaries are preferred to those of Distant Kindred.

Thus a full brother's son's daughter, being the child of a residuary (full brother's son), is preferred to a full sister's daughter's son who is the child of a distant kinswoman (full sister's daughter). For the same reason, a consanguine brother's son's daughter is preferred to a full sister's daughter's son, though the former is of half blood and the latter of whole blood.

Rule (3).—Among claimants in the same degree of relationship, and not excluded by reason of Rule (2) above, the descendants of full brothers exclude those of consanguine brothers and sisters.

But the descendants of full sisters do not exclude the descendants of consanguine brothers or sisters, and the latter take the residue, if there be any, after allotting shares to the descendants of full sisters and of uterine brothers and sisters.

The descendants of uterine brothers and sisters are not excluded by descendants either of full or consanguine brothers or sisters, but they inherit with them.

Note particularly that the *test of blood* laid down in Rule (3) is not to be applied until after you have applied the test laid down in Rule (2). Among descendants of uncles and aunts these tests are to be applied in the reverse order : See notes to s. 63 under the head " Rules of succession among descendants " [rules (3) and (4)].

61. Order of succession.—The above rules lead to the following order of succession among Distant Kindred of the third class :—

(1) Full brothers' daughters, full sisters' children and children of uterine brothers and sisters.

(2) Full sisters' children, children of uterine brothers and sisters, consanguine brothers' daughters and consanguine sisters' children, the consanguine group taking the residue (if any).

(3) Consanguine brothers' daughters, consanguine sisters' children, and children of uterine brothers and sisters.

(4) Full brothers' sons' daughters (children of Residuaries).

(5) Consanguine brothers' sons' daughters (children of Residuaries).

(6) Full brothers' daughters' children, full sisters' grandchildren, and grandchildren of uterine brothers and sisters.

(7) Full sisters' grandchildren, grandchildren of uterine brothers and sisters, consanguine brothers' daughters' children and consanguine sisters' grandchildren, the consanguine group taking the residue (if any).

(8) Consanguine brothers' daughters' children, consanguine sisters' grandchildren, and grandchildren of uterine brothers and sisters.

(9) *Remoter descendants of brothers and sisters in like order.*

Of the above groups each in turn must be exhausted before any member of the next group can succeed.

Among the descendants mentioned above, Nos. (1) to (3) are nephews and nieces, and Nos. (4) to (8) are grandnephews and grandnieces. Note particularly that a full brother's son and a consanguine brother's son are residuaries ; hence it is that they do not find any place in the above list.

Ss. 61, 62

Doctrine of Abu Yusuf.—According to Abu Yusuf also, there are three rules of exclusion, of which the first two are the same as those laid down in the preceding section. The third rule of Abu Yusuf, which also is to be applied after applying the first two rules, is that descendants of full brothers and sisters exclude those of consanguine brothers and sisters, and the descendants of consanguine brothers and sisters exclude the descendants of uterine brothers and sisters. This difference arises from the fact that Abu Yusuf would have regard to the "blood" of the *claimants* while Imam Muhammad looks to the "blood" of the *Roots*. The result is that the order of succession according to Abu Yusuf is different from that according to Imam Muhammad.

62. Allotment of shares.—After ascertaining which of the descendants of brothers and sisters are entitled to succeed, the next step is to distribute the estate among them, and this is to be done by applying the following rules in order [*Sir.* 53-54]:—

Rule (1).—First, divide the estate among the *Roots*, that is to say, among the brothers and sisters (as if they were living) and in so doing treat each brother who has two or more claimants descended from him as so many brothers, and each sister who has two or more claimants descended from her as so many sisters. If there is a residue left after assigning their shares to the *Roots*, but there are no Residuaries among the *Roots* [that is, neither a full nor consanguine brother], apply the doctrine of Return as described in section 53. The hypothetical claimants being brothers and sisters, no case of Increase is possible at all [sec. 51].

The relations constituting Distant Kindred of the third class are descendants of brothers and sisters, full, consanguine and uterine. The brothers and sisters are therefore the *Roots*. Of these, uterine brothers and sisters always inherit as sharers, one taking 1/6, and two or more 1/3. Full and consanguine brothers always inherit as residuaries. Full sisters inherit as sharers, if there are no full brothers, one taking 1/2, and two or more 2/3; but if there are full brothers, full sisters inherit as residuaries with them. The same remarks apply to consanguine sisters. See Tab. of Sh., nos. 9 to 12; Tab. of Res., nos. 5-7.

If the claimants be a uterine brother and a full brother, the former takes 1/6, and the latter the residue 5/6. But if the claimants be two or more descendants of a uterine brother, and two or more descendants of a full brother, the hypothetical share of the uterine brother will be 1/3, that being the share of two or more uterine brothers, and the hypothetical share of the full brother will be the residue 2/3.

If the claimants be a uterine sister and a full sister, the former will take 1/6, and the latter 1/2, and the residue 1/3 will go to them by Return, the former taking 1/4 and the latter 3/4. But if the claimants be 5 descendants of a uterine sister, and 9 descendants of a full sister, the hypothetical share of the uterine sister will be 1/3, that being the share of two or more uterine sisters, and that of the full sister will be 2/3, that being the share of two or more full sisters [see ill. (b) to Rule (3) below].

S. 62

If the claimants be a full brother and a full sister, they will inherit as residuaries, the former taking 2/3, and the latter 1/3. But if the claimants be 3 descendants of a full brother, and 4 descendants of a full sister, the full brother will count as three males, that is, 6 females and the full sister will count as 4 females. The property will then be divided into 10 parts, the hypothetical share of the full brother being 6/10, and that of the full sister 4/10 [compare ill. (a) to Rule (3) below]. The position of a consanguine brother and a consanguine sister is similar to that of a full brother and a full sister [compare ill. (e) to Rule (3) below].

As to the application of the doctrine of Return to the *Roots*, see ill. (d) to rule (3) below.

Rule (2).—After determining the hypothetical shares of the *Roots*, the next step is to assign its share to the uterine group. If there be only one claimant in that group, assign 1/6 to him, that being the hypothetical share of his parent. But if there be two or more claimants in that group, whether descended from a single uterine brother, or a single uterine sister, or two or more uterine brothers or sisters, assign 1/3 to them, that being the hypothetical share of their parent or parents, and divide it *equally* among them without distinction of sex.

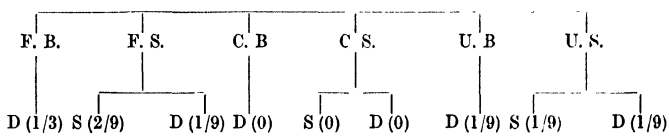
Rule (3).—Lastly, divide the hypothetical shares of the full and consanguine brothers and sisters among their respective descendants as among Distant Kindred of the first class [see sec. 58].

Doctrine of Abu Yusuf.—According to Abu Yusuf, the estate is to be divided among the claimants *per capita* according to the rule of the double share to the male.

Illustrations.

(a) A Sunni Mahomedan dies leaving a daughter of a full brother, a son and a daughter of a full sister, a daughter of a consanguine brother, a son and a daughter of a consanguine sister, a daughter of a uterine brother, and a son and a daughter of a uterine sister, as shown in the following diagram :—

Common ancestors.



The children of the consanguine brother and sister are excluded from inheritance as there is a full brother's daughter [see sec. 60, rule (3)]. The estate has therefore to be divided among the children of the full and uterine brothers and sisters.

As there are three claimants in the uterine group, the collective share of the uterine brother and sister is 1/3, and this will be divided among their three descendants equally without distinction of sex, each taking 1/9.

This leaves a residue 2/3, and this is to be divided in the first instance between the full brother and the full sister as residuaries, according to the number of claimants descended from each of them. The full brother, having only one descendant, counts as

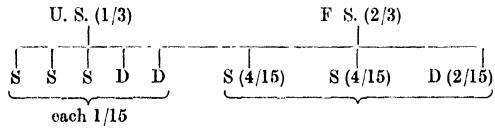
S. 62 one male or two females. The full sister, having two descendants, counts as two females. The residue will therefore be divided into four parts, the full brother taking $2/4 \times 2/3 = 1/3$, and the full sister also $2/4 \times 2/3 = 1/3$.

The full brother's share 1/3 will go to his descendant. The full sister's share 1/3 will be divided between her two children according to the rule of the double share to the male as in class I of Distant Kindred, the son taking $2/3 \times 1/3 = 2/9$, and the daughter taking $1/3 \times 1/3 = 1/9$.

Note.—On failure of children of full brother and sister, the residue will be divided in like manner among the children of consanguine brother and sister.

(According to Abu Yusuf, the whole estate will be divided among the children of the *full* brother and sister according to the rule of the double share to the male, so that the full brother's daughter will take 1/4, the full sister's son 1/2, and her daughter 1/4. On failure of children of the full brother and sister, the estate will be divided in like manner among the children of *consanguine* brother and sister. And on failure of them, it will be distributed in like manner among the children of the *uterine* brother and sister)

(b) A Sunni Mahomedan dies leaving five children of a uterine sister, and three children of a full sister, as shown in the following diagram:—

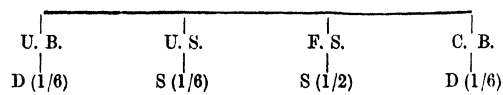


As there are five claimants in the uterine group, the share of the uterine sister is 1/3, and this will be divided among her five children equally without distinction of sex, each taking $1/5 \times 1/3 = 1/15$.

The full sister, having three descendants, will count as three sisters, and she will take 2/3, that being the share of two or more full sisters [see Tab. of Sh. No. 11]. This will then be divided among her three children according to the rule of the double share to the male as among Distant Kindred of the first class, so that each son will take $2/5 \times 2/3 = 4/15$, and the daughter will take $1/5 \times 2/3 = 2/15$.

[According to Abu Yusuf, the whole estate will be divided among the children of the *full* sister according to the rule of the double share to the male, so that each son will take 2/5, and the daughter will take 1/5].

(c) A Sunni Mahomedan dies leaving a uterine brother's daughter, a uterine sister's son, a full sister's son, and a consanguine brother's daughter, as shown in the following diagram.—



Here there is no descendant of a full brother; therefore the consanguine brother's daughter is not excluded from inheritance, and she will take what remains after the estate is divided among the other claimants.

As there are two descendants in the uterine group, the collective share of the uterine brother and sister is 1/3, and this will be divided equally between their children without distinction of sex, each taking 1/6.

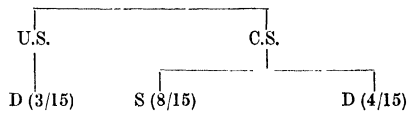
The full sister, having only one descendant, counts as one full sister, and her share therefore is 1/2. This will descend to her son. S. 62

This leaves a residue of 1/6 which will go to the consanguine brother as a residuary. This will descend to his daughter.

[According to Abu Yusuf, the whole estate will go to the *full* sister's son.]

(cc) A Sunni Mahomedan dies leaving 2 widows, 4 children of a full sister, and two daughters of a consanguine brother. The High Court of Calcutta held that the shares should be determined according to the system of Imam Muhammad. Following that system, they held that the widows were entitled to 1/4, the full sister's children were entitled to 2/3, and that the residue, that is, 1/12, belonged to the consanguine brother's daughters (*n*).

(d) A Sunni Mahomedan dies leaving a uterine sister's daughter, and a son and a daughter of a consanguine sister, as shown in the following diagram :—



The uterine sister has only one descendant, her share therefore is 1/6. The consanguine sister, having two descendants, counts as two consanguine sisters, and her share therefore is 2/3 [Tab. of Sh. No. 12]. This leaves the residue 1/6, and since there is no residuary among the *Roots*, the residue will go to the uterine sister and consanguine sister by Return. The hypothetical shares will therefore be—

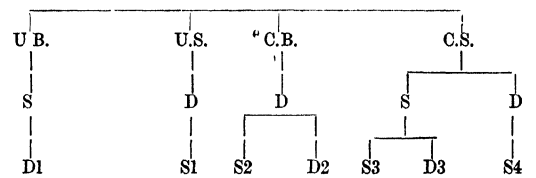
uterine sister	1/6=1/6	increased to 1/5
consanguine sister .	2/3=4/6	,, ,, 4/5

The uterine sister's share 1/5 will pass to her daughter.

The consanguine sister's share 4/5 will be divided between her son and daughter, the son taking $2/3 \times 4/5 = 8/15$, and the daughter $1/3 \times 4/5 = 4/15$.

[According to Abu Yusuf, the whole estate will go to the children of the *consanguine* sister, the son taking 2/3, and the daughter 1/3.]

(e) A Sunni Mahomedan dies leaving four grandnephews S1, S2, S3, and S4, and 3 grandnieces, D1, D2, and D3, as shown in the following diagram .—



As there are two claimants in the uterine group, the collective share of the uterine brother and sister is 1/3, and this will pass to D1 and S1, each taking 1/6.

This leaves a residue 2/3, and this is to be divided in the first instance between the consanguine brother and sister as residuaries according to the number of claimants descended from each of them.

(*n*) *Akbar Ali* v. *Adar Bibi* (1931) 58 Cal. 366, 130 I. C. 873, ('31) A. C. 155.

Ss. 62, 63

The consanguine brother, having two claimants descended from him, counts as two males or four females. The consanguine sister, having three claimants descended from her, counts as 3 females. The residue will therefore be divided into seven parts, the consanguine brother taking $4/7 \times 2/3 = 8/21$, and the consanguine sister taking $3/7 \times 2/3 = 6/21$.

The consanguine brother's share 8/21 will be divided between his two descendants S2 and D2, S2 being a male taking $2/3 \times 8/21 = 16/63$, and D2 being a female taking $1/3 \times 8/21 = 8/63$.

The consanguine sister's share 6/21 is to be divided in the first instance between her son and her daughter. The son, having two claimants descended from him, counts as two males or four females The daughter, having only one claimant descended from her, counts as one female. The son will therefore take $4/5 \times 6/21 = 8/35$, and the daughter will take $1/5 \times 6/21 = 2/35$.

The son's share 8/35 will be divided between his two children S3 and D3 according to the rule of the double share to the male, S3 taking $2/3 \times 8/35 = 16/105$, and D3 taking $1/3 \times 8/35 = 8/105$.

The daughter's share 2/35 will pass to her son S4

The shares will therefore be—

D1 = 1/6, S1 = 1/6, S2 = 16/63, D2 = 8/63; S3 = 16/105, D3 = 8/105, and S4 = 2/35. The total of these shares is unity.

[According to Abu Yusuf, the whole property will be divided among the consanguine groups to the entire exclusion of the uterines, so that S2, S3, and S4 will each take 2/8 or 1/4, and D2 and D3 will each take 1/8.]

Class IV of Distant Kindred.

63. Order of succession.—(*1*) If there are no Distant Kindred of the first, second, or third class, the estate will devolve upon Distant Kindred of the fourth class in the order given below [*Sir.* 56-58]:—

(1) Paternal and maternal uncles and aunts *of the deceased*, other than his full and consanguine paternal uncles who are Residuaries.

(2) The descendants h. l. s. of all the paternal and maternal uncles and aunts of the deceased, other than sons h. l. s. of his full and consanguine paternal uncles (they being Residuaries), the nearer excluding the more remote.

(3) Paternal and maternal uncles and aunts *of the parents*, other than the full and consanguine paternal uncles of the father who are Residuaries.

(4) The descendants h. l. s. of all the paternal and maternal uncles and aunts of the parents, other than sons, h. l. s. of the full and consanguine paternal uncles of the father (they being Residuaries), the nearer excluding the more remote.

(5) Paternal and maternal uncles and aunts *of the grandparents*, other than the full and consanguine paternal uncles of the father's father who are Residuaries.

(6) The descendants h. l. s. of all the paternal and maternal uncles and aunts of the grandparents, other than sons h. l. s. of the full and consanguine paternal uncles of the father's father (they being Residuaries), the nearer excluding the more remote.

(7) *Remoter uncles and aunts* and their descendants in like manner and order.

(*2*) Of the above groups each in turn must be exhausted before any member of the next group can succeed.

Doctrine of Abu Yusuf—The only difference between the two disciples as regards succession of the Distant Kindred of the fourth class is as to the allotment of *shares* among the descendants. See sec 65 below.

64. Uncles and aunts.—To distribute the estate among the uncles and aunts of the deceased, proceed as follows :—

(1) *First*, assign 2/3 to the paternal side, that is, to paternal uncles and aunts, even if there be only one such, and 1/3 to the maternal side, that is, to maternal uncles and aunts, even if there be only one such.

(2) *Next*, divide the portion assigned to the paternal side, that is, 2/3 of the estate, among

(a) full paternal aunts in equal shares ; failing them, among

(b) consanguine paternal aunts in equal shares ; and, failing them, among

(c) uterine paternal uncles and aunts, according to the rule of the double share to the male.

(3) *Lastly*, divide the portion assigned to the maternal side, that is 1/3 of the estate, among

(a) full maternal uncles and aunts ; failing them among

(b) consanguine maternal uncles and aunts ; and, failing them, among

(c) uterine maternal uncles and aunts, according to the rule, in *each* case, of the double share, to the male.

S. 64 (4) If there be no uncle or aunt on the paternal side, the maternal side will take the whole. Similarly, if there be no uncle or aunt on the maternal side, the paternal side will take the whole.

Sir. 55, 56.

Note that no claimant on the paternal side excludes any claimant on the maternal side, and no claimant on the maternal side excludes any claimant on the paternal side.

Note particularly that full paternal uncles and consanguine paternal uncles are *Residuaries*. Hence we are not concerned with them here.

Doctrine of Abu Yusuf.—There is no difference between the two disciples as regards *the succession* of uncles and aunts

Illustrations.

(a) 2/3 { *Full paternal aunt* .. .. .. 2/3=6/9
Cons paternal aunt .. .. .. (excluded by *full* paternal aunt)

1/3 { *Full maternal uncle* . . .. 2/3×1/3=2/9
Full maternal aunt . . .. 1/3×1/3=1/9
Cons. maternal uncle .. .. .. (excluded by full maternal uncle and aunt)

(b) 2/3 { *Cons. paternal aunt* 2/3
Ut. paternal uncle .. .. (excluded by *cons.* paternal aunt)

1/3 *Full maternal aunt* 1/3

(c) 2/3 { *Ut. paternal uncle* .. . . 2/3×2/3=4/9
Ut. paternal aunt . . 1/3×2/3=2/9

1/3 { *Full maternal uncle* .. . . 2/3×1/3=2/9
Full maternal aunt .. . . 1/3×1/3=1/9

Note.—The result would be the same if the deceased left a *uterine* maternal uncle and aunt instead of a *full* maternal uncle and aunt.

(d) 2/3 *Ut. paternal aunt* . . .. 2/3=6/9

1/3 { *Cons. maternal uncle* .. . 2/3×1/3=2/9
Cons. maternal aunt .. .. 1/3×1/3=1/9

Rules of succession.—The present section is based upon the following rules :—

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

(2) Among claimants *on the same side*, those of the full blood are preferred to those of the half blood, and consanguine relations are preferred to uterine relations.

Order of priority.—The uncles and aunts may belong to the paternal side or they may belong to the maternal side. The two sides *inherit together*, and no claimant on either side excludes any claimant on the other side. The order of succession among the uncles and aunts of the deceased is explained in the Table on p. 72 below.

65. Descendants of uncles and aunts.—If there are no uncles or aunts of the deceased, the estate will devolve upon the descendants of uncles and aunts, other than sons how low soever of full paternal uncles and consanguine paternal uncles who are residuaries. To distribute the estate among these relations, proceed as follows [*Sir.* 56-58] :— S. 65

(1) *First*, assign 2/3 to the paternal side, that is, to descendants of paternal uncles and aunts, even if there be only one such, and 1/3 to the maternal side, that is, to descendants of maternal uncles and aunts, even if there be only one such.

(2) *Next*, divide the portion assigned to the paternal side, that is, 2/3 of the estate, among—

(a) full paternal uncles' daughters; failing them, among

(b) full paternal aunts' children; failing them, among

(c) consanguine paternal uncle's daughters; failing them, among

(d) consanguine paternal aunt's children; and failing them, among

(e) children of uterine paternal uncles and aunts,

the division among the members of each of the five groups above to be made as among Distant Kindred of the first class [see sec. 58].

Note that (a) excludes (b), the reason being that (a) are children of residuaries (full paternal uncles), while (b) are children of distant kindred (full paternal aunts).

Note also that a full paternal uncle's son and a consanguine paternal uncle's son are residuaries; hence they do not find any place in the above list.

(3) *Lastly*, divide the portion assigned to the maternal side, that is, 1/3 of the estate, among—

(a) children of full maternal uncles and aunts; failing them, among

(b) children of consanguine maternal uncles and aunts; failing them, among

(c) children of uterine maternal uncles and aunts,

S. 65 the division among the members of each of the three groups above to be made as among Distant Kindred of the first class [see sec. 58].

(4) If there be no children of paternal uncles and aunts, the children of maternal uncles and aunts will take the whole. Similarly, if there be no children of maternal uncles and aunts, the children of paternal uncles and aunts will take the whole.

(5) If there be no children either of paternal uncles and aunts or of maternal uncles and aunts, the estate will be divided among their grandchildren on the same principle. Failing grandchildren, it will be divided among remoter descendants, the nearer degree excluding the more remote.

The order of succession on each side is based on certain rules which are set forth below immediately after the illustrations.

Doctrine of Abu Yusuf.—The only difference between the two disciples as to the succession of descendants of uncles and aunts is that, according to Abu Yusuf, the portion assigned to each side is to be divided among the claimants *per capita* according to the rule of the double share to the male.

Illustrations.

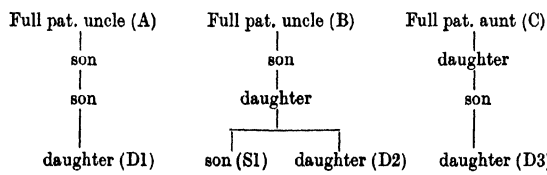
(a) The claimants are those indicated in the lowest line of the following diagram —



Here the first line in which the sex of the ancestors differs is the second line of descent. Therefore S1 takes 2/3, and D1 takes 1/3. Therefore, the share of D2 is 2/3 and that of S2 is 1/3.

According to Abu Yusuf, D2 being a female will take 1/3, and S2 being a male will take 2/3.

(b) Suppose the surviving relatives to be as shown in the last line of the following diagram :—



Here all the descendants are *equal in degree*; and they are also the same in blood, that is, they are all descendants of uncles and aunts of the *full blood*. But D1 is a child of a residuary (full paternal uncle's son's son), while S1, D2, and D3 are children of distant kindred. Therefore D1 excludes S1, D2, and D3, and she will take the whole estate [see below "Rules of Succession"]. S. 65

Suppose now that the surviving relations are S1, D2, and D3. In that case the distribution will be as follows —

Here the sexes differ first in the first line. As B has two claimants descended from him, he will count as two males or four females. C, having only one claimant descended from her, will count as one female. The estate will therefore be divided into five parts of which B will take 4/5 and C 1/5.

B's share 4/5 will be divided among his two descendants S1 and D2 according to the rule of the double portion to the male, so that S1 will take $2/3 \times 4/5 = 8/15$, and D2 will take $1/3 \times 4/5 = 4/15$ C's share 1/5 will descend to D3. Hence—

$$S1 = 8/15,\ D2 = 4/15,\ \text{and}\ D3 = 1/5 = 3/15.$$

[According to Abu Yusuf, the shares will be 1/2, 1/4 and 1/4 respectively.]

Rules of succession among descendants.—To distribute the estate among descendants of uncles and aunts, apply the following rules *in the order in which they are given below* —

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

Rule (2).—If both the paternal and maternal sides are represented, two-thirds are assigned to the paternal side and one-third to the maternal side.

Rule (3) —Among claimants *on the same side*, those of the whole blood are preferred to those of the half blood, and consanguine relations are preferred to uterine relations. [This rule applies both to the paternal and maternal sides, and it is to be applied separately to each side.]

Rule (4).—Among claimants on the paternal side, the children of residuaries are preferred to those of distant kindred. [Thus a full paternal uncle is a residuary; his daughters, therefore, would be the children of a residuary, and they would be preferred to the daughters of a full paternal aunt who is a distant kinswoman. Similarly, a consanguine paternal uncle is a residuary; his daughters therefore would be daughters of a residuary, and they would be preferred to the daughters of a consanguine paternal aunt. Again, a full paternal uncle's son is a residuary; his daughters therefore would be children of a residuary, and they would be preferred to the daughters of a full paternal uncle's daughter. Upon the same principle the daughters of a consanguine paternal uncle's son would be preferred to the daughters of consanguine paternal uncle's daughter. This rule cannot apply to relations on the maternal side, because none of the *maternal* uncles is a residuary.]

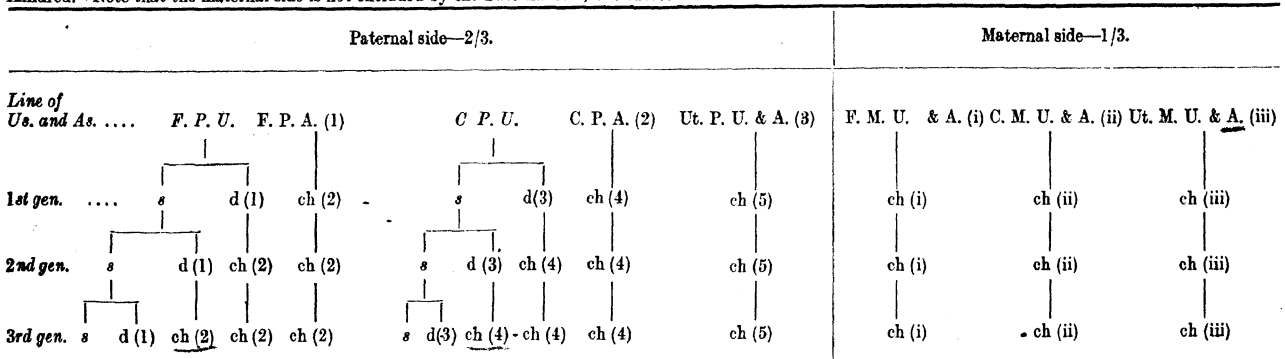
Rule (5).—After ascertaining which of the relations are entitled to succeed, the portion assigned to the paternal side is to be distributed among the members of that side as among Distant Kindred of the first class [sec. 58]. The portion assigned to the maternal side is also to be distributed according to the same principle [sec. 58].

The whole of sec. 65 is based on the above rules.

Order of priority among descendants.—The descendants of uncles and aunts may belong to the paternal side or they may belong to the maternal side. The two sides *inherit together*, and no claimant on either side excludes any claimant on the other side. The Table given on the next page shows at a glance all uncles and aunts of the deceased and their descendants up to the third generation.

Table of uncles and aunts of the deceased and their descendants up to the third generation.

In the following Table F stands for 'full,' C for 'consanguine,' and Ut for 'uterine'. P stands for 'paternal' and M for 'maternal'. U stands for 'uncle' and A for 'aunt'. The small letter *s* stands for 'son,' d stands for 'daughter,' and ch. for 'children.' The italics indicate Residuaries; the rest are Distant Kindred. Note that the maternal side is not excluded by the Paternal side, but succeeds with members of that side:—



Line of uncles and aunts.—In this line, *F. P. U.* and *C. P. U.* are Residuaries. The rest are Distant Kindred, and the order of succession among them is shown in the case of paternal uncles and aunts, by the Arabic numerals (1), (2) and (3), and in the case of maternal uncles and aunts by the Roman figures (i), (ii) and (iii). See sec. 64.

1st generation.—If there be no uncles or aunts, the estate devolves upon their children. Of these, *F.P.U. s.* and *C.P.U. s.* are Residuaries. The rest are Distant Kindred, and the order of succession among them is shown, in the case of children of paternal uncles and aunts, by the Arabic numerals, (1), (2), (3), (4) and (5), and in the case of maternal uncles and aunts by the Roman figures (i), (ii) and (iii). No. (1), being the child of a residuary, is preferred to No. (2), though they are both of full blood. For the same reason, No. (3) is preferred to No. (4), though they are both consanguine relations. See sec. 65.

2nd generation.—If there be no children of uncles and aunts, whether paternal or maternal, the estate devolves upon the grandchildren of uncles and aunts. Of these *F. P. U. s. s.* and *C. P. U. s. s.* are Residuaries. The rest are Distant Kindred, and the order of succession among them is shown in the same manner as in the first generation. No. (1), being the child of a residuary, is preferred to the group constituted by No. (2) and No. (2), they being children of Distant Kindred, though they are all of full blood. For the same reason No. (3) is preferred to the group constituted by No. (4) and No. (4), though they are all consanguine relations. Failing No. (1), No. (2) and No. (2) inherit together. Failing No. (3), No. (4) and No. (4) inherit together. Failing these No. (5) succeeds.

3rd generation.—This does not require any further explanation. All that requires to be noted is that No. (1) excludes the group constituted by No. (2), No. (2) and No. (2), and No. (3) excludes the group constituted by No. (4), No. (4) and No. (4).

Ss. 66-69

66. **Other Distant Kindred of the fourth class.**—If there are no descendants of uncles and aunts, the estate will devolve upon other Distant Kindred of the fourth class in the order of succession given in sec. 63 above, the distribution among higher uncles and aunts being governed by the principles stated in sec. 64, and that among their descendants by those stated in sec. 65 [*Sir.* 58].

E.—Successors unrelated in blood.

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

Sir. 13; *Hedaya*, 517. The right of inheritance by reason of *Wala* dealt with in this section is taken away by the Slavery Act, 1843.

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

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

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

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

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

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

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

Ss. 70-73

70. Escheat.—On failure of all the heirs and successors above enumerated, the property of a deceased Sunni Mahomedan escheats to the Crown.

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

F.—Miscellaneous.

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

See Macnaghten, Precedents of Inheritance, No. XXI.

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

Illustration.

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

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

73. Missing persons.—When the question is whether a Mahomedan is alive or dead, and it is proved that he has not been heard of for seven years by those who would naturally have heard of him if he had been alive, the burden of proving that he is alive is on the person who affirms it.

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

(*q*) Tagore Law Lectures, 1873, p 123.
(*r*) *Mazhar Ali* v *Budh Singh* (1884) 7 All 297, *Mairaj* v. *Abdul Wahid* (1921) 43 All 673, 63 I C. 286, ('21) A. A. 175. See Also *Moolla Cassim* v *Moolla Abdul* (1905) 33 Cal 173, 178, 32 I A 177

CHAPTER VIII.

SHIA LAW OF INHERITANCE.

Work of highest authority: Sharaya-ul-Islam.—The most authoritative text-book of the Shia law is *Sharaya-ul-Islam* (*s*), the whole of which has been translated into French by M. Querry under the title *Droit Musalman*. The Second part of Baillie's Digest of Mahomedan Law, with the exception of the last book, is composed, as the author tells us in the Introduction (p. xxvi), of translations from *Sharaya-ul-Islam*. This Digest is referred to as Baillie, II.

Ss. 74, 75

74. Division of heirs.—The Shias divide heirs into two groups, namely, (1) heirs by consanguinity, that is, blood relations, and (2) heirs by marriage, that is, husband and wife.

75. Three classes of heirs by consanguinity.—(*1*) Heirs by consanguinity are divided into three classes, and each class is sub-divided into two sections. These classes are respectively composed as follows:—

I. (i) Parents;
   (ii) children and other lineal descendants h.l.s.

II. (i) Grandparents h.h.s. (true as well as false);
   (ii) brothers and sisters and their descendants h.l.s.

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

(*2*) Of these three classes of heirs, the first excludes the second from inheritance, and the second excludes the third. But the heirs of the two sections of each class succeed together, the nearer degree in each section excluding the more remote in that section [Baillie, II, 276, 280, 285].

As to the distribution of estate among the heirs, see s. 83 *et seq.*

Illustrations.

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

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

(*s*) *Agha Ali Khan* v. *Altaf Hasan Khan* (1892) 14 All. 429, 450; *Aziz Bano* v. *Muhammad Ibrahim* (1925) 47 All 823, at pp. 828, 829, 836, 89 I C. 690, ('25) A. A. 720.

Ss. 75, 76

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

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

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

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

(c) A Shia Mahomedan dies leaving a full paternal uncle's son and a mother's father.

By Hanafi law the full paternal uncle's son, being a residuary, will succeed to the whole estate to the entire exclusion of the mother's father who is a distant kinsman.

By Shia law the mother's father, being an heir of the second class, will succeed in preference to the full paternal uncle's son who belongs to the third class of heirs.

(d) A Shia Mahomedan dies leaving (1) a father, (2) a mother, (3) a daughter, (4) a son's son, (5) a brother, and (6) a paternal uncle. Which of these relations are entitled to succeed ?

Here the first four relations belong to the first class of heirs, the fifth belongs to the second class, and the sixth belongs to the third class. The fifth and sixth are therefore excluded from inheritance. The father and mother belong to the first section of Class I, and they are both equal in degree. The daughter and son's son belong to the second section, and of these two the daughter, being nearer in degree, excludes the son's son. The only person therefore entitled to inherit are the father, the mother, and the daughter.

(e) The surviving relations are (1) a grandfather, (2) a grandmother, (3) a great grandfather, (4) a brother, and (5) a brother's son. Here all the relations belong to the second class of heirs, the first three belonging to the first section of that class, and the last two to the second section. The grandfather and grandmother exclude the great grandfather by reason of the rule that the nearer in each section excludes the more remote. For the same reason the brother excludes the brother's son. The only persons therefore entitled to inherit are the grandfather, the grandmother and the brother.]

Note that parents do not exclude children, but inherit with them. If there be no children, parents inherit with grandchildren. Similarly, in the second class, brothers and sisters do not exclude grandparents, but inherit with them. If there be no brothers or sisters, the grandparents inherit with the children of brothers and sisters. In the same way in the third class paternal uncles and aunts do not exclude maternal uncles and aunts, but inherit with them.

The above illustrations exemplify the fundamental distinction between the Sunni and the Shia Law of Inheritance. Under the Sunni law, distant kindred are postponed to sharers and residuaries (s. 54); under the Shia law, they inherit with them. The Sunnis prefer agnates to cognates; the Shias prefer the nearest kinsman, whether they be agnates or cognates. In fact, the Shia law does not recognize any separate class of heirs corresponding to the "distant kindred" of Sunni law. All heirs under the Shia law are either sharers or residuaries (s. 77).

76. Husband and wife.—The husband or wife is never excluded from succession, but inherits together with the nearest heirs by consanguinity, the husband taking 1/4 or 1/2, and the

wife taking 1/8 or 1/4 under the conditions mentioned in the Table of Sharers on page 79 below. Ss. 76-79

As to the disability of a childless widow to succeed to her husband's immovable property, see sec. 99 below.

77. Table of Sharers—Shia Law.—(*1*) For the purpose of determining the shares of heirs, the Shias divide heirs into two classes, namely, Sharers and Residuaries. There is no separate class of heirs corresponding to the " Distant Kindred " of Sunni law.

(*2*) The Sharers are nine in number. The Table on page 79 gives a list of Sharers together with the shares assigned to them in Shia law.

(*3*) The descendants h. l. s. of Sharers are also Sharers.

Of the nine sharers mentioned in the Table, the first two are heirs by affinity. The next three belong to the first class of heirs by consanguinity [s 75], and the remaining four belong to the second class There are no sharers in the third class of heirs.

Note that the true grandfather h. h. s., the true grandmother h. h. s., and the son's daughter h. l. s., who are sharers according to Sunni law, are not sharers, but residuaries, according to Shia law.

It is very important to note that the descendants of sharers are also sharers. This refers, of course, to the descendants of the (1) daughter, (2) uterine brother, (3) uterine sister, (4) full sister, and (5) consanguine sister. It does not refer to the descendants, if they can be called descendants at all, of the husband, wife, father or mother. The Shia jurists are not concerned with the descendants of these four relations

78. Residuaries.—(*1*) All heirs other than Sharers are Residuaries.

(*2*) The descendants h. l. s. of Residuaries are also Residuaries.

Thus sons, brothers, uncles and aunts, are all residuaries. Their descendants, therefore, are also residuaries For example, a son's daughter, being a descendant of a residuary (son), is also a residuary.

Of the nine shares mentioned in the Table of Sharers, there are four who inherit sometimes as sharers, and sometimes as residuaries. These are the (1) father, (2) daughter, (3) full sister, and (4) consanguine sister. As to the last three, it is to be observed that where any one of them would have, if living, inherited as a sharer, her descendants would inherit as sharers, and if she would have inherited as a residuary, her descendants would inherit as residuaries (sec. 82).

79. Distribution of property.—(*1*) If the deceased left only one heir, the whole property would devolve upon that heir, except in the case of a wife. If the only heir be a wife she is entitled to no more than her Koranic share (one-fourth) and the residue (three-fourths) escheats to the Crown.

Ss. 79, 80

Baillie, II, 262. The reason of the exception in the case of a wife is that she is not entitled to the surplus by *Return*, not even if there be no other heir. If she is the sole heir, she takes 1/4, and the surplus passes to the Imam, now the Crown. Ameer Ali is of opinion that there being no machinery now to take charge of the Imam's share, the surplus should pass to the wife [Ameer Ali, 5th ed., Vol II, p. 123, f. n. (3)].

If the only heir be a sharer, *e.g.*, a husband, he takes his Koranic share (one-half) as a sharer, and the residue by Return. If the only heir be a residuary, *e g*, a brother, he takes the whole estate as a residuary. As to Sunni law, see sec. 53.

(*2*) If the deceased left two or more heirs, the first step in the distribution of the estate is to assign his or her share to the husband or wife. The next step is to ascertain which of the surviving relations are entitled to succeed, and this is to be done with the help of the rules laid down in sec. 75. The estate (*minus* the share of the husband or wife, if any) is then to be divided among those entitled to succeed according to the rules of distribution applicable to the class to which they belong (ss. 83-97).

Note that the husband or wife, as the case may be, is always entitled to succeed whatever be the class to which the other claimants belong. The husband and wife always inherit as sharers, their shares being respectively 1/4 and 1/8 when there is a lineal descendant, and 1/2 and 1/4 when there is no lineal descendant. Since there are no lineal descendants either in the second or third class of heirs, it follows that when the husband or wife succeeds with the heirs of the second or third class, he or she takes his or her full share, that is, the husband takes 1/2, and the wife takes 1/4.

80. Principle of representation.—The cardinal principle underlying the rules of the Shia law of inheritance is the principle of representation. According to that principle the descendants of a deceased son represent the son, and take the portion which he, if living, would have taken. Similarly, the descendants of a deceased daughter represent the daughter, and take the portion which she, if living, would have taken. The same is the case with the descendants of a deceased brother, a deceased sister, a deceased uncle, and a deceased aunt (*t*).

The principle of representation is not confined in its operation to descendants only. It applies in the ascending as well as in the descending line. Thus great-grandparents take the portion which the grandparents, if living, would have taken: and the father's uncles and aunts take the portion which the deceased's uncles and aunts, if living, would have taken.

The application of this principle is shown in secs. 83, 85, 87, 88, 91 and 92.

(*t*) *Aga Sheralli* v. *Bai Kulsum* (1908) 32 Bom. 540, 547, 548, 558.

TABLE OF SHARERS—SHIA LAW [Sec. 77.]

(Baillie, II, 271-276, 381.)

Sharers.	Normal share		Conditions under which the share is inherited.	Share as varied by special circumstances.
	of one	of two or more collectively		
1. Husband	1/4	..	When there is a lineal descendant	1/2 when no such descendant.
2. Wife	1/8	1/8	When there is a lineal descendant	1/4 when no such descendant.
3. Father (*u*)	1/6	.	When there is a lineal descendant.	[If there be no lineal descendant, the father inherits as a residuary.]
4. Mother	1/6	.	(a) When there is a lineal descendant, or (b) when there are two or more full or consanguine brothers, or one such brother and two such sisters, or four such sisters, with the father.	1/3 in other cases.
5 Daughter	1/2	2/3	When no son.	[With the son she takes as a residuary.]
6. Uterine brother or sister	1/6	1/3	When no parent, or lineal descendant [see s. 75].	
7.				
8. Full sister	1/2	2/3	When no parent, or lineal descendant, or full brother, or father's father [see ss. 75, 88]	[The full sister takes as a residuary with the full brother and also with the father's father: see s. 88.]
9. Consanguine sister.	1/2	2/3	When no parent, or lineal descendant, or full brother or sister, or consanguine brother or father's father [see ss. 75, 88].	[The consanguine sister takes as a residuary with the consanguine brother and also with the father's father: see s. 88.]

Note.—The descendants h. l. s. of sharers are also sharers [sec. 77.]

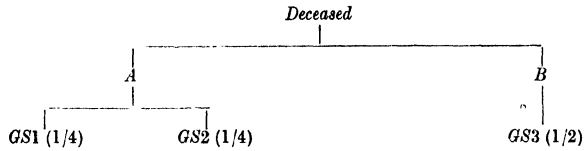
(*u*) As to the father's *extra* rights as Sharer, see ss. 95 and 97.

Ss. 80-82

First paragraph.—This does not mean that grandsons by a predeceased son inherit with sons or that granddaughters by a predeceased daughter inherit with daughters. Grandchildren succeed only in default of children : see sec. 83 below.

81. Stirpital succession.—Succession among descendants in each of the three classes of heirs (sec. 75) is *per stirpes*, and not *per capita* (*v*).

This is repeating in other words the principle of representation described in the last section. Thus suppose a Shia dies leaving two grandsons *GS*1 and *GS*2 by a predeceased son *A* and a grandson *GS*3 by another predeceased son *B*, as shown in the following diagram :—

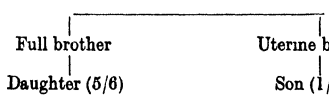


By Shia law the estate is to be notionally divided first among the two sons *A* and *B*, so that each takes 1/2. *A*'s share 1/2 descends to his two sons *GS*1 and *GS*2, each taking 1/4. *B*'s share 1/2 passes to his son *GS*3. The division, in other words, is according to the *stocks*, and not according to the *claimants*. By Sunni law *GS*1, *GS*2 and *GS*3 take *per capita*, that is, each takes 1/3 without reference to the shares which their respective fathers, if living, would have taken. Under the Shia law *A*'s two sons *represent A* and stand in his place, and *B*'s son *represents B* and stands in his place. Under the Sunni law there is no such representation (sec. 42).

The above is an example of succession *per stirpes* among the descendants of sons. The descendants of daughters, brothers, sisters, uncles, aunts, granduncles and grand-aunts also succeed *per stirpes* . see secs. 83, 87, 91 and 92.

82. Succession among descendants.—The descendants of a person who, if living, would have taken as a Sharer, succeed as Sharers. The descendants of a person who, if living, would have taken as a Residuary, succeed as Residuaries.

This follows necessarily from the principle of representation described in sec. 80. Thus suppose a Shia dies leaving a full brother's daughter and a uterine brother's son as shown in the following diagram :—



The uterine brother, had he survived, would have taken as a sharer his Koranic share 1/6 [see Table of Sh., No. 6]. The full brother, had he survived, would have taken 5/6 as a residuary. The uterine brother's son, being the descendant of a sharer, will succeed as a sharer, and *representing* as he does his father, take his father's share 1/6. The full brother's daughter, being the descendant of a residuary, will succeed also as a residuary, and *representing* as she does her father, take her father's portion 5/6. Under

(*v*) *Aga Sheralli* v. *Bai Kulsum* (1908) 32 Bom. 540.

the Sunni law, both a full brother's daughter and a uterine brother's son are distant kindred of the third class. According to Imam Muhammad, the former would take 5/6, and the latter 1/6 exactly as in Shia law [see sec. 62]. According to Abu Yusuf, the former entirely excludes the latter [see notes to sec. 61, " Doctrine of Abu Yusuf "]. Ss. 82, 83

Having described the mode of distribution in sec. 79, and having explained the principle of representation in sec. 80, and its two corollaries in secs. 81 and 82, we proceed to enumerate the special rules by which succession in each of the three classes of heirs mentioned in sec. 75 is governed.

Distribution among Heirs of the First Class.

83. Rules of succession among heirs of the first class.— The persons who are first entitled to succeed to the estate of a deceased Shia Mahomedan are the heirs of the first class *along with* the husband or wife, if any [sec. 79 (2)]. The first class of heirs comprises parents, children, grandchildren, and remoter lineal descendants of the deceased. The parents inherit together with children, and, failing children, with grandchildren, and, failing grandchildren, with remoter lineal descendants of the deceased, the nearer excluding the more remote [sec. 75]. Succession in this class is governed by the following rules :—

(1) *Father.*—The father takes 1/6 as a Sharer if there is a lineal descendant; as a residuary, if there be no lineal descendant [see Tab. of Sh., No. 3].

(2) *Mother.*—The mother is always a Sharer, and her share is 1/6 or 1/3 [see Tab. of Sh., No. 4].

(3) *Son.*—The son always takes as a Residuary.

(4) *Daughter.*—The daughter inherits as a Sharer, unless there is a son in which case she takes as a Residuary with him according to the rule of the double share to the male [see Tab. of Sh., No. 5].

(5) *Grandchildren.*—On failure of children, the grandchildren stand in the place of their respective parents, and they inherit according to the principle of representation described in secs. 80, 81, and 82, that is to say—

(i) the children of each son take the portion which their father, if living, would have taken as a Residuary, and divide it among them according to the rule of the double share to the male;

S. 83 (ii) the children of each daughter take the portion which their mother, if living, would have taken either as a Sharer or as a Residuary and divide it among them also according to the rule of the double share to the male.

(6) *Remoter lineal descendants.*—Succession among remoter lineal descendants is governed by the same principle of representation, that is to say, great-grandchildren take the portion which their respective parents, if living, would have taken, and divide it among them according to the rule of the double share to the male, and great-great-grandchildren take the portion which their respective parents, if living, would have taken, and divide it among them also according to the same rule.

Baillie, II, 276-279.

Mode of distribution among husband or wife and heirs of the first class —

first, assign his or her share to the husband or wife [see Tab. of Sh , Nos 1-2] ,

next, assign their shares to such of the claimants as can inherit as sharers only ,

next, divide the residue, if any, among the residuaries ;

lastly, if there be no residuary, and the sum total of the shares is *less* than unity, apply the Doctrine of Return as stated in secs 93 to 96 ; and if the sum total *exceeds* unity, proceed as stated in sec. 97.

Illustrations.

(a) *Husband* . . . . 1/2 (as sharer)
Mother . . . 1/3 (as sharer)
Father . . . . . 1/6 (as residuary)

Note.—Under the Sunni law, the mother takes $1/3 \times 1/2 = 1/6$, and the father 1/3 as a residuary [see Tab of Sh , Sunni law, No. 5].

(b) *Wife* . . . . . 1/4 (as sharer)
Mother . . . . . 1/3 (as sharer)
Father . . . . . 5/12 (as residuary)

Note.—Under the Sunni law, the mother takes $1/3 \times 3/4 = 1/4$, and the father 1/2 as a residuary [see Tab. of Sh., Sunni law, No. 5].

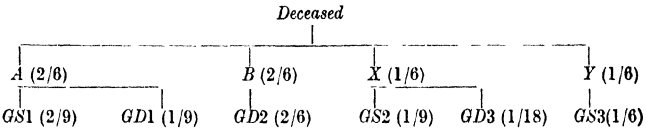
(c) *Father* . . . . . 1/6 (as sharer)
Mother . . . . . 1/6 (as sharer)
Son . . . . . 2/3 (as residuary)

Note.—If instead of a son, there was a son's daughter, she would have taken 2/3 as representing her father.

(d) *Father* . . . . . 1/6 (as sharer, because there are daughters)
Mother . . . . . 1/6 (as sharer)
2 daughters . . . . . 2/3 (as sharers)

Note.—The shares would be the same if we substitute daughters' sons or daughters' daughters for daughters. Ss. 83, 84

(e) A Shia dies leaving a grandson *GS*1 and a granddaughter *GD*1 by a predeceased son *A*, a granddaughter *GD*2 by another predeceased son *B*, a grandson *GS*2 and a granddaughter *GD*3 by a predeceased daughter *X*, and a grandson *GS*3 by another predeceased daughter *Y*, as shown in the following diagram :—



Here the two daughters *X* and *Y*, if living, would have taken as residuaries with the two sons *A* and *B* according to the rule of the double share to the male, so that *A* and *B* would each have taken 2/6, and *X* and *Y* would each have taken 1/6.

A's share 2/6 will pass to his son and daughter according to the rule of the double share to the male, so that *GS*1 will take $2/3 \times 2/6 = 2/9$, and *GD*1 will take $1/3 \times 2/6 = 1/9$.

B's share 2/6 will pass to his daughter *GD*2.

X's share 1/6 will be divided between her son and her daughter according to the rule of the double share to the male, so that *GS*2 will take $2/3 \times 1/6 = 1/9$, and *GD*3 will take $1/3 \times 1/6 = 1/18$.

Y's share 1/6 will pass to her son *GS*3.

The shares will thus be $2/9 + 1/9 + 2/6 + 1/9 + 1/18 + 1/6 = 1$.

According to the Hanafi law *GS*1, *GD*1 and *GD*2 are residuaries, and they exclude *GS*2, *GD*3, and *GS*3 who are d. k. *GS*1 will take 1/2, and *GD*1 and *GD*2 will each take 1/4.

If in the case put above, the deceased left also a wife, the wife will first take her share 1/8, and the remaining 7/8 will be divided among the six grandchildren in the same proportions.

Distribution among Heirs of the Second Class.

84. Rules of succession among heirs of the second class.—If there are no heirs of the first class, the estate (*minus* the share of the husband or wife, if any) devolves upon the heirs of the second class. The second class of heirs comprises grandparents h.h.s. and brothers and sisters and their descendants h.l.s. [sec. 75]. The rules of succession among the heirs of this class are different according as the surviving relations are—

(1) grandparents h.h.s., *without* brothers or sisters or their descendants ;

(2) brothers and sisters or their descendants, *without* grandparents or remoter ancestors ;

Ss. 85-86

(3) grandparents h.h.s., *with* brothers and sisters or their descendants.

The first case is dealt with in sec. 85. The second case is dealt with in secs. 86 and 87. The third case is dealt with in sec. 88.

85. Grandparents h.h.s., without brothers or sisters or their descendants.—If there are no brothers or sisters, or descendants of brothers or sisters, the estate (*minus* the share of the husband or wife, if any) is to be distributed among grandparents according to the following rules :—

(1) If the deceased left all his four grandparents surviving, the paternal grandparents take two-thirds, and divide it between them according to the rule of the double share to the male, and the maternl grandparents take 1/3, and divide it equally between them, as shown below :—

2/3 { Father's father .. 2/3×2/3=4/9=8/18
Father's mother . 1/3×2/3=2/9=4/18

1/3 { Mother's father . . . 1/2×1/3=1/6=3/18
Mother's mother .. . 1/2×1/3=1/6=3/18

(2) If there is only one grandparent on the paternal side, he or she takes the entire 2/3. Similarly, if there is only one grandparent on the maternal side, he or she takes the entire 1/3, as shown below :—

(a) Father's father 2/3
Mother's father . . . { 1/3 (each taking 1/6)
Mother's mother . .. . .

(b) Father's father } 2/3 . .. .. { 2/3×2/3=4/9
Father's mother } { 1/3×2/3=2/9
Mother's mother 1/3 =3/9

(c) Father's father 2/3
Mother's mother 1/3

(3) If there are no grandparents, the property will devolve according to the same rules upon remoter ancestors of the deceased, the nearer excluding the more remote.

Baillie, II, 281, 283.

86. Brothers and sisters, without any ancestor.—If the deceased left no ancestors, but brothers and sisters of various kinds, the estate (*minus* the share of the husband or

wife, if any) will be distributed among them according to the same rules as those in Hanafi law. The said rules are as follows :— Ss. 86, 87

(i) Brothers and sisters of the full blood exclude consanguine brothers and sisters.

(ii) Uterine brothers and sisters are not excluded by brothers or sisters either full or consanguine, but they inherit with them, their share being 1/3 or 1/6 according to their number [see Tab. of Sh., Nos. 6 and 7].

(iii) Full brothers take as Residuaries, so do consanguine brothers.

(iv) Full sisters take as sharers [see Tab. of Sh., No. 8], unless there be a full brother in which case they take as Residuaries with him according to the rule of the double share to the male. Consanguine sisters also take as sharers [see Tab. of Sh., No. 9] unless there be a consanguine brother with them in which case they take as Residuaries with him according to the same rule.

Baillie, II, 280.

Illustrations.

Note.—The shares of the several heirs in the following illustrations are the same both in Sunni and Shia law. The illustrations are given to familiarize the student with combinations of heirs that are common in Shia law :—

(a)	*Husband*	1/2	(as sharer)
	Full (or cons.) sister	1/2	(as sharer)
(b)	*Wife*	1/4	(as sharer)
	Full brother	3/4	(as residuary)
(c)	*Husband*	1/2	(as sharer)
	Full brother	2/3×(1/2)=1/3	(as residuaries)
	Full sister	1/3×(1/2)=1/6	
(d)	*Wife*	1/4	(as sharer)
	Ut. brother	1/6	(as sharer)
	Cons. Brother	2/3×(7/12)=7/18	(as residuaries)
	Cons. sister	1/3×(7/12)=7/36	

87. **Descendants of brothers and sisters, without any ancestor.**—If there are no brothers or sisters of any kind, and no ancestors, but there are children of brothers and sisters, the estate (*minus* the share of the husband or wife, if any) will devolve upon them according to the principle of representation described in secs. 80, 81, and 82, that is to say—

(1) The children of each full or consanguine brother will take the portion which their father, if living, would have taken as a Residuary, and they will divide it among them according to the rule of the double share to the male; and the children

S. 87

of each full or consanguine sister will take the portion which their mother, if living, would have taken either as a Sharer or as a Residuary, and they will divide it among them according also to the rule of the double share to the male.

(2) The children of each uterine brother will take the portion which their father, if living, would have taken as a Sharer, and they will divide it *equally* among them; and so will the children of each uterine sister.

(3) If there are no children of brothers or sisters, the estate will devolve upon the grandchildren of brothers and sisters according to the principle of representation, that is to say, the grandchildren of full or consanguine brothers and sisters take the portion which their *respective* parents, if living, would have taken and divide it among them according to the rule of the double share to the male, and the grandchildren of uterine brothers and sisters take the portion which their *respective* parents, if living, would have taken, and divide it equally among them without distinction of sex.

Baillie, II, 284.

Illustrations.

(a)

Husband	1/2 (as sharer)
Ut. brother's daughter	1/6 (as sharer, being her father's portion)
Full brother's daughter	1/3 (as residuary, being her father's portion)
Cons. brother's son	0 (excluded by *full* brother's daughter)

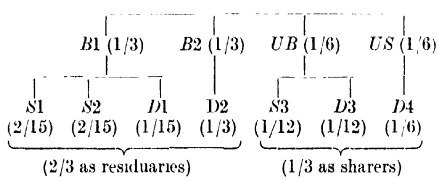
(b) Suppose the claimants to be as shown in the second line of the following diagram, that is to say,—

two sons and a daughter of a full brother, *B*1,

a daughter of another full brother, *B*2;

a son and a daughter of a uterine brother, *UB*,

a daughter of a uterine sister, *US*,



Ss. 87, 88

First, assign their respective shares to the brothers and sisters thus .—

UB and *US* .. . .. 1/3 (as sharers), each taking 1/6;

*B*1 and *B*2 .. .. .. 2/3 (as residuaries), each taking 1/3.

Next assign portions to their children thus .—

US's share 1/6 will go to her daughter *D*4;

UB's share 1/6 will be divided *equally* between *S*3 and *D*3, each taking 1/12,

*B*2's share 1/3 will go to his daughter *D*2;

*B*1's share 1/3 will be divided among his two sons and his daughter according to the rule of the double share to the male, so that *S*1 will take $2/5 \times 1/3 = 2/15$, *S*2 will also take 2/15, and *D*1 will take $1/5 \times 1/3 = 1/15$.

The shares will thus be $2/15+2/15+1/15+1/3+1/12+1/12+1/6=1$.

Suppose that in the case put above the children of the brothers and sisters had all predeceased the propositus, and that *S*1 had left a son and a daughter, that *S*3 also had left a son and a daughter, and the remaining five nephews and nieces had each left a son. In that case the share of *S*1, that is, 2/15, would be divided between his son and his daughter according to the rule of the double share to the male, the son taking $2/3 \times 2/15 = 4/45$, and the daughter $1/3 \times 2/15 = 2/45$. The share of *S*3, that is, 1/12, would be divided *equally* between his son and daughter, they being descendants of a *uterine* brother, so that each would take 1/24. The sons of *S*2, *D*1, *D*2, *D*3, and *D*4, would take their respective parents' portion

88. Grandparents and remoter ancestors with brothers and sisters or their descendants.—(*1*) If the deceased left grandparents, and also brothers or sisters, the estate (*minus* the share of the husband or wife, if any) is to be distributed among grandparents *and* brothers and sisters, according to the following rules :—

(a) A paternal grandfather counts as a full or consanguine brother, and a paternal grandmother counts as a full or consanguine sister.

(b) A maternal grandfather counts as a uterine brother, and a maternal grandmother counts as a uterine sister.

(*2*) On failure of grandparents, the remoter ancestors of the deceased stand in the place of the grandparents through whom they are respectively connected with the deceased. On failure of brothers or sisters, their descendants stand in the place of their respective parents.

Baillie, II, 281, 391-392; Wilson, sec. 468.

S. 88 The effect of the above rules is that when among heirs of the second class you find a single brother or sister, full, consanguine or uterine, what you have to do is to substitute for grandparents so many brothers and sisters according to the above rules, and then assign shares to grandparents as if they were so many brothers and sisters, as is done in the following illustrations :—

(a) *Paternal grandfather* (=full brother) 2/3
Full sister 1/3

Note.—Here the full sister takes as a residuary with the paternal grandfather, the latter being counted as a full brother.

(b) *Paternal grandfather* (=consanguine brother) .. 2/3
Consanguine sister 1/3

Note.—Here the consanguine sister takes as a residuary with the paternal grandfather, the latter being counted as a consanguine brother.

(c) *Uterine brother* .. .. } 1/3 (each taking 1/6)
Maternal grandmother (=ut. sister) .. .. .. }
2 *full sisters* .. .. 2/3 (as sharers)

Note.—Here the maternal grandmother counts as a uterine sister, so that the case is the same as if we had a uterine brother and a uterine sister; these take 1/3 between them as sharers.

(d) *Full brother* .. .. 4/18 } 2/3 as residuaries.
Full sister .. .. 2/18 }
Father's father (=full brother) .. 4/18 }
Father's mother (=full sister) .. 2/18 }
Mother's father (=ut. sister) . .. .. 1/6 } 1/3 as sharers.
Mother's mother (=ut. sister) .. .. .. 1/6 }

Note.—First substitute brothers and sisters for grandparents, so that we have 2 full brothers, 2 full sisters, one uterine brother and one uterine sister. The uterine brother and sister take 1/3 between them as sharers. The residue 2/3 is to be divided between full brothers and 2 full sisters as residuaries according to the rule of the double share to the male. Each brother therefore takes $2/6 \times 2/3 = 4/18$, and each sister $1/6 \times 2/3 = 2/18$. The result would be the same if instead of a full brother and a full sister in the above case, there were a consanguine brother and a consanguine sister.

(e) *Uterine brother* .. .. = 1/9 }
Uterine sister .. .. = 1/9 } 1/3 as sharers.
Mother's mother (=uterine sister) .. .. = 1/9 }

Father's father (=con. brother) .. .. = 1/3 }
Father's mother (=con. sister) .. .. = 1/6 } 2/3 as residuaries.
Con. sister .. .. = 1/6 }

Note.—Substitute "uterine sister" for "mother's mother", so that we have one uterine brother and two uterine sisters. Next as there is a *consanguine* sister, substitute "consanguine brother" for "father's father" and "consanguine sister" for "father's mother." The uterine brother and the two uterine sisters take collectively 1/3 as sharers. The residue 2/3 is

to be divided between one consanguine brother and two consanguine sisters as residuaries according to the rule of the double share to the male. The brother therefore takes $2/4 \times 2/3 = 1/3$, and each sister takes $1/4 \times 2/3 = 1/6$.

(f) *Husband* 1/2
Father's father (=full brother) .. ..
Full brother .. .. } 1/2 as residuaries, each taking 1/4

(g) *Wife* 1/4
Uterine sister .. ..
Uterine brother .. .. } 1/3 as sharers, each taking 1/9
Maternal grandfather (=ut. brother) ..
Paternal grandfather . .. . 5/12 (as residuary)

Note.—In the above case, it is all the same whether you count the paternal grandfather as a full brother or as a consanguine brother; in either case he takes as a residuary.

(h) *Full brother's son* .. .. 1/2 (being his father's share)
Father's father (=full brother) 1/2

Note.—The above illustration is taken from Baillie, II, pp. 327-328, 392.

Distribution among Heirs of the Third Class.

89. Order of succession among heirs of the third class.—(*1*) If there are no heirs of the first or second class, the estate (*minus* the share of the husband or wife, if any) devolves upon the heirs of the third class in the order given below :—

(1) Paternal and maternal uncles and aunts of the deceased.

(2) Their descendants h. l. s., the nearer in degree excluding the more remote.

(3) Paternal and maternal uncles and aunts of the parents.

(4) Their descendants h. l. s., the nearer in degree excluding the more remote.

(5) Paternal and maternal uncles and aunts of the grandparents.

(6) Their descendants h. l. s., the nearer in degree excluding the more remote.

(7) Remoter uncles and aunts and their descendants in like order.

Ss. 89, 90

(2) Of the above groups each in turn must be exhausted before any member of the next group can succeed.

Exception.—If the only claimants be the son of a full paternal uncle and a consanguine paternal uncle, the former, though he belongs to group (2), excludes the latter who is nearer and belongs to group (1).

Baillie, II, 285-286, 329-332.

Exception to sub-sec (2).—The Shias are the followers of Ali. Ali was a cousin of the Prophet. He was also the son-in-law of the Prophet, having been married to his favourite daughter Fatima. The Shias maintain that on the death of the Prophet the Caliphate (successorship to the Prophet) ought to have gone first to Ali, on the ground that he was the *nearest male heir* of the Prophet. But the Prophet had also left a consanguine paternal uncle (named Abbas), and Ali was but a cousin of the Prophet, being the son of a full paternal uncle (Abu Talib) of the Prophet. Ali therefore could not be the *nearest* male heir, unless the son of a full paternal uncle was entitled to succeed in preference to a consanguine uncle. To uphold, however, the claim of Ali and that of the lineal descendants of the Prophet through Fatima, the Shias had to hold that the son of a full paternal uncle was entitled to succeed in preference to a consanguine paternal uncle, and this accounts for the exception to sub-sec (2) above.

No sharers in the third class of heirs.—The heirs of the third class are all residuaries. There is no sharer among them as will be seen on referring to the Table of Sharers given above.

90. Uncles and aunts.—To distribute the estate among uncles and aunts proceed as follows:—

(1) *First*, assign 2/3 of the estate to the paternal side, that is, to paternal uncles and aunts, even if there be only one such, and 1/3 to the maternal side, that is, to maternal uncles and aunts, even if there be only one such.

(2) *Next*, divide the portion assigned to the paternal side (that is 2/3 of the estate) among the paternal uncles and aunts exactly as if they were brothers and sisters of the deceased, that is to say:—

(i) assign to uterine paternal uncles and aunts—

(a) if there be two or more of them, 1/3 to be equally divided among them;

(b) if there be only one of them, 1/6;

(ii) divide the remainder among full paternal uncles and aunts according to the rule of the double share to the male, and, *failing them*, among consanguine paternal uncles and aunts according to the same rule. S. 90

(3) *Lastly*, divide the portion assigned to the maternal side, among the maternal uncles and aunts as follows : –

(i) assign to uterine maternal uncles and aunts—

(a) if there be two or more of them, 1/3 to be equally divided among them ;

(b) if there be only one of them, 1/6 ;

(ii) divide the remainder *equally* among full maternal uncles and aunts, and, *failing them*, among consanguine maternal uncles and aunts.

(4) If there be no uncle or aunt on the maternal side, the paternal side takes the whole. Similarly, if there be no uncle or aunt on the paternal side, the maternal side takes the whole.

Baillie, II, 285, 286, 329.

Note.—In working out examples, proceed in the order given in this section.

(a)
2/3 { *Full pat. uncle* .. 5/6×2/3=5/9
Cons. pat uncle . =0 (excluded by *full* pat. uncle)
Ut. pat. uncle .. 1/6×2/3=1/9

1/3 { *Full mat. uncle* . 5/6×1/3=5/18
Cons. mat. uncle . =0 (excluded by *full* mat. uncle)
Ut. mat. uncle . 1/6×1/3=1/18

(b)
2/3 { *Full pat. aunt* . 2/3
Cons. pat. uncle .. 0 (excluded by *full* pat. aunt)
1/3 *Ut. mat. aunt* . 1/3

(c)
Full pat. uncle .. 2/3 (takes a double share, being a male)
Full pat. aunt .. 1/3

(d)
Full mat. uncle .. 5/6
Ut. mat. uncle .. 1/6 (being only one)

(e)
2/3 { *Cons. pat. uncle* .. 5/6×2/3=5/9
Ut. pat. uncle .. 1/6×2/3=1/9
1/3 *Ut. mat. aunt* .. =1/3

Ss. 90, 91

(f)

2/3 { *Full pat. uncle* .. } 2/3×2/3=4/9 .. .. { 2/3×4/9=8/27
Full pat. aunt .. } 1/3×4/9=4/27

2/3 { *4 Ut. pat. uncles* .. } 1/3×2/3=2/9 (each taking .. 1/6×2/9=1/27
2 Ut. pat. aunts .. }

1/3 { *1 Ut. mat. uncle* .. .. 1/2×1/3=1/6
1 Ut. mat. aunt .. .. 1/2×1/3=1/6

8/27+4/27+2/9+1/6+1/6=1

(g)

Full mat. uncle .. 1/2
Full mat. aunt .. 1/2

Note.—Maternal uncles and aunts take equally without distinction of sex.

(h)

Ut. mat. uncle .. } 1/3, each taking 1/6
Ut. mat. aunt }
Full mat. uncle .. } 2/3, each taking 1/3
Full mat. aunt .. }

Note.—The above result is in accordance with rule (3) above, namely, that full maternal uncles and aunts take equally without distinction of sex. This proposition, however, is not free from doubt. There is another possible view, namely, that full maternal uncles and aunts take equally only if there are no uterine maternal uncles and aunts [as in ill. (g)], and that if there be any such uncles or aunts (as in the above illustration), they take according to the rule of the double share to the male. According to this view, the full maternal uncle in the above illustration is entitled to 2/3×2/3=4/9, and the full maternal aunt to 1/3×2/3=2/9. The same remarks apply to consanguine maternal uncles and aunts. See Baillie, II, pp. 285-286, and Querry's Translation of the *Sharya-ul-Islam*, ss. 214-219; Ameer Ali, 5th ed., Vol. II, pp. 119-120.

91. Descendants of uncles and aunts.—If there are no uncles or aunts of any kind, children of deceased uncles and aunts take the portion of their respective parents according to the principle of representation described in secs. 80, 81 and 82, the children of each full or consanguine paternal uncle or aunt dividing their parent's share among them according to the rule of the double share to the male, and the children of each of the remaining uncles and aunts, that is, of uterine paternal uncles and aunts, and of maternal uncles and aunts, whether full, consanguine or uterine, dividing their parent's share equally among them.

If there are no children of uncles and aunts, the grandchildren of uncles and aunts take the portion of their respective parents according to the same principle.

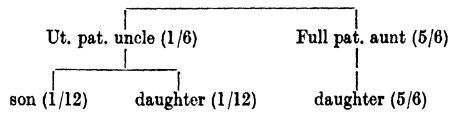
Baillie, II, 287.

Note.—In working out examples, first ascertain the hypothetical shares of uncles and aunts.

(a) The surviving relations are—

a son and a daughter of a unterine paternal uncle, and

a daughter of a full paternal aunt, as shown in the following diagram :—



The uterine uncle takes 1/6. The aunt of the full blood takes the residue 5/6. The uterine uncle's share 1/6 is to be divided *equally* between his son and daughter. The aunt's share 5/6 goes to her daughter.

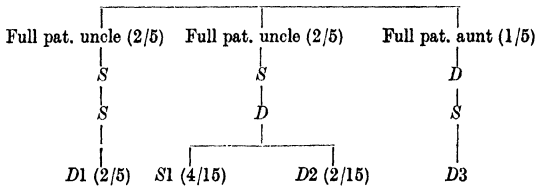
(b) *Paternal uncle's son* .. .. 2/3 (the portion of the *paternal side*)
Maternal aunt's son . . 1/3 (the portion of the *maternal side*)

(c) The surviving relations are (*w*)—

a great-granddaughter of a full paternal uncle, *D*1 ;

a great-grandson and a great-granddaughter of another such uncle, *S*1 and *D*2 ;

a great-granddaughter of a full paternal aunt, *D*3 ;



The two uncles take each twice as much as the aunt, so that each uncle takes 2/5 and the aunt takes 1/5. The first uncle's share 2/5 goes to his descendant *D*1.

The second uncle's share 2/5 is to be divided between his two descendants *S*1 and *D*2 according to the rule of the double share to the male, so that *S*1 takes $2/3 \times 2/5 = 4/15$, and *D*2 takes $1/3 \times 2/5 = 2/15$.

The aunt's share 1/5 passes to her descendant *D*3.

According to Hanafi law, the shares will be as stated in ill. (b) to sec. 65 above.

92. Other heirs of the third class.—If there are no descendants of uncles or aunts, the estate will devolve upon the other heirs of the third class in the order of succession given in sec. 89, the distribution among higher uncles and aunts being governed by the principles stated in sec. 90, and that among their descendants being governed by the principles stated in sec. 91.

Baillie, II, 287, 331, 332.

(*w*) *Aga Sheralli* v. *Bai Kulsum* (1908) 32 Bom. 540

The "Return" and the "Increase."

Ss. 93, 94

93. Doctrine of "Return."—If there is a residue left after satisfying the claims of Sharers, but there are no Residuaries *in the class to which the Sharers belong*, the residue reverts, subject to the three exceptions noted in secs. 94, 95 and 96, to the Sharers in the proportion of their respective shares.

Baillie, II, 262

Note.—In working out examples, follow the rules given in the notes appended to ill. (f) and ill (l) to sec. 53.

(a)	*Mother*	..	1/6 increased to	1/4
	Daughter	1/2=3/6	,,	3/4
	Brother	0 (excluded, as being an heir of the second class).		

Note.—By Hanafi law, the brother would have taken the residue 1/3

(b)	*Mother*	1/6	increased to	1/5
	Father	1/6	,,	1/5
	Daughter	1/2=3/6	,,	3/5

Note.—By Hanafi law, the father would have taken the residue 1/6 as a residuary.

(c)	*Ut. sister*	1/6	increased to	1/4
	Con. sister	1/2=3/6	,,	3/4

Note.—Baillie, II, 335-336 If there was a full sister instead of a consanguine sister, the uterine sister would have been excluded from participating in the *Return*. See sec. 96 below.

94. Husband and wife and "Return".—Neither the husband nor wife is entitled to the *Return*, if there is any other heir. If the deceased left a husband, but no other heir, the surplus will pass to the husband by *Return*. If the deceased left a wife, but no other heir, the wife will take her share 1/4, and the surplus will escheat to the Crown; in other words, the surplus never reverts to a wife.

Baillie, II, p. 262. See sec. 79 and the notes thereto.

(a)	*Wife*	1/8			= 5/40
	Father	1/6	increased to	1/5×(7/8)	= 7/40
	Mother	1/6	,,	1/5×(7/8)	= 7/40
	Daughter	1/2=3/6	,,	3/5×(7/8)	=21/40

Note.—By Hanafi law, the residue 1/24 would go to the father as a residuary.

(b)	*Husband*	1/4			= 4/16
	Father	1/6	increased to	1/4×(3/4)	= 3/16
	Daughter	1/2=(3/6)	,,	3/4×(3/4)	= 9/16

Note.—By Hanafi law, the residue 1/12 would go to the father as a residuary.

Ss. 95, 96

95. Mother when excluded from "Return".—If the deceased left a mother, a father, and one daughter, and also—

(a) two or more full or consanguine brothers, *or*

(b) one such brother and two such sisters, *or*

(c) four such sisters,

the brothers and sisters, though themselves excluded from inheritance as being heirs of the second class, prevent the mother from participating in the *Return*, and the surplus reverts to the father and the daughter in the proportion of their respective shares. This is the only case in which the mother is excluded from the *Return*.

Baillie, II, 272, 317-318, 365, 386.

Mother	1/6		= 4/24
Father	1/6	increased to	1/4 × (5/6) = 5/24
Daughter	1/2 = 3/6	,,	3/4 × (5/6) = 15/24
2 *full brothers*	0 (excluded).		

96. Uterine brothers and sisters when excluded from "Return".—If there are uterine brothers or sisters, and also full sisters, the uterine brothers and sisters are not entitled to participate in the *Return*, and the residue goes entirely to the full sisters. This rule does not apply to consanguine sisters. Consanguine sisters and uterine brothers and sisters divide the *Return* in proportion to their shares.

Baillie, II, 335-336.

(a)	*Uterine brother*	= 1/6
	Full sister	1/2 (as sharer) + 1/3 (by Return) = 5/6
(b)	*Uterine brother* .. .. .. } 1/3, each taking 1/6	
	Uterine sister . .. . }	
	Full sister	1/2 (as sharer) + 1/6 (by Return) = 2/3
(c)	*Wife*	1/4 = 3/12
	Uterine sister	1/6 = 2/12
	Full sister	1/2 (as sharer) + 1/12 (by Return) = 7/12

Note.—The wife is not entitled to the "Return" (sec. 94). The uterine sister is excluded from the "Return" by the full sister, and the latter takes the whole "Return."

Consanguine sister.—There is a conflict of opinion whether a consanguine sister is entitled to the whole "Return" in the absence of a full sister. The author of the *Sharaya-ul-Islam* is of opinion that she is not. The author of the *Kafi* is of opinion that she is. See sec. 93, ill. (c).

Ss. 97, 97A

97. Doctrine of "Increase."—The Sunni doctrine of *Increase* is not recognized in the Shia law. According to the Shia law, if the sum total of the shares exceeds unity, the fraction in excess of the unity is deducted invariably from the share of—

(a) the daughter or daughters ; or

(b) full or consanguine sister or sisters.

Baillie, II, 263, 396.

(a)	*Husband*	1/4=3/12	=3/12
	Daughter	1/2=6/12 reduced to (6/12—1/12)	=5/12
	Father	1/6=2/12	=2/12
	Mother	1/6=2/12	=2/12
		13/12	1

Note.—Here the excess over unity is 1/12, and this is to be deducted from the daughter's share.

(b)	*Husband* .	1/4=3/12	=3/12
	2 *daughters* ..	2/3=8/12 reduced to (8/12—3/12)	=5/12 (each 5/24)
	Father	1/6=2/12	=2/12
	Mother	1/6=2/12	=2/12
		15/12	1
(c)	*Husband*.. .	1/2=3/6	=3/6=1/2
	2 *full (or cons.) sisters* ..	2/3=4/6 reduced to (4/6—1/6)	=3/6=1/2 (each 1/4)
		7/6	
(d)	*Husband* .. .	1/2	
	Uterine sister or brother	1/6	
	Full (or cons.) sister ..	1/2 reduced to (1/2—1/6)=1/3	
		7/6	

Reason of the rule.—The reason of the rule laid down in this section is stated to be that since a full sister, when co-existing with uterines, gets the full benefit of the "Return" (sec. 93), it is but fair that when the sum total of the shares exceeds unity, she should bear the deficit. But what then of the *consanguine* sister ? According to the *Sharaya-ul-Islam*, a *consanguine* sister is not entitled to the whole "Return" when she co-exists with uterines. Why then should *she* bear the deficit ?

97A. Escheat.—On failure of all natural heirs, the estate of a deceased Shia Mahomedan escheats to the Crown (*x*)

Baillie, II, 301, 362-363. See sec. 79.

(*x*) *Mussammat Khursaidi* v. *Secretary of State* (1926) 5 Pat. 539, 94 I. C. 433, ('26) A. P. 321.

Miscellaneous.

Ss. 98-100

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

Baillie, II, 279.

99. Childless widow.—A childless widow takes no share in her husband's lands, but she is entitled to her one-fourth share in the value of trees and buildings standing thereon, as well as in his movable property including debts due to him though they may be secured by a usufructuary mortgage or otherwise.

Baillie, II, 295, *Mir Alli* v. *Sajuda Begum* (*y*); *Umardaraz Ali Khan* v. *Wilayat Ali Khan* (*z*); *Muzaffar Ali* v *Parbati* (*a*); *Aga Mahomed Jaffer* v. *Koolsom Beebee* (*b*); *Durga Das* v. *Nawab Ali Khan* (*c*); *Syed Ali* v. *Syed Muhammad* (*d*).

The expression "lands" in this section is not confined to *agricultural* land only, it includes lands forming the site of *buildings* (*e*).

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

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

(*y*) (1897) 21 Mad 27.
(*z*) (1896) 19 All 169
(*a*) (1907) 29 All 640.
(*b*) (1897) 25 Cal. 9
(*c*) (1926) 48 All. 557, 93 I C 19, ('26) A. A 522.
(*d*) (1928) 7 Pat 426, ('28) A. P. 441.
(*e*) (1897) 25 Cal. 9, *supra*.
(*f*) (1869) 12 W. R. 512, s.c. on review (1870) 14 W. R. 125.

CHAPTER IX.

WILLS.

S. 101 **Works of authority: Hedaya and Fatawa Alamgiri (Baillie).**—The leading authority on the subject of wills is the *Hedaya* (Guide), which was translated from the original Arabic into Persian by four Maulvis or Mahomedan lawyers and from Persian into English by Charles Hamilton, by order of Warren Hastings, when he was Governor-General of India. The *Hedaya* was composed by Sheikh Burhan-ud-Din Ali who flourished in the twelfth century. The author of the *Hedaya* belonged to the Hanafi School, and it is the doctrines of that school that he has principally recorded in that work. The *Fatawa Alamgiri* is another work of authority, and it has been accepted by the Courts in India as well as by the Privy Council as of greater authority than the *Hedaya*. It was compiled in the seventeenth century by command of the emperor Aurungzeb Alamgir. It is "a collection of the most authoritative *futwas* or expositions of law on all points that had been decided up to the time of its preparation." The law there expounded is again the law of the Hanafi sect, as the Mahomedan sovereigns of India all belonged to that sect. The first volume of Baillie's Digest of Mahomedan law is founded chiefly on that work. Both the *Hedaya* and *Fatawa Alamgiri* deal with almost all topics of Mahomedan law, except that the Law of Inheritance is not dealt with in the *Hedaya*. The references to the *Hedaya* in this and subsequent chapters are given to the pages of Mr. Grady's Edition of Hamilton's *Hedaya*. The first volume of Baillie's Digest is referred to as "Baillie." The leading work on Shia law is *Sharaya-ul-Islam*, for which see the preliminary note to sec. 74 above.

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

Hedaya, 673, Baillie, 627.

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

Minority under the Mahomedan law terminates on completion of the fifteenth year; therefore, before the passing of Act IX of 1875, a Mahomedan who had attained the age of fifteen years was competent to make a valid disposition of his property (Ameer Ali, 4th ed., Vol. I, pp. 42-43). But this rule of Mahomedan law, so far as regards matters other than marriage, dower and divorce (adoption not being recognized by that law), must be taken to be superseded by the provisions of the Majority Act, for the Act extends to the whole of British India (sec. 1), and applies to every person domiciled in British India (sec. 3). Hence minority in the case of Mahomedans, for purposes of wills, gifts, wakfs, etc., terminates not on the completion of the fifteenth year, but on completion of the eighteenth year (*g*).

(*g*) Compare *Bai Gulab* v. *Thakoredal* (1912) 36 Bom. 622, 17 I C 86.

Ss. 101-103

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

102. Form of will immaterial.—A will (*wasiyyat*) may be made either verbally or in writing.

Writing not necessary.—"By the Mahomedan law no writing is required to make a will valid, and no particular form, even of verbal declaration, is necessary as long as the intention of the testator is sufficiently ascertained" (*i*). In a case before the Privy Council a letter written by a testator shortly before his death and containing directions as to the disposition of his property, was held to constitute a valid will (*j*). The mere fact that a document is called *tamlik-nama* (assignment) will not prevent it from operating as a will, if it possesses the substantial characteristics of a will (*k*). But where a Mahomedan executed a document which stated, "I have no son, and I have adopted my nephew to succeed to my property and title," it was held by the Privy Council that the document did not operate as a will. Nor did it operate as a gift, for there was no delivery of possession to the nephew by the deceased (*l*). The fact that the donor reserves the usufruct for himself does not render the transaction a will (*m*).

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

Oral will, proof of.—The burden of establishing an oral will is always a very heavy one; it must be proved with the utmost precision, and with every circumstance of time and place (*p*).

103. Bequests to heirs.—A bequest to an heir is not valid unless the other heirs consent to the bequest after the death of the testator (*q*). Any single heir may consent so as to bind his own share (*r*).

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

Illustrations.

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

(*h*) (1898) 21 All 91
(*i*) *Mahomed Altaf* v. *Ahmed Buksh* (1876) 25 W R 121.
(*j*) *Mazhar Husen* v. *Bodha Bibi* (1898) 21 All 91
(*k*) *Saad Kasum* v. *Shaista Bibi* (1875) 7 N W. P 313, *Ishri Singh* v *Baldeo* (1884) 11 I.A. 135, 141-143, 10 Cal 792, 800-802
(*l*) *Jeswunt Singjee* v. *Jet Singjee* (1844) 3 M I A. 245, 258, Macnaghten p. 124, case 54
(*m*) *Mohammad* v *Fakhr Jahan* (1922) 49 I A. 195, 44 All. 301, 68 I C. 254, ('22) A.PC 281
(*n*) *Aulia Bibi* v. *Alauddin* (1906) 28 All. 715
(*o*) *In re Aba Satar* (1905) 7 Bom. L R. 558 [Cutchi Memon will]; *Sarabai* v *Mahomed* (1919) 43 Bom 641, 49 I C 637 [Cutchi Memon will].
(*p*) *Venkat Rao* v. *Namdeo* (1931) 58 I. A 362, 133 I.C. 711, ('31) A. P C 285
(*q*) *Ghulam Mohammad* v. *Ghulam Husain* (1932) 59, I.A 74, 54 All 93, 136 I.C. 454, ('32) A. PC 81; *Shek Muhammad* v. *Shek Imamuddin* (1865) 2 B H. C 50, *Ahmad* v *Bai Bibi* (1916) 41 Bom 377, 39 I C 83 [Bhagdari property]; *Muharram Ali* v. *Barkat Ali* (1931) 12 Lah. 286, 125 I.C. 886, ('30) A. L. 695.
(*r*) *Salayjee* v. *Fatima* (1923) 1 Rang. 60, 63, 71 I. C. 753, ('22) A. PC. 391 [P. C].

S. 103

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

(c) *A*, by his will, bequeaths certain property to his brother. The only relatives of the testator living at the time of the will are a daughter and the brother. After the date of the will, a son is born to *A*. The son, the daughter and the brother all survive the testator. The bequest to the brother is valid, for though the brother was an expectant heir *at the date of the will*, he is not an "heir" *at the death of the testator*, for he is excluded from inheritance by the son. If the daughter and the brother had been the sole surviving relatives, the brother would have been one of the heirs, in which case the bequest to him could not have taken effect, unless the daughter assented to it: Baillie, 625; *Hedaya*, 672.

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

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

Hedaya, 621, Baillie, 625, as to Explanation. Under the Mahomedan law a bequest to an heir is not valid without the consent of the other heirs (*s*). The policy of that law is to prevent a testator from interfering by will with the course of devolution of property according to law among his heirs, although he may give a specified portion, as much as a third, to a stranger (*t*). The reason is that a bequest in favour of an heir would be an injury to the other heirs, as it would reduce their share, and "would consequently induce a breach of the ties of kindred" (*Hedaya*, 671). But it cannot be so if the other heirs, "having arrived at the age of majority," consent to the bequest. The consent necessary to give effect to the bequest must be given *after* the death of the testator, for no heir is entitled to any interest in the property of the deceased *in his lifetime*. The fact that an heir consenting to a bequest to a co-heir is an insolvent at the time when the consent is given, is immaterial, the consent is effective all the same (*u*).

Where a bequest is made *to an heir* subject to a condition which is void as being repugnant to the Mahomedan law, *e.g.*, that the legatee shall not alienate the property bequeathed, and the other heirs consent to the bequest, the legatee will take the property absolutely as he would have done if he were a *stranger* (*v*). Similarly where a bequest is made to an heir subject to the condition that in the event of his death the property shall go to *X*, and the other heirs assent to the legacy, the condition attached to the legacy being void, he will take the property absolutely (*w*). See sec. 138 below.

(*s*) *Bafatun* v. *Bilaiti Khanum* (1903) 30 Cal. 683.

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

(*u*) *Aziz-un-Nissa* v. *Chiene* (1920) 42 All. 593, 59 I. C. 296.

(*v*) *Abdul Karim* v. *Abdul Qayum* (1906) 28 All. 324

(*w*) *Nasir Ali* v. *Sughra Bibi* (1920) 1 Lah 302, 54 I C. 853.

Bequests to heirs and non-heirs.—See notes to sec. 104 under the same head. Ss.

Bequest of remainder.—*A* bequeaths the rents of a house to one of his sons for life, 103, 104
and after his death to a charitable society for the benefit of the poor The other sons do not consent to the legacy. The bequest to the son being void for want of assent of the other sons, the subsequent bequest to charity also fails (*x*).

Shia law.—According to the Shia law, a testator may leave a legacy to an heir so long as it does not exceed one-third of his estate. Such a legacy is valid without the consent of the other heirs. But if the legacy exceeds one-third, it is not valid unless the other heirs consent thereto; such consent may be given *either before or after the death of the testator* (*y*): Baillie, II, 244. In *Fahmida* v. *Jafri* (*z*), the High Court of Allahabad laid it down as a broad proposition of law that where a bequest to an heir exceeds one-third, and the other heirs do not consent to the bequest, the bequest is void in its entirety. *Fahmida*'s case was followed by the same High Court in *Amrit Bibi* v. *Mustafa* (*a*). But in the first case the bequest was of the entire property to one heir (daughter) to the exclusion of the other heir (another daughter). In the second case also the bequest was *substantially* of the whole of the testator's property to one heir (testator's widow) to the exclusion of the other heir (daughter's daughter), and the Court treated it as a case of entire exclusion of the daughter's daughter. In the latest Allahabad case on the subject (*b*), the testatrix had two daughters, and it was not clear whether the bequest to one of them exceeded one-third. In any event the finding of the Court was that each of the two daughters had a portion of the estate bequeathed to her. On these facts the Court refused to apply the rulings in the two earlier cases, and upheld the bequest. As to the decision in the earlier cases it was said that it should be confined to cases where the whole estate was bequeathed to one heir and the other heirs were excluded entirely from inheritance. This, it is submitted, is the correct view. The only authoritative text on the subject is to be found in *Sharaya-ul-Islam*, where it is said: "If a person should make a will *excluding* some of his children from their shares in his succession, the exclusion is not valid." The text further goes on to say that the better view is that the words of exclusion "are quite futile and of no efficacy whatever": Baillie, II, 238. The meaning of this text would appear to be that where a bequest is made of the *entire* property to one heir to the exclusion of the other heirs, the will is to be read as if it did not contain any disposition of the property. But it does not follow that where a bequest to an heir is not of the *entire* estate, but merely exceeds the legal third, such bequest also is void in its entirety.

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

Hedaya, 671; Baillie, 625.

Origin of the rule.—"Wills are declared to be lawful in the Koran and the traditions; and all our doctors, moreover, have concurred in this opinion": *Hedaya*, 671. But the limit of one-third is not laid down in the Koran. This limit derives sanction from a

(*x*) *Fatima Bibee* v. *Ariff Ismailjee* (1881) 9 C. L. R. 66, with facts slightly altered.
(*y*) *Husaini Begam* v. *Muhammad Mehdi* (1927) 49 All. 547, 100 I. C. 673, ('27) A.A. 340, dissenting from *Fahmida* v. *Jafri* (1908) 30 All. 153 where it was held that the consent must be given *after* the death of the testator.
(*z*) (1908) 30 All. 153
(*a*) (1924) 46 All. 28, 77 I. C. 66, ('24) A. A. 20.
(*b*) *Husaini Begam* v. *Muhammad Mehdi* (1927) 49 All. 547, 100 I.C. 673, ('27) A.A. 340.
(*c*) *Khajoorooneesa* v. *Rowshan Jehan* (1876) 2 Cal. 184, 3 I. A. 291; *Cherachom* v. *Valia* (1865) 2 M.H.C. 350.

S. 104 tradition reported by Abee Vekass. It is said that the Prophet paid a visit to Abee Vekass while the latter was ill and his life was despaired of. Abee Vekass had no heirs except a daughter, and he asked the Prophet whether he could dispose of the whole of his property by will to which the Prophet replied saying that he could not dispose of the whole, nor even two-thirds, nor one-half, but only one-third: *Hedaya*, 671. But though the limit of one-third is not prescribed by the Koran, there are indications in the Koran that a Mahomedan may not so dispose of his property by will as to leave his heirs destitute. See Sale's Koran, pp. 60-61, 95-96, and Preliminary Discourse, p. 98.

Consent of heirs.—It will be seen from this and the preceding section that the power of a Mahomedan to dispose of his property by will is limited in two ways, first, as regards *the persons* to whom the property may be bequeathed, and, secondly, as regards *the extent to which* the property may be bequeathed. The only case in which a testamentary disposition is binding upon the heirs is where the bequest does not exceed the legal third and it is made to a person who is not an heir. But a bequest in excess of the legal third may be validated by the consent of the heirs; similarly, a bequest to an heir may be rendered valid by the consent of the other heirs. The reason is that the limits of testamentary power exist solely for the benefit of the heirs, and the heirs may, if they like, forgo the benefit by giving their consent. For the same reason, if the testator has no heirs, he may bequeath the whole of his property to a stranger: see Baillie, 625.

If the heirs do not consent, the remaining two-thirds must go to the heirs in the shares prescribed by the law. The testator cannot reduce or enlarge their shares, nor can he restrict the enjoyment of their shares (*d*).

Consent cannot be rescinded.—As to the consent of heirs to a legacy exceeding the legal third, it is to be remembered that the consent once given cannot be rescinded: *Hedaya*, 671.

Consent may be express or implied.—The consent need not be express: it may be signified by conduct showing a fixed and unequivocal intention. *A* bequeaths the whole of his property, which consists of three houses, to a stranger. The will is attested by his two sons who are his only heirs. After *A*'s death the legatee enters into possession and recovers the rents with the knowledge of the sons and without any objection from them. These facts are sufficient to constitute consent on the part of the sons, and the bequest will take effect as against the sons and persons claiming through them (*e*).

Bequests to heirs and non-heirs.—Where by the same will a legacy is given to an heir and a legacy also to a non-heir, the legacy to the heir is invalid unless assented to by the other heirs, but the legacy to the non-heir is valid to the extent of one-third of the property. *A* bequeaths 1/3 of his property to *S*, a non-heir, and 2/3 to *H*, one of his heirs. The other heirs do not assent to the bequest to *H*. The result is that *S* will take 1/3 under the will, and the remaining 2/3 will be divided among all the heirs of *A* (*f*). Similarly if *A* bequeaths the whole of his property to his wife and a non-heir, and the bequest to the wife is not assented to by the other heirs of *A*, the non-heir will take 1/3 under the will (that being the maximum disposable under the will), and the remaining 2/3 will be divided among the heirs of *A* (*g*).

Bequest for pious purposes.—A bequest, though it be for pious purposes, can only be made to the extent of the bequeathable third.

(*d*) *Jeewa* v. *Yacoob Ally* (1928) 6 Rang. 542, ('23) A R 307.

(*e*) *Daulatram* v. *Abdul Kayum* (1902) 26 Bom 497. See also *Sharifa Bibi* v. *Gulam Mahomed* (1892) 16 Mad. 43.

(*f*) *Muhammad* v. *Aulia Bibi* (1920) 42 All. 497, 61 I. C. 947.

(*g*) (1920) 42 All. 497, at p. 502, 61 I C. 947, *supra*

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

Cutchi Memons.—A Cutchi Memon may dispose of the *whole* of his property by will; it is so by custom (*i*). See sec. 16A.

Shia law.—Under the Shia law, the consent necessary to validate a bequest exceeding the legal third may be given either *before* or *after* the death of the testator: Baillie, II, 233.

105. Abatement of legacies.—If the bequests exceed the legal third, and the heirs refuse their consent, the bequests abate rateably.

Hedaya, 766; Baillie, 636-637.

Shia law.—The Shia law does not recognize the principle of rateable distribution. Under that law if a testator bequeaths 1/3 of his estate to *A*, 1/4 to *B*, and 1/6 to *C*, and the heirs refuse to confirm the bequests, *A*, the legatee first named, takes 1/3, and *B* and *C* take nothing: Baillie, II, 235. But if, instead of 1/3, 1/12 was given to *A*, then *A* would take 1/12, and *B* would take 1/4, but *C*, who is last in order would not be entitled to anything, as 1/12+1/4 exhausts the legal third. To the above rule there is an exception where there are successive bequests of the exact *third* to two different persons, as where a testator bequeaths 1/3 of his property to *A*, and 1/3 again to *B*. In such a case the later bequest would be a revocation of the earlier bequest, so that *B* would take the whole of the one-third, and *A* would take nothing: Baillie, II, 235.

Bequests for pious purposes.—Bequests for pious purposes fall under three classes according to the purpose for which they are made, namely:—

(1) Bequests for *faraiz*, that is, purposes expressly ordained in the Koran, namely, (i) *haj* (pilgrimage), (ii) *zakat* (tithe or poor's rate), and (iii) expiation, *e.g.*, for prayers missed by a Mahomedan.

(2) Bequests for *wajibat*, that is, purposes not expressly ordained, but which are in themselves necessary and proper, namely, *sadaqa fitrat* (charity given on the day of breaking fast), and sacrifices.

(3) Bequests for *nawafil*, that is, bequests of a purely voluntary nature, *e.g.*, bequests to the poor, or for building a mosque, or a bridge, or an inn for travellers.

Of these three classes bequests of the first class take precedence over bequests of the second and the third class, and bequests of the second class take precedence over bequests of the third class. In class (1) again, a bequest for *haj* must be paid before a bequest for *zakat* or expiation, and a bequest for *zakat* must be paid before a bequest by way of expiation.

Hedaya, 688; Baillie, 653-654.

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

(*h*) *Aga Mahomed Jaffer* v. *Koolsom Beebee* (1897) 25 Cal. 9, 18; *Salayjee* v. *Fatima* (1923) 1 Rang. 60, 71 I.C. 753, ('22) A PC. 391 [P.C.]

(*i*) *Advocate-General* v. *Jimbabai* (1917) 41 Bom. 181, 31 I. C. 106.

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The legatee, according to Mahomedan law, must be a person *competent* to receive the legacy: Baillie, 624; he must therefore be a person in existence at the death of the testator (*j*). As to bequests to a child in the womb, see *Hedaya*, 674.

107. Lapse of legacy.—If the legatee does not survive the testator, the legacy will lapse, and form part of the estate of the testator.

Compare the Indian Succession Act, 1925, sec. 105, which, however, does not apply to Mahomedans.

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

108. Subject of legacy.—It is not requisite to the validity of a bequest that the thing bequeathed should be in existence at the time of making the will; it is sufficient if it exists at the time of the testator's death.

Baillie, 624. The reason is that a will takes effect from the moment of the testator's death, and not earlier. The subject of a *gift*, however, must be in existence *at the time of the gift*: see sec. 136.

108A. Subject of bequest.—A bequest may be made of any property which is capable of being transferred, and which exists at the testator's death. It need not be in existence at the date of the will.

Baillie, 624, 665-666.

108B. Bequest in futuro.—A bequest in futuro is void: as to gift, see sec. 136.

108C. Contingent bequest.—A contingent bequest is void: as to gift, see sec. 137.

108D. Alternative bequest.—An alternative bequest has been held to be valid (*l*).

A Cutchi Memon, who had no son at the date of his will, bequeathed the residue of his property in effect as follows: "Should I have a son, and if such son be alive at my death, my executors shall hand over the residue of my property to him; but if such son dies in my lifetime leaving a son, and the latter is alive at my death, then my executors shall hand over the residue to him. But if there be no son or grandson alive at my death, my executor shall apply the residue to charity." The testator died without having ever had a son. It was held that the gift was not conditioned *in futuro*, but it was an absolute gift in the alternative and that the charity was entitled to the residue.

109. Revocation of bequests.—A bequest may be revoked either expressly or by implication.

(*j*) *Abdul Cadur* v. *Turner* (1884) 9 Bom. 158.
(*k*) *Husaini Begam* v. *Muhammad Mehdi* (1927) 49 All. 547, 100 I. C. 673, ('27) A.A. 340.
(*l*) *Advocate-General* v. *Jumbabai* (1917) 41 Bom. 181, 284-286, 31 I.C. 106. [Cutchi Memon will].

Hedaya, 674; Baillie, 628. Revocation is express, when the testator revokes the bequest in express terms, either oral or written. It is implied, when he does an act from which revocation may be inferred.

It is doubtful whether, if a testator denies that he ever made a bequest, the denial operates as a revocation; but the better opinion seems to be that it does not: *Hedaya*, 675; Baillie, 630.

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

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

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

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

Hedaya, 674, 675; Baillie, 628-629. The illustrations are taken from the *Hedaya*.

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

Hedaya, 675; Baillie, 630.

111A. Probate of a Mahomedan will.—(*1*) A Mahomedan will may, after due proof, be admitted in evidence, though no probate has been obtained (*m*).

(*2*) In the case of a Mahomedan will, the estate of the testator vests in the executor, if he accepts office, from the date of the testator's death, and he has the power to alienate the estate for the purpose of administering it, and has all other powers of an executor under the Probate and Administration Act, 1881, and the corresponding provisions of the Indian Succession Act, 1925 (*n*). See sec. 30 and notes.

The same rule applies to wills of Cutchi Memons (*o*) and Khojas (*p*).

As to suits for recovery of debts, sec. 38.

(*m*) *Shaik Moosa* v. *Shaik Essa* (1884) 8 Bom. 241, 255; *Abdul Karim* v *Karmali* (1920) 22 Bom. L.R. 708, 58 I.C 270; *Mahomed Yusuf* v. *Hargovandas* (1923) 47 Bom. 231, 70 I.C. 268, ('22) A.B. 392.

(*n*) *Venkata Subamma* v. *Ramayya* (1932) 59 I.A. 112, 55 Mad. 443, 136 I.C. 111, ('32) A. PC 92 [a case of a Hindu will, but applies also to a Mahomedan will]; *Shemai* v. *Ahmed Omer* (1931) 33 Bom. L.R. 1056, ('31) A B. 533, (1884) 8 Bom. 241, 255, *supra*; (1923) 47 Bom. 231, 70 I.C. 268, ('22) A.B. 392, *supra*

(*o*) *Haji Ismail*, in the matter of the will of (1880) 6 Bom. 452.

(*p*) (1920) 22 Bom. L.R. 708, 58 I C. 270, *supra*,

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111B. Letters of administration.—Except as regards debts due to the estate of the deceased [sec. 38], no letters of administration are necessary to establish any right to the property of a Mahomedan who has died intestate [Indian Succession Act, 1925, sec. 212 (2)].

112. Executor need not be a Mahomedan.—It is not necessary that the executor of the will of a Mahomedan should be a Mahomedan.

A Mahomedan may appoint a Christian, a Hindu, or any non-Mahomedan to be his executor (*q*).

113. Powers and duties of executors.—The powers and duties of executors of a Mahomedan will are determined by the provisions of the Indian Succession Act, 1925, in so far as they are applicable to Mahomedans. See sec. 30 and notes.

Per Sargent, C J., in *Shaik Moosa* v *Shaik Essa* (*r*). The Probate and Administration Act, 1881, applied amongst others to Mahomedans. Before the passing of that Act the powers and duties of Mahomedan executors were regulated by the Mahomedan law. After the passing of that Act, they were determined by the provisions of that Act. The Probate and Administration Act has been repealed and re-enacted by the Indian Succession Act, 1925.

When there are several executors, the powers of all may, in the absence of any direction to the contrary in the will, be exercised by any one of them who has proved the will: Indian Succession Act, 1925, sec. 311. But if no probate has been obtained they must all act jointly, none of them is entitled to represent the estate alone or to exercise any of the powers of an executor alone (*s*).

(*q*) *Moohummud Ameenoodeen* v *Moohummud Kubeeroodeen* (1825) 4 S D A [Beng] 49, 55, *Henry Imlach* v. *Zuhooroonisa* (1828) 4 S D A [Beng] 301, 303

(*r*) (1884) 8 Bom. 241, 256

(*s*) (1884) 8 Bom 241, 255-256, *supra*

CHAPTER X.

DEATH-BED GIFTS AND ACKNOWLEDGMENTS.

114. Gift made during marz-ul-maut.—A gift made by a Mahomedan during *marz-ul-maut* or death-illness cannot take effect beyond a third of his estate after payment of funeral expenses and debts, unless the heirs give their consent, after the death of the donor, to the excess taking effect; nor can such a gift take effect if made in favour of an heir unless the other heirs consent thereto after the donor's death (*t*). S. 114

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

Hedaya, 684, 685, Baillie, 551-552.

Marz-ul-maut (*u*).—It is an essential condition of *marz-ul-maut*, that is, death-illness, that the person suffering from the *marz* (malady) must be under an apprehension of *maut* (death). "The most valid definition of death-illness is that it is one which it is *highly probable* will issue fatally": Baillie, 552. Where the malady is of long continuance, as, for instance, consumption or albuminuria, and there is no immediate apprehension of death, the malady is not *marz-ul-maut*; but it may become *marz-ul-maut* if it subsequently reaches such a stage as to render death highly probable, and does in fact result in death (*v*). According to the *Hedaya*, a malady is said to be of "long continuance", if it has lasted a year; a disease that has lasted a year does not constitute *marz-ul-maut*, for "the patient has become familiarized to his disease, which is not then accounted as sickness": *Hedaya*, 685. But "this limit of one year does not constitute a hard-and-fast rule, and it may mean a period of *about* one year" (*w*). In short, a gift must be deemed to be made during *marz-ul-maut*, if as observed by the Privy Council, it was made "under pressure of the sense of the imminence of death" (*x*).

To constitute a malady *marz-ul-maut*, there must be (1) proximate danger of death, so that there is a preponderance of apprehension of death, (2) some degree of subjective apprehension of death in the mind of the sick person, and (3) some external indicia, chief among which would be inability to attend to ordinary avocations (*y*).

(*t*) *Wazir Jan* v. *Sayyyd Altaf Ali* (1887) 9 All 357; *Fazl Ahmad* v. *Rahim Bibi* (1918) 40 All. 238, 244, 51 I.C. 638

(*u*) *Fatima Bibee* v. *Ahmad Baksh* (1903) 31 Cal 319, affm. by P C. (1908) 35 Cal 271, 35 I A. 67 [albuminuria for upwards of a year—not *marz-ul-maut*], *Ibrahim Goolam Ariff* v. *Saiboo* (1908) 35 Cal 1, 22, 34 I A. 167, 177. [Sudden bursting of a blood vessel in the stomach—not a case of *marz-ul-maut*]; *Labbi Beebee* v. *Bibbun Beebee* (1874) 6 N. W.P.H.C. 159; *Hasarat Bibi* v *Golam Jaffar* (1898) 3 C W.N 57 [long standing asthma—not *marz-ul-maut*]; *Mahammad Gulshere Khan* v. *Mariam Begam* (1881) 3 All. 731 [lingering illness—no *marz-ul-maut*]; *Sarabai* v. *Rabiabai* (1906) 30 Bom. 537 [paralysis—not a case of *marz-ul-maut*]; *Rashid Karmalli* v. *Sherbanoo* (1907) 31 Bom. 264 [rapid consumption—*held marz-ul-maut*]; *Jinjira* v. *Mohammad* (1922) 49 Cal 477, 489-494, 67 I C. 77, ('22) A C. 429 [not a case of *marz-ul-maut*], *Fazl Ahmad* v. *Rahim Bibi* (1918) 40 All. 238, 51 I.C. 638 [rapid consumption—*held marz-ul-maut*]; *Fazlur* v. *Mohammad* (1917) 3 Pat. L. W 232, 43 I C. 196

(*v*) (1918) 40 All 238, 243-244, 51 I C 638, *supra*.

(*w*) (1903) 31 Cal. 319, at p. 326, *supra*.

(*x*) (1908) 35 Cal. 1, 22, 34 I.A. 167, 177, *supra*.

(*y*) (1906) 30 Bom. 537, 551, *supra*; (1907) 31 Bom. 264, *supra*; (1922) 49 Cal. 477, 490, 67 I.C. 77, ('22) A C. 429 *supra*; *Abdul Ahad* v. *Ahmad Nawaz* (1931) 12 Lah. 683, 132 I C. 391, ('32) A.L. 229.

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Shia Law.—The same is the rule of Shia law (z).

Sale.—The provisions of this section do not apply to a transfer for consideration, *e.g.*, a sale (*a*). A transfer of property made by a husband to his wife in lieu of dower is in effect a *sale*, though the transaction may be described as a gift (*b*). On the other hand, a transaction, though in reality a gift, may be described as a sale to evade the provisions of the law relating to gifts made during *marz-ul-maut*. Such a transaction will be governed by the law relating to gifts made during *marz-ul-maut* (*c*).

115. Conditions necessary for its validity.—A gift made during *marz-ul-maut* is subject to all the conditions necessary for the validity of a *hiba* or gift, including delivery of possession by the donor to the donee.

Baillie, 551. As to the conditions requisite to the validity of a *hiba* or gift, see the Chapter on Gifts below. See also the cases cited in the preceding section. A death-bed gift is essentially a *hiba* or gift, though the limits of the donor's power to dispose of his property by such a gift are the same as the limits of his *testamentary* power. It is therefore subject to all the conditions of a gift, including delivery of possession by the donor to the donee before the death of the donor.

116. Death-bed acknowledgment of debt.—An acknowledgment of a debt may be made as well during death-illness as "in health."

When the *only proof* of a debt is an acknowledgment made during *marz-ul-maut* or death-illness, the debt must not be paid until after payment of debts acknowledged by the deceased while he was "in health" and of debts proved by other evidence. An acknowledgment of a debt made during death-illness in favour of an *heir* is no proof at all of the debt, and no effect can be given to it.

Hedaya, 436, 437, 438, 684, 685; Baillie, 693-694. This section is to be read with that part of sec. 29 which refers to *priority* of debts.

(z) *Khurshed* v. *Faiyaz* (1914) 36 All 289, 23 I C 253.

(a) *Fazl Ahmad* v. *Rahim Bibi* (1918) 40 All. 238, 244-245, 51 I C. 638.

(b) *Esahaq* v. *Abedunnessa* (1914) 42 Cal 361, 28 I C 692, *Sadiq Ali* v. *Mt Amiran* ('29) A O 439, 121 I C 87.

(c) (1918) 40 All 238, 244-245, 51 I.C 638, *supra*.

CHAPTER XI.

GIFTS.

117. Hiba or gift.—A *hiba* or gift is "a transfer of property, made immediately, and without any exchange," by one person to another, and accepted by or on behalf of the latter.

Hedaya, 482; Baillie, 515. See Transfer of Property Act, 1882, s. 122, and also s. 129.

118. Persons capable of making gifts.—Every Mahomedan of sound mind and not a minor may dispose of his property by gift.

Hedaya, p. 524. As to minority, see notes to s. 101.

119. Gift with intent to defraud creditors.—There must be in every gift a bona fide intention on the part of the donor to transfer the property from the donor to the donee (*d*). A gift made with intent to defraud the creditors of the donor is voidable at the option of the creditors. Such intention however cannot be *inferred* from the mere fact that the donor owed some debts at the time of the gift (*e*).

See Transfer of Property Act, 1882, sec. 53.

120. Gift to unborn person.—A gift to a person not yet in existence is void (*f*).

Provision for maintenance of donee and his male heirs.—It has been held by the Chief Court of Oudh that a gift by one person to another of a *guzara* (maintenance allowance) for the lifetime of the donee and after his death to his male heirs, is a valid gift under the Mahomedan law (*g*). It would, however, not be valid, if none of the male heirs of the donee was in existence at the date of the gift.

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

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

(*d*) *Sultan Miya* v *Ajubakhatoon Bibi* (1932) 59 Cal. 557, 138 I C. 733, ('32) A C. 497

(*e*) *Azim-un-nissa* v. *Dale* (1871) 6 Mad. H C 455, 468-469; *Abdool Hye* v. *Mir Mohamed* (1886) 11 I A. 10, 10 Cal 616; Macnaghten, p. 217 (case 15), p. 510 (case 44); Ameer Ali, 4th ed., I, pp. 51-54.

(*f*) *Abdul Cadurv Turner* (1884) 9 Bom. 158; *Mahomed Shah* v *Official Trustee of Bengal* (1909) 36 Cal. 431, 2 I C 291.

(*g*) *Mt Sartaj* v. *Muhammad* (1931) 6 Luck. 423, 129 I.C. 322, ('31) A. O. 6.

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

A Mahomedan may dispose of the whole of his property by *gift* in favour even of a *stranger*, to the entire exclusion of his *heirs*.

122. Gift of actionable claims and incorporeal property.—Actionable claims and incorporeal property may form the subject of gift equally with corporeal property.

[A gift may be made of debts, negotiable instruments, or of Government promissory notes (*i*), of *malikana* (*j*) or of zemindari (*k*) rights, also of property let on lease (*l*), and property under attachment (*m*). Similarly, a gift may be made of a right to receive a specified share in the offerings that may be made by pilgrims at a shrine (*n*). In short a gift may be made of anything which comes within the definition of the word "*mal*," that is, property (*o*).]

"*Hiba* in its literal sense signifies the donation of a *thing from which the donee may derive a benefit*".—*Hedaya*, 482. "Gift, as it is defined in law, is the conferring of a *right of property* in something specific, without an exchange". Baillie, 515.

The cases cited in para. 1 above would not have arisen at all, had it not been for the wrong notion which prevailed at one time that *khas* or physical possession was necessary in *all cases* to constitute a valid gift. Following that notion, it was contended in those cases that corporeal property alone could form the subject of gift, as that was the only kind of property that was capable of *khas* or physical possession. But that notion has long since been rejected as erroneous, and it has been held that when the subject of gift is not capable of physical possession as in the case of choses in action or incorporeal rights, the gift may be completed by any act on the part of the donor showing a clear intention to divest himself of ownership in the property. Note that debts, negotiable instruments and Government promissory notes are all choses in action, or, to use the language of the Transfer of Property Act, actionable claims. See s. 126 below.

123. Gift of equity of redemption.—(*1*) A gift may be made by a mortgagor of his equity of redemption.

(*2*) There is a conflict of opinion whether a gift of an equity of redemption, where the *mortgagee* is in *possession* of the mortgaged property at the date of the gift, is valid. The High Court of Bombay has held that it is not (*p*). On the other hand, it has been held by the High Court of Calcutta, that it is valid (*q*). The latter, it is submitted, is the correct view.

(*h*) *Khajooroonissa* v *Rowshan Jehan* (1876) 2 Cal. 184, 197, 3 I. A. 291, 307; *Chaudhri Mehdi Hasan* v. *Muhammad Hasan* (1905) 28 All. 439, 449, 33 I A 68, 75; *Sadik Husain* v. *Hashim Ali* (1916) 43 I A. 212, 221, 38 All. 627, 645-646, 36 I.C. 104

(*i*) *Mullick Abdool Guffoor* v. *Muleka* (1884) 10 Cal. 1112, 1125.

(*j*) *Ib.*, p. 1125.

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

(*l*) *Ib*, p. 1125.

(*m*) *Anwari Begam* v *Nizam-ud-din Shah* (1898) 21 All. 165 167.

(*n*) *Ahmad-ud-din* v *Ilahi Bakhsh* (1912) 34 All 465, 14 I C 587

(*o*) *Mirza Abid* v *Munnoo Bibi* (1927) 2 Luck. 496, 102 I.C. 72, ('27) A.O 261.

(*p*) *Ismal* v *Ramji* (1899) 23 Bom. 682, *Mohinu-din* v *Manchershah* (1882) 6 Bom 650

(*q*) *Tara Prasanna* v. *Shandi Bibi* (1922) 49 Cal. 68, 75 I.C. 319, ('22) A. C. 422.

The Bombay High Court does not hold that an equity of redemption could not form the subject of a gift in any case. What it does hold is that a gift of an equity of redemption is not valid if the mortgaged property at the time of gift is *in the possession of the mortgagee*. The ground of the Bombay decisions is that delivery of possession by the donor to the donee is a condition essential to the validity of a gift, and the mortgagor cannot deliver possession if the mortgagee is in possession. It is true that delivery of possession by the donor to the donee is necessary to validate a gift. But it is equally well established that when the subject of a gift is not capable of actual possession, the gift may be perfected by appropriate acts on the part of the donor which may have the effect of transferring the ownership to the donee (s. 126). When the mortgagor himself is in possession of the mortgaged property, a gift of the equity of redemption is not valid unless he delivers possession of the property to the donee. But where the mortgagee is in possession, the mortgagor *cannot* deliver possession to the donee, and the gift, it is submitted, may in that event be completed by some other appropriate method. The Bombay decisions, it is submitted, are not sound. The correctness of these decisions was questioned by the High Court of Allahabad (*r*), and they have been dissented from by the Calcutta High Court.

A owns six immovable properties. He mortgages three with possession to *M*. He then makes a gift of all the six properties to *D* and puts him in possession of the three properties not mortgaged to *M*. The High Court of Bombay has held that in such a case the gift of all the six properties is valid (*s*).

124. Gift of property held adversely to donor.—A gift of property in the possession of a person who claims it adversely to the donor is not valid, unless the donor obtains and delivers possession thereof to the donee [ill. (a)], or does all that he can to complete the gift so as to put it within the power of the donee *to obtain* possession [ill. (b)].

[(a) *A* executes a deed of gift in favour of *B*, conferring upon him the proprietary right to certain lands then in the possession of *Z*, and claimed by *Z* adversely to *A*. *A* dies without acquiring possession of the lands. After *A*'s death, *B* sues *Z* to recover possession from him. The suit must fail, for the gift was not completed by delivery of possession to *B*: *Meherali* v. *Tajudin* (1888) 13 Bom. 156; *Rahim Bakhsh* v. *Muhammad Hasan* (1888) 11 All. 1, Macnaghten, p. 201, case 6; *Fakir Nynar* v. *Kandasawmy* (1912) 35 Mad. 120, 128-131, 14 I.C. 993.

(b) *A* executes a deed of gift of immovable property in favour of *B*. At the date of the gift the property is in possession of *C* who claims to hold it adversely to *A*. *B* sues *C* to recover possession of the property from him, joining *A* in the suit as a party defendant. *A* by his written statement *admits B's claim*. *C* contends that the gift is void, inasmuch as *A* was out of possession at the date of the gift, and no possession was ever given to *B*. The gift is valid though no possession was delivered by the donor to the donee. Their Lordships of the Privy Council said: "But it must be observed that in this case the dispute as to the validity of the gift is not between the donee and the donor. The person who disputes it claims adversely to both. *The donor has done all that she can to complete the gift and is a party to the suit, and admits the gift to be complete*":

(*r*) *Rahim Bakhsh* v. *Muhammad Hasan* (1888) 11 All. 1, 10, *Anwari Begam* v. *Nizam-ud-din Shah* (1898) 21 All. 165, 170, 171

(*s*) *Chandsaheb* v. *Gangabai* (1921), 45 Bom, 1296, 64 I C. 21, ('21) A. B. 248.

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Kalidas v. *Kanhaya Lal* (1884) 11 Cal. 121, 11 I.A. 218, a case under the Hindu law, but followed in *Mahomed Buksh* v. *Hosseini Bibi* (1888) 15 Cal. 684, 701-702, 15 I.A. 81 which was a Mahomedan case. In the last-mentioned case their Lordships of the Privy Council observed as follows :—

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

Following the above observations, it has been held that a gift of immovable property by a purchaser at a sale in execution of a decree, though made before confirmation of the sale and before acquisition of possession by him, is valid, if the donee is authorized by the donor to obtain possession (*t*). See Code of Civil Procedure, 1908, sec. 65.

125. Writing not necessary.—Writing is not essential to the validity of a gift either of movable or of immovable property (*u*).

Secs. 122-129 (Chapter VII) of the Transfer of Property Act, 1882, deal with gifts. By sec. 123 of the Act it is provided that a gift of immovable property must be effected by a registered instrument signed by the donor and attested by at least two witnesses, and that a gift of movable property may be effected either by a registered instrument signed as aforesaid or by delivery. But the provisions of sec. 123 do not apply to Mahomedan gifts (see sec. 129 of the Act). A gift under the Mahomedan law is to be effected in the manner prescribed by the Mahomedan law (sec. 126). If the formalities prescribed by that law (sec. 126) are complied with, the gift is valid even though it is not effected by a registered instrument and though, where effected by an instrument, the instrument is not attested (*v*). But if the formalities are not complied with, the gift is not valid even though it may have been effected in the manner prescribed by sec. 123 of the Transfer of Property Act. See notes to sec. 126.

The law of gifts in Lower Burma.—Sec. 123 of the Transfer of Property Act, which requires a gift of immovable property to be made by a registered instrument, was extended to the Pegu District in 1904, but sec. 129, which saves the rules of the Mahomedan law of gifts including the requirement of delivery of possession [sec. 126 below], was not so extended in terms. In a recent case their Lordships of the Privy Council held that the Local Government was not authorized by sec. 1 of the Transfer of Property Act, and did not appear to have intended, to extend sec. 123 apart from sec. 129; in other words, the extending of sec. 123 in the District did not operate as an exclusion of sec. 129. The result is that a gift by a Mahomedan of immovable property situated in the Pegu District is not complete, unless (1) it is effected by a registered instrument as required by sec. 123 of the Transfer of Property Act, and (2) it is accompanied by delivery of possession as required by Mahomedan law (*w*).

(*t*) *Mirza Abid* v. *Munnoo Bibi* (1927) 2 Luck. 496, 100 I C 72, ('27) A O. 61.

(*u*) In *Kamar-un-nissa Bibi* v. *Hussaini Bibi* (1880) 3 All. 267, the Privy Council upheld a verbal gift. See also Baillie, 509.

(*v*) *Karam Ilahi* v. *Sharf-ud-Din* (1916) 38 All. 212, 35 I.C. 14.

(*w*) *Ma Mi* v. *Kadir Sander Ammal* (1927) 54 I.A. 28, 5 Rang. 7, 100 I C. 32, ('27) A.P.C. 22

125A. Relinquishment by donor of ownership and dominion.—It is essential to the validity of a gift that the donor should divest himself completely of all ownership and dominion over the subject of the gift (*x*).

"A gift cannot be implied. It must be express and unequivocal, and the intention of the donor must be demonstrated by his entire relinquishment of the thing given, and the gift is null and void when he continues to exercise any act of ownership over it": Macnaghten, p. 51, s. 8.

125B. The three essentials of a gift.—It is essential to the validity of a gift that there should be (1) a declaration of gift by the donor, (2) an acceptance of the gift, express or implied, by or on behalf of the donee, and (3) delivery of possession of the subject of the gift by the donor to the donee as mentioned in sec. 126. If these conditions are complied with, the gift is complete.

Baillie, 515; *Hedaya*, 482. This section should be read subject to what is stated in sec. 119

126. Delivery of possession.—(*1*) It is essential to the validity of a gift that there should be a delivery of such possession as the subject of the gift is susceptible of (*y*). As observed by the Judicial Committee, "the taking of possession of the subject-matter of the gift by the donee, either actually *or constructively*," is necessary to complete a gift (*z*). See. secs. 123, 124, 127 and 128.

(*2*) *Registration.*—Registration of a deed of gift does not cure the want of delivery of possession.

[*A* executes a deed of gift of a dwelling house belonging to him in favour of *B*. The deed is duly registered, but possession is not delivered to *B*. The gift is incomplete, and therefore void: *Mogulsha* v. *Mahamad Saheb* (1887) 11 Bom. 517; *Ismal* v. *Ramji* (1899) 23 Bom. 682; *Vahazullah* v. *Boyapati* (1907) 30 Mad. 519.]

(*3*) If it is proved by oral evidence that a gift was completed as required by law [secs. 125B and 126], it is immaterial that the donor had also executed a deed of gift, but the deed has not been registered as required by the Registration Act, sec. 17 (a) (*a*).

(*x*) *Musammat Bibi* v. *Sheikh Wahid* (1928) 7 Pat 118, ('28) A.P 183.

(*y*) *Sadik Husain* v *Hashim Ali* (1916) 43 I. A. 212, 221-222, 38 All 627, 645-646, 36 I.C. 104; *Khajooroonissa* v *Roushan Jehan* (1876) 2 Cal 184, 197, 3 I.A. 291, 307, *Chaudhri Mehdi Hasan* v *Muhammad Hasan* (1906) 28 All. 439, 449, 33 I A. 68, 75, *Tara Prasanna* v. *Shandi Bibi* (1922) 49 Cal. 68, 75 I.C. 319, ('22) A C. 422.

(*z*) *Mohammad* v. *Fakhr Jahan* (1922) 49 I.A. 195, 209, 44 All. 301, 315, 68 I C. 254, ('22) A.PC. 281.

(*a*) *Nasib Ali* v. *Wajed Ali* (1926) 44 Cal L J 490, 100 I.C. 296, ('27) A. C. 197; *Abdul Rahman* v. *Gaya Prasad* ('29) A.C. 435.

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(*4*) A declaration in a deed of gift that possession has been given binds the heirs of the donor (*b*).

Hedaya, 482; Baillie, 520-522.

Constructive possession.—Where a donor makes a gift of the corpus of a property, but reserves the usufruct to himself and continues in physical possession of the property, the payment by the donee of Government revenue after the date of the gift in respect of the property amounts to *constructive* possession of the property on the part of the donee and the gift is completed by such possession (*c*).

Mutation of names.—No mutation of names is necessary to complete the transfer of possession in the case of a gift (*d*). Nor is mutation of names a valid substitute for delivery of possession (*e*).

Burden of proof.—"By the Muhammadan law a holder of property may in his lifetime give away the whole or part of his property if he complies with certain forms, but it is incumbent upon those who seek to set up such a transaction to show very clearly that those forms have been complied with. It may be by deed of gift simply [that is *hiba*], or by deed of gift coupled with consideration, that is, *hiba-bil-iwaz* [as to which see sec. 141]. If the former, unless accompanied by delivery of the thing given, so far as it is capable of delivery, it is invalid. If the latter (in which case delivery of possession is not necessary), actual payment of the consideration must be proved, and the bona-fide intention of the donor to divest himself *in præsenti* of the property, and to confer it upon the donee must also be proved" (*f*).

Subsequent delivery of possession.—A gift is not complete unless possession is taken at the time of gift, that is at the time of declaration and acceptance (*g*). Possession taken at a subsequent date is sufficient if it was taken with the donor's consent (*h*).

The law of gifts in Lower Burma.—See notes under the same heading to sec 125 above.

126A. Gift through the medium of trust.—(*1*) A gift may be made through the medium of a trust. The same conditions are necessary for the validity of such a gift as those for a gift to the donee direct with this difference that the gift should be accepted by the *trustees* [sec. 125 B], and possession also should be delivered to the *trustees* (*i*) [sec. 126].

(*2*) A Mahomedan cannot through the medium of a trust settle property for the benefit of persons who are incapable of taking under a gift, nor can he through the medium of a

(*b*) *Muhammad Mumtaz* v. *Zubaida Jan* (1889) 16 I.A. 205.

(*c*) *Mohammad* v. *Fakhr Jahan* (1922) 49 I A. 195, 210, 44 All. 301, 316, 68 I.C. 254, ('22) A.PC. 281

(*d*) (1889) 16 I A. 205, 217, *supra*; *Mohammad Sadiq* v. *Fakhr Jahan* (1932) 59 I A. 1, 13, 6 Luck. 556, 136 I.C. 385, ('32) A. PC. 13.

(*e*) *Mohammad Azim* v. *Saadat Ali* ('31) A.O. 177.

(*f*) *Chaudhri Mehdi Hasan* v *Muhammad Hasan* (1906) 28 All. 439, 448-449, 33 I A 68, 74; *Khajoorooniesa* v. *Rowshan Jehan* (1876) 3 I.A. 291, 307, 2 Cal 184, 197, *Sadik Husain* v *Hashim Ali* (1916) 43 I A 212, 221, 38 All. 627, 645-646, 36 I C 104; *Gulam Jafar* v. *Masludin* (1881) 5 Bom. 238, 242.

(*g*) See (1916) 43 I A. 212, 222-223, 38 All 627, 646-647, 36 I.C 104, *supra*, *Mulani* v. *Maula Bakhsh* (1924) 46 All. 260, 262-263, 78 I C. 222, ('24) A.A 307.

(*h*) Macnaghten, p. 50, s. 4, and case 14, p. 215; *Jhumman* v. *Husain* ('31) A.O. 7, 129 I.C. 161.

(*i*) *Sadik Husain* v *Hashim Ali* (1916) 43 I.A. 212, 218-224, 38 All. 627, 642-648; 36 I.C. 104; *Moosabhai* v *Yacoobbhai* (1904) 29 Bom 267, 274-276 [a Khoja case]; *Jivanbai* v. *Sethna* (1910) 34 Bom. 604, 6 I C 513; *Cassamally* v. *Currimbhoy* (1911) 36 Bom. 214, 259-260, 12 I. C. 225 [a Khoja case]; *Ram Charan* v. *Fatima Begam* (1915) 42 Cal. 933, 938, 30 I.C. 686 (a case of wakf); *Mirza Hashim* v. *Bandanem* (1928) 6 Rang 343, 113 I.C. 255, ('28) A.R 323.

trust create an estate not recognized by the law of gifts governing the sect to which he belongs. Thus neither a Sunni nor a Shia can make a gift in favour of an unborn person; so he cannot through the medium of a trust settle property in favour of an unborn person. And since a gift of a life-estate is not recognized by the Sunni law, a Sunni cannot through the medium of a trust create a valid life-estate. But the Shia law recognizes life-estates and vested remainders. A Shia may therefore create such estates through the medium of a trust, but not in favour of unborn persons. Successive life-interests, however, may be created both under the Sunni and the Shia law in favour even of unborn persons by means of a wakf.

[*A*, a Shia Mahomedan, executes a deed purporting to transfer certain immovable properties to *B*, *C* and *D* as trustees for the benefit of his wife and children. The deed is executed by *A* and it is registered. It is not executed by *B*, *C* and *D* or any of them. None of the properties is transferred to the names of the trustees, and *A* continues to be in receipt and enjoyment of the rents as before. Here there is no acceptance of the trust by the trustees, nor is there any delivery of possession to the trustees. The gift is therefore void: *Sadik Husain* v. *Hashim Ali* (1916) 43 I.A. 212, 218-224, 38 All. 627, 642-648, 36 I.C. 104.]

The introduction of trustees is merely the employment of machinery whereby the gift is carried into effect (*j*). Acceptance of a trust by trustees is indicated by their executing the deed of trust. In the case put above, the deed was not executed by the trustees, and hence there was no acceptance.

As in the case of a gift to the donee direct, so in the case of a gift through the medium of a trustee, the donor should divest himself of all control over the corpus of the property. If he does not do so, the gift is invalid (*k*).

127. Delivery of possession of immovable property.—(*1*) *Where donor is in possession.*—A gift of immovable property of which the donor is in actual possession is not complete, unless the donor physically departs from the premises with all his goods and chattels, and the donee formally enters into possession (*l*).

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

(*j*) *Ram Charan* v. *Fatima Begam* (1915) 42 Cal 933, 938, 30 I.C. 686.

(*k*) *Mirza Hashim* v. *Bindaneem* (1928) 6 Rang 343, 113 I.C. 255, ('28) A R. 323 [where the condition that the trustees should not sell the property without the consent of the donor was held to render the gift invalid].

(*l*) Macnaghten, p. 231, Prec. XXII.

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

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(3) *Where donor and donee both reside in the property.*—No physical departure or formal entry is necessary in the case of a gift of immovable property in which the donor and the donee are both residing at the time of the gift. In such a case the gift may be completed by some overt act by the donor indicating a clear intention on his part to transfer possession and to divest himself of all control over the subject of the gift (*n*). The principle for the determination of questions of this nature was thus stated by West, J., in a Bombay case (*o*): "When a person is present on the premises proposed to be delivered to him, a declaration of the person previously possessed puts him into possession."

Illustration to sub-section (3).—A Mahomedan lady, who had brought up her nephew as her son, executed a deed of gift in favour of the nephew of a house in which they were both residing at the time of the gift. The donor did not physically depart from the house either at the time of the gift or at any subsequent period, but continued to live in the house with her nephew. The property was transferred to the name of the nephew, and the rents were recovered in his name. *Held* that the gift was complete, though there was no formal delivery of possession: *Humera Bibi* v. *Najm-un-nissa* (1905) 28 All. 147.

127A. Gift of immovable property by husband to wife.—The rule laid down in sec. 127 (3) applies to gifts of immovable property by a wife to the husband (*p*), and by a husband to the wife, whether the property is used by them for their joint residence (*q*), or is let out to tenants (*r*). The fact that the husband continues to live in the house or to receive the rents after the date of the gift will not invalidate the gift, the presumption in such a case being that the rents are collected by the husband on behalf of the wife and not on his own account (*s*).

Gift from husband to wife.—In *Amina Bibi* v. *Khatija Bibi* (*t*), the gift was from a husband to the wife, and the gift consisted of a house in which the husband and wife lived together, and of a chawl (adjoining the house) which was let out to tenants. Sir M. Sausse, C.J., said: "In my opinion, the relation of husband and wife and his legal right to reside with her and to marriage her property rebut the inference which in the case of parties standing in a different relation would arise from a continued residence in the house after the making of the *hiba* (gift), and in the husband generally receiving the rents of the chawl annexed to the house." In *Ma Mi* v. *Kallander*

(*n*) *Shaik Ibhram* v. *Shaik Suleman* (1884) 9 Bom 146; *Abdul Majadkhan* v. *Husseinbu* (1920) 22 Bom L R 229, 55 I. C. 952, *Humera Bibi* v. *Najm-un-nissa* (1905) 28 All. 147 [aunt to nephew]; *Bibi Khaver* v. *Bibi Rukhia* (1905) 29 Bom. 468 [gift to daughter-in-law and her children]; *Kandath* v *Musaliam* (1907) 30 Mad. 305 [mother to daughter].

(*o*) (1884) 9 Bom. 146, *supra*.

(*p*) Macnaghten, p. 51, s. 9.

(*q*) *Amina Bibi* v. *Khatija Bibi* (1864) 1 Bom. H C. 157, *Azm-un-nissa* v. *Dale* (1868) 6 Mad. H.C. 455

(*r*) *Emnabai* v. *Hajirabai* (1888) 13 Bom 352.

(*s*) *Ma Mi* v. *Kallander Ammal* (1927) 54 I.A. 23, 5 Rang. 7, 100 I.C. 32, ('27) A PC. 22, approving, (1864) 1 Bom H C. 157, 162, *supra*; *Mohammad Sadiq* v. *Fakhr Jahan* (1932) 59 I.A. 1, 6 Luck. 556, 136 I.C. 385, ('32, A. PC. 13; (1888) 13 Bom. 352, 354-355, *supra*.

(*t*) (1864) 1 Bom. H.C. 157, 162, *supra*.

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Ammal (*u*), the gift was by a husband to the wife, and mutation of names was duly effected in public records and the wife's name was entered as proprietress. Dealing with this case their Lordships of the Privy Council said: "It must therefore be taken that mutation was effected by Moideen [husband] himself, and in the case of a gift of immovable property by a Mahomedan husband to his wife, once mutation of names has been proved, the natural presumption arising from the relation of husband and wife existing between them is that the husband's subsequent acts with reference to the property were done on his wife's behalf and not on his own." But no mutation of names is necessary if the deed of gift declares that the husband delivered possession to the wife, and the deed is handed over to her and retained by her (*v*).

128. Delivery of possession in case of incorporeal property and actionable claims.—When the subject of the gift is incorporeal property or an actionable claim, the gift may be completed by any act on the part of the donor showing a clear intention on his part to divest himself *in præsenti* of the property, and to confer it upon the donee.

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

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

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

As regards delivery of possession, a distinction ought to be made between cases where, from the nature of the subject of the gift, actual possession could not be given to the donee and cases where such possession could be given to the donee. Thus where lands are let on leases, no *khas* or actual possession could be delivered. In such a case a gift of the lands is valid though possession is not delivered (*w*). "There is no doubt that the principle of Mahomedan law is that possession is necessary to make a good gift, but the question is, possession of what? If the donor does not transfer to the donee, *so far as he can*, all the possession which he can transfer, the gift is not a good one. As we have said above, there is, in our judgment, nothing in the Mahomedan law to prevent the gift of a *right* to property. The donor must, *so far as it is possible for him*, transfer to the donee that which he gives, namely, such right as he himself has; but this does not imply that where a *right to property* forms the subject of a gift, the gift will be invalid unless the donor transfers what he himself does not possess, namely, the *corpus* of the property. He must evidence the reality of the gift by divesting himself *so far as he can*, of the whole of what he gives" (*x*).

(*u*) (1927) 54 I.A. 23, 5 Rang. 7, 100 I.C. 32, ('27) A. PC. 22.

(*v*) *Mohammad Sadiq* v. *Fakhr Jahan* (1932) 59 I.A. 1, 13, 8 Luck. 556, 136 I.C. 385, ('32) A. PC. 13.

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

(*x*) *Anwari Begam* v. *Nizam-ud-din Shah* (1898) 21 All. 165, 170-171.

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129. Gift to a minor by father or other guardian.—No transfer of possession is required in the case of a gift by a father to his minor child or by a guardian to his ward. All that is necessary is to establish a bona fide intention to give (*y*).

Hedaya, 484; Baillie, 538; Macnaghten, p. 51, sec. 9. "Where there is on the part of a father or other guardian a real and bona fide intention to make a gift, the law will be satisfied without change of possession, and will presume the subsequent holding of the property to be on behalf of the minor:" *Ameeroonnissa* v. *Abadoonnissa* (1875) 15 Beng. L.R 67, 78, L.R. 2 I.A. 87, 104.

The guardian referred to in this section is the guardian of the *property* of a minor. The following persons are entitled in order to the guardianship of the property of a minor, namely, (1) the father, (2) his executor, (3) the father's father and (4) his executor. No change of possession is necessary in the case of a gift by a father to his minor son, for the father himself is the person to receive possession as the guardian of his son Similarly no change of possession is necessary in the case of a gift by a grandfather to his minor grandson *if the father is dead*, for the grandfather is then the person to take delivery on behalf of his grandson as his guardian. *But if the father is alive and has not been deprived of his rights and powers as guardian*, there must be a delivery of possession by the grandfather to the father as guardian of his minor sons, otherwise the gift is not complete. The mere fact that the minors have always lived with their grandfather and have been brought up and maintained by him will not constitute him guardian of their property so as to dispense with delivery of possession (*z*).

The mother is not in law the guardian of the property of her infant child; therefore, a gift by a *mother* to her infant child *does* require transfer of possession from her to the child's father, and, if the father be dead, to his executor, and if there be no executor, to the child's father's father, and if he be dead, to his executor. But if there be none of these, no change of possession is necessary in the case of a gift by a mother to her infant child, or in the case of a gift by any other person to a minor under his care (sec. 130).

130. Gift to a minor by a person other than his father or guardian.—A gift to a minor or to a lunatic by a person other than his father or guardian may be completed by delivery of possession to the father or guardian (*a*).

"When the donee is a minor, or insane, the right to take possession for him belongs to his guardian, who is, first his father, then his father's executor, then his grandfather, then his executor." If there be none of these, possession may be taken for the minor by any person under whose power he may happen to be (sec. 262 B); Baillie, 539; *Hedaya*, 484; Macnaghten, p. 51, sec. 10. Of course, no change of possession is necessary where the guardian himself is the donor (sec. 129). See notes to sec. 129.

131. Gift to a bailee.—Where the subject of the gift is already in the possession of the donee as bailee, the gift may be

(*y*) *Ameeroonnissa* v. *Abadoonnissa* (1875) 15 Beng. L. R. 67, 78, 2 I.A. 87, 104; *Mohammad Sadiq* v. *Fakhr Jahan* (1932) 59 I.A. 1, 6 Luck. 556, 136 I.C. 385, ('32) A. PC. 13 [bona fide intention proved]; *Sultan Miya* v. *Ajibakhatoon Bibi* (1932) 59 Cal. 557, 138 I.C. 733, ('32) A. C. 497 bona fide intention not proved]; *Fatima Bibi* v. *Ahmad Baksh* (1904) 31 Cal. 399, 330; *Khaliq Bux* v. *Mahabir Prasad* (1931) 6 Luck. 403, 129 I.C. 335, ('31) A. O. 19.

(*z*) *Musa Miya* v. *Kadar Bux* (1928) 55 I. A. 171, 52 Bom. 316, 109 I. C. 31, ('28) A. PC. 108.

(*a*) *Musa Miya* v. *Kadar Bux*, *supra*; *Jhumman* v. *Husain* ('31) A. O. 7, 129 I.C. 161 [gift by maternal uncle—no possession delivered—gift held invalid].

completed by declaration and acceptance, without formal delivery of possession. Ss. 131-134

[(a) A gift of property in the possession of a bailee, lessee, pledgee, or mortgagee may be completed without formal transfer of possession: *Hedaya*, 464; Baillie, 522.

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

132. Mushaa defined.—Mushaa is an *undivided* share in property either movable or immovable.

133. Gift of mushaa where property indivisible.—A valid gift may be made of an undivided share [mushaa] in property which is *not capable* of partition.

[*A*, who owns a house, makes a gift to *B* of the house and of the right to use a staircase used by him jointly with the owner of an adjoining house. The gift of *A*'s undivided share in the staircase, though it is a gift of a mushaa, is valid, for a staircase is *not capable* of division: *Kasim Husain* v. *Sharif-un-Nissa* (1883) 5 All. 285.]

134. Gift of mushaa where property divisible.—A gift of an undivided share (mushaa) in property which is *capable of division* is irregular (*fāsid*), but not void (*bātil*). The gift being irregular, and not void, it may be perfected and rendered valid by subsequent partition and delivery to the donee of the share given to him. If possession is once taken and the deed of gift takes effect, no subsequent change of possession will invalidate it [ill. (a)].

Exceptions.—A gift of an undivided share (mushaa), though it be a share in property *capable of division*, is valid from the moment of the gift, even if the share is not divided off and delivered to the donee, in the following cases:—

(1) where the gift is made by one co-heir to another [ill. (b)];

(2) where the gift is of a share in a zemindari or taluka [ill. (c)];

(3) where the gift is of a share in freehold property in a large commercial town [ill. (d)];

(4) where the gift is of shares in a land company (*b*).

(*b*) *Ibrahim Goolam Ariff* v. *Saiboo* (1907) 35 Cal. 1, 34 I. A. 167.

S. 134 [(a) *A* makes a gift of her undivided share in certain lands to *B*. The share is not divided off at the time of gift, but it is *subsequently* separated and possession thereof is delivered to *B*. The gift, though irregular in its inception, is validated by subsequent delivery of possession: *Muhammad Mumtaz* v. *Zubaida Jan* (1889) 11 All. 460, 16 I. A. 205; *Mahomed* v. *Cooverbai* (1904) 6 Bom. L. R. 1043; *Mohib Ullah* v. *Abdul Khalik* (1908) 30 All. 250; *Abdul Aziz* v. *Fateh Mahomed* (1911) 38 Cal. 518, 9 I. C. 635.

(b) A Mahomedan female dies leaving a mother, a son and a daughter as her only heirs. The mother may make a valid gift of her undivided share in the inheritance to the son, or to the daughter, or jointly to the son and daughter: *Mahomed Buksh* v. *Hossein Bibi* (1888) 15 Cal. 684, 701, 15 I. A. 81.

(c) *A*, *B* and *C* are co-sharers in a certain zemindari. Each share is separately assessed by the Government, and has a separate number in the Collector's books, and the proprietor of each share is entitled to collect a definite share of rents from the ryots. *A* makes a gift of his share to *Z without* a partition of the zemindari. The gift is valid, for it is not a gift strictly of a mushaa, the share being *definite* and marked off from the rest of the property: *Ameeroonnissa* v. *Abadoonnissa* (1875) 15 B. L. R. 67, 2 I. A. 87; *Abdul Aziz* v. *Fateh Mahomed* (1911) 38 Cal. 518, 9 I.C. 635, *Jiwan* v. *Imtiaz* (1878) 2 All. 93; *Kasim* v. *Sharif-un-Nissa* (1883) 5 All. 285, *Zahuran* v. *Abdus Salam* (1930) 5 Luck. 597, 123 I.C. 857, ('30) A. O. 71.

(d) *A*, who owns a house in Rangoon, makes a gift of a third of the house to *B*. The gift is valid, the property being situated in a large commercial town: *Ibrahim Goolam Ariff* v. *Saiboo* (1907) 35 Cal. 1, 34 I. A. 167.

(e) *A*, a partner in a firm, makes a gift of his share of the partnership assets to *B*. The gift is not valid unless the share is divided off and handed over to *B*: *Hedaya* 483 Baillie, 529-530.]

Hedaya, 483-484; Baillie, 523-530. "A gift of part of a thing which is capable of division is not valid unless the said part is divided off and separated from the property of the donor; but a gift of part of an indivisible thing is valid," the reason being that the thing being indivisible, "a complete seisin is altogether impracticable, and hence an incomplete seisin must necessarily suffice, since this is all that the article admits of; *Hedaya*, 483.

The term "mushaa" is derived from *shuyuu*, which signifies confusion. An undivided share is called mushaa, because of the confusion that is likely to arise in the enjoyment of the property if a gift were made of an undivided share in the property by one co-sharer to a *stranger*. No such confusion can arise, if the gift is by one co-sharer to another *co-sharer*. The result is that a gift by one of several heirs of his undivided share in property which is capable of division to a stranger is irregular, but a gift of such a share in favour of a co-heir is valid.

Doctrine of mushaa unadapted to a progressive state of society.—In *Muhammad Mumtaz* v. *Zubaida Jan*, upon which illustration (a) is based, their Lordships of the Privy Council said: "The doctrine relating to the invalidity of gift of mushaa is wholly unadapted to a progressive state of society, and ought to be confined within the strictest rules." This principle was applied by their Lordships of the Privy Council in the case cited in ill. (d).

Doctrine of mushaa in Madras.—In a Madras case (*c*), Benson, J., observed that the doctrine of mushaa did not apply in the Madras Presidency, but it was held in a later case that that view was erroneous (*d*).

(c) *Alabi Koya* v. *Mussa Koya* (1901) 24 Mad. 513.

(d) *Vaharullah* v. *Boyapati* (1907) 30 Mad. 519.

Doctrine of mushaa does not apply to transfers for consideration.—The rule laid down in this section applies only to gifts; it does not apply to transfers for consideration (*e*).

Device to get over doctrine of mushaa.—It has been held by the High Court of Allahabad that though a valid gift cannot be made of an undivided share (mushaa) in property which is capable of division, the difficulty may be overcome by the donor selling the undivided share at a fixed price to the person to whom the gift is intended to be made, and then releasing that person from payment of the debt representing the price (*f*). If this decision were correct, delivery of possession in the case of a gift could be dispensed with in every case by the donor making a pretence of a sale to the donee and afterwards releasing the donee from the obligation to pay the price.

Shia law.—A gift of an undivided share is valid, though it be a share in property capable of partition (*g*): Baillie, II, 204.

135. Gift to two or more donees.—A gift of property which is capable of division to two or more persons without dividing it is invalid, but it may be rendered valid if separate possession is taken by each donee of the portion of the property given to him. This rule does not apply to the case mentioned in the third Exception to sec. 134 (*h*), nor, it is conceived, to the cases mentioned in the other Exceptions.

[*A* makes a gift of a house to *B* and *C* without making any division of the property at the time of gift. Subsequently *B* and *C* divide the property and each takes possession of the portion allotted to him with the consent of the donor. Is the gift valid? According to Macnaghten [p. 50, s. 7, p. 201, case 5], it is not, the reason given being that the division should have taken place simultaneously with the transfer. According to Baillie (p. 524), the gift is not void in its inception and it may be rendered valid by subsequent division between the donees. The latter seems to be the better opinion. See also *Hedaya*, p. 485.]

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

136. Gift in futuro.—A gift cannot be made of anything to be performed *in futuro* [ills. (a) and (b)], nor can it be made to take effect at any future period whether definite [ill. (c)] or indefinite (*i*).

[(a) *A* makes a gift to *B* of "the fruit that may be produced by his palm tree this year." The gift is void as being a gift of future property: Baillie, 516.

(b) A Mahomedan executes a deed in favour of his wife purporting to give to the wife and her heirs in perpetuity Rs. 4,000 every year out of his share of the income of certain Jaghir villages. The gift is void, as being a gift of a portion of the *future* revenue of the villages: *Amtul Nissa* v. *Mir Nurudin* (1896) 22 Bom. 489.

(*e*) *Ashibai* v. *Abdulla* (1906) 31 Bom. 271.
(*f*) *Ahmadi Begam* v. *Abdul Aziz* (1927) 49 All. 503, 100 I. C. 644, ('27) A.A. 345.
(*g*) *Sadik Hussain* v. *Hashim Ali* (1916) 43 I.A. 212, 221-222, 38 All. 627, 646, 36 I.C. 104.
(*h*) *Ibrahim Goolam Ariff* v. *Saiboo* (1908) 35 Cal. 1, 34 I A. 167.
(*i*) *Chekkonekutti* v. *Ahmed* (1887) 10 Mad. 196, 199.

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(c) *A* executes a deed of gift in favour of *B*, containing the words "so long as I live, I shall enjoy and possess the properties, and I shall not sell or make gift to any one, *but after my death*, you will be the owner." The gift is void, for it is not accompanied by delivery of possession and it is *not to operate until after the death* of *A* : *Yusuf Ali* v. *Collector of Tipperah* (1882) 9 Cal. 138. See also *Chekkonekutti* v. *Ahmed* (1886) 10 Mad. 196, at p. 199.

(d) *A* is entitled to receive a specified share in the offerings made by pilgrims at a certain shrine. *A* may make a valid gift of the right to receive such share. Here the thing gifted is "the *right* of the donor to receive a fixed share in the offerings after they have been made" (see sec. 122) : *Ahmad-ud-Din* v. *Ilahi Bakhsh* (1912) 34 All. 465, 14 I.C. 587 ; *Anwari Begam* v. *Nizam-ud-din Shah* (1898) 21 All. 165, at pp. 170-171.]

Macnaghten, p. 50, ss. 3 and 5 ; Baillie, 516. The rule set forth in this section is based on the principle that the object of the gift must be in existence at the time of the gift . Baillie, 516.

137. Contingent gift.—A gift cannot be made to take effect on the happening of a contingency (*j*).

"A gift must not be dependent on any thing contingent, as the entrance of Zeyd, or the arrival of Khalid" : Baillie, 515-516, 549-550. A gift by a Shia Mahomedan to *A* for life, and, *in the event of the death of A* without leaving male issue, to *B*, is as regards *B* a contingent gift, and therefore void (*k*). In a Privy Council case a gift was made by a Shia Mahomedan to his wife for life, and after her death to *such of his children as may be living at his death*. Their Lordships observed that the gift to the children was contingent, but they refrained from expressing any opinion as to its validity (*l*). As to alternative bequests, see s. 108A.

138. Gift with a condition.—When a gift is made subject to a condition which derogates from the completeness of the grant, the condition is void, and the gift will take effect as if no condition were attached to it (*m*). As to life-estates in general under the Sunni law, see sec. 44 (1) and (2) and the cases there cited.

Gift of a life-estate.—"All our masters are agreed that when one has made a gift and stipulated for a condition that is *fāsid*, or invalid, the gift is valid and the condition is void" : Baillie, 546. "An *amree* (life-grant) is nothing but a gift and a condition ; and the condition is invalid ; but a gift is not rendered null by involving an invalid condition" : *Hedaya*, 489.

Illustrations.

[(a) If a Sunni Mahomedan says, "this mansion is to thee *oomree* (for thy life), and when thou art dead it reverts to me," the gift is lawful, and the condition is void : Baillie, 517 ; *Hedaya*, 489.

(*j*) Macnaghten, p 50, s. 3 , Baillie, 515-516 , *Abdul Karim* v. *Abdul Qayum* (1906) 28 All 342, 345

(*k*) *Cassamally* v. *Currimbhoy* (1911) 36 Bom 214, 257-258, 12 I C. 225

(*l*) *Sadik Husain* v *Hashim Ali* (1916) 43 I.A. 212, 219-220 , 38 All. 627, 643-644, 36 I.C 104.

(*m*) *Nizamudin* v. *Abdul Gafur* (1888) 13 Bom. 264, 275 affirmed on appeal to P.C sub-nominee *Abdul Gafur* v. *Nizamudin* (1892) 17 Bom 1, 5, 19 I A 170, 178 [as to the last decision, see *Mahomed Ibrahim* v *Abdul Latiff* (1913) 37 Bom 447, 458, 17 I C. 689] ; *Suleman* v *Dorab Ali* (1881) 8 I A. 117, 122 ; *Abdoola* v. *Mahomed* (1905) 7 Bom. L R. 306 , *Mahomed Shah* v *Official Trustee of Bengal* (1909) 36 Cal. 431, 2 I C 292.

The result is that the donee takes an absolute interest in the mansion, and not only a life-interest. This is the *legal effect* of the gift. Similarly, if a house is given to *A* for life, and after his death to *B*, the legal effect of the gift is that *A* takes the house absolutely, and *B* takes nothing. The same rule applies to a testamentary gift (*n*).

(b) *A* makes a gift of Government promissory notes to *B*, on condition that *B* should return a *fourth part of the notes* to *A* after a month. The condition is void and *B* takes an absolute interest in the notes: see Baillie, 547; *Hedaya*, 488. (Here the condition relates to the *return* of part of the *corpus*.)

(c) *A* makes a gift of a house to *B* on condition that he shall not sell it, or that he shall sell it to a particular individual, or that *B* shall give *some part of it* in *iwaz* or exchange. The condition is void, and *B* takes an absolute interest in the house: Baillie, 547. See sec. 139.

Restraint against alienation.—In the case of a gift, a restraint against alienation, whether absolute or partial, is void. In the case of a transfer for a consideration, it is valid if the restraint is partial, as where it is provided that the transferee shall not sell the property to any one but the members of the transferor's and transferee's family (*o*), but void if the restraint is absolute. See Transfer of Property Act, sec. 10.

(d) *A* makes a gift of certain property to *B*. It is provided by the deed of gift that *B* shall not transfer the property. The restraint against alienation is void, and *B* takes the property absolutely: *Babu Lal* v. *Ghansham Das* (1922) 44 All. 633, 70 I.C. 84, ('22) A.A. 205.]

Life-grant under Shafei law.—A gift for life is recognized among Shafeis, a sub-sect of Sunnis (*p*).

Life-grant under Shia law.—The Shia law recognizes a gift of a life-estate (*q*). Thus it is stated in Baillie, II, 226, that if a man says, "I have bestowed on thee this mansion for thy life or my life," it is a valid gift. Contrast this with ill. (a). See sec. 44 (3) and the cases cited in the illustrations.

139. Condition in the nature of a trust.—Where property is transferred by way of gift, and the donor does not reserve dominion over the *corpus* of the property nor any share of dominion over the *corpus*, but stipulates simply for and obtains a right to the *recurring income* during his life, the gift and the stipulation are both valid. Such a stipulation is not void, as it does not provide for a return of any part of the *corpus* as in sec. 138 ills. (b) and (c). The stipulation may also be enforced as an agreement raising a trust, and constituting a valid obligation to make a return of the proceeds during the time stipulated. It was so held by the Privy Council in *Nawab Umjad Ally* v. *Mohumdee Begum* (*r*) [ill. (a)] which was a Shia case, and in *Mohammad* v. *Fakhr Jahan* (*s*) which was a Sunni case.

(*n*) *Abdul Karim* v. *Abdul Qayum* (1906) 28 All 342

(*o*) *Muhammad Raza* v. *Abbas Bandi Bibi* (1932) 59 I A. 236, 36 C. W. N. 774, 137 I C. 321, ('32) A PC. 158

(*p*) *Mahomed Ibrahim* v *Abdul Latiff* (1913) 37 Bom 447, 458, 17 I C. 689

(*q*) *Banoo Begum* v *Mir Abed Ali* (1908) 32 Bom 172, *Siraj Husain* v *Mustaf Husain* (1921) O C 321, 49 I C. 58

(*r*) (1867) 11 M.I A. 517, 547-548; *Mirza Hashim* v. *Bindaneem* (1928) 6 Rang 343, 113 I C. 255, ('28) A. R 323 [where it was held that the donor had not divested himself completely of all dominion over the property in that the deed of trust contained a condition that the trustees should not sell the property without the consent of the donor, and that the reservation of a life-interest by the donor to himself was therefore invalid].

(*s*) (1922) 49 I.A. 195, 208-210, 44 All 301, 314-416, 68 I C. 254, ('22) A PC. 281

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The principle of the above decision has been extended by the Courts in India to cases where a gift is made subject to the condition that the donee shall pay the income to a person or persons nominated by the donor during the life of such person or persons [ills. (b) and (c)].

[(a) *A* transfers and endorses Government promissory notes into the name of his son *B*, and delivers them to *B* as a gift, with a condition that *B* should pay the income thereof to *A* during his life. Both the gift and the condition are valid, and *B* is bound to pay the income to *A* during *A*'s life : *Nawab Umjad Ally* v. *Mohumdee Begum* (1867) 11 M I A. 517, 547-548, a Shia case. The same principle applies to a gift by a Sunni Mahomedan : *Mohammad* v. *Fakhr Jahan* (1922) 49 I.A. 195, 44 All. 301, 68 I.C. 254, ('22) A. PC. 281.

(b) *A* makes a gift of his house to his son *B* with a condition that *B* should give the income of one-third of the house to *A*'s grandson *C* during *C*'s life. Both the gift and the condition are valid, and *B* is bound to pay the income to *C* during *C*'s lifetime : *Lali Jan* v. *Muhammad* (1912) 34 All. 478, 16 I.C. 105, a Sunni case.

(c) *A* makes a gift of certain property to her son *B* with a condition that *B* should pay out of the income thereof Rs. 40 every year to *C* during *C*'s life, and divide the remaining income equally between him (*B*) and *D* during *D*'s life. Both the gift and the condition are valid, and *B* is bound to pay Rs. 40 per annum to *C* and divide the remaining income equally between himself and *D* until *D*'s death : *Tavakalbhai* v. *Imatiyaj Begam* (1916) 41 Bom 372, 39 I C. 96, a Sunni case.

(d) A Mahomedan lady transfers certain immovable properties by way of gift to her nephews upon condition that they should pay her Rs. 900 every year for her maintenance. She also reserves a right of residence for herself in a portion of one of the properties. The deed of gift contains a stipulation that if the payments are not regularly made, she should be at liberty to recover them by a suit. This is not a valid gift, for the payment of Rs. 900 is not made dependent upon the profits of the *corpus* being sufficient to meet it, as in ills. (a), (b) and (c) ; the consideration for the transfer is the promise to make the payment *in any event*: *Sarifuddin* v. *Mohiuddin* (1927) 54 Cal. 754, 767, 105 I.C. 67, ('27) A.C. 808]

Note.—The transaction in each of the illustrations (a), (b) and (c), is in substance a *hiba-ba-shart-ul-iwaz*, as to which see sec. 142 below.

139A. Gift over.—A gift of property to *A* and *B* in equal shares with a condition that if either of them died without leaving male issue his share should go to the other, is valid according to the Shia law (*t*).

According to the Sunni law, the condition would be void, and *A* and *B* would each take his share of the property absolutely, and it would descend on his death to his heirs ; see sec. 138.

140. Revocation of gifts.—(*1*) A gift may be revoked by the donor at any time before delivery of possession. The reason is that *before* delivery there is no complete gift at all.

t) *Musammat Wahibunnisa* v. *Mushaf Husain* (1927) 2 Luck. 187, 95 I.C. 113, ('27) A.O. 328.

(2) Subject to the provisions of sub-sec. (4), a gift may be revoked even after delivery of possession, except in the following cases :— S. 140

(1) when the gift is made by a husband to his wife or by a wife to her husband ;

(2) when the donee is related to the donor within the prohibited degrees ;

(3) when the donee is dead ;

(4) when the thing given has passed out of the donee's possession by sale (*u*), gift or otherwise ;

(5) when the thing given is lost or destroyed ;

(6) when the thing given has increased in value, whatever be the cause of the increase (*u*1) ;

(7) when the thing given is so changed that it cannot be identified, as when wheat is converted into flour by grinding (*v*) ;

(8) when the donor has received something in exchange (*iwaz*) for the gift [see secs. 141 and 142].

(3) A gift may be revoked by the donor, but not by his heirs after his death.

(4) Once possession is delivered, nothing short of a decree of the Court is sufficient to revoke the gift. Neither a declaration of revocation by the donor nor even the institution of a suit for resuming the gift is sufficient to revoke the gift. Until a *decree* is passed, the donee is entitled to use and dispose of the subject of the gift.

Hedaya, 485 ; Baillie, 533-537. The reason why a gift to a person other than a husband or wife or to a person other than one related within the prohibited degrees may be revoked is thus stated in the *Hedaya*, p. 486 : " The object of a gift to a *stranger* is a return ;—for it is a custom to send presents to a person of high rank that he may protect the donor ; to a person of inferior rank that the donor may obtain his services ; and to a person of equal rank that he may obtain an equivalent ;—and such being the case it follows that the donor has power of annulment, so long as the object of the deed is not answered, since a gift is capable of annulment."

A gift made in favour of any of the persons mentioned in cls. (1) and (2) of sub-sec. (2) cannot be revoked at all, not even if the donor has expressly reserved to himself

(*u*) *Wali Bandi* v. *Tabeya* (1919) 41 All 534, 50 I.C. 919 ; *Mulani* v. *Maula Bakhsh* (1924) 46 All. 260, 78 I.C. 222, ['24] A.A. 307.

(*u*1) *Ibid.*

(*v*) *Maqbul* v. *Ghafur-un-nissa* (1914) 36 All. 333, 24 I.C. 225.

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the right to revoke. In all other cases a gift is revocable, unless the power of revocation has come to an end by the happening of any of the events mentioned in cls. (3) to (8) of sub-sec. (2). If no such event has happened, the donor may revoke the gift, even though he may have declared that he would not revoke it. The reason is that, except in the cases mentioned in cls. (1) and (2), the power of revocation is inherent in the donor of every gift (*w*). Contrast sec. 126 of the Transfer of Property Act, 1882, which, however, does not apply to Mahomedan gifts.

Shia law.—The Shia law differs from the Hanafi law in the following particulars :—

(a) a gift to any blood relation, whether *within the prohibited degrees or not*, is irrevocable after delivery of possession ;

(b) a gift by a husband to his wife, or by a wife to her husband, is, according to the better opinion, *revocable* (Baillie, II, 205-206).

(c) a gift may be revoked *by a mere declaration* on the part of the donor without any proceedings in Court [Baillie, II, p. 205, f. n. (10)]

141. Hiba-bil-iwaz (gift with exchange).—(*1*) A *hiba-bil-iwaz*, as distinguished from a *hiba* or simple gift, is a gift for a consideration. It is in reality a sale, and has all the incidents of a contract of sale. Accordingly possession is not required to complete the transfer as it is in the case of a *hiba*, and an undivided share (mushaa) in property capable of division may be lawfully transferred by it, though it cannot be done in the case of a *hiba* (*x*). Two conditions, however, must concur to make the transaction valid, namely, (1) actual payment of consideration (*iwaz*) on the part of the donee, and (2) a bona fide intention on the part of the donor to divest himself *in præsenti* of the property and to confer it upon the donee. The adequacy of consideration is not material ; but whatever its amount, it must be *actually and bona fide* paid (*y*). Such a transaction is called the *hiba-bil-iwaz* of India as distinguished from " true " *hiba-bil-iwaz* dealt with in the notes below. It was introduced by the Muslim lawyers of India as a device for effecting a gift of mushaa in property capable of division (*z*).

(*2*) The High Court of Calcutta has held that a transaction of this character is nothing but a sale ; therefore, where the property is immovable and is of the value of Rs. 100 and

(*w*) *Cassamally* v. *Currimbhoy* (1911) 36 Bom 214-251, 256, 12 I C. 225

(*x*) Baillie, 122-123, Macnaghten, pp 51-52, ss. 14 and 15, *Hutendra Singh* v. *Maharaja of Darbhanga* (1928) 55 I. A. 197, 7 Pat. 500, 109 I.C. 858, ('28) A PC. 112, *Sarifuddin* v. *Mohiuddin* (1927) 54 Cal 754, 105 I C. 67, ('27) A C 808, *Fateh Ali* v. *Muhammad* (1928) 9 Lah. 428, ('28) A L 516

(*y*) *Khajooroonissa* v *Rowshan Jehan* (1876) 2 Cal 184, 3 I A 291, *Muhammad Faiz* v. *Ghulam Ahmad* (1881) 3 All 490, 8 I A, 25, *Chaudhri Mehdi Hasan* v *Muhammad Hasan* (1906) 28 All 439, 33 I A 68, *Mohan Lal* v. *Mahmud* (1922) 44 All. 580, 67 I C 67, ('22) A. A. 347

(*z*) Baillie, p. XXXV.

upwards, it must be effected by a registered instrument as required by sec. 54 of the Transfer of Property Act, 1882, which relates to sales (*a*). As a sale, it also gives rise to a right of pre-emption (*b*). S. 141

[(a) *A* and *B*, two Mahomedan brothers, own certain villages which are held by them as tenants-in-common. *A* dies leaving his brother *B* and a widow *W*. Some time after *A*'s death, *B* executes a deed whereby he grants two of the villages to *W*. Two days after the date of the grant, *but as part of the same transaction*, *W* executes a writing whereby *in consideration* of the grant to her of the two villages she gives up her claim to her husband's estate in favour of *B*. The transaction is a *hiba-bil-iwaz*, and it is valid though possession may not have been delivered: see *Muhammad Faiz* v. *Ghulam Ahmad* (1881) 3 All. 490, 8 I. A. 25.

(b) A Mahomedan executes a deed in favour of his wife whereby he grants certain immovable property to her *in lieu* of her dower. Possession of the property is not delivered to the wife. The transaction is nevertheless valid as a *hiba-bil-iwaz*: *Muhammad Esuph* v. *Pattamsa Ammal* (1899) 23 Mad. 70.

(c) A Mahomedan lady, who owns an undivided share (mushaa) in an immovable property which is capable of division, executes a deed whereby she transfers her share in the property by way of gift to her two nephews in consideration of the nephews paying Rs. 999 to her every year for her maintenance. The deed provides that if they fail to make the payments regularly, she should be at liberty to recover them by a suit. The deed is duly registered. The transaction is not a *hiba*, and it is valid though it is a transfer of a mushaa: *Sarfuddin* v. *Mohiuddin* (1927) 54 Cal. 754, 105 I.C. 67, ('27) A.C. 808.

True nature of transaction.—Though a transaction may be described in the plaint as a *hiba-bil-iwaz*, it is open to the plaintiff to show that it was in fact a simple *hiba*, provided that the point is raised at an early stage of the proceedings (*c*).

(d) A Mahomedan dies leaving two brothers and a daughter. Subsequently each brother relinquishes his share in the estate of the deceased in favour of the daughter in consideration of the other doing so. The transaction is not a *hiba*, the relinquishment by one brother being the consideration for relinquishment by the other, and delivery of possession to the daughter is not necessary to validate the transaction (*d*).]

A gift "in consideration of your being my cousin" is not a gift for a consideration or a *hiba-bil-iwaz*. Such a transaction is a *hiba* or gift simple, and delivery of possession is necessary to validate the gift (*e*). Similarly a gift "for having with cordial affection and love rendered service to me, and maintained and treated me with kindness and indulgence, and shown all sorts of favour to me," is a *hiba* or gift simple. Such a transaction is not a *hiba-bil-iwaz*, there being no *iwaz* or consideration, and delivery of possession is necessary to validate the gift (*f*).

Adequacy of consideration.—In *Khajooroonissa* v. *Rowshan Jehan* (*g*) which is the leading case on the subject, their Lordships of the Privy Council said: "Undoubtedly the adequacy of the consideration is not the question. A consideration may be perfectly valid which is wholly inadequate in amount when compared with the thing given.

(a) *Abbas Ali* v *Karim Baksh* (1909) 13 C W N 160, 4 I C 466; *Sarfuddin* v *Mohuddin* (1927) 54 Cal. 754, 105 I. C. 67, ('27) A. C. 808; See also *Fateh Ali* v. *Muhammad* (1928) 9 Lah 428, 435-436, ('28) A.L. 516.

(b) *Satyendra Nath* v. *Fulsom Bibi* (1932) 36 C.W N. 486, 139 I.C 403, ('32) A.C. 625

(c) *Serajuddin* v. *Isab* (1922) 49 Cal. 161, 70 I. C 203, ('22) A C 258

(d) *Ashidbai* v. *Abdulla* (1906) 31 Bom. 271.

(e) *Jafar Ali* v. *Ahmed* (1868) 5 Bom. H. C. A. C 37.

(f) *Rahim Bakhsh* v. *Muhammad Hasan* (1888) 11 All 1.

(g) (1876) 2 Cal. 184, 197, 3 I A 291.

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Some of the cases have gone so far as to say that even a gift of a ring may be a sufficient consideration; but whatever its amount, it must be actually and *bona fide* paid." It would seem to follow from this, that however small the consideration for a *hiba-bil-iwaz* may be, the transaction would be valid if the consideration was actually and *bona fide* paid. In a Bombay case, decided before the above Privy Council case, there was a grant by *A* to *B* of property, and the consideration for the grant was stated to be Rs 10. It was held that the consideration being only Rs. 10, the transaction could not be sustained as a *hiba- bil-iwaz* (*h*). This decision can no longer be regarded as good law Even a copy of the Koran is a good consideration for a *hiba-bil-iwaz* (*i*).

Intention to transfer in præsenti.—Where property was transferred to a donee *subject to* a reservation of the possession and enjoyment to the donor and his wife during their lives, it was held by their Lordships of the Privy Council that there was no intention on the part of the donor to divest himself *in præsenti* of the property, and that the transaction could not be upheld as a *hiba-bil-iwaz* (*j*).

True hiba-bil-iwaz.—*Hiba-bil-iwaz* means, literally, a gift for an exchange. It is of two kinds, one being the true *hiba-bil-iwaz*, that is, *hiba-bil-iwaz* as defined by the older jurists, and the other the *hiba-bil-iwaz* of India. In the former there are two acts namely, (1) the *hiba*, which is followed by (2) an independent and uncovenanted *iwaz* (return-gift), that is, an *iwaz* not stipulated for at the time of the *hiba*. In the latter there is only one act, the *iwaz* or exchange being involved in the contract of gift as its *direct consideration*: Baillie, 122. In the true *hiba-bil-iwaz*, the *hiba* and *iwaz* are both governed by the law of gifts. There must be delivery of possession both of the *hiba* and *iwaz*, and they are both subject to the doctrine of mushaa. The donor may even after delivery revoke the gift [sec. 140] at any time before the *iwaz* is delivered to him, but after delivery of the *iwaz* neither party can revoke his gift. The transaction consists of *two distinct acts of donation* between two persons each of whom is alternately the donor of one gift and the donee of the other. Thus if *A* makes a gift of a ring to *B* and delivers it to him, and *B, without having stipulated for it*, subsequently makes a gift of a watch to *A*, saying that it is the *iwaz* or return for the gift of the ring, and delivers the watch to him, the transaction is a true *hiba-bil-iwaz*, and neither *A* nor *B* can revoke the gift. But if *B* delivers the watch to *A* without saying that it is the *iwaz* or return for his gift, the transaction does not amount to a *hiba-bil-iwaz*. The case is then one of two *hibas*, and either party may revoke his *hiba* [sec. 140]. If *A* makes a gift of a ring to *B* saying, "I have given this to you *for so much*," it is a *hiba-bil-iwaz* of India. It is in reality a sale, while a true *hiba-bil-iwaz* is not a sale either in its inception or completion (*k*).

142. Hiba-ba-shart-ul-iwaz.—Where a gift is made *with a stipulation* (*shart*) for a return, it is called *hiba-ba-shart-ul-iwaz*. As in the case of a *hiba* (simple gift), so in the case of a *hiba-ba-shart-ul-iwaz*, delivery of possession is necessary to make the gift valid, and the gift is also revocable [sec. 140]. But the gift becomes irrevocable on delivery by the donee of the *iwaz* (return) to the donor (*l*).

(*h*) *Rujabai* v *Ismail* (1870) 7 Bom. H.C., O.C. 27, 30

(*i*) *Abbas Ali* v *Karim Baksh* (1909) 13 Cal. W. N. 160, 4 I C 466

(*j*) *Chaudhri Mehdi Hasan* v. *Muhammad Hasan* (1906) 28 All. 439, 453, 33 I.A. 68 (It was also found that no consideration passed from the donee to the donor); *Moosa Adam Patel* v. *Ismail Moosa* (1909) 12 Bom. L R. 169, 194, 5 I.C. 946.

(*k*) Baillie, 122-123, 541-543; *Rahim Bakhsh* v *Muhammad Hasan* (1888) 11 All. 1; *Sarfuddin* v. *Mohuddin* (1927) 54 Cal. 754, 105 I C. 67, ('27) A C. 808

(*l*) Baillie, 543-544; *Hedaya*, 488; *Mogulsha* v. *Mahamad Saheb* (1887) 11 Bom. 517 [having regard to the decision that possession was necessary, the transaction is wrongly described in the judgment as *hiba-bil-iwaz*].

The main distinction between the *hiba-bil-iwaz* of India, and *hiba-ba-shart-ul-iwaz* is that delivery of possession is not necessary in the former case, while it is necessary in the latter case.

The main distinction between *hiba-bil-iwaz* as defined by the older jurists and *hiba-ba-shart-ul-iwaz* is that in the former the *iwaz* proceeds *voluntarily* from the donee of the gift, while in the latter it is expressly *stipulated for* between the parties. The former bears the character of a gift throughout and does not partake of the character of a sale either in its inception or completion, while as regards the latter, it is a gift in its first stage, but it partakes of the character of a sale after possession has been taken by the donee of the thing given and by the donor of the *iwaz*, so that the transaction, when completed, is exposed to *shufaa* or pre-emption, and either party may return the thing delivered to him for a defect. These two incidents, namely, the right of pre-emption and the right to return a thing for a defect, are two of the incidents of the contract of sale in the Mahomedan law. As *hiba-ba-shart-ul-iwaz* is not common in India, it is useless to pursue the matter further. As to the incidents of sale in Mahomedan law, the student is referred to Baillie's Digest, 2nd ed., Introduction to the Chapter on Sale, pp. 775-783

See ills. (a), (b) and (c) to sec. 139, and notes.

143. Areeat.—The grant of a license, resumable at the grantor's option, to take and enjoy the usufruct of a thing, is called *areeat* (*m*).

Hedaya, 478.

A *hiba* is a transfer of *ownership* without consideration. A *hiba-bil-iwaz* is a transfer of *ownership* for a consideration. An *areeat* is not a transfer of *ownership*, but a temporary *license to* enjoy the profits so long as the grantor pleases. A *hiba* is revocable except in certain cases (sec. 140) A *hiba-bil-iwaz* is not revocable in any case. An *areeat* is revocable in every case.

144. Sadaqah.—A *sadaqah* is a gift made with the object of acquiring religious merit. Like *hiba*, it is not valid unless accompanied by delivery of possession; nor is it valid if it consists of an undivided share in property capable of division [sec. 134]. But unlike *hiba*, a *sadaqah*, once completed by delivery, is not revocable; nor is it invalid if made to two or more persons all of whom are *poor* [sec. 135].

Baillie, 554-556; *Hedaya*, 489. The distinction between *hiba* and *sadaqah* lies in the object with which it is made. In the case of *hiba*, the object is to manifest affection towards the donee, or to win his regard or esteem; in the case of *sadaqah*, the object is "to acquire merit in the sight of the Lord" A gift of property even to the rich would be a *sadaqah* if made with the object of acquiring religious merit.

Sadaqah distinguished from wakf.—In the case of a *sadaqah*, the *corpus* may be consumed; in the case of a wakf, the *income* only can be spent (*n*). See secs. 168 and 169 below.

(*m*) *Muhammad Faiz* v. *Ghulam Ahmad* (1881) 3 All 490, 8 I A 25, *Mumtaz-un-Nissa* v. *Tufail* (1906) 28 All. 264, as explained in *Khalil Ahmad, In the matter of* (1908) 30 All, 309, *Muhammad Siddiq* v *Rasaldar* (1927) 2 Luck. 216, 95 I.C. 220, ('26) A.O. 360

(*n*) *Ramanadham* v. *Vada Leevai* (1911) 34 Mad. 12, 14, *Abdulsakur* v *Abubakkar* (1930) 54 Bom. 358, 369, 127 I C. 401, ('30) A.B. 191.

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145. Gift by a Mahomedan governed by Marumakkatyam law to a tawazhi.—A tawazhi consists of a mother and *all* her children and descendants in the female line. It is a corporate unit, and capable of holding property as such. Therefore, where a Mahomedan who follows the Marumakkatyam law, makes a gift of property to his wife and *all* her children constituting a tawazhi, without any expression of intention as to how they are to hold and enjoy it, the gift will be deemed to be a gift to the tawazhi, and the donees will take the property subject to the incidents of an ordinary tarwad or tawazhi property, one of which is impartibility (*o*). But when the gift is to the wife and her children by him, to the exclusion of her children by a former husband, the gift cannot be deemed to be one to a tawazhi, and the donees will take the property as tenants-in-common in equal shares with power to alienate their respective interests (*p*).

(*o*) *Kunhacha Umma* v *Kutti Mammi* (1893) 16 Mad 201, *Chakkra Kannan* v *Kunhi Pokker* (1916) 39 Mad 317, 30 I C 755

(*p*) *Moithayan Kutty* v *Ayissa* (1928) 51 Mad 574, 110 I C 480, ('28) A M 870

CHAPTER XII.

WAKFS.

146. Wakf as defined in the Wakf Act.—" Wakf means the permanent (s. 146A) dedication by a person professing the Mussalman faith of any property (s. 146B-146D) for any purpose recognized by the Mussalman law as religious, pious or charitable (s. 146E)." Ss. 146-146B

The above is the definition of wakf as given in the Mussalman Wakf Validating Act, 1913, s 2. That Act came into force on the 7th March, 1913. It has a retrospective effect, and applies to all wakfs, whether created before or after that date: see sec. 162 below. Referring to the above definition, the Judicial Committee observed that it was a definition for the purposes of the Act, and not necessarily exhaustive (*q*).

Wakf as defined by Mahomedan jurists—The term wakf literally means *detention*. The legal meaning of wakf, according to Abu Hanifa, is the detention of a specific thing in the ownership of the *wakif* or appropriator, and the devoting or appropriating of its profits or usufruct "in charity on the poor or other good objects." According to the two disciples, Abu Yusuf and Muhammad, *wakf* signifies the extinction of the appropriator's ownership in the thing dedicated and the *detention* of the thing in the implied ownership of God, in such a manner that its profits may revert to or be applied "for the benefit of mankind" Baillie, 557-558. See *Hedaya*, 231, 234.

146A. The dedication must be permanent.—The dedication must be permanent. A wakf, therefore, for a limited period, *e.g.*, twenty years, is not valid. Further, the purpose for which a wakf is created must be of a permanent character.

Baillie, 565; *Hedaya*, 234. See sec. 160 below.

146B. Subject of wakf.—The Wakf Act may be "any property." A valid wakf may, therefore, be made not only of immovable property, but also of movables, such as shares in joint stock companies, Government promissory notes, and even money (*r*).

In cases before the Wakf Act, there was a conflict of opinion whether a valid wakf can be made of movables. It was held in Calcutta, Bombay and Madras, that a valid wakf cannot be made of movables, unless the movables were accessory to the immovable property, such as cattle attached to agricultural land and implements of husbandry, or unless a wakf of movables was allowed by custom (*s*). This was in accordance with the view taken by Mahomedan jurists on the subject: Baillie, 570-571;

(*q*) *Ma Mi* v. *Kallander Ammal* (1927) 54 I A 23, 27, 5 Rang. 7, 100 I.C. 32, ('27) A PC. 22.

(*r*) *Abdulsakur* v. *Abubakkar* (1930) 54 Bom. 358, 369-370, 127 I.C. 401, ('30) A.B. 191.

(*s*) *Kulsom Bibee* v *Golam Hossein* (1905) 10 Cal W.N 449; *Fatmabai* v. *Gulam Husen* (1907) 9 Bom. L.R 1337. *Kadir Ibrahim* v *Mahomed* (1909) 33 Mad. 118, 4 I.C. 136.

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Hedaya, 234-235. On the other hand, it was held in Allahabad that a valid wakf may be made of movables, and that a wakf even of coins or shares in a joint stock company was not invalid (*t*). Such a wakf would be valid under the Wakf Act. In a recent Privy Council case the question arose whether a valid wakf can be made under the Wakf Act of Government promissory notes, but it was not decided, as the wakf had been acted upon for a number of years and it was held valid on that ground (*u*)

146C. Subject of wakf must belong to wakif.—The property dedicated by way of wakf must belong to the wakif (dedicator) at the time of dedication (*v*).

Baillie, 562.

Wakf of property subject to mortgage or lease.—A valid wakf may be made of property, though it is subject to a mortgage (*w*) or a lease: Baillie, 563-564.

Property agreed to be purchased by wakif.—A valid wakf may be made of property of which the wakif has been put in possession under a contract for the purchase thereof by him, provided the sale is eventually completed (*x*).

146D. Wakf of mushaa.—A mushaa or an undivided share in property may, according to the more approved view, form the subject of wakf, whether the property be capable of division or not.

Exception.—The wakf of a mushaa for a mosque or burial ground is not valid, whether the property is capable of division or not.

Hedaya, 233; Baillie, 573. The approved opinion above referred to is that of Abu Yusuf. According to Muhammad, the wakf of a mushaa in property *capable* of partition is not valid, for he holds that delivery of possession by the endower to a *mutawalli* is a condition necessary for the validity of a wakf, see s. 151 below. But though Abu Yusuf holds that a wakf of a mushaa is valid though the property may be capable of partition, he has declared that a wakf of a mushaa *for a mosque or burial ground* is invalid. He gives two reasons for it, one of which is that "the continuance of a participation in anything is repugnant to its becoming the exclusive right of God."

It follows from what is stated above that one of several heirs of a deceased Mahomedan cannot make a valid wakf of his undivided share of the inheritance *for a mosque or burial ground* though he may do so for other purposes. In a Rangoon case (*y*), however, it was held, relying on a passage in Wilson's Anglo-Muhammadan Law, 6th ed., para. 321, and on the judgment of the Privy Council in *Muhammad Mumtaz* v. *Zubaida Jan* (*z*), that if one of several heirs takes possession of the *whole* property and delivers possession of it to the trustees of a mosque for the benefit of the mosque, though it be without the consent of the other heirs, the wakf is valid to the extent of *his own share*. The passage referred to above is in these terms: "But if a wakf is valid as in the cases noted in n. 1 above, they are valid for the endowment or construction of mosques or burial grounds." This

(*t*) *Abu Sayid* v. *Bakar Ali* (1901) 24 All 190
(*u*) *Mohammad Sadiq* v. *Fakhr Jahan Begam* (1932) 59 I A 1, 17-18, 6 Luck. 556, 136 I.C 385, ('32) A PC. 13.
(*v*) *Mashuddin* v. *Ballabh Das* (1912) 35 All 68, 17 I C. 471.
(*w*) *Shahazadee* v. *Khaja Hossein* (1869) 12 W.R. 498, *Jinjira* v *Mohammad* (1922) 49 Cal 477, 483, 67 I C 77, ('22) A C. 429
(*x*) *Musammat Bismilla* v *Mohammad Ali* ('27) A.O 162, 102 I C 77
(*y*) *Abdul Rahman* v *Maung Mutu* ('32) A.R. 65, 138 I C. 851.
(*z*) (1889) 11 All. 460, 16 I.A. 205.

passage appears for the first time in the 6th ed., and the cases referred to there are cases of a wakf of a mushaa for purposes *other than a mosque or a burial ground*. The Privy Council case referred to above is a case of a *gift* of a mushaa. A wakf of a mushaa for a mosque or burial ground is invalid for the specific reasons stated by Abu Yusuf. Ss. 146D, 146E

146E. Objects of wakf.—The purpose for which a wakf may be created must be one recognized by the Mahomedan law as "religious, pious or charitable" [Wakf Act, sec. 2 (1)]. A wakf may also be created in favour of the settlor's family, children and descendants [Wakf Act, sec. 3].

A. The following are valid objects of a wakf:—

(1) mosques and provision for imams to conduct worship therein (*a*).

(2) colleges and provision for professors to teach in colleges (*b*).

(3) aqueducts, bridges and caravanserais (*c*).

(4) distribution of alms to poor persons, and assistance to the poor to enable them to perform the pilgrimage to Mecca (*d*),

(5) celebrating the birth of Ali Murtaza (*e*);

(6) keeping *tazias* in the month of Muharram (*f*), and provision for camels and *duldul* for religious processions during Muharram (*g*);

(7) repairs of imambaras (*h*);

(8) celebrating the death anniversaries (*barsi*) of the settlor and of the members of his family (*i*);

(9) performance of ceremonies known as *kadam sharif* (*j*);

(10) burning lamps in a mosque (*k*);

(11) reading the Koran in public places, and also at private houses (*l*);

(12) performance of annual *fateha* of the settlor and of the members of his family (*m*). [The ceremony of *fateha* consists in the recital of prayers for the welfare of the souls of deceased persons, accompanied with distribution of alms to the poor];

(13) expenses in connection with the family mausoleum, and daily breakfast in Ramzan (*n*).

(14) maintenance of poor relations and dependants (*o*).

(*a*) Baillie, 574.
(*b*) Baillie, 574.
(*c*) *Hedaya*, 240.
(*d*) *Hedaya*, 240.
(*e*) *Bibo Jan* v. *Kalb Husain* (1909) 31 All. 136, 1 I C. 763; *Sayid Ismail* v. *Hamidi Begum* (1921) 6 Pat. L.J. 218, 235-236, 62 I.C. 455 ('21) A P. 125, *Hajı Abdul* v. *Hajı Hamid* (1903) 5 Bom L. R. 1010 [Cutchi Memon will], *Abdulsakur* v. *Abubakkar* (1930) 54 Bom 358, 127 I C. 401, ('30) A.B 191 [Cutchi Memon case—bequest for *dharmakriya*].
(*f*) *Ibid.*
(*g*) *Syed Ali* v. *Syed Muhammad Ali* (1928) 7 Pat. 426, ('28) A P. 441.
(*h*) See cases cited in foot-note (*e*).
(*i*) See cases cited in foot-note (*e*).
(*j*) *Phul Chand* v. *Akbar Yar Khan* (1896) 19 All. 211.
(*k*) *Mazhar Husain* v. *Abdul* (1911) 33 All. 400, 9 I.C. 753.
(*l*) *Ibid.*
(*m*) *Luchmiput Singh* v. *Amir Alum* (1882) 9 Cal. 176; *Phul Chand* v. *Akbar Yar Khan* (1896) 19 All. 211, *Bibo Jan* v. *Kalb Husain* (1909) 31 All. 136, 1 I.C. 763; see p. 139 of the report, *Mazhar Husain* v. *Abdul* (1911) 33 All. 400, 9 I C. 753, [Stanley, C. J., *dubitante*]; *Mutu Ramanadan* v. *Vava Levvai* (1917) 44 I.A. 21, 27, 40 Mad. 116, 122, 39 I.C. 235. See also *Salebhai* v. *Safiabu* (1912) 36 Bom. 111, 12 I.C. 702
(*n*) *Syed Ali* v. *Syed Muhammad* (1928) 7 Pat. 426, ('28) A.P. 441.
(*o*) *Muharram* v. *Anjuman-un-Nissa* (1923) 45 All. 152. 69 I.C. 836. ('24) A.A. 223.

Ss. 146E, 146F

B. The following are not valid objects of a wakf :—

(i) objects prohibited by Islam, *e.g.*, erecting or maintaining a church or a temple: Baillie, 560;

(ii) maintaining a private tomb as distinguished from the tomb of a saint (*p*);

(iii) reading the Koran at graves, and perpetual performance of ceremonies for the benefit of the soul of the deceased. This is the Madras view (*q*), and it has been dissented from in Bombay at least as regards ceremonies for the benefit of the soul of the deceased (*r*);

(iv) the High Court of Allahabad had held, following the opinion of Ameer Ali, expressed in his Mahomedan law [4th ed., vol 1, p. 276], that a provision for the wages and pensions of servants and dependants is valid (*s*). A similar question arose in a recent case before the Privy Council (*t*), and it was argued, relying on the same passage in Ameer Ali's work, that a wakf for servants was valid, but the point, it would appear, was later on abandoned, and the Board said: "It is admitted that a trust for slaves and dependants is not within the terms of the Wakf Validating Act (VI of 1913)."

146F. Wakf void for uncertainty.—The objects of a wakf must be indicated with reasonable certainty; if they are not, the wakf will be void for uncertainty [see note (1)]. But it is not necessary that the objects should be *named* (*u*). Nor is it necessary, where the objects are specified, to name the sum to be spent on each object (*v*) [see note (2)].

Note (1).—According to the English law the object of trusts, whether private or public, must be certain, otherwise the trust is void for uncertainty. The leading English case on public trusts is *Morice* v. *The Bishop of Durham* (*w*). In that case it was held by Lord Eldon that a bequest for "such objects of benevolence or liberality as the executor should most approve of" was too vague to be enforced. It has similarly been held that a trust for "charitable or benevolent purposes" (*x*), or for "purposes charitable or philanthropic" (*y*), or for "such charitable or public purposes as my trustee thinks proper" (*z*), is void for uncertainty. Following this principle, it has been held by the Privy Council that a gift by a Hindu for *dharam*, an expression equivalent to "charitable, religious or philanthropic purposes," is void for uncertainty (*a*).

Turning now to Mahomedan cases, the High Court of Bombay expressed the opinion in an old case that a bequest by a Khoja Mahomedan for *dharam* was void for uncertainty (*b*). In a later Bombay case, a bequest by a Mahomedan for *dharam*, *kherat*, *vigere*, was held to be void for uncertainty. The Gujarati word "kherat," it was said, was derived from the Arabic "khairat," and that "khair" in Arabic means

(*p*) *Kaleloola* v. *Nuseerudeen* (1894) 18 Mad. 201

(*q*) (1894) 18 Mad 201, *supra*; *Zooleka Bibi* v *Syed Zynul Abedin* (1904) 6 Bom L R. 1058 [reading the Koran at graves].

(*r*) *Abdulsakur* v *Abubakkar* (1930) 54 Bom. 356, 367-368, 127 I C. 401, ('30) A.B. 191

(*s*) *Ghulam Mohammad* v *Ghulam Husain* (1932) 59 I A. 74, 86, 54 All. 93, 136 I.C. 454, ('32) A. PC 81.

(*t*) *Ibid.*

(*u*) *Sheikh Ramzan* v. *Mussammat Rahmani* ('32) A O. 71, 135 I.C 372. *Gangabai* v. *Thavar* (1868) 1 Bom. H.C. O.C. 71.

(*v*) *Mulu Ramanadan* v. *Vaia Levvai* (1916) 44 I A. 21, 28-29, 40 Mad. 116, 39 I C. 235, ('16) A. PC 86, *Syed Shah* v. *Syed Abi* (1932) 11 Pat 288, 325-326, 136 I.C. 417, ('32) A P 33

(*w*) (1804) 10 Ves 522.

(*x*) *In re Ruland* (1881) W N. 173

(*y*) *In re Macduff* (1896) 2 Ch. 463

(*z*) *Blair* v. *Duncan* [1902] A C. 37, *Grimond* v. *Grimond* [1905] A.C. 124

(*a*) *Runchordas* v *Parvatibai* (1899) 23 Bom. 725, 26 I A. 71.

(*b*) *Gangabai* v. *Thavar* (1863) 1 Bom. H. C., O C. 71.

"good," and "khairat" means "good works, alms, charities" (c). In a Punjab case it was held that a wakf for such charitable objects as the trustees should think proper and for such purpose as that the settlor should obtain certain bliss therefrom, is void for uncertainty (d). In an Allahabad case it was held that a wakf for *fateha* and for *amar-i-khair* including the maintenance of poor relations and dependents was not void for uncertainty (e). But "amar-i-khair" means "khair" or "good" works, and if that is the correct meaning of the word, the wakf would be void for uncertainty, unless it can be said that when a Mahomedan dedicates his property by way of wakf for "good works," it must be taken that the dedication is for "purposes recognized by the Mussalman law as religious, pious, or charitable" within the meaning of sec. 2 (1) of the Wakf Act.

Note (2).—A bequest by a Khoja Mahomedan under a will in the English language of a fund "to be disposed of in *charity* as my executor shall think fit," is not void for uncertainty (f). In an Oudh case (g), part of the income was directed to be given to a mosque and part to a school, and the balance was to be divided among the settlor's heirs. The deed did not *name* the objects to which the income was to be devoted after the extinction of the heirs, but it was clear that the object was to apply the balance to purposes recognized by the Mahomedan law as religious, pious or charitable. It was held that the wakf was valid (h).

146G. Objects partly valid and partly invalid.—Where a wakf is created for mixed purposes, some of which are lawful and some are not, it is valid as to lawful purposes, but invalid as to the rest, and so much of the property as is dedicated for invalid purposes will revert to the wakif (dedicator) (i).

146H. Doctrine of cy-pres.—Where a clear charitable intention is expressed in the instrument of wakf, it will not be permitted to fail because the objects, if specified, happen to fail, but the income will be applied for the benefit of the poor or to objects as near as possible to the objects which failed (j).

Shia law.—The same is the rule of Shia law: Baillie, II, 216.

147. Persons capable of making a wakf.—Every Mahomedan of sound mind and not a minor may dedicate his property by way of wakf.

Baillie, 560. As to majority, see notes to sec. 101 above.

148. Form of wakf immaterial.—A wakf may be made either verbally or in writing. It is not necessary, in order to constitute a wakf, that the term "wakf" should be used in the grant, if from the general nature of the grant itself that

(c) *Mariambi* v. *Fatmabai* (1928) 31 Bom. L R. 135, 116 I C. 242, ('29) A B. 127

(d) *Shahab-ud-Din* v. *Sohan Lal* (1907) Punj. Rec. No. 75. See also *Advocate-General* v. *Hormusji* (1905) 29 Bom. 375.

(e) *Mukarram* v. *Anjuman-un-Nissa* (1923) 45 All 152, 69 I C. 836, ('24) A A. 223.

(f) *Gangabai* v. *Thavar* (1863) 1 Bom. H C. O.C. 71.

(g) *Sheikh Ramzan* v. *Mussammat Rahmani* ('32) A.O. 71, 135 I.C. 372.

(h) ('32) A.O. 71, 135 I.C. 372, *supra*.

(i) *Mazhar Husain* v. *Abdul* (1911) 33 All. 400, 406, 9 I.C. 753.

(j) *Kulsom Bibee* v. *Golam Hossein* (1905) 10 C.W.N. 449, 484-485; *Salebhai* v. *Safiabu* (1912) 36 Bom. 111, 12 I.C. 702.

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tenure can be inferred (*k*). Where it is not clear whether a grant constitutes a wakf, the statements and conduct of the grantee and his successors, and the method in which the property has been treated, are circumstances which, though not conclusive, are worthy of consideration (*l*).

Note that the provisions of the Indian Trusts Act II of 1882 do not apply to wakfs: see sec. 1 of the Act.

Though a wakf may be created orally, yet when the terms of a dedication have been reduced to writing, no evidence can be given to prove the terms except the document itself or secondary evidence of its contents (*m*).

149. Wakf may be inter vivos or testamentary.—A wakf may be created by act inter vivos or by will [sec. 150].

A wakf created by will is not invalid because it contains a clause that the wakf shall not operate if a child is born to the testator The reason is that a testator has power in law to revoke or modify his will at any time he likes, and he may therefore revoke a wakf created by will even without reserving any express power in that behalf (*n*).

Shia law.—It was held at one time that a Shia cannot create a wakf by *will*. But this view was erroneous, and it has been held by the Privy Council that a Shia may create a wakf by will (*o*).

150. Testamentary wakf and wakf made in death-illness.—A Mahomedan may dedicate the whole of his property by way of wakf. But a wakf made by will or during *marz-ul-maut* cannot operate upon more than one-third of the net assets without the consent of the heirs.

Hedaya, 233; Baillie, 612.

Shia law.—The same is the rule of Shia law (*p*).

A testamentary wakf is no more than a *bequest* to charity, and it is subject to the same restrictions as a bequest to an individual: see sec. 104 above.

151. Wakf how completed.—(*1*) A wakf inter vivos is completed, according to Abu Yusuf, by a mere declaration of endowment by the owner. This view has been adopted by the High Courts of Calcutta (*q*), Rangoon (*r*), and Bombay (*s*). According to Muhammad, the wakf is not complete unless,

(*k*) *Jewun Doss* v. *Shah Kubeer-ood-Deen* (1840) 2 M I.A 390, *Salıq-un-Nissa* v. *Mah Ahmad* (1903) 25 All 418 [Shia law], *Muhammad Hamid* v. *Mian Mahmud* (1923) 50 I A 92, 104, 4 Lah 15, 28, 77 I C 1009, ('22) A.PC 384

(*l*) *Muhammad Raza* v. *Yadgar* (1924) 51 I A. 192, 195, 51 Cal. 446, 80 I.C. 645, ('24) A PC. 109.

(*m*) *Shaikh Muhammad* v. *Bibi Mariam* (1929) 8 Pat 484, 117 I C 638, ('29) A.P. 410.

(*n*) *Muhammad Ahsan* v. *Umardaraz* (1906) 28 All 633; *Abdul Karim* v. *Shofiannissa* (1906) 33 Cal. 853.

(*o*) *Baqar Ali Khan* v. *Anjuman Ara Begam* (1902) 25 All. 236, 30 I A. 94.

(*p*) *Ali Husain* v. *Fazal* (1914) 36 All. 431, 23 I C. 291

(*q*) *Doe dem Jaun Beebee* v *Abdollah Barber* (1838) Fulton, 345, *Jinjira* v. *Mohammad* (1922) 49 Cal. 477, 485-488, 67 I.C. 77, ('22) A.C. 429.

(*r*) *Ma E Khin* v. *Maung Sein* (1924) 2 Rang. 495, 88 I.C. 167, ('25) A.R. 71.

(*s*) *Abdul Rajak* v. *Jimbabai* (1911) 14 Bom. L.R. 295, 300-301, 14 I.C. 988; *Husseinbhai* v. *Advocate-General of Bombay* (1920) 22 Bom. L.R. 846, 57 I.C. 991.

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besides a declaration of wakf, a mutawalli (superintendent) is appointed by the owner and possession of the endowed property is delivered to him [*Hedaya*, 233; Baillie, 550]. This view has been adopted by the High Court of Allahabad (*t*).

(*2*) The founder of a wakf may constitute himself the first mutawalli (superintendent). The founder and the mutawalli being the same person, no transfer of physical possession is necessary, whichever of the two views is upheld. Nor is it necessary that the property should be transferred from his name as owner into his name as mutawalli (*u*). Such a transfer is not necessary even in Allahabad where the view of Muhammad prevails (*v*).

Intention.—Where there is neither a declaration of wakf nor delivery of possession, a *mere intention* to set apart property for charitable purposes is not sufficient to create a wakf, even if the income of the property is applied to the intended purpose (*w*).

It was held in a Calcutta case (*x*) that if a wakf is created by a document which establishes by its terms a religious or charitable trust, and it is completed by delivery of possession, it is not open to the settlor or those claiming under him to say that it was not intended to be acted upon. In a later case (*y*), it was held that the deed and delivery of possession amount to no more than an admission that a wakf has been created, and that neither the settlor nor those claiming under him are precluded from showing that the deed was not intended to operate as a wakf, and that it was fictitious. Evidence of intention is always admissible if the wakf is not created by a document (*z*), or, if it is created by a document, the language used is ambiguous (*a*). A creditor, of course, is always entitled to show that a wakf was created to defraud the creditors.

Shia law.—Under the Shia law, a wakf *inter vivos* cannot be created by a mere declaration, there must also be delivery of possession; Baillie, II, 212. No delivery of possession is necessary when the wakif constitutes himself the first mutawalli, but it is necessary in that case to transfer the property from his name as owner into his name as mutawalli. If this is not done, the wakf is invalid (*b*).

151A. Registration.—A wakfnama by which immovable property of the value of Rs. 100 and upwards is dedicated by way of wakf requires to be registered under the Indian

(*t*) *Muhammad Aziz-ud-din* v. *The Legal Remembrancer* (1893) 15 All. 321; *Muhammad Yunus* v. *Muhammad Ishaq* (1921) 43 All. 487, 62 I C. 896, ('21) A A. 103; *Muhammad Shafi* v. *Muhammad Abdul* (1927) 49 All. 391, 99 I C. 1052, ('27) A A. 255.

(*u*) *Abdul Rajak* v *Jimbabai* (1911) 14 Bom. L.R 295, 300, 14 I.C. 988, *Muhammad Rustam Ali* v. *Mushtaq Husain* (1920) 47 I.A. 224, 227, 42 All. 609, 612, 57 I.C. 329; *Hussenbhai* v. *Advocate-General of Bombay* (1920) 22 Bom. L.R. 846, 57 I.C. 991; *Jinjira* v. *Mohammad* (1922) 49 Cal. 477, 488, 67 I.C. 77, ('22) A.C. 429; *Abdul Jalil* v. *Obed-ullah* (1921) 43 All. 416, 62 I.C. 725, ('21) A.A. 165; *Muhammad Zain* v. *Nur-ul-Hasan* (1923) 45 All. 682, 74 I.C.142, ('24) A.A. 113; *Tafazzal* v. *Majid Ullah* (1924) 5 Lah. 59, 79 I.C. 120, ('24) A.L. 432.

(*v*) (1923) 45 All. 682, 74 I.C. 142, ('24) A.A. 113, *supra*; *Ghazanfar* v. *Ahmadi Bibi* (1930) 52 All. 368, 123 I.C. 369, ('30) A.A. 169.

(*w*) *Banubi* v. *Narsingrao* (1907) 31 Bom. 250.

(*x*) *Kulsom Bibee* v. *Golam Hossein* (1905) 10 C W.N 449, 484.

(*y*) *Masuda Khatun* v *Mahammad* (1932) 59 Cal. 402, 426-428, 133 I.C. 657, ('32) A C. 93.

(*z*) *Salig Ram* v. *Amjad Khan* (1906) All. W.N. 159; *Zooleka Bibi* v. *Syed Zynul Abedin* (1904) 6 Bom. L.R. 1058, 1067.

(*a*) *Kulsom Bibee* v. *Golam Hossein* (1905) 10 C. W. N. 449, 484.

(*b*) *Abadi Begum* v. *Kaniz Zainab* (1927) 54 I.A. 33, 6 Pat. 259, 99 I.C 669, ('27) A.PC. 2, approving *Hamid Ali* v. *Mujawar Husain* (1902) 24 All. 257; *Syed Ali* v. *Syed Muhammad* (1928) 7 Pat. 426, ('28) A P. 441; *Syed Ali* v. *Syed Muhammad* (1928) 7 Pat. 468, 474, 110 I C. 12, ('28) A.P. 352.

Ss. 151A-153 Registration Act, 1908, though the wakif (dedicator) may have constituted himself sole mutawalli thereof, but not a "trusteenama" by which he appoints additional mutawallis if the document does not purport to transfer any interest in the property to them (*c*).

Every wakfnama, that is, a document creating a wakf, operates to *extinguish* the ownership of the wakif in the wakf property (see note to sec. 146), and therefore requires registration under sec. 17 (1) (b) of the Registration Act. This was assumed in the Privy Council case of *Muhammad Rustam Ali* v. *Mushtaq Husain* (*d*), upon which the present section (sec. 151A) is founded. The facts of the case are more fully reported in 42 All 609, than in 47 I.A. 224. In that case the wakif first executed a wakfnama by which he constituted himself the first mutawalli, and reserved to himself the power to appoint additional mutawallis. By that document he defined the powers and duties of the mutawallis and the relation in which they were to stand to the property. After three months he executed another document called "trusteenama," by which he appointed additional mutawallis some to act jointly with him, and others to act after his death. He died after about a month, and the suit was brought by the mutawallis to recover possession of the property from his heirs. The wakfnama was registered in fact, but it was argued for the heirs that it was not *duly* registered as certain rules made under sec. 69 of the Registration Act were contravened. The Privy Council held that it was duly registered. The "trusteenama," however, was not registered, and it was argued that, not being registered, it did not confer upon the mutawallis any right of suit. But this argument was not accepted, and it was held that the document, even if read with the wakfnama, did not purport to assign the property to the mutawallis, and did not therefore require registration. See in this connection sec. 163B which defines the position of a mutawalli.

152. Wakf by immemorial user.—If land has been used from time immemorial for a religious purpose, *e.g.*, for the purpose of a burial ground, then the land is by user wakf, though there may be no evidence to show when or how it was originally set apart for that purpose (*e*).

Cemetery.—Land used as a public graveyard is wakf land, and therefore inalienable even if it has ceased to be used as such by orders of the Municipality (*f*). See Baillie, 622.

153. Revocation of wakf.—(*1*) A testamentary wakf, that is a wakf made by will, may be revoked by the wakif (dedicator) at any time before his death (*g*) [sec. 149].

A testamentary wakf, being no more than a *bequest* for a religious or charitable purpose, may be revoked as any other bequest may be; see sec. 109 above. A wakf created during *marz-ul-maut* stands on the same footing (*h*); see sec. 114 above.

(*2*) Where at the time of creating a non-testamentary wakf, the wakif reserves to himself the power of revoking the wakf, the wakf is invalid (*i*).

Baillie, 565; *Hedaya*, 234.

(*c*) *Muhammad Rustam Ali* v. *Mushtaq Husain* (1920) 47 I.A 224, 42 All. 609, 57 I.C. 329

(*d*) (1920) 47 I.A 224, 42 All. 609, 57 I.C. 329

(*e*) *Court of Wards* v. *Ilahi Bakhsh* (1912) 40 Cal 297, 40 I.A. 18, 17 I.C. 744; *Mehraj Din* v. *Ghulam* (1931) 12 Lah. 540, 134 I. C. 492, ('31) A. L. 607.

(*f*) *Abdul Ghafoor* v. *Rahmat Ali* ('30) A.O. 245, 122 I. C. 326.

(*g*) *Muhammad Ahsan* v. *Umardaraz* (1906) 28 All. 633.

(*h*) *Sayad Abdula* v. *Sayad Zain* (1889) 13 Bom. 555, 560.

(*i*) *Fatmabibi* v. *The Advocate-General of Bombay* (1882) 6 Bom 42, 51, *Assoobai* v. *Nodrbai* (1906) 8 Bom L.R 245, 250-251; *Pathukutti* v. *Avathalakutti* (1890) 13 Mad. 66, 73-74, *Ashna Bibi* v. *Awalgadi* (1917) 44 Cal. 698, 702, 37 I.C 887; *Abdul Satar* v *Advocate-General of Bombay* (1933) 35 Bom. L.R. 18.

153A. Power to alter beneficiaries and to increase or reduce their shares.—The wakif (dedicator) may, at the time of dedication, reserve to himself the power to alter the beneficiaries either by adding to their number or excluding some, and to increase or reduce their shares (*j*).

He cannot, of course, so reduce the shares as to withdraw any part of the *property* from the wakf. Nor can he substitute an invalid for a valid purpose for the effect would be to withdraw so much of the property as would be appropriated for the invalid purpose.

154. Contingent wakf not valid.—It is essential to the validity of a wakf that the appropriation should not be made to depend on a contingency.

A Mahomedan wife conveys her property to her husband upon trust to maintain herself and her children out of the income, and to hand over the property to the children on their attaining majority, and *in the event of* her death without leaving children, to devote the income to certain religious uses. This is not a valid wakf, for it is contingent on the death of the settlor without leaving issue: *Pathukutti* v. *Avathalakutti* (1888) 13 Mad 66; *Cassamally* v. *Currimbhoy* (1911) 36 Bom. 214, 258, 12 I.C. 225: Baillie, 564.

Shia law.—The same is the rule of Shia law (*k*) Baillie, II, 218.

155. Reservation of life interest for benefit of wakif (dedicator).—(*1*) Under the Hanafi law, the wakif (dedicator) may provide for his maintenance out of the income of the wakf property. He may, if he wishes, reserve even the whole income for himself for his life (*l*).

(*2*) *Payment of wakif's debts.*—Under the Hanafi law, the wakif may provide for the payment of his debts out of the income of the wakf property (*m*).

This was well established before the Wakf Act, 1913, and it is now reproduced in sec. 3, cl. (b), of the Act. See sec. 161 below.

[(a) A Hanafi Mahomedan female conveys her house to her husband upon trust to pay the income of the house to her for her life, and from and after her death to devote the whole of it to certain charitable purposes. This is a valid wakf, though the charitable trust is not to come into effect until after the founder's death (*m*1) *Hedaya*, 237. Such a wakf is not valid under the Shia law: See below "Shia law."

(b) A Hanafi Mahomedan executes a deed of wakf by which he directs his debts to be paid out of the rents and profits of the wakf property. This is a valid wakf (*m*). Such a wakf is not valid under the Shia law: see below "Shia law."]

Wakf to defraud creditors.—A wakf made with intent to defeat or defraud creditors is voidable at the option of creditors (*n*).

(*j*) *Ma E. Khin* v. *Maung Sein* (1924) 2 Rang. 495, 88 I.C. 167, ('25) A.R. 71. *Abdul Wahab* v. *Musammat Sughra* ('32) A.A. 248, 136 I.C. 619.

(*k*) *Syeda Bibi* v. *Mughal Jan* (1902) 24 All. 231. The actual decision in this case cannot be supported since the Privy Council ruling in *Bagar Ali Khan* v. *Anjuman Ara Begam* (1902) 25 All. 236, 30 I.A. 94.

(*l*) *Doe dem Jain Beebee* v. *Abdoolah* (1838) Fulton's Rep. 345; *Fatmabibi* v. *Advocate-General of Bombay* (1881) 6 Bom. 42, 51-52; *Cassamally* v. *Currimbhoy* (1912) 36 Bom. 214, 12 I.C. 25, *Muhammad Zain* v. *Nur-ul-Hasan* (1923) 45 All. 682, 74 I.C. 142, ('24) A.A. 113; *Ma E Khin* v. *Maung Sein* (1924) 2 Rang. 495, 88 I.C. 167, ('25) A.R. 71.

(*m*) *Luchmiput* v. *Amir Alum* (1882) 9 Cal. 176. *Jinjira* v. *Mohammad* (1922) 49 Cal. 477, 483, 67 I.C. 77, ('22) A.C. 429 [a case under the Wakf Act].

(*m*1) See cases cited in f.n. (*l*) above.

(*n*) *Bismillah Begam* v. *Tahsin Ali* (1930) 52 All. 710, 124 I.C. 722, ('30) A.A. 462.

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Provision for settlor's residence.—It would seem that a provision for the residence of the settlor for his life in the endowed property is not invalid (*o*).

Shia law.—According to the Hanafi law, the settlor may reserve the usufruct of the endowed property for himself for his life. According to the Shia law a wakf is not valid unless the settlor divests himself of the ownership of the property and of everything in the nature of usufruct from the moment the wakf is created (*p*). Hence a settlor cannot, according to that law, reserve for himself a life-interest in the income or any portion thereof: Baillie, II, 218-219. It has been held by the High Court of Allahabad that if the settlor reserves the whole income for himself, the wakf is wholly void; but if he reserves a portion of the income, *e.g.*, one-third, the wakf is void as to one-third only of the corpus, but valid as to the remaining two-thirds (*q*). In a recent case their Lordships of the Privy Council expressed a strong opinion that if the settlor reserved a life-interest even in a portion of the income, the wakf would be wholly void (*r*). But a provision in a wakfnama that the wakif shall be entitled, as long as he acts as a mutawalli, to the salary which the deed properly assigns for the mutawallis generally, is valid (*s*). Though a wakif under the Shia law cannot reserve a life-interest for himself, he may create a life-interest in favour of *another person*, *e.g.*, his wife (*t*).

Again, according to the Shia law, a wakf is not valid, if it provides for the payment of *personal* debts of the settlor. But a provision for payment of debts *charged* on the estate is valid; in other words, a Shia may, like a Sunni, make a valid wakf of property which is subject to a mortgage (*u*): Baillie, II, 218-219.

156. Wakf property cannot be alienated.—Wakf property cannot be alienated except in the cases mentioned in secs. 168 and 169 (*v*).

Hedaya, 231, 232; Baillie, 558-560.

157. Attachment of wakf property.—Wakf property is not liable to attachment and sale in execution of a personal decree against the mutawalli (*w*), nor can the rents and profits thereof be seized in execution.

158. Suit for a declaration that property is wakf.—A suit for a declaration that property belongs to a wakf can be brought by Mahomedans interested in the wakf without the sanction of the Advocate-General. The provisions of sec. 92 of the Civil Procedure Code, 1908, do not apply to such a suit. That section applies only to suits claiming any of the reliefs specified in it (*x*).

(*o*) See *Muhammad Shafi* v. *Muhammad Abdul* (1927) 49 All. 391, at p. 395, 99 I C. 1052, ('27) A.A. 255.

(*p*) *Ali Raza* v. *Sanwal Das* (1919) 41 All. 34, 48 I C. 212.

(*q*) *Hajee Kalub* v. *Mehrum Beebee* (1872) 4 N.W.P. 155; *Hamid Ali* v. *Mujawar Husain* (1902) 24 All 257.

(*r*) *Abadi Begum* v. *Kaniz Zainab* (1927) 54 I A 33, 6 Pat. 259, 99 I C 669, ('27) A PC. 2

(*s*) (1927) 54 I A 33, 6 Pat. 259, 99 I.C. 669, ('27) A PC 2, *supra*.

(*t*) *Muhammad Ahsan* v. *Umardaraz* (1906) 28 All. 633.

(*u*) *Musharraf Begam* v. *Sikandar* (1929) 51 All. 40, 49-50, 111 I.C. 583 ('28) A.A. 516 explaining *Hamid Ali* v. *Mujawar* (1902) 24 All 257, 263.

(*v*) *Abdur Rahim* v. *Narayan Das* (1923) 50 I.A. 84, 50 Cal. 329, 71 I C. 646, ('23) A.PC. 44.

(*w*) *Bushen Chand* v *Nadir Hossein* (1887) 15 Cal. 329, 15 I.A. 1; *Mutu Ramanadan* v. *Vava Levvai* (1917) 44 I.A. 20, 40 Mad. 116, 39 I.C. 235; *Shah Mohammad* v. *Mohammad* (1927) 2 Luck. 109, 100 I.C. 241, ('27) A O. 113; *Muhammad Ismail* v. *Muhammad* (1921) 43 All. 508, 62 I.C. 904, ('21) A.A. 224.

(*x*) *Abdur Rahim* v. *Mahomed Barkat Ali* (1928) 55 I.A. 96, 55 Cal. 519, 108 I.C. 361, ('28) A.PC. 16.

Family Settlements by way of Wakf. S. 158

History of the Wakf Act.—In order to understand what follows, wakfs may be divided into two classes, *viz.*, (1) public and (2) private. A public wakf is one for a public religious or charitable object. A private wakf is one for the benefit of the settlor's family and his descendants, and is called *wakf-alal-aulad*. It was considered at one time that "to constitute a valid wakf there must be a dedication of property *solely* to the worship of God or to religious or to charitable purposes" (*y*), in other words, that a private wakf was in no case valid. But this extreme view is no longer tenable (*z*), and a private wakf may now be made subject to certain limitations. These limitations were very strict under the law as it stood before the Wakf Act of 1913. They have been considerably relaxed by the Wakf Act. It will be convenient to consider private wakfs under two distinct heads.

A. Wakf *exclusively* for the benefit of the settlor's family, children, and descendants in perpetuity.—Such a wakf was invalid before the Wakf Act. It is also invalid under that Act. see Wakf Act, proviso to sec. 3 reproduced in sec. 161 below.

B. Wakf *both* for the benefit of the settlor's family, children, and descendants, *and* for charity.—According to the Privy Council decisions before the Wakf Act, such a wakf was valid if there was a *substantial* dedication of the property to charitable uses at some period of time or other" (*a*). But if the primary object of the wakf was the aggrandizement of the family, and the gift to charity was illusory whether from its small amount or from its uncertainty and remoteness, the wakf for the benefit of the family was invalid and no effect could be given to it. The leading case on the subject was *Abul Fata Mahomed* v. *Rasamaya* (*b*), decided in 1894 [see ill (d) to sec. 159 below]. Under the Wakf Act, a wakf for the benefit of the family is valid, even if the gift to charity is illusory. All that is necessary under the Act is that there should be an ultimate gift to charity. See Wakf Act, sec. 4, reproduced in sec. 161 below.

In *Abul Fata Mahomed*'s case referred to above, the income of the wakf property was to be applied in the first instance for the benefit of the settlor's descendants from generation to generation, and the trust in favour of charity was not to come into operation *until after the extinction of the whole line of the settlor's descendants*. Their Lordships of the Privy Council held that the gift to charity was illusory, and that the sole object of the settlor was to create a family settlement *in perpetuity*, and that the provision for the settlor's family was therefore invalid. In the course of the judgment their Lordships said (p. 631):—

"As regards precepts, which are held up as the fundamental principles of Mahomedan law [see sec. 24], their Lordships are not forgetting how far law and religion are mixed up together in the Mahomedan communities; but they asked during the argument how it comes about that by the general law of Islam, at least as known in India, simple gifts [*hiba*] by a private person to remote unborn generations of descendants, successions that is of inalienable life-interests, are forbidden; and whether it is to be taken that the very same dispositions, which are illegal when made by ordinary words of gift, become legal if only the settlor says that they are made as *wakf* in the name of God, or for the sake of the poor. To those questions no answer was given or attempted, nor can their Lordships see any."

The decision of the Privy Council in *Abul Fata Mahomed*'s case caused considerable dissatisfaction in the Mahomedan community in India. It can hardly be doubted that under the pure Mahomedan law a wakf exclusively for the benefit of the settlor's family

(*y*) *Abdul Ganne* v. *Hussen Miya* (1873) 10 Bom. H.C. 7; *Mahomed Hamidulla* v. *Lotful Huq* (1881) 6 Cal. 744.

(*z*) *Luchmiput* v. *Amir Alum* (1882) 9 Cal 176; *Mahomed Ahsanulla* v. *Amarchand Kundu* (1889) 17 Cal. 498, 509, 17 I.A. 28.

(*a*) *Mahomed Ahsanulla* v. *Amarchand Kundu* (1899) 17 Cal. 498, 509, 17 I.A. 28.

(*b*) (1894) 22 Cal. 619, 22 I.A. 76.

and descendants was valid. Such a settlement may be one in favour of *unborn persons;* for it may create successive *life-interests* in favour of such persons; it may be "a *perpetuity*, of the worst and most pernicious kind," but it was recognized by Mahomedan law. The Privy Council, however, held that such a wakf was invalid. A representation was thereupon made to the Government of India with the result that an Act was passed in 1913, called the Mussalman Wakf Validating Act, the object being to remove the disability created by that decision But it was held as to this Act that it was not retrospective, that is to say, it did not apply to wakfs created before the Act. This led to the enactment of another Act in 1930, by which a retrospective effect was given to the Wakf Act of 1913 The result is that the Wakf Act of 1913 now applies also to wakfs created before that Act. see sec 162 below. We now proceed to state in the form of propositions the law before the Wakf Act and the law as laid down by that Act.

159. Law relating to private wakfs before the Mussalman Wakf Validating Act, 1913.—Under the law before the Wakf Act of 1913, a wakf was valid if the effect of the deed of wakf was to give the property in substance to charitable uses. It was not valid if the effect was to give the property in substance to the testator's family (*c*).—

Shia law.—The same was held as to Shia wakfs (*d*).

[(a) A Mahomedan conveys property to a mutawalli, *A. B.*, with a direction to defray out of the profits of the endowed land the expenses of a mosque, to give alms to mendicants, to educate poor students, and to utilize the surplus for the marriages, burials, and circumcision of the members of *A B.*'s family Here there is a substantial dedication to charity, the wakf, therefore, is valid *Muzhurool Huq* v *Puhraj* (1870) 13 W. R. 235; *Deoki Prasad* v. *Inait Ullah* (1892) 14 All. 375.

(b) *A* executes a document purporting to settle property as "wakf" for the benefit of his wife, daughter, and descendants of the daughter. The deed does not contain any provision for the application of the income in the event of the family becoming extinct. This is not a valid wakf under the law before the Wakf Act, as there is no gift to charity: *Nizamudin* v. *Abdul Gafur* (1888) 13 Bom. 264, affirmed on appeal by the Privy Council, sub-nomine *Abdul Gafur* v. *Nizamudin* (1892) 17 Bom. I, 19 I.A. 170, *Abdul Ganne* v. *Hussen Miya* (1873) 10 Bom. H. C 7. Nor is it a valid wakf under the Wakf Act, for there is no ultimate gift to charity. See sec. 160, note (3).

(c) A Mahomedan executes a document purporting to be a *wakfnama* which begins with a dedication of his entire property for the purpose of supporting a mosque and two schools, and for *sadir warid*. The dedication is qualified by the words "in the manner provided by the following paragraphs," and these paragraphs contain provisions for the appointment of the settlor's sons and descendants as mutawallis and for their salary, and for the maintenance and support of his family and descendants *from generation to generation*. The only provision in the deed as to religious and charitable purposes is that the mutawallis should continue to perform them *according to custom*, and this requires a *very small expenditure* compared to the income. The effect of the deed, as a whole, is that while it professes to dedicate as wakf property bringing in an annual income of about Rs. 12,000, it leaves it to the members of the family who as mutawallis are to retain the control and management, to spend a small amount for religious purposes, and to take as much as they like for themselves and the members of the family, for all time on account of salary as maintenance. This

(*c*) *Mutu Ramanadan* v. *Vava Levvai* (1916) 44 I.A. 21, 26-27, 40 Mad. 116, 39 I C. 235, ('16) A. PC. 86

(*d*) *Hamid Ali* v. *Mujawar Husain* (1902) 24 All. 257.

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is not a valid wakf under the law before the Wakf Act, for the main purpose of the settlement is the *aggrandizement of the settlor's family*, and the gift to charity is illusory: *Mahomed Ahsanulla* v. *Amarchand Kundu* (1889) 17 Cal. 498, 17 I. A. 28; *Mujib-un-nissa* v. *Abdur Rahim* (1900) 23 All. 233, 28 I. A. 15 [where the income to be devoted to charity was left entirely to the mutawalli for the time being]; *Muhammad Munawar* v. *Razia Bibi* (1905) 27 All. 320, 32 I A 86; *Fazlur Rahim* v. *Mahomed Obedul* (1903) 30 Cal. 666; *Balla Mal* v. *Ata Ullah Khan* (1927) 54 I. A. 372, 9 Lah. 203, 103 I. C. 518, ('27) A. PC. 191 [annual income Rs 1,558—Rs 146 per annum to be applied to charity and the rest to go to settlor's descendants—wakf held to be invalid]; *Rukeya Banu* v. *Najira Banu* (1928) 55 Cal. 448, 105 I. C. 647, ('28) A. C 130, [annual income Rs. 10,000—Rs. 456 per year to be applied to charity and the rest to go to settlor's descendants—wakf held to be invalid]. [All these would constitute a valid wakf under the Wakf Act.]

Note.—In *Mahomed Ahsanulla's* case their Lordships of the Privy Council observed: "If indeed it were shown that the *customary* uses were of such magnitude as to *exhaust* the income or to absorb the *bulk* of it, such a circumstance would have its weight in ascertaining the intention of the grantor" Accordingly, where a Mahomedan dedicated property, of which the average annual income was Rs 850, for the purpose of performing *fateha* and *kadam sharif* ceremonies, and it was found that according to the custom prevailing in the country the amount required for the ceremonies was Rs 500 per annum, it was held by the High Court of Allahabad that the dedication to religious purposes was *substantial*, and that the wakf was therefore valid: *Phul Chand* v. *Akbar Yar Khan* (1896) 19 All 211.

(d) Two Mahomedan brothers execute a deed purporting to make a wakf of all their immovable property for the benefit of their children and their descendants from generation to generation, and, on *total failure of all their descendants*, for the benefit of widows, orphans, beggars and the poor. The provision for the settlor's children and their descendants is void according to the law before the Wakf Act, for the gift to the poor is *too remote*, and it is not to take effect until the total extinction of all the descendants of the settlor. *Abul Fata Mahomed* v. *Rasamaya* (1894) 22 Cal. 619, 22 I. A. 76. [Such a wakf is valid under the Wakf Act. see sec. 4 of the Act reproduced in sec. 161 blow.]

In the above case their Lordships of the Privy Council said: "If a man were to settle a crore of rupees, and provide ten for the poor, that would be at once recognized as illusory. It is equally illusory to make a provision for the poor under which they are not entitled to receive a rupee till after the total extinction of a family: possibly not for hundreds of years; possibly not until the property had vanished away under the wasting agencies of litigation or malfeasance or misfortune; certainly not as long as there exists on the earth one of those objects whom the donors really cared to maintain in a high position. Their Lordships agree that the poor have been put into this settlement merely to give it a *colour of piety*, and so to legalize arrangements meant to serve for the *aggrandizement of a family*."

(e) Two Mahomedan brothers execute a deed whereby they settle lands of the value of Rs. 20,000 in trust to apply an *indeterminate* portion of the income for the due performance of customary *fateha* for ancestors and to almsgiving, and to apply the residue of the income in perpetuity for the benefit of the settlor's sons and their descendants without power of alienation. The amount required for *fateha* and almsgiving is estimated by the Court at Rs. 600 per annum. The total income of the trust estate is estimated at Rs. 1,500, leaving a balance of Rs. 900 for the benefit of the settlor's descendants. It was held by their Lordships of the Privy Council that though *two-fifths* of the income was to be devoted to the charity, and three-fifths was to go to the family, the effect of the deed was to give the property in substance to charitable uses, and that the

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deed was therefore valid. Their Lordships said: "But these figures may vary. They are not fixed and unalterable. The income may fluctuate or decrease permanently, and the needs of the charity may expand even. The *paramount* purpose of the grantors was evidently to provide for all the needs of those charities up to the limit of the trust funds, the income received from the land. Those needs are the first burden upon that income. *It is the residue, which may be a dwindling sum, that is given to the family.* The contention that, because the share of the income going to the family is at present larger than that going to the charities, the effect of the deed is not to give the property in substance to the family, and that therefore it is invalid as a deed of wakf, is, their Lordships think, entirely unsound". *Mutu Ramanadan* v. *Vava Levvai* (1917) 44 I. A. 21, 40 Mad. 116, 39 I. C. 235]

Family settlement based on invalid wakf.—*A* executes a deed of wakf. After *A*'s death some of his heirs bring a suit against the mutawalli and the other heirs to set aside the wakf on the ground that the gift to charity is illusory. The suit is compromised and an agreement is made whereby the members of the family agree that the wakf is binding and that allowances fixed thereunder should be paid *out of the income of the endowed property* to named members of the family, and upon the death of any of the named persons, to his heirs. The agreement, being for consideration, is enforceable as constituting a valid charge upon the property, although the wakf is invalid (*e*).

160. Law relating to private wakfs under the Mussalman Wakf Validating Act, 1913.—(*1*) It is now declared by the Mussalman Wakf Validating Act that it is lawful for a person professing the Mussalman faith to create a wakf which in all other respects is in accordance with the provisions of the Mussalman 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 Hanaf Mussalman, also for his own maintenance and support during his lifetime or for the payment of his debts out of the rents and profits of the property dedicated [see sec. 155 above].

Provided that the ultimate benefit is in such cases expressly or impliedly reserved for the poor or for any other purpose recognized by the Mussalman law as a religious, pious or charitable purpose of a permanent character.

This is s. 3 of the Wakf Act.

(*2*) No such wakf is to be deemed to be invalid merely because the ultimate 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

This is s. 4 of the Wakf Act.

(*e*) *Khajeh Solehman* v. *Nawab Sir Salimullah* (1922) 49 I.A. 153, 49 Cal. 820, 69 I.C. 138, ('22) A.PC. 107.

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Note (1).—A wakf may be created for the support of the "family" [Wakf Act, s. 3 (a)]. The term "family" includes a daughter-in-law (*f*). It is not confined to persons who are dependent for their maintenance on the wakif. It has accordingly been held that the son of a half-brother, the son and grandson of a paternal uncle, and the son of a half-sister, though not dependent on the wakif for their maintenance and residing separately from him, are included in the term "family" (*g*). A provision for the maintenance of the settlor's nephews and of their descendants generation after generation has also been held to be valid (*h*).

Note (2).—The *ultimate* gift must be one for a religious, pious or charitable purpose (*i*) [Wakf Act, s. 3, proviso]. It is not necessary, as it was under the law before the Act, that there should also be a *concurrent* gift to charity. A Mahomedan may not, under the Act, provide for any gift to charity until after the extinction of the whole line of his descendants This is in accordance with the view of Mahomedan law as taken by West, J., in *Fatma Bibi* v. *The Advocate-General* (*j*), by Farran, J., in *Amrullal* v. *Shaik Hussein* (*k*), and by Ameer Ali, J., in *Bikani Mia* v. *Shuk Lal* (*l*). In the first of these cases, West, J, said: "If the condition of an ultimate dedication to a pious and unfailing purpose be satisfied, a wakf is not made invalid by an intermediate settlement on the founder's children and their descendants. The benefit these successively take may constitute a perpetuity in the sense of the English law; but according to the Mahomedan law, that does not vitiate the settlement, provided the ultimate charitable object is clearly designated." It will be remembered that the view taken by West, J., Farran, J., and Ameer Ali, J., was disapproved by the Privy Council in *Abul Fata Mahomed* v. *Rasamaya* (*m*). See ill. (d) to s. 159.

Note (3).—The ultimate gift to charity may be an "implied" gift; it need not be express [Wakf Act, s. 3, proviso]. What does "implied" mean? According to Abu Hanifa and Muhammad, it is necessary for a wakf to be complete that the ultimate benefit for the poor should be *expressly* reserved. According, however, to Abu Yusuf, such benefit may be reserved *impliedly*, and this can be done by the mere use of the word "wakf." Thus according to Abu Yusuf, if a person simply says "I give this land by way of *wakf* to Zeyd," the wakf is complete, and Zeyd has the usufruct for his life, and after his death, the income will go to the poor, though the poor are not expressly mentioned (*n*). The *Fatawa Alamgiri* declares a preference for the opinion of Abu Yusuf (*o*). In the first case cited in ill. (b) to s. 159, the High Court of Bombay held that the opinion of Abu Hanifa and Muhammad was to be preferred to that of Abu Yusuf, and it accordingly held that there being no express provision for the ultimate gift to charity, the deed was not valid as a wakf. This decision was upheld by the Privy Council on appeal (*p*). Is it intended by the word "impliedly," which appears in sec. 3 of the Wakf Act, to give effect to the opinion of Abu Yusuf, so that an ultimate gift to charity may be *implied*, even where none is named, from the mere use of the word "wakf"? It has been held in Allahabad (*q*), Calcutta (*r*), and Oudh (*s*), that it is not to be so implied. A similar view has been taken by the Privy Council (*t*).

Shia wakfs.—The Wakf Act applies to Shias also, except s. 3, (b).

(*f*) *Musharraf Begam* v. *Sikandar* (1929) 51 All. 40, 111 I.C. 583 ('28) A.A. 516.
(*g*) *Imdad Ali* v *Ashiq Ali* (1929) 4 Luck. 101, 113 I. C. 494, ('29) A.O. 25.
(*h*) *Ghazanfar* v. *Ahmadi Bibi* (1930) 52 All. 368, 123 I.C 369, ('30) A.A 169.
(*i*) *Ghulam Mohammad* v. *Ghulam Husain* (1932) 59 I.A. 74, 54 All. 93, 136 I C. 454, ('32) A. PC. 81; *Abul Hasan* v. *Rajbir* ('31) A.O. 124, 131 I.C. 433.
(*j*) (1861) 6 Bom. 42, 53.
(*k*) (1887) 11 Bom. 493.
(*l*) (1893) 20 Cal. 116, 132-177.
(*m*) (1894) 22 Cal. 619, 22 I.A. 76.
(*n*) *Hedaya*, p. 234.
(*o*) Baillie's Digest, p. 558
(*p*) *Abdul Gafur* v. *Nizamuddin* (1892) 17 Bom. 1, 19 I A. 170
(*q*) *Irfan Ali* v. *Official Receiver* (1930) 52 All. 748, ('30) A.A. 837.
(*r*) *Maruda Khatun* v. *Mahammad* (1932) 59 Cal. 402, 412-414, 133 I C. 657, ('32) A.C. 93.
(*s*) *Sheikh Ramzan* v. *Musammat Rahmani* ('32) A.O. 71, 135 I.C. 372
(*t*) *Ghulam Mohammad* v. *Ghulam Husain* (1932) 59 I.A. 74, 86 [see the argument of counsel], 54 All. 93, 136 I.C. 454, ('32) A. PC. 81.

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161. Text of the Mussalman Wakf Validating Act, 1913.— The following is the text of the Wakf Act VI of 1913, which came into force on 7th March 1913 :—

An Act to declare the rights of Mussalmans to make settlement of property by way of "wakf" in favour of their families, children and descendants.

Whereas doubts have arisen regarding the validity of wakfs created by persons professing the Mussalman faith in favour of themselves, their families, children and descendants and ultimately for the benefit of the poor or for other religious, pious or charitable purposes; and whereas it is expedient to remove such doubts; It is hereby enacted as follows :—

Short title and extent.

1. (1) This Act may be called the Mussalman Wakf Validating Act, 1913.

(2) It extends to the whole of British India.

Definitions.

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 Mussalman faith of any property for any purpose recognized by the Mussalman law as religious, pious or charitable (*u*).

(2) "Hanafi Mussalman" means a follower of the Mussalman faith who conforms to the tenets and doctrines of the Hanafi school of Mussalman law.

Power of Mussalmans to create certain wakfs.

3 It shall be lawful for any person professing the Mussalman faith to create a wakf which in all other respects is in accordance with the provisions of Mussalman law (*v*), for the following among other purposes.—

(a) for the maintenance and support wholly or partially of his family (*w*), children or descendants, and

(b) where the person creating a wakf is a Hanafi Mussalman, also for his own maintenance and support during his lifetime or for the payment of his debts out of the rents and profits of the property dedicated (*x*).

Provided that the ultimate benefit (*y*) is in such cases expressly or impliedly (*z*) reserved for the poor or for any other purpose recognized by the Mussalman 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 Mussalmans of any particular class or sect.

162. Wakf Act of 1913 has now a retrospective effect.— The Wakf Act of 1913 came into force on the 7th March, 1913.

(*u*) See s 146D.
(*v*) See ss. 146 to 154
(*w*) As to meaning of "family" see note (1) to s 160 above.
(*x*) This is not new. It is in accordance with the law as settled before the Act. See s. 155 and notes thereto.
(*y*) See note (2) to s. 160 above.
(*z*) See note (3) to s. 160.

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It was held not to be retrospective, that is to say, that it did not apply to wakfs created before that date (*a*). To give it a retrospective effect, an Act was passed in 1930, called the Mussalman Wakf Validating Act, 1930 (XXXII of 1930). It came into force on the 25th July, 1930. The effect of it is that the Wakf Act of 1913 applies also, from and after the 25th July, 1930, to wakfs created before the 7th March, 1913.

163. Succession among descendants.—Where a wakf is made for the benefit of the settlor's descendants, but no rules of succession are laid down in the deed of wakf, the descendants take *per stirpes*, and not *per capita* (*b*), and males and females take equal shares (*c*).

163A. Forfeiture of interest under Wakfnama on remarriage of widows.—A condition in a deed of wakf that the interest given by the deed to a widow or to the wife of a beneficiary shall be forfeited on her remarriage is not invalid (*d*).

Of Mutawallis or Managers of Wakf property.

163B. Mutawalli.—Under the Mahomedan law the moment a wakf is created all rights of property pass out of the wakif and vest in the Almighty. The mutawalli has no right in the property belonging to the wakf; the property is not vested in him, and he is not a trustee in the technical sense. He is merely a superintendent or manager (*e*).

Suit for possession.—A mutawalli is entitled to sue for possession, though the property is not vested in him (*f*).

Appointment of mutawalli by arbitration.—The office of mutawalli of a public wakf, being in the nature of a public office, the question as to which of two persons is entitled to be mutawalli cannot be referred to arbitration (*g*). But where *A* claims that certain property is wakf property and that he is the mutawalli thereof, and *B* denies that the property is wakf property, an award made by an arbitrator that each shall be entitled to an equal share in the management and profits of the property until the matter is decided by the Court, is perfectly valid (*h*).

(*a*) *Khajeh Solehman* v. *Nawab Sir Salimullah* (1922) 49 I.A. 153, 49 Cal 820, 69 I C. 138, ('22) A.PC. 107; *Balla Mal* v. *Ata Ullah Khan* (1927) 54 I. A. 372, 9 Lah. 203, 103 I. C. 518, ('27) A.PC. 191.

(*b*) Macnaghten, 341; *Sayad Mahomed* v. *Sayad Gobar* (1881) 6 Bom. 88, 90-91.

(*c*) Macnaghten, 342; Baillie, 553 *et seq.* See *Abdul Ganne* v. *Hussen Miya* (1873) 10 Bom. H.C. 7 at p. 14; *Shekh Karimodin* v. *Nawab Mir Sayad* (1885) 10 Bom 119.

(*d*) *Latafatunnisa* v. *Shaharbanu* (1932) 139 I C. 292, ('32) A.O. 108.

(*e*) *Vidya Varuthi* v. *Balusami* (1921) 48' I A. 302, 312, 44 Mad. 831, 65 I C. 161, ('22) A PC 123, *Abdur Rahim* v *Narayan Das* (1923) 50 I A. 84, 90, 50 Cal 329, 71 I C. 646, ('23) A.PC 44.

(*f*) *Ibid.*

(*g*) *Muhammad Ibrahim* v. *Ahmad* (1910) 32 All. 503, 6 I.C. 219.

(*h*) *Moazzam* v. *Raza* (1924) 46 All. 856, 81 I.C. 851, ('24) A.A. 818.

S. 164 **164. Who may be appointed mutawalli.**—(*1*) Subject to the provisions of sub-sec. (2), the founder of a wakf may appoint himself (*i*), or his children and descendants (*j*), or any other person, even a female (*k*), or a non-Mahomedan (*l*), to be mutawalli of wakf property.

But where the mutawalli has to perform religious duties or spiritual functions which cannot be performed by a female, *e.g.*, the duties of a *sajjadanashin* (spiritual superior) (*m*) [s. 175], or *khatib* (one who reads sermons), or *mujavar of a dargah* (*n*), or an *imam* in a mosque (whose function it is to lead the congregation) (*o*), she is not competent to hold the office of mutawalli, and cannot be appointed as such (*p*). Similar remarks apply to non-Mahomedans.

(*2*) Neither a minor nor a person of unsound mind can be appointed mutawalli (*q*). But where the office of mutawalli is hereditary and the person entitled to succeed to the office is a minor, or where the mode of succession to the office is defined in the deed of wakf and the person entitled to succeed to the office on the death of the first or other mutawalli is a minor, the Court may appoint another mutawalli to act in his place during his minority (*r*).

Female as mutawalli.—The general rule is that a woman may hold a religious office *unless* there are duties of a religious nature attached to the office which she cannot perform in person or by deputy, *e.g.*, the duties of a *sajjadanashin*. Thus a woman is not incompetent to hold the office of the head *mujavar* of an *astan* or platform on which moharram ceremonies are performed (*s*).

Difference of sect.—In one case the Court appointed a Shia to be mutawalli of a Sunni wakf, but he was a person of considerable local influence both among Sunnis and Shias (*t*). In another case the Court refused to appoint a woman of the Babi sect to be mutawalli of a Shia wakf, though she was a lineal descendant of the founder of the wakf who was himself a Shia (*u*).

(*i*) Baillie, 601; *Hedaya*, 238; Baillie, II. 214, *Advocate-General* v *Fatima* (1872) 9 B H C. 19; *Abdul Rajak* v. *Jimbabai* (1911) 14 Bom L R 295, 14 I C 988; *Muhammad Rustam Ali* v. *Mushtaq Husain* (1920) 47 I.A. 224, 42 All. 609, 57 I C. 329.

(*j*) Baillie, 601.

(*k*) Baillie, 601; *Wahid Ali* v. *Ashruff Hossain* (1882) 8 Cal. 732, *Shahar Banoo* v. *Aga Mahomed* (1907) 34 I. A. 46, 34 Cal 118, *Munnavaru Begam* v *Mir Mahapalli* (1918) 41 Mad 1033, 51 I C. 489.

(*l*) Ameer Ali, 4th Ed Vol. I, p. 446.

(*m*) *Kaniz* v. *Satyid* (1923) 2 Pat. 819, 77 I C. 209, ('23) A.P. 576.

(*n*) *Hussain Beebee* v *Hussain Sherif* (1868) 4 M H C. 23, *Ibrambibi* v. *Hussain Sherff* (1880) 3 Mad. 95. As to durgah, see *Piran* v. *Abdool Karim* (1891) 19 Cal. 203.

(*o*) See *Munnavaru Begam* v *Mir Mahapalli* (1918) 41 Mad 1033, 1038, 51 I.C 489.

(*p*) *Kaniz* v. *Satyid* (1923) 2 Pat 819, 77 I C 209, ('23) A P. 576 See also *Munnavaru Begam* v. *Mir Mahapalli* (1918) 41 Mad. 1033, 51 I C. 489, and *Ismailmiya* v. *Wahadani* (1911) 36 Bom. 308, 14 I C. 469.

(*q*) Baillie, 601, *Piran* v. *Abdool Karim* (1891) 19 Cal. 203, 219-220; *Syed Hasan* v. *Mir Hasan* (1917) 40 Mad. 941, 38 I C 528; *Kaniz* v. *Satyid* (1923) 2 Pat. 819, 77 I C. 209, ('23) A P 576.

(*r*) (1891) 19 Cal. 203, 220, *supra*; *Ejaz Ahmad* v. *Khatun Begam* (1917) 39 All. 288, 37 I.C. 885

(*s*) *Munnavaru Begam* v. *Mir Mahapalli* (1918) 41 Mad 1033, 51 I C 489

(*t*) *Doyal Chund* v. *Syud Keramut Ali* (1871) 16 W.R. 116.

(*u*) *Shahar Banoo* v. *Aga Mahomed* (1907) 34 I.A. 46, 34 Cal. 148.

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165. Appointment of mutawalli.—(*1*) The founder of the wakf has power to appoint the first mutawalli, and to lay down a scheme for the administration of the trust and for succession to the office of mutawalli. He may nominate the successors by name, or indicate the class together with their qualifications, from whom the mutawalli may be appointed, and may invest the mutawalli with power to nominate a successor after his death or relinquishment of office (*v*).

(*2*) Where any person appointed as mutawalli dies, or refuses to act in the trust, or is removed by the Court, or the office of mutawalli otherwise becomes vacant, and there is no provision in the deed of wakf regarding succession to the office, a new mutawalli may be appointed (*w*)—

(a) by the founder of the wakf (*x*) ;

(b) by his executor (if any) ;

(c) if there be no executor, the mutawalli for the time being may, subject to the provisions of sec. 166 below, appoint a successor on his death-bed ;

(d) if no such appointment is made, the Court may appoint a mutawalli. In making the appointment the Court will have regard to the following rules :—

(i) the Court should not disregard the directions of the founder except for the manifest benefit of the endowment (*y*) ;

(ii) the Court should not appoint a stranger, so long as there is any member of the founder's family in existence qualified to hold the office (*z*) ;

(iii) where there is a contest between a lineal descendant of the founder and one who is not a lineal descendant, the Court is not bound to appoint the lineal descendant, but has a discretion in the matter, and may in the exercise of that discretion appoint the other claimant to be mutawalli (*a*).

Baillie, 603-604 ; Macnaghten, p. 70, sec. 6, p. 344, Case X.

(*v*) *Ghazanfar* v. *Ahmadi Bibi* (1930) 52 All. 368, 123 I.C. 369, ('30) A.A 169; *Syed Ali* v. *Syed Muhammad* (1928) 7 Pat. 468, 110 I.C 12, ('28) A P 532; *Shah Gulam* v. *Mahommed* (1875) 8 Mad. H.C. 68.

(*w*) *Advocate-General* v. *Fatima* (1872) 9 B H.C. 19; *Khajeh Salimullah* v. *Abul Khair* (1909) 37 Cal. 263, 3 I.C. 419; *Phalmabi* v. *Haji Musa* (1913) 38 Mad. 491, 21 I.C. 964.

(*x*) *Rugghan* v. *Dhanno* (1927) 49 All. 435, 99 I.C. 1045, ('27) A.A. 257.

(*y*) *Khajeh Salimullah* v. *Abul Khair* (1909) 37 Cal. 263, 268, 3 I.C. 419.

(*z*) *Advocate-General* v. *Fatima* (1872) 9 B.H C 191.

(*a*) *Shahar Banoo* v. *Aga Mahomed* (1907) 34 I.A. 46, 34 Cal. 118.

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Lineal descendant.—In *Shahar Banoo* v. *Aga Mahomed* (*b*), the founder was a Shia and his lineal descendant who claimed to be appointed mutawalli was a female of the Babi sect. The trial Judge appointed her a mutawalli, but the appointment was set aside by the Appellate Court, not on the ground that she was disqualified from acting as a mutawalli, but on the ground that she being a female could at best discharge many of her duties only by deputy, and being a Babi she might not take a zealous interest in carrying out the religious observances of the Shia school for which the trust was founded, and appointed another person to be mutawalli. This decision was upheld by the Privy Council on appeal. In considering the authorities cited by the other side, their Lordships said: "The authorities seem to their Lordships to fall far short of establishing the absolute right of the lineal descendants of the founder of the endowment, in a case like the present, in which that founder has not prescribed any line of devolution."

Powers of Court.—As regards the management of public religious or charitable trusts, the Privy Council in *Mahomed Ismail* v. *Ahmed Moolla* (*c*) said as follows:—

"It has further been contended that under the Mahomedan law the Court has no discretion in the matter [*i e*, appointment of trustees of the mosque in question] and that it must give effect to the rule laid down by the founder in all matters relating to the appointment and succession of trustees or mutawallis. Their Lordships cannot help thinking that the extreme proposition urged on behalf of the appellants is based on a misconception. The Mussalman law, like the English law, draws a wide distinction between public and private trusts Generally speaking, in case of a wakf or trust created for specific individuals or a determinate body of individuals, the Kazi, whose place in the British Indian system is taken by the Civil Court, has, in carrying the trust into execution to give effect so far as possible to the expressed wishes of the founder. With respect, however, to public religious or charitable trusts, of which a public mosque is a common and well-known example, the Kazi's discretion is very wide He may not depart from the intentions of the founder or from any rule fixed by him as to the *objects* of the benefaction; but as regards *management*, which must be governed by circumstances, he has complete discretion. He may defer to the wishes of the founder so far as they are conformable to changed conditions and circumstances, but his primary duty is to consider the interests of the general body of the public for whose benefit the trust is created He may in his judicial discretion vary any rule of management which he may find either not practicable or not in the best interests of the institution."

In the case cited above the dispute was as regards the management of a Sunni mosque in Rangoon. The Sunnis of Rangoon consist partly of Randherias and partly of Soorties. The mosque was founded by a Randheria, it was subsequently rebuilt and improved with money the bulk of which was supplied by Randherias, and the management had been for about 50 years in the hands of Randherias. It was not alleged that they had mismanaged the mosque. In these circumstances their Lordships held that all other conditions being equal, the Randheria section was entitled to manage and act as trustees of the mosque.

Vacancy may be filled up on application to Court.—Where there is a *vacancy* in the office of mutawalli, and there is no question of removing an existing trustee, the vacancy may be filled up by an application to the Court. It is not necessary to bring a suit under sec. 92 of the Civil Procedure Code (*d*).

Appointment by congregation.—In the case of an institution confined to a particular locality, such as a mosque or a graveyard, the appointment of a mutawalli may be made by the congregation of the locality (*e*).

(*b*) (1907) 34 I A. 46, 34 Cal 118
(*c*) (1916) 43 I.A. 127, 134, 43 Cal 1085, 1100, 35 I C 30. See also *Ibrahim Esmael* v. *Abdool Carrim* (1908) 35 I.A. 151, 164 [a case from Mauritius].
(*d*) *Abdul Alim* v *Abir Jan* (1917) 55 Cal. 1284, 110 I C. 416, ('28) A.C. 368.
(*e*) *Piran* v. *Abdool Karim* (1891) 19 Cal. 203; *Dilawar Husain* v. *Subhan Khan* ('31) A.O. 375.

166. Mutawalli may appoint successor on his death-bed.— If the founder and his executor are both dead, and there is no provision in the wakfnama for succession to the office, the mutawalli for the time being may appoint a successor *on his death-bed.* He cannot, however, do so while he is in health, as distinguished from death-illness (*f*).

A mutawalli may on his death-bed appoint even a stranger as his successor, he is not bound to appoint a member of the founder's family (*g*).

167. Office of mutawalli not hereditary.—The Mahomedan law does not recognize any right of inheritance to the office of mutawalli. But the office may become hereditary by custom, in which case the custom should be followed (*h*).

Where there is a vacancy in the office of mutawalli, and the Court is called upon to appoint a mutawalli, the Court will ordinarily appoint a member of the founder's family in preference to a stranger, and a senior member in preference to a junior member. But where no such appointment is to be made, and the suit is merely one to oust the defendant from the office of mutawalli, he *being already in possession and enjoyment of the office*, the Court will not oust the defendant from the office merely because the plaintiff is the elder brother and the defendant a younger brother, or because the plaintiff is a member of the founder's family and the defendant a stranger The reason is that according to Mahomedan law no right of inheritance attaches to the office of mutawalli. The office, however, may be hereditary by *custom.* Such a custom, however, is opposed to the general law, and must be supported by strict proof (*i*).

168. Power of mutawalli to sell or mortgage.—(*1*) A mutawalli has no power, without the permission of the Court, to mortgage, sell or exchange wakf property or any part thereof, unless he is expressly empowered by the deed of wakf to do so.

(*2*) Where property is mortgaged to secure a lease for mixed purposes some of which are valid and some invalid, the mortgage is void in its entirety (*j*).

Baillie, 605.

Retrospective confirmation.—It has been held in Calcutta that a mortgage of wakf property, though made without the previous sanction of the Court, may be *retrospectively* confirmed by the Court. A mortgage without the previous leave of the Court is not void *ab initio* (*k*).

Procedure for obtaining permission of Court.—It was held by the Calcutta High Court in a case decided in 1909 that a mutawalli, desirous of obtaining the sanction of the Court for a sale, mortgage, or lease of wakf property, must proceed by way of suit, and not by an application under the Trustees Act 27 of 1866, the reason given being

(*f*) Baillie, 604, *Piran* v *Abdool Karim* (1891) 19 Cal 203, 219, *Zoolekha Bibi* v. *Syed Zynul Abedin* (1904) 6 Bom. L.R. 1059.

(*g*) *Sheikh Amir Ali* v. *Syed Wazir* (1905) 9 C W.N. 876.

(*h*) Macnaghten, p 344, case X, *Sayad Abdula* v. *Sayad Zain* (1889) 13 Bom 555, 561, *Phatmabi* v. *Haji Musa* (1913) 38 Mad 491, 21 I C. 964; *Atimannessa* v. *Abdul Sobhan* (1916) 43 Cal 467, 32 I.C. 21.

(*i*) (1889) 13 Bom. 555, *supra*; (1913) 38 Mad 491, 21 I.C. 964, *supra*

(*j*) *Abdur Rahim* v *Narayan Das* (1923) 50 I.A. 84, 91, 50 Cal. 329, 71 I C 646, ('23) A. PC 44

(*k*) *Nimai Chand* v. *Golam Hossein* (1909) 37 Cal 179, 3 I C. 353, *Shailendranath* v *Hade Kaza* (1932) 59 Cal 586, 137 I C. 500, ('32) A.C. 356 P [where confirmation was refused].

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that that Act applies only to trusts in the English form constituted by persons of purely English domicile or by persons governed by the Indian Succession Act, and that it does not apply to Mahomedans (*l*). But this decision has been disapproved in recent cases where it was held that the sanction may be obtained on an application and that it is not necessary to bring a suit (*m*). It would seem that in Bombay leave may be obtained on an application under the Trustees Act (*n*).

Unauthorized alienation and limitation.—The law as regards the period of limitation for a suit to follow wakf property in the hands of a mutawalli, and to set aside unauthorized transfers of such property, and to recover possession thereof from the transferee, was amended and altered by Act I of 1928. The amendments consist of an addition of a para. to sec. 10 of the original Act [Limitation Act, 1908], being para. 2, and of the insertion of new articles, being arts. 48B, 134A, 134B and 134C. As to the law before the amendment, see the under-mentioned cases (*o*).

169. Power of mutawalli to grant leases.—A mutawalli has no power to grant a lease of wakf property, if it be agricultural, for a term exceeding three years, and, if non-agricultural, for a term exceeding one year—

(a) unless he has been expressly authorized by the deed of wakf to do so;

(b) or, where he has no such authority, unless he has obtained the leave of the Court to do so (*p*); such leave may be granted even if the founder has expressly prohibited a lease for a longer term.

Baillie, 606-607.

Lease and presumption of legal origin.—It follows from what has been stated above that a *permanent* lease cannot be granted without the leave of the Court. The leave required during the Mahomedan rule in India would be the leave of the kazi (judge). Where such a lease was granted of lands belonging to a wakf created before 1772, and there was no evidence of the permission of the kazi, it was held by the Privy Council that the lands having been proved to have been held by the tenant and his successors for a long series of years without any objection by any of the mutawallis, it should be presumed that the tenure was created with the permission of the kazi, and that the document granting the permission was lost (*q*).

Limitation.—See note to sec. 168 above.

170. Allowance of officers and servants.—The mutawalli has no power to increase the allowance of officers and servants attached to the endowment where the allowance is fixed by

(*l*) *Halima Khatun in re*, (1909) 37 Cal. 870, 7 I.C. 33.

(*m*) *Fakrunnessa* v. *District Judge* (1920) 47 Cal. 592, 56 I.C. 475; *Habibar* v. *Saidannessa* (1924) 51 Cal. 331, 77 I.C. 949, ('24) A.C. 473.

(*n*) See *In re Kahandas Narrandas* (1881) 5 Bom. 154, and *Lang* v. *Mooljt* (1919) 21 Bom. L.R. 1111, 54 I.C. 455, where it was held, on a petition for appointment of new trustees that the Act applied to Hindus in Bombay.

(*o*) *Vidya Varuthi* v. *Balusami* (1921) 48 I.A. 302, 44 Mad. 831, 65 I.C. 161, ('22) A.PC. 123; *Abdur Rahim* v. *Narayan Das* (1923) 50 I. A. 84, 50 Cal. 329, 71 I.C. 646, ('23) A.PC. 44 [mortgage]; *Subbaiya* v. *Mahamad* (1923) 50 I.A. 295, 46 Mad. 751, 74 I.C. 492, ('23) A.PC. 175 [sale in execution of decree].

(*p*) *Woozatunnessa, in the matter of* (1908) 36 Cal. 21.

(*q*) *Mahammad Mazaffar-al-Musavi* v. *Jabeda Khatun* (1930) 57 I.A. 125, 57 Cal. 1093, 123 I.C. 722, ('30) A.PC. 103.

the wakif (dedicator), but the Court may in a proper case increase such allowance.

Ameer Ali, 4th ed. I, 469.

171. Remuneration of mutawalli.—The founder may provide for the remuneration of the mutawalli. Such remuneration may be a fixed sum or it may be the residue of the income of the wakf property after defraying the expenses necessary for the maintenance of the wakf (*r*). If no provision is made by the founder for the remuneration of the mutawalli, the Court may fix a sum not exceeding one-tenth of the income of the wakf property (*s*). If the amount fixed by the founder is too small, the Court may increase the allowance, but it must not exceed the limit of one-tenth (*t*).

171A. Duty of mutawalli to file accounts: Mussalman Wakf Act, 1923.—The object of the Act of 1923 is 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. A mutawalli is bound under that Act (s. 5) to prepare a true statement of the accounts and to have it audited (s. 6), and to furnish the statement so audited to the District Court, or where the property is situated within the limits of the ordinary original civil jurisdiction of a High Court, to such Court subordinate to the High Court, as the local Government may designate. Omission to do so is punishable with a fine (s. 10). The Act does not apply to wakfs under which any benefit is *for the time being* claimable by the settlor for himself or his family or descendants [s. 2 (e)].

The Mussalman Wakf Act, 1923, does not prescribe any procedure for cases in which the holder of a property denies that it is wakf property. This raises the question whether the Court has power in such a case to hold an inquiry under the Act whether the property is wakf property or not. It has been held in Oudh (*u*), and Allahabad (*v*), that it has. The High Court of Patna has held that it has not (*w*), but that an inquiry may be made in such a case under sec. 5 of the Charitable and Religious Trusts Act, 1920 (*x*). The Act of 1920 is a general Act, and it applies to all "trusts" created "for a *public* purpose of a charitable or religious nature," whether they are created by Hindus or Mahomedans. It has been held in Oudh that the Act of 1920 does not apply to a wakf *partly* for a public purpose and *partly* for the benefit of the family (*y*).

(*r*) *Sayid Ismail* v. *Hamida Begum* (1921) 6 Pat. L J. 218, 233-234, 62 I C. 455, ('21) A.P. 125

(*s*) *Mohiuddin* v. *Sayiduddin* (1893) 20 Cal 810, 821.

(*t*) Ameer Ali, 4th ed. Vol. I, 469 *et seq.*

(*u*) *Mohammad Baqar* v. *Mohammad* ('32) A.O. 210, 138 I C 725.

(*v*) *Nasarullah* v. *Syed Wajid Ali* ('32) A.A. 362, 136 I C. 812.

(*w*) *Syed Ali* v. *Collector of Bhagalpore* ('27) A P 189, 101 I C. 207

(*x*) *Syed Ali* v. *Bibi Akhtari* (1931) 10 Pat. 506, 134 I C. 417, ('31) A P 354.

(*y*) *Shabbir Husain* v *Ashiq Husain* (1929) 4 Luck. 429, 117 I.C. 739, ('29) A.O 225.

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In Allahabad, it has been held that though the Court has power to inquire whether a property is wakf or not in proceedings taken under sec. 10 of the Act of 1923, it has no power under the Act to *order* the defaulting party to file accounts (*z*).

172. Removal of mutawalli.— A mutawalli may be removed by the Court on proof of misfeasance or breach of trust, or if it is found that he is otherwise unfit to hold the office, though the founder may have expressly directed that he should not be removed in any case. The *founder* has no power, after delivery of possession, to remove a mutawalli in any case, unless he has expressly reserved such a power in the deed of wakf (*a*).

Baillie, 608, Macnaghten, p. 79, sec 5. A founder, who is himself a *mutawalli*, may be removed by the Court on the ground of misconduct.

173. Office of mutawalli not transferable.—A mutawalli has no power to transfer the office to another, unless such a power is expressly conferred upon him by the founder. But he may appoint a deputy to assist him in the management of the endowed property (*b*).

173A. Attachment of office of mutawalli.—The office of mutawalli cannot be attached in execution of a personal decree against him (*c*).

173B. Limitation for suits against mutawallis.—No suit against a mutawalli or manager of wakf property, or against his legal representatives or assigns (not being assigns for valuable consideration), for the purpose of following in his or their hands such property or the proceeds thereof, or for an account of such property or proceeds, shall be barred by any length of time.

Sec. 10 of the Limitation Act, 1908, as amended by sec. 2 of Act I of 1929. As to limitation for suits where the property is transferred for a consideration, see arts. 48B, 134A, 134B and 134C, inserted by sec. 3 of Act I of 1929

Miscellaneous.

174. Public Mosques.—Every Mahomedan is entitled to enter a mosque dedicated to God, whatever may be the sect or school to which he belongs, and to perform his devotions according to the ritual of his own sect or school. But it is not certain whether a mosque *appropriated exclusively by the*

(*z*) *Nasrullah Khan* v. *Wajid Ali* (1930) 52 All 167, 118 I C 717, ('30) A A 81

(*a*) *Gulam Hussain* v. *Ali Ajam* (1868) 4 Mad. H C 44, *Advocate-General* v. *Fatima* (1870) 9 Bom. H C. 19, 23-24 [a Shia case], *Hidaitoonnissa* v. *Syud Afzul* (1870) 2 N.W.P. 422 [a Shia case].

(*b*) *Khajeh Salimullah* v. *Abul Khair* (1909) 37 Cal. 263, 277-279, 3 I C. 419, *Hajee Ali* v *Anjuman-i-Islamia* (1931) 12 Lah. 590, 596, 135 I C. 56, ('31) A L 379, *Wahid Ali* v. *Ashruff Hossain* (1882) 8 Cal. 732

(*c*) *Sarkum* v. *Rahaman Buksh* (1896) 24 Cal. 83, 91.

founder to any particular sect or school can be used by the followers of another sect or school (*d*).

In *Ata-Ullah*'s case (*e*), it was held by the High Court of Allahabad, that a mosque dedicated to God is for the use of all Mahomedans, and cannot lawfully be appropriated to the use of any particular sect. This ruling was referred to by their Lordships of the Privy Council in *Fazl Karim*'s case, but they did not express any opinion on it, stating that the facts of the case before them did not properly raise that question. In *Abdus Subhan*'s case, the High Court of Calcutta doubted whether a special dedication of a mosque to any particular sect of Mahomedans was in accordance with Mahomedan Ecclesiastical law. The view taken in *Ata-Ullah*'s case was followed by the High Court of Lahore in *Maula Bakhsh*'s case. The question therefore cannot be said to be quite settled. But when a mosque is not appropriated to a particular sect, there is no doubt that it may be used by any Mahomedan for the purpose of worship without distinction of sect. Thus a Shafei may join in a congregational worship, though the majority of worshippers in the congregation may be Hanafis; and he cannot be prevented from taking part in the service, because the Shafei practice is to pronounce *amin* (amen) in a loud voice and the Hanafi practice is to mutter the word softly. Similarly, Mahomedans of the *Amil-bil-hadis* or *Wahabi* sect have the right to worship in a mosque built primarily for the use of Hanafis and generally used by them, though their views in the matter of ritual differ from those of the Hanafis. But there is nothing in the Mahomedan law to entitle the members of a new sect to pray as a *separate* congregation behind an Imam chosen by themselves (*f*).

The Court will not, in framing a scheme under a decree by which it is declared that the members of a particular sect are entitled to use a particular mosque, vest in the religious head of the sect the power to exclude at his discretion any member of the community from joining in congregational prayers, or to prevent him from attending the mosque for prayers (*g*).

As to management of mosques, see note to sec. 165, "Powers of Court."

175. Sajjadanashin; Khankah.—A *sajjadanashin* is the head of a *khankah*, a Mahomedan institution analogous in many respects to a math where Hindu religious instruction is dispensed. He is the teacher of religious doctrine and rules of life, and the manager of the institution and the administrator of its charities, and has, ordinarily speaking, a larger right in the surplus income than a mutawalli (*h*). But this does not mean that in every case the whole income from a *khankah* is at the disposal of the *sajjadanashin*, at certain shrines the members of the founder's family other than the *sajjadanashin* are entitled to share in the surplus offerings which remain after payment of expenses (*i*).

(*d*) *Ata-Ullah* v. *Azim-Ullah* (1889) 12 All 494, *Jangu* v. *Ahmad-Ullah* (1889) 13 All. 419, *Fazl Karim* v *Maula Baksh* (1891) 18 Cal 448, 18 I A. 59, *Abdus Subhan* v. *Korbon Ali* (1908) 35 Cal. 294, *Maula Bakhsh* v. *Amir-ud-Din* (1920) 1 Lah 317, 57 I C. 1000.

(*e*) (1889) 12 All 494, *supra*

(*f*) *Hakim Khalil* v. *Malik Israfi* (1917) 2 Pat. L J. 108, 37 I.C. 302.

(*g*) *Akbarally* v *Mahomedally* (1932) 34 Bom. L R. 655, 138 I C. 810, ('32) A.B. 356.

(*h*) *Vidya Varuthi* v. *Balusami* (1921) 48 I A. 302, 312, 44 Mad. 831, 841, 65 I C 161, ('22) A PC 123, *Zooleka Bibi* v. *Syed Zynul Abedin* (1904) 6 Bom L R. 1058.

(*i*) *Muhammad Hamid* v. *Mian Mahmud* (1923) 50 I A. 92, 105-106, 4 Lah. 15, 29, 77 I C. 1009, ('22) A.PC. 384.

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The word "*sajjadanashin*" (spiritual superior) is derived from *sajjáda*, that is, the carpet used by Mahomedans for prayer, and *nashin*, that is, sitting. The *sajjadanashin* takes precedence on the carpet during prayers. The office of a mutawalli is a secular office; that of a *sajjadanashin* is a spiritual office, and he has certain spiritual functions to perform (*j*). A person may hold the office both of a mutawalli and a *sajjadanashin* at the same time; the Court, however, in framing a scheme under sec. 92 of the Code of Civil Procedure, may separate the two offices. A *sajjadanashin* may, like a mutawalli (s 167), appoint his own successor (*k*). A minor cannot be appointed *sajjadanashin* (*l*). A *sajjadanashin* may be removed for misconduct (*m*). Property given for the upkeep of buildings and schools connected with a *khankah* cannot be attached in execution of a personal decree against the *sajjadanashin* (*n*). In the absence of directions in the wakfnama the succession to the office of *sajjadanashin* is regulated by custom (*o*).

A provision in a wakfnama for *naubat nawaz* (drum-beaters) attached to a *khankah* is not invalid (*p*).

175A. Kazi.—The Mahomedan law does not regard the office of Kazi as hereditary (*q*). A claim to such a right, though supported by custom, is not one that can be recognised by a civil Court (*r*).

A Kazi may be appointed by the Government (*s*) or by some internal arrangement among the Mahomedans of each locality (*t*).

175B. Takia.—A *takia* is a religious institution recognized by law. A valid endowment may, therefore, be made to a *takia* (*u*).

"*Takia*" means literally a resting place. The word is now used to denote the place where a *fakir* (holy person) resides and imparts religious instruction to his disciples and others The mere fact, however, that a certain property is described in settlement papers as a *takia*, does not prove it to be wakf property (*v*).

176. Enactments relating to administration of wakfs.—The following is a list of enactments which provide for the protection, enforcement and administration of public endowments:—

(i) Official Trustees Act II of 1913.

(ii) Charitable Endowments Act VI of 1890, ss. 2, 3, 4, 5, 6 and 8.

(*j*) See *Piran* v *Abdool Karim* (1891) 19 Cal. 203, *Secretary of State* v. *Mohiuddin* (1900) 27 Cal. 674.

(*k*) See *Syed Shah* v *Syed Abi* (1932) 11 Pat. 288, 136 I C. 417, ('32) A P 33.

(*l*) (1891) 19 Cal. 203, 219-220, *supra*

(*m*) *Syed Shah* v. *Syed Abi* (1932) 11 Pat 288, 346-347, 136 I C 417, ('32) A.P 33 Contra *Ishtiaq* v *Syed Masood* (1909) 3 I C 508

(*n*) *Shah Mohammad* v *Mohammad* (1927) 2 Luck. 109. 100 I.C 241, ('27) A O 113.

(*o*) See *Ismailmiya* v. *Wahadans* (1912) 36 Bom. 308, 14 I.C 469, *Syed Shah* v. *Syed Abi* (1932) 11 Pat. 288, 136 I C. 417, ('32) A.P. 33.

(*p*) *Syed Shah* v. *Syed Abi* (1932) 11 Pat. 288, 323, 136 I C 417, ('32) A P 33.

(*q*) *Jamal Walad Ahmed* v *Jamal Walad Jallal* (1877) 1 Bom. 633, *Daudsha* v *Ismalsha* (1878) 3 Bom 72, *Baba Kakaji* v. *Nassaruddin* (1893) 18 Bom 103.

(*r*) *Kasamkhan* v. *Kazi Abdulla* (1926) 50 Bom. 133, 93 I C 135, ('26) A B 153

(*s*) See the Kazi's Act 12 of 1880, and *Sheik Ummar* v *Budan Khan* (1912) 37 Mad. 228, 25 I.C 898.

(*t*) See (1926) 50 Bom. 133, at p. 146, 93 I.C. 135, ('26) A B. 153, *supra*.

(*u*) *Hussain Shah* v *Gul Muhammad* (1925) 6 Lah 140, 88 I C. 816, ('25) A L. 420.

(*v*) *Shafiq-ud-Din* v *Mahbub* (1930) 11 Lah. 632, 125 I C. 893, ('30) A.L. 714

(iii) Religious Endowments Act XX of 1863, s. 14. S. 176

(iv) The Code of Civil Procedure, 1908, ss. 92-93.

If a suit is to obtain one or more of the reliefs mentioned in sec. 92 (1) of the Code in respect of a wakf for a "public purpose," it must be brought with the sanction of the Advocate-General as provided by that section, but not if the wakf is not for a "public purpose." A suit in respect of a private imambara is not a suit in respect of a wakf for a "public purpose" (*w*). Nor is a suit is respect of a wakf where the effect of the deed of wakf is to give the property in substance to the settlor's family (*x*). But a wakf for a mosque or a *khankah* is a wakf for a public purpose, and a suit in respect of it must be brought in accordance with the provisions of that section (*y*).

(v) Charitable and Religious Trusts Act XIV of 1920.

See notes to sec 171A.

(vi) Mussalman Wakf Act XLII of 1923.

See sec 171A.

(*w*) *Asghar Ali* v. *Delroos Banoo* (1877) 3 Cal. 324.

(*x*) *Muhammad Shafiq* v *Muhammad* (1929) 51 All 30, 111 I.C 93, ('28) A A 660.

(*y*) *Syed Shah* v *Syed Abi* (1932) 11 Pat 288, 344-345, 136 I C. 417, ('32) A P. 33

CHAPTER XIII.

PRE-EMPTION.

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177. Pre-emption.—The right of *shufaa* or pre-emption is a right which the owner of an immovable property possesses to acquire by purchase another immovable property which has been sold to another person.

Hedaya, 547; Baillie, 475.

It has been held in Calcutta (*z*) and Bombay (*a*), that the right of pre-emption is a right of *re-purchase* from the buyer. In Allahabad (*b*), it has been held that it is an *incident of property*.

178. Law of pre-emption not applied in the Madras Presidency.—The Mahomedan law of pre-emption is applied by the Courts of British India to Mahomedans as a matter of "justice, equity and good conscience," except in the Madras Presidency where the right of pre-emption is not recognized at all [unless by local custom as in Malabar (*c*)]. The reason given by the Madras High Court in the earliest case on the subject for refusing to recognize the right is that the law of pre-emption places a restriction upon the liberty to transfer property, and is therefore opposed to "justice, equity and good conscience." The right of pre-emption in that case was claimed on the ground of vicinage (*d*).

In a recent Rangoon case the parties were Madras Mahomedans by origin and the right of pre-emption was claimed on the ground of co-ownership. The High Court of Rangoon upheld the plaintiff's claim for pre-emption on the ground that the case was covered by sec. 13, sub-section (1), of the Burma Laws Act (*e*).

See notes to sec. 5 above.

179. Special Acts.—The law of pre-emption in the Punjab is regulated by the Punjab Laws Act, 1872, as amended by Act XII of 1878, and in Oudh by the Oudh Laws Act, 1876. These Acts apply to Mahomedans as well as non-Mahomedans, with the result that the rules of the Mahomedan law of pre-emption do not apply even to Mahomedans in those places except on the footing of local custom (*f*).

(*z*) *Kudratulla* v. *Mahini Mohan* (1869) 4 Beng L R 134
(*a*) *Hameidmiya* v *Benjamin* (1929) 53 Bom. 525, 532-533, 118 I. C 548, ('29) A B. 206.
(*b*) *Gobind Dayal* v *Inayatullah* (1885) 7 All. 775.
(*c*) *Krishna Menon* v *Kesavan* (1897) 20 Mad 305
(*d*) *Ibrahim* v. *Munı Mir Udin* (1870) 6 H M C. 26.
(*e*) *Syed Ebrahim* v. *Syed Khan* (1926) 4 Rang. 13, 95 I.C. 83, ('26) A.R 79.
(*f*) Wilson's Digest of Anglo-Muhammedan Law, s. 353.

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180. Pre-emption among Hindus.—The right of pre-emption is recognized *by custom* among Hindus who are either natives of, or are domiciled in (*g*), Behar (*h*), and certain parts of Gujarat, such as Surat, Broach and Godhra (*i*), and it is governed by the rules of the Mahomedan law of pre-emption except in so far as such rules are modified by such custom (*j*).

Where the existence of any such custom is generally known and judicially recognized, it is not necessary to assert or prove it (*k*).

The explanation lies in the fact that under the Mahomedan law, non-Mahomedans are as much entitled to exercise the right of pre-emption as Mahomedans: Baillie, 477. Accordingly, during the Mahomedan rule in India, claims for pre-emption were entertained by the Courts of the country, whether they were preferred by or against Hindus. In this wise, the Mahomedan law of pre-emption came to be the customary law of Behar and Gujarat. But the law of pre-emption as applied to Hindus in those places was the Hanafi law, the Mahomedan sovereigns of India being Sunnis of the Hanafi sect, and the same law is now applied to them in cases of pre-emption. But it is a necessary condition of the application of the Mahomedan law of pre-emption to Hindus in Behar and Gujarat that they should be either natives of, or domiciled in, those places. It is not enough that the party is a Hindu and owns immovable property in those places. Thus in a Calcutta case the right of pre-emption was denied to a Hindu who was a co-sharer of certain immovable property in Behar, but who was neither a native of, nor domiciled in, that place (*l*). See notes to sec. 180A below. As to a summary of the law in the Bombay Presidency, see the under-mentioned case (*m*).

180A. Pre-emption by contract.—(*1*) Rights of pre-emption may be created by contract between the sharers in a village (*n*).

(*2*) A Mahomedan vendor may agree with a Hindu purchaser that the Mahomedan law of pre-emption applying between the vendor and his co-sharer also a Mahomedan, should be applicable to the purchase. Where such a contract is entered into, and the vendor informs his co-sharer about it, and the co-sharer makes the "demands" as required by law [sec. 186], he is entitled to pre-emption against the purchaser, though the purchaser may be a Hindu (*o*).

(*g*) *Parsashth Nath* v. *Dhanai* (1905) 32 Cal. 988.
(*h*) *Fakir Rawot* v. *Emambaksh* (1863) Beng L R Sup Vol 35; *Jadu Lal* v. *Janki Koer* (1912) 39 Cal 915, 39 I A. 101, 15 I C 659.
(*i*) *Gordhandas* v. *Prankor* (1869) 6 B. H. C. A. C. 263, read with *Dahyabhai* v *Pandya Chunilal* (1914) 38 Bom 183, 185-188, 22 I C. 289, *Jagjivan* v *Kalidas* (1921) 45 Bom. 604, 60 I.C. 901, ('21) A B 188 [Surat—as to houses only, and not agricultural lands], *Gokaldas* v. *Partab* (1916) 18 Bom. L. R. 693, 35 I. C. 871 [Godhra], *Mahomed* v. *Narayan* (1916) 40 Bom. 358, 32 I. C. 933 [not in Khandesh]; *Sitaram* v. *Sayad Sirajul* (1917) 41 Bom. 636, 649, 42 I C. 32 [not in Kolaba], *Motilal* v. *Harilal* (1920) 44 Bom 696, 57 I C 590 [Ahmedabad]; *Ram Chand* v *Goswami* (1923) 45 All 501, 74 I. C. 379, ('23) A A 513 [Benares—in respect of houses only, not agricultural lands]
(*j*) *Chakauri* v. *Sundari* (1906) 28 All. 590; *Jai Kuar* v *Heera Lal* (1874) 7 N W. P. 1.
(*k*) *Jadu Lal* v *Janki Koer* (1908) 35 Cal. 575.
(*l*) *Parsashth Nath* v. *Dhanai* (1905) 32 Cal. 988.
(*m*) *Hamedmiya* v. *Benjamin* (1929) 53 Bom. 525, 540-542, 118 I. C 548, ('29) A. B. 206.
(*n*) *Dygambar Singh* v. *Ahmad* (1915) 37 All. 129, 141, 42 I A 10, 18, 28 I. C. 24.
(*o*) *Sitaram* v. *Sayad Sirajul* (1917) 41 Bom. 636, 650-651, 42 I. C. 32

Ss. 180A, 181

Introduction of the law of pre-emption into India.—In *Digambar Singh* v. *Ahmad* (*p*) their Lordships of the Privy Council said: "Pre-emption in village communities in British India had its origin in the Mahomedan law as to pre-emption, and was apparently unknown in India before the time of the Moghul rulers. In the course of time customs of pre-emption grew up and were adopted among village communities. In some cases the sharers in a village adopted or followed the rules of the Mahomedan law of pre-emption, and in such cases the custom of the village follows the rules of the Mahomedan law of pre-emption. In other cases, where a custom of pre-emption exists, each village community has a custom of pre-emption which varies from the Mahomedan law of pre-emption and is peculiar to the village in its provisions and its incidents. A custom of pre-emption was doubtless in all cases the result of agreement amongst the share-holders of the particular village, and may have been adopted in modern times and in villages which were first constituted in modern times. Rights of pre-emption have in some provinces been given by Acts of the Indian Legislature. Rights of pre-emption have also been created by contract between the sharers in a village. But in all cases the object is as far as possible to prevent strangers to a village from becoming sharers in the village. Rights of pre-emption when they exist are valuable rights, and when they depend upon a custom or upon a contract, the custom or the contract, as the case may be, must, if disputed, be proved."

181. Who may claim pre-emption.—The following three classes of persons and no others, are entitled to claim pre-emption, namely:—

(1) a co-sharer in the property (*q*) [*shafi-i-sharik*];

A *mukarraridar* (lessee in perpetuity) holding under a co-sharer has no right to pre-empt as against another co-sharer (*r*),

(2) a participator in immunities and appendages, such as a right of way or a right to discharge water (*s*) [*shafi-i-khalit*]; and

(3) owners of adjoining immovable property (*t*) [*shafi-i-jar*], but not their *tenants* (*u*), nor persons in possession of such property without any *lawful title* (*v*) [Baillie, 481].

The first class excludes the second, and the second excludes the third. But when there are two or more pre-emptors belonging to the same class, they are entitled to equal shares of the property in respect of which the right is claimed [Baillie, 500].

Exception.—The right of pre-emption on the ground of *vicinage* does not extend to estates of large magnitude, such as villages and zemindaris, but is confined to houses, gardens,

(*p*) (1915) 37 All. 129, 140-141, 42 I A. 10 18, 28 I C. 34.

(*q*) *Jadu Lal* v. *Janki Koer* (1912) 39 Cal. 915, 39 I.A 101, 15 I.C. 659, *Syed Ebrahim* v. *Syed Khan* (1926) 4 Rang. 13, 95 I.C. 83, ('26) A.R. 79 [co-heirs].

(*r*) *Mussammat Bibi Saleha* v. *Haji Amiruddin* (1929) 8 Pat. 251, 117 I.C. 865, ('29) A.P. 214.

(*s*) *Karim* v. *Priyo Lal* (1905) 28 All 127.

(*t*) *Aziz Ahmad* v *Nazir Ahmad* (1928) 50 All. 257, 103 I.C 897, ('27) A.A. 504; *Abdul Shakur* v. *Abdul Ghafur* (1910) 7 All L J. 641, 6 I. C. 358.

(*u*) *Gooman Sing* v *Tripool Sing* (1867) 8 W R. 437.

(*v*) *Beharee Ram* v. *Shoobhudra* (1868) 9 W.R. 455.

and small parcels of land (*w*). The right, however, may be claimed by a *co-sharer* (*x*). S. 181

[(a) *A*, who owns a piece of land, grants a building lease of the land to *B*. *B* builds a house on the land, and sells it to *C*. *A* is not entitled to pre-emption of the house, though the land on which it is built belongs to him, for he is not a co-sharer, nor a participator in the appendages of the house, nor an owner of *adjoining* property: *Pershadi Lal* v. *Irshad Ali* (1870) 2 N. W. P. 100.

(b) *A* owns a house which he sells to *B*. *M* owns a house towards the north of *A*'s house, and is entitled to a right of way through that house. *N* owns a house towards the south of *A*'s house, separated from *A*'s house by a party wall, and having a right of support from that wall. Both *M* and *N* claim pre-emption of the house sold to *B*. Here *M* is a participator in the appendages, while *N* is merely a neighbour, for the right of collateral support is not an appendage of property. *M* is therefore entitled to pre-emption in preference to *N*; see *Ranchoddas* v. *Jugaldas* (1899) 24 Bom. 414; *Karim* v. *Priyo Lal* (1905) 28 All. 127. It is immaterial that *M*'s right of way has not been perfected by prescription under the Easements Act. In such a matter the rules of Mahomedan law are to be applied, and that law does not prescribe any period which would give a person the right to enjoy an immunity, such as a right of way (*y*).

Note.—In the above illustration, the house owned by *M* is a dominant heritage, and the pre-empted house is a servient heritage, for *M* has a right of way through it. But *M* would not the less be a "participator in the appendages," if the pre-empted property was the dominant heritage and his property was the servient heritage: *Chand Khan* v. *Naimat Khan* (1869) 3 B. L. R. A. C. 296. And *M* would still be a "participator," if his house and the pre-empted house were both dominant tenements having a right of easement against a third property: *Mahatab Singh* v. *Ramtahal* (1868) 6 Beng. L. R. at p. 43 (foot-note).

(c) *A* is the owner of a plot of land. *B* and *C* own a piece of land adjoining it. The land owned by *B* and *C* is divided by a *kachcha* road. The public have a right of passage over that road, but the land along which the road runs belongs to *B* and *C*. *B* and *C* sell the land to *D*. *A* is entitled to pre-empt the whole of the land belonging to *B* and *C*, and not merely the portion on his side of the road: *Aziz Ahmad* v. *Nazir Ahmad* (1928) 50 All. 257, 103 I.C. 897, ('27) A.A. 504.]

Hedaya, 548-550; Baillie, 481-484, 500.

Right of pre-emption arises from ownership.—The right of pre-emption cannot be resisted on the ground that the pre-emptor was not in possession of his own property at the date of the suit. It is *ownership*, and not *possession*, that gives rise to the right (*z*).

Pre-emptors of same class.—When pre-emption is claimed by two or more persons on the ground of participation in a right of way, all the pre-emptors have equal rights, although one of them may be a contiguous neighbour (*a*). The reason is that the Mahomedan law does not recognize degrees of nearness in the same class of pre-emptors (*b*). But nearness may be recognized by custom (*c*).

(*w*) *Mahomed Hossein* v *Mohsin Ali* (1870) 6 B. L. R. 41, 50, *Abdul Rahim* v. *Kharag Singh* (1892) 15 All. 104, *Munna Lal* v. *Hajira Jan* (1910) 33 All 28, 7 I C. 404.

(*x*) *Sitaram* v. *Sayad Sirajul* (1917) 41 Bom 636, 652-653, 42 I C 32, *Jadu Lal* v. *Janki Koer* (1912) 39 Cal. 915, 39 I.A. 101, 15 I.C. 659 s[Mahal]; *Said-ud-din* v *Latif-un-nissa* (1922) 44 All. 114, 64 I.C. 456, ('22) A.A. 391 [Zemindari].

(*y*) *Baldeo* v. *Badri Nath* (1909) 31 All. 519, 2 I.C. 458.

(*z*) *Sakina Bibi* v. *Amiran* (1888) 10 All 472.

(*a*) *Karim Bakhsh* v. *Khuda Bakhsh* (1894) 16 All. 247. See also *Bachan Singh* v. *Byai Singh* (1926) 48 All. 221, 90 I. C. 238, ('26) A. A. 180.

(*b*) *Said-ud-din* v. *Latif-un-nissa* (1922) 44 All 114, 116-117, 64 I. C. 456, ('22) A. A 391, *Nageshar* v. *Ram Harakh* (1924) 46 All. 370, 79 I. C. 417, ('24) A. A. 541.

(*c*) *Dhanraj* v. *Rameshwar* (1923) 46 All. 170 78 I. C. 904, ('24) A. A. 227.

Ss. 181, 182

Tree with overhanging branches.—The fact that the branches of a tree project over the land of a neighbour does not give the owner of the tree any right as a *shafi-i-khalit* on a sale of that land (*d*).

Villages and zemindaris.—The reason why the right of pre-emption cannot be claimed when the contiguous estates are of large magnitude is that the law of pre-emption "was intended to prevent vexation to holders of *small* plots of land who might be annoyed by the introduction of a stranger among them" But this principle applies only when the right of pre-emption is claimed merely on the ground of *vicinage* It does not apply where the right is claimed by a *co-sharer*. See the section.

Female —A female is not precluded from maintaining a suit for pre-emption if she by law is entitled to inherit, even though it may be a widow's estate (*e*) But a female entitled to maintenance only is not entitled to pre-empt (*f*)

Sale by one of several co-sharers to another.—See sec. 185 below.

Shia law —By the Shia law the only persons entitled to the right of pre-emption are co-sharers; Baillie, II, 179, *Qurban* v. *Chote* (*g*), and that too if the number of co-sharers does not exceed two (*h*)

182. Sale alone gives rise to pre-emption.—The right of pre-emption arises only out of a valid (*i*), complete (*j*), and *bona fide* (*k*) sale. It does not arise out of gift (*hiba*), *sadaqah* (sec. 144), wakf, inheritance, bequest (*l*), or a lease even though in perpetuity (*m*). Nor does it arise out of a mortgage even though it may be by way of conditional sale (*n*); but the right will accrue, if the mortgage is foreclosed (*o*). An exchange of properties between two persons subject to an option to either of them to cancel the exchange and take back his property at any time during his life, stands on the same footing as a conditional sale; such an exchange does not extinguish the ownership in the property, and does not give rise to the right of pre-emption. But if one of them dies without cancelling the exchange, the transaction will mature into two sales and will give rise to the right of pre-emption (*p*). It has been held by the High Court of Allahabad that a transfer of property by a husband to his wife in lieu of dower is a sale, and is therefore subject to a claim for pre-emption (*q*). On the other hand, the Chief Court of Oudh has held that the transaction

(*d*) *Aziz Ahmad* v *Nazir Ahmad* (1928) 50 All 257, 103 I C 897, ('27) A A 504
(*e*) *Ishar Devi* v *Shro Ram* (1924) 5 Lah 435, 84 I. C. 484, ('25) A.L. 83
(*f*) *Karan Singh* v *Muhammad* (1885) 7 All. 860, *Bhupal* v *Mohan* (1897) 19 All. 324
(*g*) (1899) 22 All. 102.
(*h*) *Abbas Ali* v. *Maya Ram* (1888) 12 All 229, *Husain Bakhsh* v *Mahfuz-ul-Haq* (1925) 47 All. 944, 88 I. C. 972, ('25) A A 559.
(*i*) *Hedaya*, 560, Baillie, 475-477, *Najm-un-nissa* v *Ajaib Ali* (1900) 22 All 343 [where the price was not ascertained at the date of the contract]
(*j*) *Hedaya*, 560, Baillie, 475-477
(*k*) *Parsashth Nath* v *Dhanai* (1905) 32 Cal 989
(*l*) Baillie, 471
(*m*) *Dewanutulla* v *Kazem Molla* (1887) 15 Cal 184
(*n*) *Gurdial* v *Teknarayan* (1865) B L. R Sup. Vol 166
(*o*) *Batul Begam* v *Mansur Ali* (1901) 24 All. 17.
(*p*) *Muhammad Yunis* v *Muhammad* (1931) 53 All. 169, 130 I.C. 295; ('31) A A. 106
(*q*) *Fida Ali* v. *Muzaffar Ali* (1882) 5 All 65, *Nathu* v *Shadi* (1915) 37 All 522, 29 I C 495, doubted by Ameer Ali, 4th ed., Vol. I., p. 713

amounts to a *hiba-bil-iwaz*, and no claim for pre-emption can therefore arise (*r*). The right of pre-emption arises not only out of a private sale, but also out of a sale by the Court or a receiver (*s*). S. 182

Explanation I.—According to the Mahomedan law a sale is an exchange of property for property with the mutual consent of the parties, the exchange consisting in payment of price by the purchaser to the vendor and delivery of possession by the vendor to the purchaser. The execution of an instrument of sale is not necessary (*t*). According to the Transfer of Property Act, 1882, sec. 54, a sale of property of the value of Rs. 100 and upwards is not complete unless made by a registered instrument. It has been held by a Full Bench of the Allahabad High Court that, although the rules of the Mahomedan law of sale have been superseded by the provisions of the Transfer of Property Act, the question whether a sale is complete so as to give rise to the right of pre-emption is to be determined by applying the Mahomedan law, and if a complete sale is effected under that law as where the price is paid and possession is delivered, the right of pre-emption will arise, though the sale may not be complete under the Transfer of Property Act (*u*). On the other hand, some judges have expressed the opinion that the right of pre-emption does not arise until after registration as required by the Transfer of Property Act (*v*). In *Jadu Lal* v. *Janki Koer* (*w*), Brett, J., suggested that a solution of the problem was to be found in determining in each case what was the intention of the parties as to the date when the sale should be considered as complete. The rule suggested by Brett, J., was adopted by some judges in Calcutta (*x*) and Patna (*y*) and also by the High Court of Bombay in *Sitaram* v. *Sayad Sirajul* (*z*). The decision of the Bombay Court in *Sitaram*'s case was affirmed on appeal by the Judicial Committee. In the course of the judgment their Lordships of the Privy Council said: "You are to look at

(*r*) *Bashir Ahmad* v. *Musammat Zubaida* (1926) 1 Luck 83, 92 I C. 265, ('26) A O 186, *Chaudhri Talib Ali* v *Musammat Kaniz* (1927) 2 Luck 575, 102 I. C. 142, ('27) A O. 204.

(*s*) *Brij Narain* v *Kedar Nath* (1923) 45 All. 186, 71 I C. 836, ('23) A. A. 57

(*t*) *Hedaya*, 241, Macnaghten, 42, Baillie, 476, *Begam* v *Muhammad* (1894) 16 All 344, 346-348.

(*u*) *Begam* v. *Muhammad* (1894) 16 All 344 [F. B]; *Najm-un-nissa* v. *Ajaib Ali* (1900) 22 All. 343, *Janki* v. *Girjadat* (1885) 7 All 482 [F B.]

(*v*) Banerji, J., in (1894) 16 All. 344, 356 [F. B.] *supra* Carnduff, J., *Budhai* v. *Sonaullah* (1914) 41 Cal 943, 949, 23 I. C. 885, Mullick, J, in *Kheyali* v. *Mullick* (1916) 1 Pat. L. J, 174, 177-178, 34 I. C. 210.

(*w*) (1908) 35 Cal 575, 599, affirmd. in (1912) 39 Cal. 915, 39 I A 101, 15 I. C 659.

(*x*) Richardson, J., in (1914) 41 Cal. 943, 953, 23 I C 385, *supra*

(*y*) Roe, J, in (1916) 1 Pat L. J, 174, 179, 34 I C. 210, *supra*.

(*z*) (1917) 41 Bom 636, 651-652, 42 I C 32, followed in *Abdulla* v. *Ismail* (1921) 46 Bom. 302, 64 I. C. 913, ('22) A.B. 124.

S. 182 the intention of the parties (that is, the vendor and the vendee) in determining what system of law was to be taken as applying and what was to be taken to be the date of the sale with reference to which the ceremonies were performed" (*a*). In a later case the High Court of Bombay followed the Full Bench decision of the Allahabad High Court (*b*).

Explanation II.—It has been held by the High Court of Allahabad that the right of pre-emption arises not only when an out-and-out sale has been completed, but also when a complete contract of sale, without any option to the vendor, has been made (*c*).

The importance of the question now under consideration arises in this way. A Mahomedan is not entitled to pre-emption unless he makes the "demands" required by law (sec. 186). These demands should not be made before the sale is completed. They should be made after the sale is completed, and immediately after the pre-emptor hears of the sale, that is, a completed sale. Now a sale according to the Mahomedan law is completed by payment of the price by the purchaser to the vendor and by delivery of possession by the vendor to the purchaser. But a sale under the Transfer of Property Act is not complete unless made by a registered instrument. Hence the view taken by some Judges that the 'demands' should be made after *registration* of the sale-deed. But if this view be accepted, the vendor and vendee, with a view to defeat the pre-emptor, may not execute and register a sale-deed, and may complete the transaction by payment of price and delivery of possession so as to deprive the pre-emptor of the right of pre-emption. Hence the rule suggested by Brett, J., and approved by the Judicial Committee, namely, to ascertain in each case what was the intention of the parties as to the date when the sale should be considered as completed.

A agrees to sell his house to *B* in January 1918 for Rs. 300. On the 1st February 1918 *B* pays the purchase-money to *A*, and obtains possession of the house from *A*. The sale-deed is registered on the 1st March 1918. The pre-emptor comes to know of the payment of price and delivery of possession on the 15th February 1918, but he does not make the demands (sec. 186) until the 2nd March 1918, being the date on which he first comes to know of the registration. Is he entitled to pre-emption? (1) No, according to the Allahabad High Court (*d*), for the sale, according to that Court, became complete on payment of the price and delivery of possession, and the pre-emptor having failed to make the 'demands' on the 15th February when he first came to know of it, the right of pre-emption is lost by delay. (2) If the sale be regarded as complete on *registration*, the pre-emptor is entitled to pre-emption, for he made the 'demands' when he first came to know of the registration. In fact, if he had made the 'demands' *before* registration, they would have been premature, and he would not have been entitled to pre-emption unless he made the 'demands' again immediately *after* he came to know of registration. (3) According to the rule now laid down by the Judicial Committee, the intention of the parties is the sole guide. Therefore, if in the case put above, possession was not given and no part of the price was paid till registration, the intention of the parties would be taken to be that they did not regard the sale to be complete till registration, and the 'demands' in such a case should be made immediately after the

(*a*) *Sitaram* v. *Jaud Hasan* (1921) 45 Bom 1056, 48 I. A. 475, 64 I. C. 826, ('23) A. PC. 41.
(*b*) *Abdulla* v. *Ismail* (1922) 46 Bom. 302, 64 I. C 913, ('22) A. B. 124.
(*c*) *Zamani Begam* v. *Khan Muhammad* (1924) 46 All 142, 81 I. C. 586, ('24) A. A. 251, follg *Begam* v. *Muhammad* (1894) 16 All. 344, 347 [F.B.],
(*d*) (1894) 16 All. 344 [F.B.], *supra*.

pre-emptor hears of the registration (*e*). But if the contract of sale says, "I have agreed to sell you my share for Rs. 29,000, Rs. 1,000 paid down, and the remainder payable in two quick instalments, and that a formal deed of sale shall be executed and registered," and the agreement further contemplates a notice of the transaction to be given by the vendor to his co-sharer on the same day, and provides that if the co-sharer elects to purchase the vendor's share, the vendor should immediately return the Rs. 1,000 to the purchaser, it is the date of the agreement that is to be taken as the date of the sale and it is with reference to that date that the co-sharer (pre-emptor) should perform the necessary ceremonies (*f*).

Lease in perpetuity.—A lease even though in perpetuity does not give rise to the right of pre-emption. The Allahabad High Court has, however, held that a transaction, though in form a lease, may in truth and substance be a sale, as where the property is of the value of Rs. 2,000 and a lease is given for 99 years under which Rs. 1,950 are paid as premium and Re. 1 is reserved as annual rent. In such a case the pre-emptor is entitled to pre-emption, though the transaction is in form a lease. The Mahomedan law does not recognize the device of dressing up a transaction of sale in the garb of a lease so as to defeat the right of pre-emption (*g*). It is difficult to see how on the facts stated above, the lease could be regarded as a sale. See sec. 192 below.

183. Ground of pre-emption must continue until the decree is passed.—The right in which pre-emption is claimed—whether it be co-ownership, or participation in appendages, or vicinage—must exist not only at the time of sale, but at the date of the suit for pre-emption (*h*), and it must continue up to the time the decree is passed (*i*). But it is not necessary that the right should be subsisting at the date of the execution of the decree (*j*) or at the date of the decree of the appellate Court (*k*). The reason is that the crucial date in these cases is the date of the decree of the Court of first instance (*l*).

Thus if a plaintiff, who claims pre-emption as owner of a contiguous property, sells his property to another person *after institution of the suit*, he will not be entitled to a *decree*, for he does not then belong to any of the three classes of persons to whom the right of pre-emption is given by law: see sec. 181 above. But once the *decree* is passed, the plaintiff does not forfeit the right of being put into possession of the pre-empted property in execution of the decree, although he may have alienated the property *before execution* or alienated it before the date of the decree of the appellate Court. It need hardly be mentioned that a plaintiff does not forfeit his right of pre-emption merely because he had on a previous occasion mortgaged his own share on which his right of pre-emption depends (*m*).

(*e*) *Jadu Lal* v. *Janki Koer* (1908) 35 Cal. 575; *Budhai* v. *Sonaullah* (1914) 41 Cal. 943, 950, 954, 23 I.C. 385.

(*f*) *Sitaram* v. *Jiaul Hasan* (1921) 45 Bom. 1056, 48 I. A. 475, 64 I C 826, ('23) A. PC. 41.

(*g*) *Muhammad* v. *Muhammad* (1918) 40 All. 322, 44 I.C. 227.

(*h*) *Janki Prasad* v. *Ishar Das* (1899) 21 All. 374.

(*i*) *Ram Gopal* v. *Piari Lal* (1899) 21 All. 441, *Tafazzul* v. *Than Singh* (1910) 32 All. 567, 6 I. C. 426; *Nuri Mian* v. *Ambica Singh* (1917) 44 Cal. 47, 34 I. C. 869.

(*j*) *Ram Sahai* v *Gaya* (1884) 7 All 107.

(*k*) *Baldeo Misir* v *Ram Lagan* (1923) 45 All. 709, 77 I C. 694, ('24) A.A 82; *Umrao* v. *Lachhman* (1924) 46 All. 321, 79 I. C. 217, ('24) A A. 448.

(*l*) (1923) 45 All. 709, 710, 77 I. C. 694, ('24) A A. 82, *supra*; *Haji Sultan* v. *Masitu* (1926) 48 All. 689, 96 I. C. 744, ('26) A. A. 749, *Sri Thakur Radhika* v. *Bohra Shaam* (1923) 45 All. 561, 74 I. C. 382, ('23) A.A. 526.

(*m*) *Ujagar Lal* v. *Jia Lal* (1896) 18 All. 382.

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184. Doubt as to whether buyer should be a Mahomedan.—According to the Allahabad (*n*) and Patna (*o*) decisions, it is not necessary, to enforce the right of pre-emption, that the buyer should be a Mahomedan. According to the Calcutta (*p*) and Bombay (*q*) decisions, the buyer must be a Mahomedan except in the cases mentioned in secs. 180 and 180A. All the three Courts, however, are agreed that the seller and the pre-emptor should both be Mahomedans (*r*).

There are no Madras decisions, because in Madras the law of pre-emption is not applied even as between Mahomedans [s. 178].

The vendor should be a Mahomedan. Hence no right of pre-emption can be claimed by a Mahomedan when the vendor is a Hindu or a European, though the vendee may be a Mahomedan.

The pre-emptor also should be a Mahomedan, the reason being that if he is a Mahomedan and subsequently wants to sell the pre-empted property, he is bound to offer it to his Mahomedan neighbours or partners before he can sell it to a stranger. But a non-Mahomedan is not subject to any such obligation, and he can sell it to any one he likes. The law of pre-emption contemplates both a right and an obligation, and if a non-Mahomedan were allowed to pre-empt, it would be allowing him the right without the corresponding obligation. This is the principle underlying the decision of the Allahabad High Court in *Qurban*'s case (*s*), where it was held that a Shia Mahomedan could not maintain a claim for pre-emption based on the ground of *vicinage* when the vendor is a Sunni. The decision was based on the ground that by the Shia law a *neighbour* as such has no right of pre-emption, and that if he were allowed to pre-empt, he might sell his house to any one he liked, and his Sunni neighbours could not successfully assert any right of pre-emption against him.

The vendee also, according to the Calcutta High Court, should be a Mahomedan Hence a Mahomedan cannot obtain pre-emption of property sold by a Mahomedan to a *Hindu*. According to that decision, the right of pre-emption is not a right that attaches to the land, but is merely a personal right. If it were a right attaching to the *land*, it might be claimed, even against a Hindu or any other non-Mahomedan purchaser. "We cannot, . . . in justice, equity and good conscience, decide that a Hindu purchaser in a district in which the custom of pre-emption does not prevail as amongst Hindus, is bound by the Mahomedan law, which is not his law, to give up what he has purchased to a Mahomedan pre-emptor." On the other hand, it has been held by the Allahabad High Court that it is not necessary that the vendee should be a Mahomedan and that pre-emption can therefore be claimed even against a *Hindu* purchaser. According to that Court, a Mahomedan owner of property is under an obligation imposed by the Mahomedan law to offer the property to his Mahomedan neighbours or partners before he can sell it to a stranger, and this is an incident of his property which attaches to it whether the vendee be a Mahomedan or a non-Mahomedan. The

(*n*) *Gobind Dayal* v. *Inayatullah* (1885) 7 All 775, *Abbas Ali* v. *Maya Ram* (1888) 12 All 229

(*o*) *Achutananda* v. *Biki* (1922) 1 Pat. 578, 69 I.C. 666, ('22) A P. 601.

(*p*) *Kudratulla* v. *Mahini Mohan* (1869) 4 Beng. L. R 134.

(*q*) *Sitaram* v *Sayad Sirajul* (1917) 41 Bom 636, 649-650, 42 I C. 32, *Mahomed* v. *Narayan* (1916) 40 Bom. 358, 32 I. C. 933; *Hamedmiya* v *Benjamin* (1929) 53 Bom. 525, 118 I.C. 548, ('29) A. B. 206 [buyer a Bene Israel].

(*r*) *Dwarka Das* v. *Husain Bakhsh* (1878) 1 All. 564 (Hindu vendor) *Poorno Singh* v. *Hurrychurn* (1872) 10 B. L. R. 117 (European vendor); *Qurban* v *Chote* (1899) 22 All 102 (Shia pre-emptor against Sunni vendor and Sunni vendee).

(*s*) (1899) 22 All. 102, *supra*.

Bombay High Court has adopted the view taken by the High Court of Calcutta. According to the Calcutta and Bombay High Courts, the right of pre-emption may be enforced against a Hindu vendee, in those cases only where the right is recognized by custom as stated in sec. 180, or is created by contract as stated in sec. 180A.

185. Pre-emption in the case of a sale to a shafi.—Where there are two or more *shafis* of the same class, and the sale is made by one of them to another, the other *shafis* are entitled to claim pre-emption of their share against the *shafi* purchaser (*t*). Similarly, where the sale is made to a *shafi* and a stranger, the other *shafis* are entitled to claim pre-emption of their share against the *shafi*-purchaser and the stranger (*u*).

[(a) *A*, *B* and *C* are co-sharers in certain property. *A* sells his share to *B*. *C* is entitled to claim pre-emption of one-half of the property: *Enatullah* v. *Kowsher Ali* (1927) 54 Cal. 266, 98 I C. 220, ('26) A.C. 1153.

(b) *A*, *B*, *C* and *D* own each a house situate in a private lane common to all the four houses. *A* sells his house to *B*. Here *B*, *C* and *D* are "participators in the appendages" of the house sold, the appendage being the right of way. *C* and *D* are each entitled to claim pre-emption of a third of the house: *Amir Hasan* v. *Rahim Bakhsh* (1897) 19 All. 466.

(c) *A*, *B* and *C* are co-sharers in certain property. *A* sells his share to *B* and *S*. *C* is entitled to claim pre-emption of one-half of the property. *Saligram* v. *Raghubardyal* (1887) 15 Cal. 224.]

It was at one time held by the High Court of Calcutta (*v*), that where there are several co-sharers, and one of them sells his share to another, none of the other co-sharers is entitled to claim pre-emption against the purchaser. The ground of the decision was thus stated by Garth, C.J.: "The object of the rule (of pre-emption) . . . is to prevent the inconvenience which may result to families and communities from the introduction of a disagreeable stranger as a co-parcener or near neighbour. But it is obvious, that no such annoyance can result from a sale by one co-parcener to another." A different view was taken by the High Courts of Allahabad and Bombay, one of the grounds of the decisions being that the rule laid down in the *Hedaya*, that "when there is a plurality of persons entitled to the privilege of *shuffa*, the right of all is equal," applies as much when the sale is made to a *shafi* as when it is made to a stranger. A special Bench of the Calcutta High Court has now taken the same view as that taken by the Allahabad and Bombay High Courts (*w*).

186. Demands for pre-emption.—No person is entitled to the right of pre-emption unless—

(1) he has declared his intention to assert the right *immediately* on receiving information of the sale. This

(*t*) *Amir Hasan* v. *Rahim Bakhsh* (1897) 19 All. 466, *Abdullah* v. *Amanat-ullah* (1899) 21 All 292, *Muhammad Yakub* v *Kanhai Lal* (1922) 44 All. 83, 64 I C. 673, ('22) A A. 157, dissenting on this point from *Baldeo* v. *Badri Nath* (1909) 31 All 519, *Zia-ud-din* v. *Abul* (1923) 45 All 487, 77 I.C. 27, ('23) A.A. 520, *Nadir Husain* v. *Sadiq Husain* (1925) 47 All. 324, 326, 86 I.C. 589, ('25) A.A. 361, *Vithaldas* v. *Jametram* (1920), 44 Bom. 887, 58 I C. 279 [F B], *Enatullah* v. *Kowsher Ali* (1927) 54 Cal. 266, 98 I C. 220, ('26) A C. 1153, overruling *Lalla Nowbut Lall* v *Lalla Jewan Lall* (1878) 4 Cal 831.

(*u*) *Saligram* v. *Raghubardyal* (1885), 15 Cal. 224

(*v*) (1878) 4 Cal. 831, *supra*.

(*w*) (1927) 54 Cal. 266, 98 I.C. 220, '26) A C. 1153, *supra*.

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formality is called *talab-i-mowasibat* (literally, demand of jumping, that is, immediate demand); and unless

(2) he has with the least practicable delay affirmed the intention, referring expressly to the fact that the *talab-i-mowasibat* had already been made (*x*), and made a formal demand—

(a) either in the presence of the buyer, or the seller, or on the premises which are the subject of sale (*y*), and

(b) in the presence at least of two witnesses (*z*). This formality is called *talab-i-ishhad* (demand with invocation of witnesses).

See note (3) below.

Explanation I.—The *talab-i-mowasibat* should be made after the sale is completed. It is of no effect if it is made before the completion of the sale [s. 182].

Explanation II.—It is not necessary that the *talab-i-mowasibat* or *talab-i-ishhad* should be made by the pre-emptor in person. It is sufficient if it is made by a manager or a person *previously* authorized by the pre-emptor to make the demand (*a*). A demand made by the father or brother of the pre-emptor is not sufficient, even if he has a right to pre-empt, unless he had been previously authorized to make the demand (*b*). When the pre-emptor is at a distance, the demand may be made by means of a letter (*c*).

Explanation III.—If the *talab-i-ishhad* is made in the presence of the buyer, it is not necessary that the buyer should then be actually in possession of the property in respect of which pre-emption is claimed (*d*).

Explanation IV.—When two or more persons claim to pre-empt, each one of them should make the demands, unless one of them has also been authorized by the others to do so,

(*x*) *Rujjub Ali* v. *Chundi Churn* (1890) 17 Cal 543; *Mubarak Husain* v. *Kaniz Bano* (1904) 27 All. 160; *Jadu Lal* v. *Janki Koer* (1912) 39 Cal. 915, 923, 39 I.A. 101, 108, 15 I C. 659, affmg. (1908) 35 Cal. 575; *Sadiq Ali* v. *Abdul* (1923) 45 All. 290, 71 I.C. 460, ('23) A.A. 251.

(*y*) *Kulsum Bibi* v. *Faqir Muhammad* (1896) 18 All. 298; *Muhammad Usman* v. *Muhammad Abdul* (1912) 34 All. 1, 11 I.C. 319.

(*z*) *Imam-ud-din* v. *Muhammad* (1930) 52 All. 1005, 133 I.C 304, ('31) A.A. 736, dissenting from *Ganga Prasad* v. *Ajudhia* (1905) 28 All. 24.

(*a*) *Avadi Begam* v. *Inam Begam* (1877) 1 All. 521; *Ali Muhammad* v. *Muhammad* (1896) 18 All. 309; *Jadu Lal* v *Janki Koer* (1912) 39 Cal. 915, 39 I A 101, 15 I C 659; *Harihar* v. *Sheo Prasad* (1884) 7 All. 41 [pre-emptor bound by acts and omissions of his agents], *Shamsuddin* v. *Allauddin* ('32) A A. 138, 134 I.C. 462 [must be *previously* authorized].

(*b*) *Shamsuddin* v. *Allauddin* ('32) A. A. 138, 134 I.C. 462.

(*c*) *Syed Wajid* v. *Lala Hanuman* (1869) 4 Beng. L.R., A.C. 139; *Muhammad* v. *Muhammad* (1916) 38 All. 201, 33 I.C. 349.

(*d*) *Ali Muhammad* v. *Muhammad* (1896) 18 All. 309.

and he makes the demands on their behalf also. If a suit is brought by several persons claiming to pre-empt, and only one of them has made the demand on his own behalf, the suit will proceed as regards him, but it must be dismissed as to the rest (*e*). S. 186

Where there are two or more buyers, and the *talab-i-ishhad* is not made in the presence of the vendor or on the property sought to be pre-empted, the demand must be made to all the buyers (*f*). If it is made only to some of them, the shares only of those buyers can be pre-empted (*g*) [s. 191].

Explanation V.—No particular formula is necessary either for the performance of *talab-i-mowasibat* or *talab-i-ishhad* so long as the claim is unequivocally asserted (*h*).

Hedaya, 550, 551; Baillie, 487-490.

(1) The *talab-i-mowasibat* is spoken of as the first demand, and the *talab-i-ishhad* as the second demand. The third demand consists of the institution of the suit for pre-emption. The *talab-i-mowasibat* and the *talab-i-ishhad* are conditions precedent to the exercise of the right of pre-emption (*i*). The *talab-i-ishhad* is as indispensable as the *talab-i-mowasibat* (*j*). It is stated in the *Hedaya* (p. 550) that "the right of *shuffa* (pre-emption) is but a feeble right, as it is the dispossessing of another of his property merely in order to prevent apprehended inconveniences" (see notes to s. 185 above). Hence the formalities must be strictly observed, and there must be a clear proof of their observance (*k*). A petition by the pre-emptor to the sub-registrar praying that the registration of the sale-deed may be stayed cannot be treated as a *talab-i-mowasibat*, there being no assertion of the right of pre-emption (*l*). The *talab-i-mowasibat* should be made as soon as the fact of the sale is known to the claimant. Any unreasonable or unnecessary delay will be construed as an election not to pre-empt (*m*). A delay of twelve hours was held in an Allahabad case to be too long (*n*). And it was held in a Calcutta case that where the pre-emptor, on hearing of the sale, "entered his house, opened his chest, took out Rs. 47-4" (evidently to tender the amount to the buyer), and then performed the *talab-i-mowasibat*, he was not entitled to claim pre-emption, for the delay was quite unnecessary (*o*) [s. 187].

(2) It is not necessary to the validity of *talab-i-mowasibat* that it should be performed in the presence of witnesses. It is enough if the pre-emptor makes known his intention in some way. But it is of the essence of *talab-i-ishhad* that it should be performed before witnesses (*p*). It is also necessary when the *talab-i-ishhad* is made that the pre-emptor should refer expressly to the fact of the *talab-i-mowasibat* having been previously made (*q*).

(*e*) *Shameuddin* v *Allauddin* ('32) A.A. 138, 134 I.C. 462.
(*f*) *Aiman* v. *Ali Husain* (1923) 45 All. 449, 73 I C. 1029, ('23) A.A. 355.
(*g*) *Muhammad Askari* v. *Rahmatullah* (1927) 49 All. 716, 105 I.C. 771, ('27) A.A. 548
(*h*) *Jog Deb* v. *Mahomed* (1905) 32 Cal. 982; *Muhammad Nazir* v. *Makhdum* (1912) 34 All. 53, 11 I.C. 737.
(*i*) *Deonandan Prashad* v. *Ramdhari* (1917) 44 Cal. 675, 683, 44 I.A. 80, 82, 39 I.C. 958
(*j*) *Muhammad* v. *Madho Prasad* (1917) 39 All. 133, 35 I C. 911.
(*k*) *Jadu Sing* v *Rajkumar* (1870) 4 B.L.R. A.C. 171.
(*l*) *Kheyali* v. *Mullick* (1916) 1 Pat. L.J. 174, 34 I.C. 210
(*m*) *Baijnath* v. *Ramdhari* (1908) 35 Cal. 402, 35 I.A. 60.
(*n*) *Ali Muhammad* v. *Taj Muhammad* (1876) 1 All. 283.
(*o*) *Jarfan Khan* v. *Jabbar Meah* (1884) 10 Cal. 383.
(*p*) *Jadu Sing* v. *Rajkumar* (1870) 4 B.L.R. A.C. 171.
(*q*) *Mubarak Husain* v. *Kaniz Bano* (1904) 27 All. 160; *Sadiq Ali* v. *Abdul* (1923) 45 All. 290, 71 I C. 460, ('23) A.A. 251.

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(3) *Talab-i-ishhad.*—In *Ganga Prasad* v. *Ajudhia* (*r*) the High Court of Allahabad held that to constitute a demand a valid *talab-i-ishhad* it was necessary that the witnesses should have been specifically called upon to bear witness to the demand being made. To this an exception was introduced in a later case (*s*), when it was held that where the pre-emptor has made the *talab-i-mowasibat* in the presence of witnesses, and has asked them to accompany him to the buyer and made the *talab-i-ishhad* in their presence, their attention being drawn to it, the mere omission to ask them in express terms to bear testimony to the demand being made is not fatal. In a still later case (*t*), it was held, dissenting from *Ganga Prasad* v. *Ajudhia*, that it was not necessary specifically to ask the witnesses to bear witness to the demand, and that it was sufficient if the demand was made in the presence of witnesses who heard the demand being made; but that the demand should have been made in the presence at least of two witnesses though both need not be called as witnesses in Court.

(4) The *talab-i-ishhad* may be combined with the *talab-i-mowasibat*. Thus if at the time of *talab-i-mowasibat*, the pre-emptor has an opportunity of invoking witnesses *in the presence of the seller or the buyer or on the premises* to attest the *talab-i-mowasibat*, and witnesses are in fact invoked to attest it, it will suffice for both the *talabs* (demands). This, however, is the only case in which the *talab-i-ishhad* may be combined with the *talab-i-mowasibat* (*u*).

(5) The *talab-i-mowasibat* may be made by using some such words as "I do claim my *shuffa*" (right of pre-emption): *Hedaya*, 551. The *talab-i-ishhad* may be made by the pre-emptor saying, "such a person has bought such a house of which I am the *shafee*; I have already claimed my privilege of *shuffa*, and now again claim it. be therefore witness thereof" · *Hedaya*, 551. But no particular form is necessary [*Hedaya*, 551]; what the law requires is that the demand must be to that effect and no more. If there are several purchasers, it is not necessary that the names of *all* the purchasers should be mentioned either at the time of the first or the second demand. Thus where a pre-emptor claimed the right of pre-emption against five purchasers, and the form used was "whereas Jagdeb Singh *and others* have purchased the property and I have claimed pre-emption," etc., and this was proclaimed in the presence of two of the purchasers and at the empty doors of the other three, it was held that the demand was properly made, and that there was nothing equivocal in the formulation of the claim (*v*).

(6) Explanation I.—See sec. 182, Expl. II and notes thereto.

186A. Transfer of property by purchaser after demands.—When once a pre-emptor has made the "demands" required by law [sec. 186], a transfer by the purchaser of the property sought to be pre-empted will not affect the rights of the pre-emptor, and the pre-emptor is not bound to make fresh "demands" against the transferee (*w*).

187. Tender of price not essential.—It is not necessary to the validity of a claim of pre-emption that the pre-emptor should tender the price at the time of the *talab-i-ishhad* [sec. 186]; it is sufficient that he should then declare his readiness

(*r*) (1904) 28 All. 24.
(*s*) *Ahmad Hakim* v. *Muhammad* (1927) 49 All 385, 100 I.C. 39, ('27) A A 289.
(*t*) *Imam-ud-din* v. *Muhammad* (1930) 52 All 1005, 133 I.C. 304, ('31) A A. 736.
(*u*) Baillie, 490, *Nathu* v. *Shadi* (1915) 37 All 522, 29 I C. 495, *Rujjub Ali* v. *Chundi Churn* (1890) 17 Cal. 543 [F.B.]
(*v*) *Jog Deb* v. *Mahomed* (1905) 32 Cal. 982.
(*w*) *Muhammad Abdul* v. *Muhammad* (1924) 46 All. 889, 79 I C. 1053, ('24) A.A. 806.

and willingness to pay the price stated in the deed of sale, or, if he has reasonable grounds to believe that the price named in the sale deed is fictitious, such sum as the Court determines to have been actually paid by the buyer (*x*).

188. Death of pre-emptor.—If the pre-emptor dies pending the suit for pre-emption, the suit may be continued by his legal representatives.

A sues *B* for pre-emption. *A* dies *before* obtaining a decree in the suit. According to the Hanafi law, the right to sue is extinguished and the suit cannot be prosecuted by *A*'s *heirs* (*y*) According to the Shia and the Shafei law, the right to sue is not extinguished, and the suit may be continued by *A*'s *heirs*: Baillie, II, 190; *Hedaya*, 561. According to the Probate and Administration Act, 1881, sec. 89 [now Indian Succession Act 39 of 1925, sec. 306], the right is not extinguished, and the suit may be continued by *A*'s legal representative, that is, his *executor or administrator*. That Act applies to Mahomedans, and the effect of a recent Bombay decision is that whatever be the sect to which the parties belong, the rule applicable to cases of this kind is that laid down in the said Act, that is to say, if *A* dies leaving a will, the suit may be continued by his *executor*, and if he dies intestate it may be continued by his heirs *on obtaining letters of administration* (*z*).

189. Right lost by acquiescence.—The right of pre-emption is lost if the pre-emptor enters into a compromise with the buyer, or if he otherwise acquiesces in the sale (*a*). But a mere offer by a pre-emptor to purchase from the buyer at the sale-price, made with the object of avoiding litigation, does not amount to acquiescence (*b*).

189A. Right lost by joinder of plaintiffs not entitled to pre-empt.—If a plaintiff who has a right of pre-emption joins with himself as co-plaintiff a person who has no such right he is not entitled to claim pre-emption, and the suit must be dismissed. But it is not so where he joins with himself as co-plaintiff a person who, but for his failure to make the necessary demands [sec. 186], would have been entitled to pre-empt (*c*).

190. Right not lost by refusal to buy before sale.—As the right of pre-emption accrues *after* the completion of sale,

(*x*) Baillie, 494, *Heera Lall* v *Moorut Lall* (1869) 11 W R 275; *Lajja Prasad* v *Debi Prasad* (1880) 3 All 236; *Nundo Pershad* v *Gopal* (1884) 10 Cal. 1008, *Karim Bakhsh* v *Khuda Bakhsh* (1894) 16 All 247, 248. See *Jagat Singh* v *Baldeo Prasad* (1921) 43 All. 137, 59 I C. 679, ('21) A A. 290 [sale to mortgagee].

(*y*) Baillie, 505-506, *Muhammad Husain* v *Nuamatun-nissa* (1897) 20 All. 88.

(*z*) *Sayyad Jaul Hussan* v. *Sitaram* (1912) 36 Bom 144, 12 I C 720 [Shafei]; *Sitaram* v *Sayad Swajul* (1917) 41 Bom 636, 653, 42 I C. 32, affd on app. to P.C. in *Sitaram* v *Jaul Hasan* (1921) 45 Bom 1056, 1061, 48 I.A 475, 479, 64 I C 826, ('23) A.PC. 41 See also Code of Civil Procedure, 1908, O. 22, r. 1.

(*a*) *Habib-un-nissa* v. *Barkat Ali* (1886) 8 All. 275, *Amir Haidar* v. *Ali Ahmad* (1925) 47 All 635, 88 I C 234, ('25) A A 424 [minor]

(*b*) *Muhammad Nasir-ud-din* v. *Abul Hasan* (1894) 16 All. 300, *Muhammad Yunus* v *Muhammad Yusuf* (1897) 19 All 384.

(*c*) *Dwarka Singh* v. *Sheo Shankar* (1926) 43 All 810, 98 I.C 1007, ('27) A A. 168, *Mahanth Tokh Narayan* v. *Ram Rachhya* (1926) 5 Pat. 96, 90 I C. 806, ('25) A P. 743.

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it is not lost because *before* the completion of sale the property was offered to the pre-emptor and he refused to buy (*d*) [sec. 186, Expl. I]. *A fortiori* it is not lost because he had previous notice of the sale and he made no offer to the seller to buy the property (*e*).

190A. Right not lost by previous notice of sale.—As the right of pre-emption arises *after* the completion of sale, it is not lost because the pre-emptor had notice that the property was for sale and he did not offer to purchase it (*f*) [sec. 186, Expl. I].

191. Sale to two or more persons.—Where the property is sold to two or more persons, the pre-emptor may pre-empt the share of any one of them (*g*) [sec. 186, Expl. IV].

191A. Suit for pre-emption: what the claim must include.—Where the property is sold to a single buyer, a person claiming to pre-empt must pre-empt the whole interest comprised in the transfer to the buyer. A suit which does not ask for pre-emption of the whole of such interest is defective, and should not be entertained (*h*).

The principle of denying the right of pre-emption except as to the whole of the property sold is that if the pre-emptor were allowed to split up the bargain, he would be at liberty to take the best portion of the property and leave the worst part of it with the vendee (*i*). "The right of pre-emption was never intended to confer such a capricious choice upon the pre-emptor" (*j*). But where the purchaser himself sells part of the property to another, the pre-emptor is entitled to pre-emption in respect of that portion which remains with the purchaser (*k*).

Limitation.—A suit to enforce the right of pre-emption must be instituted within one year from the date when the purchaser takes physical possession of the property, or, where the subject of the sale does not admit of physical possession, when the instrument of sale is registered [Limitation Act, 1908, sch. I, art. 10]. If the subject of sale does not admit of physical possession and there is no registered instrument the suit will be governed not by art. 10, but by art. 120 (*l*). When the person entitled to pre-emption is a minor, the right may be claimed on his behalf by his guardian, but the suit must be instituted within the aforesaid period, and the period of limitation will not be extended by reason of the pre-emptor's minority [Limitation Act, 1908, sec. 8].

When pre-empted property vests in pre-emptor.—See Code of Civil Procedure, 1908, O. 20, r. 14. Upon a pre-emption decree, the property and the right to mesne profits

(*d*) *Abadi Begam* v *Inam Begam* (1877) 1 All 521, *Kanhai Lal* v *Kulka Prasad* (1905) 27 All. 670.

(*e*) *Muhammad Askari* v *Rahmatullah* (1927) 49 All. 716, 105 I. C 771, ('27) A A. 548.

(*f*) *Ibid.*

(*g*) *Ibid.*

(*h*) *Durga Prasad* v. *Munsi* (1884) 6 All 423.

(*i*) *Sheobharos* v. *Jiach Rai* (1886) 8 All. 462.

(*j*) *Durga Prasad* v. *Munsi* (1884) 6 All. 423, at p. 426.

(*k*) *Ude Ram* v *Atma Ram* (1904) 5 Lah. 80, 80 I. C. 960, ('24) AL. 431.

(*l*) *Batul Begam* v. *Mansur Ali* (1901) 24 All. 17; *Kaunsilla* v. *Gopal* (1906) All. W. N 73.

vest in the pre-emptor from the date when he pays the amount of the purchase price finally decreed; until that time, the original purchaser retains possession and is entitled to the rents and profits (*m*).

Decree in a suit for pre-emption.—See Code of Civil Procedure, O. 20, r. 14.

Property subject to mortgage.—If the property of which possession is decreed is subject to a mortgage, the pre-emptor takes it subject to the mortgage (*n*). If the property is in the possession of the mortgagee, the decree should provide that his possession should not be disturbed until redemption of the mortgage (*o*).

191B. Decree for pre-emption not transferable.—A decree for pre-emption is not transferable so as to entitle the transferee to obtain possession of the property in suit in execution of the decree (*p*).

192. Legal device for evading pre-emption.—When it is apprehended that a claim for pre-emption may be advanced by a neighbour, the vendor may sell the whole of his property excluding a portion, however small, immediately bordering on the neighbour's property, and thus defeat the neighbour's right of pre-emption.

Hedaya, 563; Baillie, 512 *et seq.* Fabrication is not one of the devices permissible under the Mahomedan law for defeating the right of pre-emption (*q*). See notes to sec. 182, "Lease in perpetuity."

193. Sect-law as governing pre-emption.—(*1*) If both the vendor and pre-emptor are Sunnis, the right of pre-emption is to be determined according to the Sunni law, and if both the parties are Shias (*r*), the right of pre-emption is governed by the Shia law (*s*).

(*2*) If the vendor is a Sunni, and the pre-emptor is a Shia, the right of pre-emption is, according to the Allahabad High Court, governed by the Shia law, on the principle of reciprocity explained in the notes to sec. 184 above (*t*).

(*3*) If the vendor is a Shia, and the pre-emptor is a Sunni, then, according to the Allahabad High Court, the right of pre-emption is governed by the Shia law (*u*); but according to the Calcutta High Court, it is governed by the Sunni law (*v*).

(*m*) *Deokinandan* v *Sri Ram* (1889) 12 All 234, *Deonandan Prashad* v. *Ramdhari* (1917) 44 Cal. 675, 44 I. A 80, 39 I C 958

(*n*) *Tejpal* v *Girdhari Lal* (1908) 30 All 130

(*o*) *Shamsuddin* v. *Allauddin* ('32) A A. 138, 134 I.C 462

(*p*) *Ram Sahai* v. *Gaya* (1884) 7 All 107, 111; *Nadir Ali* v. *Wali* (1924) 5 Lah 486, 85 I C. 182, ('25) AL. 202, *Mehr Khan* v. *Ghulam* (1921) 2 Lah 282, 64 I. C 191, ('22) A.L. 300.

(*q*) *Jadu Lal* v. *Janki Koer* (1908) 35 Cal. 575, affmd. in (1912) 39 Cal 915, 39 I.A. 101, 15 I C 69

(*r*) See *Govind Dayal* v. *Inayatullah* (1885) 7 All. 775.

(*s*) *Abbas Ali* v. *Maya Ram* (1888) 12 All. 229.

(*t*) *Qurban* v *Chote* (1899) 22 All. 102.

(*u*) *Pir Khan* v. *Fayaz* (1914) 36 All. 488, 25 I C. 445

(*v*) *Jog Deb* v. *Mahomed* (1905) 32 Cal. 982.

Ss. 193, 193A

(4) The personal law of the buyer is immaterial in these cases (*w*).

193A. Points of difference between Sunni and Shia law of pre-emption.—(1) According to the Shia law, no right of pre-emption exists in the case of property owned by *more than two* co-sharers (*x*).

(2) The Shia law does not recognize the right of pre-emption on the ground of *vicinage* (*y*), or on the ground of "participation in the appendages."

Baillie, II, 175-179. *A*, a Sunni, sells his land to *B*. *A*'s neighbour *C*, who is a Shia, sues *A* and *B* for pre-emption. According to the Allahabad High Court, the law to be applied is the Shia law, and under that law a *neighbour* as such has no right of pre-emption. *C* is not therefore entitled to pre-empt. But if we deny *C* the right to pre-empt by applying his own law [Shia law] to him it is but fair that when *C* sells his own property, we should apply the same law, so that if his *neighbour* is a Sunni and he claims the right of pre-emption on the ground of *vicinage*, we should not allow his Sunni *neighbour* the right of pre-emption This is the line of reasoning followed by the Allahabad High Court in the cases referred to in sec 193, sub-secs. (2) and (3). The tendency of the Calcutta High Court is to apply in all cases the Sunni law of pre-emption except perhaps in cases where both the vendor and pre-emptor are Shias. The reason given by that Court is that the law of pre-emption in force in this country is the Sunni law of pre-emption

(*w*) *Gobind Dayal* v. *Inayatullah* (1885) 7 All 775, *Joy Deb* v. *Mahomed* (1905) 32 Cal 982 But see *Kudratulla* v *Mahim Mohan* (1869) 4 B L R. 134.

(*x*) *Abbas Ali* v *Maya Ram* (1888) 12 All 229, *Husain Bakhsh* v *Mahfuz-ul-haq* (1925) 47 All 944, 88 I C. 972, ('25) A A. 559.

(*y*) *Qurban* v *Chote* (1899) 22 All. 102.

CHAPTER XIV.

MARRIAGE, MAINTENANCE OF WIVES AND RESTITUTION OF CONJUGAL RIGHTS.

A.—MARRIAGE.

Ss. 194-196

194. Definition of marriage.—Marriage (*nikah*) is defined to be a contract which has for its object the procreation and the legalizing of children.

Hedaya, 25, Baillie, 4.

Zina.—*Zina* means fornication or adultery. Sexual intercourse not permitted by the Mahomedan law is *zina* The offspring of such intercourse is illegitimate, and cannot be legitimated by ackowledgment [sec. 249 (2)].

195. Capacity for marriage.—(*1*) Every Mahomedan of sound mind, who has attained puberty, may enter into a contract of marriage.

(*2*) Lunatics and minors who have not attained puberty may be validly contracted in marriage by their respective guardians [secs. 207-211].

(*3*) A marriage of a Mahomedan who is of sound mind and has attained puberty, is void, if it is brought about without his consent.

The same rule applies in the case of a Shafei girl who has attained puberty (*z*).

Explanation.—Puberty is *presumed*, in the absence of evidence, on completion of the age of fifteen years.

Hedaya, 529; Baillie, 4. Note that the provisions of the Indian Majority Act, 1875, do not apply to matters relating to *marriage*, *dower*, and *divorce*. See notes to sec. 101 above.

Consent to marriage obtained by force or fraud.—Where consent to a marriage has been obtained by force or fraud, the marriage is invalid, unless it is ratified (*a*).

196. Essentials of a marriage.—It is essential to the validity of a marriage that there should be a proposal made by or on behalf of one of the parties to the marriage, and an acceptance of the proposal by or on behalf of the other, in the presence and hearing of two male or one male and two female witnesses, who must be sane and adult

(*z*) *Hassan Kutti* v. *Jainabha* (1929) 52 Mad. 39, 113 I. C. 306, ('28)A. M. 1285

(*a*) *Abdul Lalif* v *Niyaz Ahmed* (1909) 31 All. 343, 1 I. C 538 [wife's illness concealed], *Kulsumbi* v. *Abdul Kadir* (1921) 45 Bom 151, 59 I. C. 433, ('21) A. B. 205 [pregnancy concealed].

Ss. 196-198A

Mahomedans. The proposal and acceptance must both be expressed at one meeting; a proposal made at one meeting and an acceptance made at another meeting do not constitute a valid marriage. Neither writing nor any religious ceremony is essential (*b*).

Hedaya, 25, 26; Baillie, 4, 5, 10, 14. The usual form of proposal is, "I *have* married myself to you," and that of acceptance is, "I have consented."

Registration of marriages.—As to registration of Mahomedan marriages, see the Kazi's Act, 1880, and Bengal Act I of 1876 read with Act VII of 1905.

Shia law.—According to the Shia law the presence of witnesses is not necessary in any matter regarding marriage: Baillie, II, 4.

196A. Valid, irregular, and void marriages.—A marriage may be valid (*sahīh*), or irregular (*fāsid*), or void from the beginning (*bātil*).

Irregular or invalid marriages.—The term "fasid" is translated in Baillie's Digest as "invalid," but as the word "invalid" in the English language also means "void," I have substituted "irregular" for "invalid" in the present edition, in conformity with the usage of modern writers on the subject. As to irregular marriages, see ss. 197 to 200, and s. 204. As to void marriages, see ss. 201 to 203.

197. Absence of witnesses.—A marriage contracted without witnesses as required by s. 196 is irregular, but not void.

Baillie, 155. As to irregular marriages, see ss. 204 A and 206 below.

198. Number of wives.—A Mahomedan may have as many as four wives at the same time, but not more. If he marries a fifth wife when he has already four, the marriage is not void, but merely irregular.

Baillie, 30, 154 (fourth class); Ameer Ali, 5th ed., vol. II, p. 280. As to irregular marriages, see ss. 204A and 206.

198A. Plurality of husbands.—It is not lawful for a Mahomedan woman to have more than one husband at the same time. A marriage with a woman, who has her husband alive and who has not been divorced by him, is void (*c*)

A Mahomedan woman marrying again in the lifetime of her husband is liable to be punished under s. 494 of the Indian Penal Code (*d*). The offspring of such a marriage is illegitimate (*e*), and cannot be legitimated by acknowledgment (*f*) [s. 249 (2)].

(*b*) *Maung Kyi* v. *Ma Shwe Baw* (1929) 7 Rang. 777, 121 I.C. 718, ('29) A.R. 341.

(*c*) *Liaqat Ali* v. *Karim-un-nissa* (1893) 15 All. 396, 398, *Habibur Rahman* v. *Altaf Ali* (1921) 48 I. A. 114, 121, 48 Cal. 856, 60 I.C. 837; *Budansa* v. *Fatma Bi* (1914) 26 Mad. L. J. 260, 22 I.C. 697, *In the matter of Ram Kumari* (1891) 18 Cal. 264, 269; *Nandi* v. *The Crown* (1920) 1 Lah. 440 59 I. C. 33; *Government of Bombay* v. *Ganga* (1880) 4 Bom. 330.

(*d*) (1891) 18 Cal. 264, *supra*; (1920) 1 Lah. 440, *supra*, *Hamad* v. *Emperor* ('31) A. L. 194, 134 I.C. 589.

(*e*) (1893) 15 All. 396, 398, *supra*; (1914) 26 Mad. L. J. 260, *supra*.

(*f*) (1893) 15 All. 396, *supra*.

199. Marriage with a woman undergoing iddat.—(*1*) A marriage with a woman before completion of her *iddat* is irregular, not void. The High Court of Lahore has held that such a marriage is void (*g*), but the decision, it is submitted, is erroneous. S. 199

(*2*) *Iddat.*—"Iddat" may be described as the period during which it is incumbent upon a woman, whose marriage has been dissolved by divorce or death to remain in seclusion, and to abstain from marrying another husband. The abstinence is imposed to ascertain whether she is pregnant by the husband, so as to avoid confusion of the parentage. When the marriage is dissolved by *divorce*, the duration of the *iddat*, if the woman is subject to menstruation, is three courses; if she is not so subject, it is three lunar months. If the woman is pregnant at the time, the period terminates upon delivery. When the marriage is dissolved by *death*, the duration of the *iddat* is four months and ten days. If the woman is pregnant at the time, the *iddat* lasts for four months and ten days *or* until delivery, whichever period is longer (*h*).

If the marriage is dissolved by *death*, the wife is bound to observe the *iddat* whether the marriage was consummated or not. If the marriage was dissolved by *divorce*, she is bound to observe the *iddat* only if the marriage was consummated; if there was no consummation, there is no *iddat*, and she is free to marry immediately.

The *iddat* of divorce commences from the date of the divorce and that of death from the date of death. If the information of divorce or of death does not reach the wife until after the expiration of the period of *iddat*, she is not bound to observe any *iddat* [Baillie, 357].

Hedaya, 128-129; Baillie, 38, 151, 352-358. As to *iddat* in the case of an irregular marriage, see s. 206 (2) (ii).

Marriage during iddat.—*H* has four wives, *A*, *B*, *C*, and *D*. He divorces *A after* consummation of the marriage with her. It is not permissible to *A* to marry another husband, nor to *H* to marry another wife, during *A*'s *iddat*. Nor is it permissible to *H*, if one of the other wives dies during *A*'s *iddat*, to marry *A*'s sister (s. 204). But either party may marry again after completion of *A*'s *iddat*, and *H* may, if he so chooses, marry *A*'s sister. The primary object of *iddat* is to impose a restraint on the marriage of the wife, but this involves a corresponding restraint on the marriage also of the husband to the extent mentioned above. It must, however, be remembered that a marriage before completion of the *iddat* is not void, but merely irregular. As to irregular marriages, see ss. 204A and 206.

(*g*) *Jhandu* v. *Mst. Husain Bibi* (1923) 4 Lah. 192, 73 I. C. 590 ('23) A. L. 949.
(*h*) *Ibid.*

Ss. 199-200

Valid retirement.—When the husband and wife are alone together under circumstances which present no legal, moral or physical impediment to marital intercourse, they are said to be in "valid retirement" (*khilwat-us-sahih*). A valid retirement in the Sunni law has the same legal effect as actual consummation as regards dower [ss. 206, 243 (2)], the establishment of paternity, the observance of *iddat* (s. 199), wife's maintenance during iddat (s. 215), the bar of marriage with wife's sister (s. 204), and the bar of marriage imposed by the rule in s. 198. But it has not the same effect as actual consummation as regards the bar of marriage with the wife's daughter (s. 202), or the bar of remarriage between divorcees [s. 243 (4)]. In both these cases there must have been *actual* consummation as stated in ss. 202 and 243 (5): Baillie, 98-101.

199A. Marriage between a Sunni and a Shia.—A Sunni male may contract a valid marriage with a Shia female (*i*), and a Shia male may contract a valid marriage with a Sunni female (*j*).

The rights and obligations of the wife would be governed by the law to which she belonged at the time of her marriage. See s. 23.

200. Difference of religion.—(*1*) A Mahomedan male may contract a valid marriage not only with a Mahomedan woman, but also with a *Kitabia*, that is, a Jewess or a Christian, but not with an idolatress or a fire-worshipper. A marriage, however, with an idolatress or a fire-worshipper, is not void, but merely irregular (*k*).

(*2*) A Mahomedan woman cannot contract a valid marriage except with a Mahomedan. She cannot contract a valid marriage even with a *Kitabi*, that is, a Christian or a Jew. A marriage, however, with a non-Muslim, whether he is a *Kitabi*, that is, a Christian or a Jew, or a non-*Kitabi*, that is, an idolator or a fire-worshipper, is irregular, not void.

Hedaya, 30; Baillie, 40-42, 151, 153.

As to irregular marriages, see ss. 204A and 206.

Kitabi.—*Kitab* means a book, that is, a book of revealed religion. *Kitabi* means a male who believes in Christianity or Judaism. *Kitabia* is a female who believes in either of these religions. The question, whether a Buddhist woman can be regarded as a *Kitabia* arose in a case before the Privy Council, but it was not decided (*l*).

Indian Christian Marriage Act, 1872.—In British India, a marriage between a Mahomedan male and a Christian woman must be solemnized in accordance with the provisions of s. 5 (4) of the Indian Christian Marriage Act, 1872 (XV of 1872), that is to say, by, or in the presence of, a Marriage Registrar appointed under the Act; any such marriage solemnized otherwise than in accordance with those provisions "shall be void." But since a Mahomedan woman cannot contract a valid marriage with a Christian man, such a marriage, it would appear, cannot be solemnized under that Act: see s. 88 of the Act.

(*i*) *Syud Gholam Hossein* v *Musst. Setabah Begum* (1866) 6 W.R 88, *Aziz Bano* v. *Muhammad* (1925) 47 All. 823, 89 I.C. 690, ('25) A A. 720.

(*j*) *Nasrat Husain* v. *Hamidan* (1882) 4 All. 205.

(*k*) *Ihsan* v. *Panna Lal* (1928) 7 Pat. 6, 103 I C. 430, ('28) A P. 19.

(*l*) *Abdool Razack* v. *Aga Mahomed Jaffer* (1893) 21 I.A. 56, 64-65, 21 Cal. 666, 674.

Shia law.—In the Shia law, a marriage between a Muslim male and a non-Muslim female is unlawful and void; and so also is a marriage between a Muslim male and a non-Muslim female. But a Muslim male may contract a valid *muta* marriage (s. 206B) with a *Kitabia*. The Shias reckon fire-worshippers among *Kitabias*: Baillie 29, 40.

201. Prohibition on the ground of consanguinity.—A man is prohibited from marrying (1) his mother or his grandmother how high soever; (2) his daughter or grand-daughter how low soever; (3) his sister whether full, consanguine or uterine; (4) his niece or great niece how low soever; and (5) his aunt or great aunt how high soever, whether paternal or maternal. A marriage with a woman prohibited by reason of consanguinity is void.

Hedaya, 27; Baillie, 24. As to void marriages, see ss 204A and 205A below.

202. Prohibition on the ground of affinity.—A man is prohibited from marrying (1) his wife's mother or grandmother how high soever; (2) his wife's daughter or grand-daughter how low soever; (3) the wife of his father or paternal grandfather how high soever; and (4) the wife of his son, or of his son's son or daughter's son how low soever. A marriage with a woman prohibited by reason of affinity is void.

In case (2), marriage with the wife's daughter or grand-daughter is prohibited only if the marriage with the wife was consummated.

Hedaya, 28; Baillie, 24-29, 154. As to void marriage, see ss. 204A and 205A below.

203. Prohibition on the ground of fosterage.—Whoever is prohibited by consanguinity or affinity is prohibited by reason of fosterage except certain foster relations, such as sister's foster-mother, or foster-sister's mother, or foster-son's sister, or foster-brother's sister, with any of whom a valid marriage may be contracted. A marriage prohibited by reason of fosterage is void.

Hedaya, 68, 69; Baillie, 30, 154, 194, 195, as to void marriages, see ss. 204A and 205A below.

204. Unlawful conjunction.—A man may not have *at the same time* two wives who are so related to each other by consanguinity, affinity or fosterage, that if either of them had been a male, they could not have lawfully intermarried, as, for instance, two sisters, or aunt and niece. The bar of unlawful conjunction renders a marriage irregular, not void.

Hedaya, 28, 29; Baillie, 31, 153.

Ss. 204, 204A

Wife's sister.—A man may not, as already stated, marry his wife's sister in his wife's lifetime. According to the Calcutta High Court (*m*) such a marriage is void, and the issue is illegitimate (sec. 205A). According to the High Court of Bombay (*n*) and the Chief Court of Oudh (*o*) such a marriage is merely irregular, and the issue is not illegitimate (sec. 206). The Calcutta decision, it is submitted, is not correct.

There is, of course, nothing to prevent a man from marrying his wife's sister *after* the death or divorce of the wife: Baillie, 33.

Shia law.—In Shia law a man may marry his wife's aunt, but he cannot marry his wife's niece without the permission of the wife (that is, aunt): Baillie, II, 23.

204A. Distinction between void and irregular marriages.—(*1*) A marriage which is not valid may be void or irregular.

(*2*) A void marriage is one which is unlawful in itself, the prohibition against the marriage being perpetual and absolute. Thus a marriage with a woman prohibited by 'reason of consanguinity (sec. 201), affinity (sec. 202), or fosterage (sec. 203), is void, the prohibition against marriage with such a woman being perpetual and absolute (*p*).

(*3*) An irregular marriage is one which is not unlawful in itself, but unlawful "for something else," as where the prohibition is temporary or relative, or when the irregularity arises from an accidental circumstance, such as the absence of witnesses. Thus the following marriages are irregular, namely—

(a) a marriage contracted without witnesses (sec. 197);

(b) a marriage with a fifth wife by a person having four wives (sec. 198);

(c) a marriage with a woman undergoing *iddat* (sec. 199);

(d) a marriage prohibited by reason of difference of religion (sec. 200);

(e) a marriage with a woman so related to the wife that if one of them had been a male, they could not have lawfully intermarried (sec. 204).

The reason why the aforesaid marriages are irregular, and not void, is that in cl. (a) the irregularity arises from an accidental circumstance; in cl. (b) the objection may be removed by the man divorcing one of his four wives; in cl. (c) the impediment

(*m*) *Aizunnissa* v. *Karimunnissa* (1895) 23 Cal. 130

(*n*) *Tajbi* v *Mowla Khan* (1917) 41 Bom. 485, 39 I.C 603

(*o*) *Musammat Kaniza* v. *Hasan* (1926) 1 Luck. 71, 92 I C 82, ('26) A.O. 131; *Tahamand* v *Muhammad* (1931) 12 Lah. 52, 129 I.C. 12, ('30) A. L. 407

(*p*) Women within the prohibited degree are called *Mooharim*.

ceases on the expiration of the period of *iddat;* in cl. (d) the objection may be removed by the wife becoming a convert to the Mussalman, Christian or Jewish religion, or the husband adopting the Moslem faith; and in cl. (e) the objection may be removed by the man divorcing the wife who constitutes the obstacle; thus if a man who has already married one sister marries another, he may divorce the first, and make the second lawful to himself.

Baillie, 150-155.

Shia law.—The Shia law does not recognize the distinction between irregular and void marriages. According to that law a marriage is either valid or void. Marriages that are irregular under the Sunni law are void under the Shia law.

205. Effects of a valid (sahih) marriage.—A valid marriage confers upon the wife the right of dower, maintenance and residence in her husband's house, imposes on her the obligation to be faithful and obedient to him. to admit him to sexual intercourse, and to observe the *iddat.* It creates between the parties prohibited degrees of relation and reciprocal rights of inheritance.

Baillie, 13. It may be noted that a Mahomedan husband does not by marriage acquire any interest in his wife's property (*q*).

205A. Effects of a void (batil) marriage.—A void marriage is no marriage at all. It does not create any civil rights or obligations between the parties. The offspring of a void marriage are illegitimate.

Baillie, 156. The marriages referred to in secs. 198A, and 201 to 203 are *void.*

206. Effects of an irregular (fasid) marriage.—(*1*) An irregular marriage may be terminated by either party, either before or after consummation, by words showing an intention to separate, as where either party says to the other "I have relinquished you." An irregular marriage has no legal effect before consummation.

(*2*) If consummation has taken place—

(*i*) the wife is entitled to dower, proper or specified, whichever is less (ss. 218, 220);

(*ii*) she is bound to observe the *iddat,* but the duration of the *iddat* both on divorce and death is three courses [see s. 199 (2)];

(*q*) *A.* v. *B.* (1896) 21 Bom. 77, 84.

Ss. 206, 206A

(*iii*) the issue of the marriage is legitimate. But an irregular marriage, though consummated, does not create mutual rights of inheritance between husband and wife [Baillie, 694, 710]. The Chief Court of Oudh has held that it does create such rights (*r*), but the decision, it is submitted, is not correct.

Baillie, 156-158, 694. See secs. 197-200, 204 and 204A.

206A. Presumption of marriage.—Marriage will be presumed, in the absence of direct proof, from—

(a) prolonged and continual cohabitation as husband and wife (*s*); *or*,

(b) the fact of the acknowledgment by the man of the paternity of the child born to the woman, provided all the conditions of a valid acknowledgment mentioned in sec. 249 below are fulfilled (*t*).

The presumption does not apply if the conduct of the parties was inconsistent with the relation of husband and wife (*u*), nor does it apply if the woman was admittedly a prostitute before she was brought to the man's house (*v*). The mere fact, however, that the woman did not live behind the purda, as the admitted wives of the man did, is not sufficient to rebut the presumption (*w*).

In *Abdool Razack* v. *Aga Mahomed* (*x*), their Lordships of the Privy Council said: "In the next place, it was urged that every presumption ought to be made in favour of marriage when there had been a lengthened cohabitation, especially in a case where the alleged marriage took place so long ago that it must be difficult if not impossible to obtain a trustworthy account of what really occurred.... There would be much force in this argument—indeed, it would almost be irresistible—if the conduct of the parties were shown to be compatible with the existence of the relation of husband and wife." It was held in that case that the conduct of the parties was incompatible with that relation, and their Lordships held that the presumption did not apply

(*r*) *Mohammad Shafi* v *Raunaq Ali* ('28) A. O 231, 107 I. C. 882

(*s*) *Khajah Hidayut* v *Rai Jan* (1844) 3 M I A 295, 317-318, 323 [marriage presumed]; *Mahomed Bauker* v. *Shurfoon-Nissa* (1860) 8 M. I A 136, 159 [marriage not presumed]. *Ashrufood Dowlah* v *Hyder Hoseine* (1866) 11 M I. A 94, 115 [marriage not presumed]; *Jarrut-ool-Butool* v *Hoseinee Begum* (1867) 11 M. I. A. 194, 209-210 [marriage not presumed]; *Maung Kyi* v *Ma Shwe Baw* (1929) 7 Rang 777, 121 I C. 718, ('29) A.R. 341 [marriage presumed], *Mani-un-Nissa* v. *Pathan* (1904) 26 All 295 [marriage not presumed]; *Abdul Halim* v. *Saadat Ali* ('29) A O. 126, 112 I. C. 596 [marriage presumed].

(*t*) *Imambandi* v *Mutsaddi* (1918) 45 I. A. 73, 81-82, 45 Cal 878, 889-890, 47 I C 513; *Habibur Rahman* v. *Altaf Ali* (1921) 48 I. A 114, 120-121, 48 Cal. 856, 60 I. C 837, ('22) A. PC 159

(*u*) *Abdool Razack* v *Aga Mahomed* (1893) 21 I.A. 56, 65, 21 Cal. 666, 674. *Fateh Mohammad* v. *Abdul Rahman* (1931) 12 Lah 396, 134 I. C 590, ('31) A. L 223 [where the man had *refused* to acknowledge the woman as his wife and her child as his child]

(*v*) *Ghazanfar* v *Kaniz Fatima* (1910) 37 I A. 105, 109, 32 All. 345, 350, 6 I. C 674. *Jarrut-ook-Butool* v. *Hoseinee Begum* (1876) 11 M. I A. 194. In *Irashad Ali* v. *Musammat Kariman* (1918) 20 Bom. L. R. 790, 46 I.C 217, (1917) A.PC. 169, the woman was a prostitute, but there was a writing evidencing the marriage, and the marriage was held *proved*.

(*w*) *Mohabbat Ali* v *Mahomed Ibrahim* (1929) 56 I A 201, 209, 10 Lah. 725, 117 I. C. 17, ('29) A. PC. 135.

(*x*) (1893) 21 I. A. 56, 65, 21 Cal. 666, 674.

In *Ghazanfar* v. *Kaniz Fatima* (*y*), their Lordships of the Privy Council said: "The learned judges fully recognized that prolonged cohabitation might give rise to a presumption of marriage, but that presumption is not necessarily a strong one, and their Lordships agree that it does not apply in the present case, for the mother before she was brought to the father's house was, according to the case on both sides, a prostitute."

206B. Muta marriage.—(*1*) The Shia law recognizes two kinds of marriage, namely, (1) permanent, and (2) *muta* or temporary.

(*2*) A Shia of the male sex may contract a *muta* marriage with a woman professing the Mahomedan, Christian or Jewish religion, or even with a woman who is a fire-worshipper, but not with a woman following any other religion. But a Shia woman may not contract a *muta* marriage with a non-Moslem (*z*).

(*3*) It is essential to the validity of a *muta* marriage that (1) the period of cohabitation should be fixed, and this may be a day, a month, a year or a term of years (*a*), and that (2) some dower should be specified (*b*). When the term and the dower have been fixed, the contract is valid. If the term is fixed, but the dower is not specified, the contract is void. But if the dower is specified, and the term is not fixed, the contract, though void as a *muta*, may operate as a "permanent" marriage (*c*).

(*4*) The following are the incidents of a *muta* marriage:—

(a) a *muta* marriage does not create mutual rights of inheritance between the man and the woman, but children conceived while it exists are legitimate and capable of inheriting from both parents (*d*);

(b) where the cohabitation of a man and a woman *commences* in a *muta* marriage, but there is no evidence as to the term for which the marriage was contracted and the cohabitation continues, the proper inference would, in default of evidence to the contrary, be that the *muta* continued during the whole period of cohabitation, and that children conceived during that period were legitimate and capable of inheriting from their father (*e*);

(*y*) (1910) 37 I. A. 105, 109, 32 All 345, 350, 6 I. C 674.
(*z*) Baillie, II, 29, 40.
(*a*) Baillie, II, 42.
(*b*) Baillie, II, 41.
(*c*) Baillie, II, 42-43, Querry, Vol. I, pp. 689, 693.
(*d*) Baillie, II, 44, *Shoharat Singh* v. *Jafri Bibi* (1915) 17 Bom. L R. 13, 24 I C 499 [P.C.].
(*e*) (1915) 17 Bom. L. R. 13, 24 I. C. 499, *supra* [the cohabitation in this case was for 10 years].

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(c) a *muta* marriage is dissolved *ipso facto* by the expiry of the term. No right of divorce is recognized in the case of a *muta* marriage, but the husband may at his will put an end to the contract of marriage by "making a gift of the term" (*hiba-i-muddat*) to the wife, even before the expiration of the fixed term (*f*);

(d) if a *muta* marriage is not consummated, the woman is entitled to half the dower. If the marriage is consummated, she is entitled to full dower, even though the husband may put an end to the contract by giving away the unexpired portion of the term. If the woman leaves her husband before the expiry of the term, the husband is entitled to deduct a proportionate part of the dower (*g*);

(e) a woman married in the *muta* form is not entitled to maintenance under the Shia law (*h*). But it has been held that she is entitled to maintenance as a wife under the provisions of s. 488 of the Criminal Procedure Code (*i*).

The Sunni law does not recognize *muta* marriages at all: Baillie, 18.

The expression "permanent" in sub-sec. (1) is used in contradistinction to "temporary." No Mahomedan marriage, either among Sunnis or Shias, is permanent in the sense in which a Christian or a Parsi marriage is, for the husband may divorce the wife at any time he likes.

Marriage of Minors.

207. Marriage of minors.—A boy or a girl who has not attained puberty (in this Part called a minor), is not competent to enter into a contract of marriage, but he or she may be contracted in marriage by his or her guardian.

A boy or a girl who has attained puberty is at liberty to marry any one he or she likes, and the guardian has no right to interfere if the match be equal: Macnaghten, p. 58, ss. 14-16. See s. 195 above.

208. Guardianship in marriage (jabr).—The right to contract a minor in marriage belongs successively to the (1) father, (2) paternal grandfather how high soever, and (3)

(*f*) Baillie, II, 43; *Mohomed Abid Ali* v. *Ludden* (1887) 14 Cal. 276.

(*g*) Baillie, II, 41; (1887) 14 Cal. 276, 284-285, *supra*.

(*h*) Baillie, II, 97.

(*i*) *Luddun* v. *Mirza Kamar* (1882) 8 Cal. 736. This decision is of doubtful authority because, as stated in *Sharaya-ul-Islam*, "the name of a *wife* does not in reality apply to a woman contracted in *moota*" Baillie, II, 344.

brother and other male relations on the father's side in the order of inheritance enumerated in the Table of Residuaries. In default of paternal relations, the right devolves upon the mother, maternal uncle or aunt and other maternal relations within the prohibited degrees. In default of maternal kindred, it devolves upon the ruling authority.

Hedaya, 36, 39. The fact that a guardian has been appointed by the Court of the person of a minor does not take away the power of the guardian for the marriage to dispose of the minor in marriage. But the minor being in such a case ward of the Court, the guardian for the marriage should not dispose of the minor in marriage without the sanction of the Court to the proposed marriage (*j*).

Apostasy of guardian for marriage.—It is doubtful whether the right to dispose of a minor in marriage is lost by the apostasy of the guardian from the Mahomedan faith. Under the Mahomedan law an apostate has no right to contract a minor in marriage: *Hedaya*, 392. It is enacted, however, by Act XXI of 1850, that no law or usage shall inflict on any person who renounces his religion any "forfeiture of *rights* or property," and it was accordingly held by the High Court of Bengal in *Muchoo* v. *Arzoon* (*k*) that a Hindu father is not deprived of his right to the custody of his children and to direct their education by reason of his conversion to Christianity. In a subsequent case, however, decided by the same High Court, but without any reference to *Muchoo*'s case, it was held that a Mahomedan, who had become a convert to Judaism, was disqualified by reason of his apostasy from disposing of his daughter in marriage (*l*). *Muchoo*'s case was followed by the Chief Court of the Punjab (*m*), which was a case of a conversion of a Mahomedan father to Christianity. In a Bombay case, it was held, following *Muchoo*'s case, that a Hindu convert to Mahomedanism is not disqualified from giving his son in adoption to a Hindu (*n*). It is submitted that the power to contract a minor in marriage is a "right" within the meaning of the above Act, and that the decision in *Muchoo*'s case is correct. But the Court may in its discretion deal with each case on its own merits.

Shia law.—The only guardians for marriage recognized by the Shia law are the father and the paternal grandfather how high soever: Baillie, II, 6. See notes to s. 210.

209. Marriage brought about by father or grandfather.—When a minor has been contracted in marriage by the father or father's father, the contract of marriage is valid and binding, and it cannot be annulled by the minor on attaining puberty. But where a father or father's father has acted fraudulently or negligently, as where the minor is married to a lunatic, or the contract is to the manifest disadvantage of the minor, the contract is voidable at the option of the minor on attaining puberty (*o*).

Hedaya, 37; Baillie, 50; Ameer Ali, 5th ed., Vol. II, p. 370. See s. 210 below.

It has been held by the High Court of Allahabad that a Shia girl given in marriage by her father to a Sunni husband has an option of repudiation on attaining puberty unless

(*j*) *Monyan* v. *District Judge, Birbhum* (1914) 42 Cal. 351, 25 I.C. 229.
(*k*) (1866) 5 W. R. 235.
(*l*) *In the matter of Mahin Bibi* (1874) 13 B.L.R. 160.
(*m*) *Gul Muhammad* v. *Mussammat Wazir* (1901) 36 Punj. Rec. 191.
(*n*) *Shamsing* v. *Santabai* (1901) 25 Bom. 551.
(*o*) *Aziz Bano* v. *Muhammad* (1925) 47 All 823, 838-839, 89 I. C. 690, ('25) A. A. 720.

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it has been ratified by consummation or otherwise, the reason given being that it would be contrary to all rules of equity or justice to force such a marriage on her if on attaining puberty she considers the marriage to be repugnant to her religious sentiments (*p*).

210. Marriage brought about by other guardians: Option of puberty.—When a marriage is contracted for a minor by any guardian other than the father or father's father, the minor has the option to repudiate the marriage on attaining puberty. This is technically called the "option of puberty" (*khyar-ul-bulugh*).

The right of repudiating the marriage is lost, in the case of a female, if after attaining puberty and after being informed of the marriage and of her right to repudiate it, she does not repudiate without unreasonable delay (*q*). But in the case of a male, the right continues until he has ratified the marriage either expressly or impliedly as by payment of dower or by cohabitation.

Hedaya, 38; Baillie, 50-52; Macnaghten, p. 58, s. 18. Consummation consented to by the wife before the exercise of the option extinguishes the option. Baillie, 51.

Shia law.—According to the Shia law, a marriage brought about by a person other than a father or grandfather is wholly ineffective until it is ratified by the minor on attaining puberty (*r*). See notes to s. 208, "Shia law."

211. Effect of repudiation.—The mere exercise of the option of repudiation does not operate as a dissolution of the marriage. The repudiation must be confirmed by a decree of the Court. Until then the marriage subsists, and if either party to the marriage dies, the other will inherit from him or from her, as the case may be.

Hedaya, 37, 38; Baillie, 50. The woman may herself bring a suit for a declaration that she has exercised her option and repudiated the marriage. Or she may plead the repudiation in defence to her husband's suit against her for restitution of conjugal rights, and the Court may in that suit declare that the marriage has been repudiated (*s*). No such declaration, however, can be made, if she has permitted sexual intercourse with her after the exercise of the option.

212. Marriage of lunatics.—The provisions of sections 207 to 211, relating to the marriage of minors, apply to the marriage of lunatics, with this difference that the option is to be exercised when the lunatic recovers his or her reason.

Baillie, 50-54.

(*p*) *Azız Bano* v *Muhammad* (1925) 47 All 823, 89 I C 690, ('25) A A. 720, *Sibt Ahmad* v *Amina Khatun* (1928) 50 All. 733, 113 I C 434, ('29) A A 18

(*q*) *Bismillah* v *Nur Muhammad* (1922) 44 All 61, 63 I.C 702, ('22) A A. 155, *Rahmat Ali* v. *Mst Allah* (1930) 11 Lah. 172, ('29) A.L. 827, *Mst Mukhan* v. *Haidar* ('32) A.L. 449, 137 I C. 749.

(*r*) *Mulka Jehan* v. *Mahomed* (1873) L. R.I.A. Sup. Vol. 192, 26 W. R. 26.

(*s*) *Badal Aurat* v. *Queen-Empress* (1891) 19 Cal. 79.

B.—Maintenance of Wives.

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213. Husband's duty to maintain his wife.—The husband is bound to maintain his wife (unless she is too young for matrimonial intercourse) (*t*), so long as she is faithful to him and obeys his reasonable orders. But he is not bound to maintain a wife who refuses herself to him (*u*), or is otherwise disobedient (*v*), unless the refusal or disobedience is justified by non-payment of prompt (s. 221) dower (*w*).

214. Order for maintenance.—If the husband neglects or refuses to maintain his wife without any lawful cause, the wife may sue him for maintenance, but she is not entitled to a decree for *past* maintenance, unless the claim is based on a specific agreement (*x*). Or, she may apply for an order of maintenance under the provisions of the Code of Criminal Procedure, 1908, section 488, in which case the Court may order the husband to make a monthly allowance for her maintenance not exceeding one hundred rupees (*y*).

Shafei law.—According to the Shafei school, the wife is entitled to *past* maintenance though there may be no agreement in respect thereof (*z*).

215. Maintenance on divorce.—(*1*) After divorce, the wife is entitled to maintenance during the period of *iddat* (*a*) [s. 199]. If the divorce is not communicated to her until after the expiry of that period, she is entitled to maintenance until she is informed of the divorce (*b*).

(*2*) A widow is not entitled to maintenance during the period of *iddat* consequent upon her husband's death (*c*).

Order of maintenance under Criminal Procedure Code, 1908, *s.* 488.—Where an order is made for the maintenance of a wife under sec. 488 of the Criminal Procedure Code [s. 214], and the wife is afterwards divorced, the order ceases to operate on the expiration of the period of *iddat* (*d*). The result is that a Mahomedan may defy an order made against him under sec. 488 by divorcing his wife immediately after the order is made. His obligation to maintain his wife will cease in that case on the completion of her *iddat*.

215A. Agreement for future maintenance.—An ante-nuptial agreement between a Mahomedan and his prospective wife,

(*t*) Baillie, 441.
(*u*) Baillie, 442
(*v*) *A.* v *B* (1896) 21 Bom. 77, at p. 82.
(*w*) Baillie, 442
(*x*) *Abdool Futteh* v *Zabunnessa* (1881) 6 Cal 631.
(*y*) Rs. 100 was substituted for Rs 50 by s. 13 of the Code of Criminal Procedure (Amendment) Act, 1923 (Act XVIII of 1923).
(*z*) *Mahamed Haji* v *Kalimabi* (1918) 41 Mad. 211, 42 I C 517
(*a*) *Hedaya*, 145; Baillie, 450, *Musammat Mariam* v. *Kadir Bakhsh* ('29) A.O 527
(*b*) *Rashid Ahmad* v *Anisa Khatun* (1932) 59 I A 21, 27, 54 All 46, 52, 135 I C 762, ('32) A. PC 25; *Ahmad Kasim* v. *Khatun Bibi* (1932) 59 Cal 833, 846-847
(*c*) *Aga Mahomed Jaffer* v *Koolsom Beebee* (1897) 25 Cal 9
(*d*) *In re Abdul Ali* (1883) 7 Bom. 180; *In the matter of Din Muhammad* (1882) 5 All 226, *Shah Abu* v *Ulfat Bibi* (1896) 19 All. 50, *Ahmad Kasim* v. *Khatun Bibi* (1932) 59 Cal. 833, 847.

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entered into with the object of securing the wife against ill-treatment and of ensuring her suitable maintenance in the event of ill-treatment, is not void as being against public policy (*e*). Similarly an agreement between a Mahomedan and his first wife, made after his marriage with a second wife, providing for a certain maintenance for her if she could not in future get on with the second wife, is not void on the ground of public policy (*f*). See secs. 216 (3) and 237A. It has been held in Bombay that an agreement for future separation between husband and wife is void as being against public policy under the Indian Contract Act, 1872, sec. 23. An agreement, therefore, which provides for a certain maintenance to be given to the wife in the event of a future separation between them, is also void (*g*). If the marriage is dissolved by divorce, the wife is entitled to maintenance for the period mentioned in sec. 215, and not for life, unless the agreement provides that it is for life (*h*).

C.—Judicial Proceedings.

216. Suit for restitution of conjugal rights.—(*1*) Where a wife without lawful cause ceases to cohabit with her husband, the husband may sue the wife for restitution of conjugal rights (*i*).

(*2*) *Cruelty.*—Cruelty, when it is of such a character as to render it unsafe for the wife to return to her husband's dominion, is a valid defence to such a suit. "It may be, too, that gross failure by the husband of the performance of the obligation, which the marriage contract imposes on him (s. 205) for the benefit of the wife, might, if properly proved, afford good grounds for refusing to him the assistance of the Court" (*j*).

(*3*) *Agreement enabling wife to live separate from the husband.*—An agreement entered into before marriage by which it is provided that the *wife should be at liberty to live with her parents after marriage* is void, and does not afford an answer

(*e*) *Muhammad Mun-ud-din* v. *Jamal* (1921) 43 All. 650, 63 I.C. 883, ('21) A. A. 152 *Musammat Hamdan* v. *Muhammad* ('32) A.L. 65, 133 I. C 886

(*f*) *Mansur* v. *Azizul* (1928) 3 Luck. 603, 109 I C 812, ('28) A.O 303.

(*g*) *Bai Fatma* v *Alimahomed* (1913) 37 Bom. 280, 17 I C. 946.

(*h*) *Muhammad Mun-ud-din* v. *Jamal* ((1921) 43 All. 650, 63 I.C 883, ('21) A. A. 152 [stipulation for maintenance for life]; *Ahmed Kasim* v. *Khatun Bibi* (1932) 59 Cal. 833, 854 [no stipulation for maintenance for life]

(*i*) *Moonshee Buzloor Ruheem* v. *Shumsoonnissa Begum* (1867) 11 M I.A. 551.

(*j*) *Moonshee Buzloor Ruheem* v. *Shumsoonnissa Begum* (1867) 11 M.I.A. 551; *Meherally* v *Sakerkhanoobai* (1905) 7 Bom. L. R 602, 608, *Husaini Begam* v. *Muhammad* (1907) 29 All 222; *Hamid Husain* v. *Kubra Begam* (1918) 40 All. 332, 44 I.C. 728.

to a suit for restitution of conjugal rights (*k*). Similarly, an agreement, entered into after marriage between a husband and wife who were for some time prior to the date of the agreement living separate from each other, providing that they should resume cohabitation, but that if the wife should be unable to agree with the husband, *she should be free to leave him*, is void, and it is not a defence to the husband's suit for restitution (*l*). See secs. 215A and 237A.

(*4*) *Non-payment of prompt dower and restitution of conjugal rights.*—See sec. 222.

(*5*) *False charge of adultery by husband against wife.*—A false charge of adultery by a husband against his wife is a good ground for refusing a decree for restitution of conjugal rights (*m*). But if the charge is true, and it was made at a time when the wife was actually living in adultery, it is no ground for refusing a decree for restitution of conjugal rights (*n*). See sec. 240.

(*6*) *Expulsion of husband from caste.*—In a Bombay case, where the parties belonged to the Mussalman Kharwa community of Broach, the High Court refused to pass a decree for restitution of conjugal rights against the wife, on the ground that the husband having been expelled from the caste, the wife was not bound to live with him (*o*).

216A. Suit for jactitation of marriage.—A suit will lie between Mahomedans in British India for jactitation of a marriage (*p*).

Jactitation is a false pretence of being married to another. "There can be no doubt that unless a man is entitled by means of the Civil Courts to put to silence a woman who falsely claims to be his wife, the man and others may suffer considerable hardship and his heirs may be harassed by false claims after his death" (*q*).

216B. Suit for breach of promise to marry.—In a suit by a Mahomedan for damages for breach of promise to marry, the plaintiff is not entitled to damages peculiar to an action for breach of promise of marriage under the English law, but to a return merely of presents of money, ornaments, clothes and other things (*r*).

(*k*) *Abdul* v *Hussenbi* (1904) 6 Bom L R 728; *Imam Ali* v. *Arfatunnessa* (1913) 18 Cal. W. N. 693, 21 I. C. 87; *Fatima Bibi* v. *Nur Muhammad* (1920) 1 Lah. 597, 60 I C. 88.

(*l*) *Meherally* v. *Sakerkhanoobai* (1905) 7 Bom. L. R. 602.

(*m*) *Musammat Maqboolan* v *Ramzan* (1927) 2 Luck. 482, 101 I C. 261, ('27) A.O. 154; *Jaun Beebee* v. *Beparee* (1865) 3 W. R. 93.

(*n*) *Jamiruddin* v. *Sahera* (1927) 54 Cal. 363, 101 I C. 60, ('27) A C. 579

(*o*) *Bai Jina* v. *Kharwa Jina* (1907) 31 Bom. 366.

(*p*) *Mir Azmat Ali* v. *Mahmud-ul-nissa* (1897) 20 All 96.

(*q*) (1897) 20 All. 96, 97, *supra*.

(*r*) *Abdul Razak* v. *Mahomed* (1918) 42 Bom 499, 38 I.C. 771; Macnaghten, 250. See also *Mahomed Abid Ali* v. *Ludden* (1887) 14 Cal. 276 [*muta* marriage].

CHAPTER XV.

DOWER.

Ss. 217, 218

217. Dower defined.—*Mahr* or dower is a sum of money or other property which the wife is entitled to receive from the husband in consideration of the marriage.

See Baillie, 91, and per Mahmood, J., *Abdul Kadir* v. *Salima* (1886) 8 All. 149, at p. 157.

Marriage under the Mahomedan law is a civil contract (s. 194), and it is likened to a contract of sale. A sale is a transfer of property for a price. In the contract of marriage the "wife" is the property, and the "dower" is the price: see the Allahabad case cited above. Sir Abdur Rahim is of opinion that dower is not a consideration proceeding from the husband for the contract of marriage, but is an obligation imposed by the Mahomedan law as a mark of respect for the wife (*s*) In a Privy Council case (*t*), their Lordships said: "Dower is an essential incident under the Mussalman law to the status of marriage; to such an extent this is so that when it is unspecified at the time the marriage is contracted, the law declares that it must be adjudged on definite principles. Regarded as a consideration for the marriage, it is, in theory, payable before consummation, but the law allows its division into parts, one of which is called "prompt," payable before the wife can be called upon to enter the conjugal domicile; the other "deferred," payable on the dissolution of the contract by the death of either of the parties or by divorce."

218. Specified dower.—(*1*) The husband may settle any amount he likes by way of dower upon his wife, though it may be beyond his means, and though nothing may be left to his heirs after payment of the amount. But he cannot in any case settle less than ten *dirhams*.

(*2*) Where a claim is made under a contract of dower, the Court should, unless it is otherwise provided by any legislative enactment, award the entire sum provided in the contract (*u*).

Hedaya, 44; Baillie, 92.

Dirham.—The money value of 10 *dirhams* is between three and four rupees (*v*).

"Dower is often high among Mahomedans, to prevent the husband from divorcing his wife, in which case he would have to pay the amount stipulated" (*w*).

(*s*) Muhammadan Jurisprudence, p. 334.
(*t*) *Hamira Bibi* v *Zubaida Bibi* (1916) 43 I.A. 294, 300, 38 All. 581, 36 I C. 87, ('16) A. PC 46.
(*u*) *Sugra Bibi* v. *Mazuma Bibi* (1877) 2 All. 573, *Banoo Begum* v. *Mir Aun Ali* (1907) 9 Bom. L R. 188, *Basir Ali* v. *Hafiz* (1909) 13 Cal W N. 152, 4 I C. 462.
(*v*) *Asma Bibi* v. *Abdul Samad* (1909) 32 All. 167, 5 I C. 411.
(*w*) *Zakeri Begum* v. *Sakina Begum* (1892) 19 I.A. 157, 165, 19 Cal. 689.

"*Unless it is otherwise provided by any legislative enactment.*"—Under the Oudh Laws Act, 1876, sec. 5, the Court is not to award the amount of dower stipulated in the contract of marriage, but only such sum as "shall be *reasonable* with reference to the means of the husband and the status of the wife" (*x*). In *Zakeri Begum* v. *Sakina Begum* (*y*) the Privy Council held that the Act does not apply to a case in which a Mahomedan, residing *outside Oudh*, marries in Oudh a woman residing in Oudh.

Shia law.—Under the Shia law, there is no fixed legal minimum for dower: Baillie, II, 67, 68.

219. Dower may be fixed after marriage.—The amount of dower may be fixed either before or at the time of marriage, or even after marriage (*z*).

219A. Contract of dower may be made by father.—A contract of dower made by a father on behalf of his minor son is binding on the son. Such a contract may be made even after marriage, provided the son was then a minor (*a*). The father does not, by entering into such a contract, become personally liable for the dower debt. Nor is he liable for it merely because he consents to the marriage (*b*).

"Minor" in this section means one who has not attained puberty (*c*).

220. "Proper" dower.—If the amount of dower is not fixed (s. 218), the wife is entitled to "proper" dower (*mahr-i-misl*), even if the marriage was contracted on the express condition that she should not claim any dower. In determining what is "proper" dower, regard is to be had to the amount of dower settled upon other female members of her father's family, such as her father's sisters.

Hedaya, 45, 53, Baillie, 92, 95.

Shia law.—The proper dower under the Shia law should not exceed 500 *dirhams*: Baillie, II, 71. As to *dirham*, see notes to s. 218.

221. "Prompt" and "deferred" dower.—(*1*) The amount of dower is usually split into two parts, one called "prompt," which is payable on demand, and the other called "deferred," which is payable on dissolution of marriage by death or divorce. See sec. 243 (2).

(*2*) Where it is not settled at the time of marriage whether the dower is to be prompt or deferred, then according to the Shia law, the rule is to regard the whole as

(*x*) *Abdul Rahman* v. *Inayati Bibi* ('31) A O. 63, 130, I C. 113.

(*y*) (1892) 19 I A 157, 19 Cal. 689, *Rukia Bagam* v *Muhammad* (1910) 32 All 477, 6 I C 568.

(*z*) *Kamar-un-nissa* v *Hussaini Bibi* (1880) 3 All. 266; *Bashir Ahmad* v. *Zubaida* (1926) 1 Luck. 83, 92 I C. 265, ('26) A.O. 186, *Musammat Amina Bibi* v. *Muhammad* (1922) 4 Luck. 343, 114 I C 504, ('29) A O. 520

(*a*) *Bashir Ali* v. *Hafiz* (1909) 13 Cal. W. N. 153, 4 I C. 462

(*b*) *Muhammad Siddiq* v. *Shahab-ud-din* (1927) 49 All. 557, 100 I.C. 636, ('27) A A. 364

(*c*) *Mozharul* v. *Abdul* ('25) A. C. 322, 80 I C 914

Ss. 221-221B

prompt (*d*), but according to the Sunni law, the rule is to regard part as prompt and part as deferred, the proportion referable to each class being regulated by custom, and, in the absence of custom, by the status of the parties and the amount of the dower settled (*e*). It is not clear whether, in a case in which no specific portion of the dower has been fixed as prompt, the Court has the power, under the Sunni law, to award the *whole* amount as prompt. The High Court of Bombay has held that the Court has such power (*f*).

Baillie, 92. In *Eidan* v. *Mazhar Husain* (1877) 1 All. 483, the Court fixed *one-fifth* of a dower of Rs. 5,000 as "prompt," the wife having been a prostitute. In *Taufik-un-nissa* v. *Ghulam Kambar* (1877) 1 All. 506, the Court held that a *third* of a dower of Rs. 51,000 was reasonable as "prompt"; and the same proportion was fixed in *Fatma Bibi* v. *Sadruddin* (1865) 2 Bom. H.C. 291. In all these cases the parties were Sunnis, and the marriage contract was silent as to whether the dower was to be prompt or deferred

221A. Remission of dower by wife.—The wife may remit the dower or any part thereof in favour of the husband or his heirs. Such a remission is valid though made without consideration (*g*) [Baillie, 553].

But the remission must have been made with free consent. A remission made by a wife when she is in great mental distress owing to her husband's death is not one made with free consent, and is not binding on her (*h*). The High Court of Madras has held that a remission made by a wife who has not attained majority under the Indian Majority Act, 1875, is invalid, though she may have attained majority by Mahomedan law (*i*). The High Court of Allahabad has dissented from this decision, and held that since the Indian Majority Act (s. 2) does not affect the capacity of any person "to act in the matter of marriage or dower," a Mahomedan girl who has attained puberty is competent to relinquish her dower, though she may not have attained the age of majority (18 years) within the meaning of the Indian Majority Act (*j*). The Allahabad view is correct.

221B. Suit for dower and limitation.—If the dower is not paid, the wife, and, after her death, her heirs, may sue for it. The period of limitation for a suit to recover "prompt" dower is three years from the date when the dower is demanded and refused, or, where during the continuance of the marriage no such demand has been made, when the marriage is dissolved by death or divorce [Limitation Act, 1908, Sch. I, art. 103]. The period of limitation for a suit to recover

(*d*) *Mirza Bedar Bukht* v. *Mirza Khurrum Bukht* (1873) 19 W. R. 315 [P. C.], *Masthan Sahib* v *Assan Bivi* (1899) 23 Mad. 371.

(*e*) *Eidan* v. *Mazhar Husain* (1877) 1 All. 483; *Taufik-un-nissa* v. *Ghulam Kambar* (1877) 1 All 506; *Umda Begam* v *Muhammadi Begum* (1910) 33 All. 291, 9 I. C. 200, *Muhammad* v. *Saghir-un-nissa* (1919) 41 All 562, 50 I C. 740; *Mussammat Bibi* v *Sheikh Muhammad* (1929) 8 Pat. 645, 117 I. C. 207, ('29) A. P. 207, *Fatma Bibi* v. *Sadruddin* (1865) 2 B.H.C. 291.

(*f*) *Hoosenkhan* v *Gulab Khatum* (1911) 35 Bom. 386, 11 I C 558

(*g*) *Jyani Begam* v. *Umrao Begam* (1908) 32 Bom. 612

(*h*) *Nurannessa* v. *Khaje Mahomed* (1920) 47 Cal 537, 56 I C. 8

(*i*) *Abi Dhunmsa* v. *Mahammad* (1918) 41 Mad. 1026, 44 I C. 293.

(*j*) *Qasim Husain* v. *Bibi Kaniz* ('32) A. A. 649, 139 I C. 371.

"deferred" dower is three years from the date when the marriage is dissolved by death or divorce [*ibid.*, art. 104]. Ss. 221B-222A

Limitation for "deferred" dower does not run against the widow during the period she is in lawful possession of her husband's property under a claim for her dower (*k*).

222. Non-payment of prompt dower and restitution of conjugal rights.—The wife may refuse to live with her husband and admit him to sexual intercourse so long as the prompt dower is not paid [Baillie, 125]. If the husband sues her for restitution of conjugal rights *before* sexual intercourse takes place, non-payment of the dower is a complete defence to the suit, and the suit will be dismissed. If the suit is brought *after* sexual intercourse has taken place with her free consent, the proper decree to pass is not a decree of dismissal, but a decree for restitution conditional on payment of prompt dower (*l*).

See section 216 (4) and the cases there cited. Where a woman is pregnant at the time of her marriage, but conceals the pregnancy from her husband, the concealment does not render the marriage invalid, nor does she forfeit her right to prompt dower (*m*).

Debtor non præsumitur donare.—The maxim means that a debtor is not presumed to give, that is, to make a gift. The maxim, however, has no application as between husband and wife. Thus where a Mahomedan paid various sums of money from time to time to his wife, and there was no evidence that the payments were allocated to the dower debt, it was held that the payments could not be treated as having been made in satisfaction of the debt, and that the wife was entitled to recover the full amount of her dower (*n*).

222A. Liability of heirs for dower debt.—The heirs of a deceased Mahomedan are *not personally* liable for the dower debt. As in the case of other debts due from the deceased, so in the case of a dower debt, each heir is liable for the debt to the extent only of a share of the debt proportionate to his share of the estate [s. 33]. Where the widow, therefore, is in possession of her husband's property under a claim for her dower [s. 224], the other heirs of her husband are severally entitled to recover their respective shares upon payment of a quota of the dower debt proportionate to those shares (*o*).

A Mahomedan dies leaving a widow, a son, and two daughters. The widow is entitled to a dower debt of Rs. 3.200. The widow's share in the estate is 1/8 and she is liable to contribute Rs. 1/8×3,200=Rs. 400. The son's share is 7/16, and he is liable to pay Rs. 7/16×3,200=Rs. 1,400, and if the widow is in possession, he is entitled to recover his

(*k*) *Hamid-ul-lah Khan* v. *Najjo* (1911) 33 All. 568, 10 I.C. 282.
(*l*) *Abdul Kadir* v. *Salima* (1886) 8 All. 149; *Kunhi* v. *Moidin* (1888) 11 Mad. 327, *Bai Hansa* v *Abdullah* (1905) 30 Bom. 122; *Hamiddunnessa* v. *Zahiruddin* (1890) 17 Cal. 670.
(*m*) *Kulsumbi* v. *Abdul Kadir* (1921) 45 Bom. 151, 59 I C. 433, ('21) A. B. 205.
(*n*) *Mohammad Sadiq* v. *Fakhr Jahan* (1932) 59 I.A. 1, 6 Luck. 556, 136 I. C. 385 ('32) A. PC. 13.
(*o*) *Hamsra Bibi* v. *Zubaida Bibi* (1916) 43 I.A. 294, 38 All. 581, 36 I.C. 87.

Ss. 222A-224

share on payment of Rs. 1,400. The share of each daughter is 7/32, and she is liable to pay Rs. 7/32 × 3,200 = Rs. 700, and if the widow is in possession, she is entitled to recover her share on payment of Rs. 700.

223. Dower is a debt, but an unsecured debt.—(*1*) The dower ranks as a debt, and the widow is entitled, along with other creditors of her deceased husband, to have it satisfied on his death out of his estate. Her right, however, is no greater than that of any other unsecured creditor, except that she has a right of retention to the extent mentioned in sec. 224 below (*p*). She is not entitled to any *charge* on her husband's property, though such a charge may be created by *agreement* (*q*).

(*2*) *Whether a charge for a dower debt may be created by a decree.*—There is no doubt that it is within the competence of a Court to create a charge by its decree for a dower debt, so that if such a charge is created, and the decree has not been appealed against and has become final, effect will be given to the charge; in other words, a decree creating a charge is not a nullity for want of jurisdiction (*r*). But though it is not beyond the power of a Court to pass a decree creating a charge, it will not ordinarily do so. To pass such a decree is to give the dower debt a priority over other debts due from the deceased. The proper decree to make is a *simple money decree*. If a decree is passed creating a charge, the proper course for the Appellate Court is to set it aside to that extent (*s*).

(*3*) *Alienation by heir before payment of dower debt.*—The right of an heir to alienate his own share as stated in sec. 32 (1) above, is not affected by the fact that the dower debt has not been paid. But if the widow is in possession in lieu of her dower at the date of alienation, the alienation will be subject to her right to retain possession (*t*).

The dower debt stands on the same footing as an ordinary debt. An heir therefore may alienate his own share before payment of the dower debt just as he can alienate it before payment of any other unsecured debt, as so to pass a good title to the alienee.

224. Widow's right to retain possession of husband's estate in lieu of dower.—(*1*) The widow's claim for dower does not entitle her to a charge on any specific property of her

(*p*) *Bebee Bachun* v. *Sheikh Hamid* (1871) 14 M. I. A. 377, 383-384; *Hamira Bibi* v. *Zubaida Bibi* (1916) 43 I.A. 294, 301, 38 All. 581, 36 I.C. 87.

(*q*) *Ameer-oon-Nissa* v. *Moorad-oon-Nissa* (1855) 6 M. I A. 211.

(*r*) *Qasim Husain* v. *Habibur Rahman* (1929) 56 I.A. 254, 258, 8 Pat. 926, 117 I. C. 10, ('29) A. PC. 174; *Mahomed Wajid* v. *Bazayet Hossein* (1878) 5 I.A. 211, 223-224, 4 Cal. 302.

(*s*) *Abdul Rahman* v. *Inayati Bibi* ('31) A.O. 63, 130 I. C. 118.

(*t*) *Bazayet Hossein* v. *Doolichand* (1878) 5 I.A. 211, 4 Cal. 402.

deceased husband [s. 223]. But when she *is in possession* of the property of her deceased husband, having obtained such possession " lawfully and without force or fraud," she is entitled as against the other heirs of her husband *to retain that possession* until her dower is satisfied. The right to retain possession is extinguished on payment of the dower debt (*u*). This right is sometimes called a " lien," but it is not a lien in the strict sense of the term. Ss. 224, 224A

There is a conflict of opinion whether it is necessary, to entitle the widow to retain possession of her husband's property, that the possession should have been obtained by her not only " lawfully and without force or fraud," but also " with the express or implied consent of the husband or his other heirs." The High Court of Madras (*v*) has held that no such consent is necessary. The High Court of Calcutta has held that it is (*w*). In two earlier cases the High Court of Allahabad held that such consent was necessary (*x*); in later cases it has held that no such consent is necessary (*y*).

(*2*) A widow, who has not obtained possession of her husband's estate in lieu of her dower, cannot exclude the other heirs of her husband from possession. They are entitled to joint possession with her, and if they claim such possession, she is not entitled to say, " I will *now* go into possession." Her only right is to *retain* possession of what she has before they obtained possession (*z*).

224A. Right of retention not analogous to a mortgage.— The position of a widow claiming to retain possession of her husband's property until her dower debt is paid is essentially different from that of a mortgagee usufructuary or other to whom the owner pledges his property to secure repayment of a debt. There is no real or true analogy between the two (*a*). See sub-sec. 2 of sec. 224.

[*A* died leaving a widow and a sister. Some time after *A*'s death, the widow applied to the Collector to have the entire estate of *A* registered in her name, alleging that she

(*u*) *Bebee Bachun* v. *Sheikh Hamid* (1871) 14 M.I A 377; *Maina Bibi* v *Chaudhri Vakil* (1925) 52 I.A 145, 149-150, 47 All. 250, 254-255, 86 I.C. 179, ('25) A PC. 63.

(*v*) *Beeju Bee* v. *Syed Moorthuja* (1920) 43 Mad. 214, 53 I. C. 905.

(*w*) *Sabur Bibi* v. *Ismail* (1924) 51 Cal. 124, 80 I. C 294, ('24) A. C. 508, dissenting from *Sahebjan* v. *Ansaruddin* (1911) 38 Cal. 475, 9 I.C. 1031.

(*x*) *Amanat-un-nissa* v. *Bashir-un-nissa* (1894) 17 All. 77; *Muhammad Karim-Ullah* v. *Amani Begam* (1894) 17 All. 93

(*y*) *Ramzan Ali* v. *Asghari Begam* (1910) 32 All. 563, 566, 6 I.C. 405; *Muhammad Shoaib* v. *Zaib Jahan* (1928) 50 All. 423, ('27) A.A. 850; *Imtiaz Begam* v. *Abdul Karim* (1931) 53 All. 31, 128 I. C. 760, ('30) A A. 881.

(*z*) *Tahir-un-nissa* v. *Nawab Hasan* (1914) 36 All. 558, 24 I.C. 938.

(*a*) *Maina Bibi* v *Chaudhri Vakil* (1925) 52 I. A. 145, 151, 47 All. 250, 256, 86 I.C. 579, ('25) A. PC. 63.

Ss. 224A, 224B

had been in possession of the lands as an heir *and also on account of her dower.* The application was opposed by the sister, but the properties were registered in the widow's name. After ten years, the sister brought a suit against the widow to recover her share (three-fourths) in the estate of *A*. The widow contended that she was entitled to remain in possession of the estate until the dower debt was paid. It was held by the Privy Council that the widow was entitled to retain possession until her dower was satisfied: *Bebee Bachun* v. *Sheikh Hamid* (1871) 14 M.I.A. 377]

1. *Having obtained possession lawfully and without force or fraud.*—In *Bebee Bachun*'s case cited in the above illustration, their Lordships of the Privy Council said "The appellant (widow) having obtained actual and lawful possession of the estate under a claim to hold them as heir and for her dower, their Lordships are of opinion that she is entitled to retain that possession until her dower is satisfied . . . It is not necessary to say whether this right of the widow in possession is a lien in the strict sense of the term, although no doubt the right is so stated in a judgment of the High Court in the case of *Ahmed Hossein* v. *Mussamut Khodeja* (1868) 10 W.R. 369. Whatever the right may be called, it appears to be founded on the power of the widow, as a creditor for her dower, *to hold* the property of her husband, *of which she had lawfully and without force or fraud, obtained possession*, until her debt is satisfied, with the liability to account, to those entitled to the property, subject to the claim for the profit received."

2. The conflict referred to in the second paragraph of the sub-sec. (1) of sec. 224 arose from the judgment of the Privy Council in a later case *Hamira Bibi* v. *Zubaida Bibi* (*b*). In that case their Lordships said :—

"But the dower ranks as a debt, and the wife is entitled, along with other creditors, to have it satisfied on the death of the husband out of his estate Her right, however, is no greater than that of any other unsecured creditor, except that if she lawfully, *with the express or implied consent of the husband, or his other heirs*, obtain possession of the whole or part of his estate, to satisfy her claim with the rents . . . . accruing therefrom, she is entitled to retain such possession until it is satisfied. This is called the widow's lien for dower, and this is the only creditor's lien of the Mussulman law which has received recognition in the British Indian Courts and at this Board."

3. The Madras High Court holds that the observations of their Lordships of the Privy Council in the clause printed in italics above were *obiter dicta*. The Calcutta High Court holds, dissenting from the Madras High Court, that their Lordships were, in the above passage, defining the nature of the widow's dower debt and her right to retain possession of her husband's property, and that the observations were not *obiter*. It is noticeable that there is no suggestion about the *consent* of the husband or his heirs in the judgment of the Privy Council in the subsequent case of *Mama Bibi* v. *Chaudhri Vakil Ahmad* (*c*). It was argued in that case that the position of a widow in possession of her husband's estate was analogous to that of a mortgagee in possession. But this argument was not accepted by their Lordships. Their Lordships observed that "in the case of a mortgage the mortgagee takes and retains possession under an agreement or arrangement made between him and the mortgagor," but in the case of a Mahomedan widow who obtains possession under a claim for her dower "neither the possession of the property nor the right to retain that possession when acquired is conferred upon the widow by the *agreement or bounty of her deceased husband.* The possession of the property being once peaceably and lawfully acquired, the right of the widow to retain it till her dower debt is paid is conferred upon her by the Mahomedan law."

224B. Right of retention gives no title.—The right to hold possession does not give the widow any *title* to the property.

(*b*) (1916) 43 I.A. 294, 301, 38 All. 581, 588, 36 I.C. 87.

(*c*) (1924) 52 I.A. 145, 150-151, 47 All. 250, 255-256, 86 I.C. 579, ('25) A. PC. 63.

Ss. 224B-225

It enables her only to *retain possession* of the property of which she has obtained possession [sec. 224], and, if she is dispossessed, to sue for recovery of possession [sec. 225B]. The *title* to the property is in the *heirs* including, of course, the widow. But her right to hold possession has nothing to do with the interest which she has *as an heir* in the property. As an heir she has the rights and remedies of an *heir* (*d*).

224C. No right of retention during continuance of marriage.—The right of retention arises for the first time on the husband's death, unless the marriage is dissolved by divorce, in which case it arises on divorce (*e*).

It follows from this that if a creditor of the husband obtains a decree against him, and the husband's property is sold in execution in his lifetime, the wife has no right of retention against a purchaser in execution of the decree, and she must deliver possession to him.

224D. Liability of widow in possession to account.—A widow in possession of her husband's estate in lieu of dower is bound to account to the other heirs of her husband for the rents and profits received by her out of the estate (*f*). But she is entitled in that case to compensation for forbearing to enforce her right to the dower debt; this compensation is allowed in the form of interest on the dower debt (*g*).

225. No right to alienate property to satisfy dower debt.—(*1*) The right of a widow to retain possession of her husband's property under a claim for her dower does not carry with it the right to alienate the property by sale, mortgage, gift or otherwise (*h*). If she alienates the property, the alienation is valid to the extent of her own share; it does not affect the shares of the other heirs of her husband.

(*2*) If besides alienating the property, she delivers possession thereof to the alienee, the other heirs become entitled to recover immediate possession of their shares unconditionally, that is, without payment of their proportionate

(*d*) See *Mashal Singh* v. *Ahmad Husain* (1928) 50 All. 86, 108 I.C. 363, ('27) A.A. 534.

(*e*) *Narayana* v. *Biyari* (1922) 45 Mad. 103, 69 I. C. 977, ('23) A. M. 57; *Abdul Rahman* v. *Inayati Bibi* ('31) A.O. 63, 130 I. C. 113. See also *Ameer Ammal* v. *Sankaranarayanan* (1900) 25 Mad. 658.

(*f*) *Bebee Bachun* v. *Sheikh Hamid* (1871) 14 M. I. A. 377, 384.

(*g*) *Hamira Bibi* v. *Zubaida Bibi* (1916) 43 I. A. 294, 38 All. 581, 36 I. C. 87, affmg. (1910) 33 All. 182, 7 I. C. 497 [interest allowed at 6 per cent. per annum]; *Woomatool* v. *Meerunmun-nissa* (1868) 9 W. R. 318, *Sahebjan* v. *Ansaruddin* (1911) 38 Cal. 475, 480-481, 9 I. C. 1031; *Nawasi Begam* v. *Dilafroz* (1926) 48 All. 803, 98 I. C. 978, ('26) A.A. 39 [awarding of interest discretionary].

(*h*) *Chuhi Bibi* v. *Shams-un-nissa* (1894) 17 All. 19 [mortgage]; *Maina Bibi* v. *Chaudhri Vakil* (1925) 52 I. A. 145, 47 All. 250, 86 I. C. 579, ('25) A.P.C. 63 affmg. (1919) 41 All. 538, 51 I. C. 242 [gift]; *Beeju Bee* v. *Syed Moorthiya* (1920) 43 Mad. 214, 238, 53 I.C. 905 [sale]; *Musammat Sitaran* v. *Ganesh* (1927) 2 Luck. 553, 101 I. C. 714, ('28) A. O. 209.

Ss. 225, 225A

share of the dower debt. The widow is not entitled, on the alienation being set aside, to be restored back to possession; by giving up possession of the property, she lost her right to hold possession thereof. Whether she also loses her right to recover the dower debt is an open question (*i*).

(*3*) If the widow alienates the property, but does not deliver possession thereof to the alienee, as where she executes a mortgage without possession, the other heirs are entitled to a declaration that the mortgage does not bind their shares, but they are not entitled to immediate and unconditional possession thereof.

If the widow sells or makes a gift of the property, the sale or gift is valid to the extent of her own share in the property. It has been said in some cases that the sale or gift is void altogether so as not to take effect to the extent even of the widow's share (*j*), but there is nothing in the judgments in those cases to justify that view.

This section relates to the effect of an alienation and of delivery of possession by the widow to the alienee of the *property itself*. The next section relates to the effect of a transfer by her of her *right of retention*. See ill. (b) to sec. 225A.

225A. Whether right of retention is heritable and transferable.—(*1*) There is a conflict of opinion whether the widow's right to hold possession is transferable and heritable. One view is that the right is a *personal* right, and it cannot therefore be transferred by sale, gift or otherwise (*k*), nor can it pass to her heirs on her death (*l*). The other view is that the right to hold possession is *property*. But is the right both heritable and transferable? It has been held in some cases that it is heritable, without expressing any opinion whether it is also transferable (*m*). In other cases it has been held that it is both transferable and heritable (*n*). If it is transferable, can it be transferred without transferring also the dower debt? Here again there is a difference of opinion. In some cases it has been held that the right to hold possession cannot be severed from the dower debt and transferred as a separate

(*i*) *Mana Bibi* v. *Chaudhri Vakil* (1925) 52 I. A. 145, 47 All 250, 86 I C. 579, ('25) A PC. 63 [suit by heirs to recover *their own shares*]; *Musammat Sitaran* v. *Ganesh* (1927) 2 Luck. 553, 101 I. C 714, ('28) A.O. 209 [suit by heirs to recover *their own shares*].

(*j*) *Chuhi Bibi* v. *Shams-un-nissa* (1894) 17 All 19; *Mussammat Bibi* v. *Mussammat Bibi* (1923) 2 Pat. 84, 70 I.C 32, ('23) A.P 33

(*k*) *Muzaffar Ali* v. *Parbati* (1907) 29 All. 640.

(*l*) *Hadi Ali* v. *Akbar Ali* (1898) 20 All. 262.

(*m*) *Azizullah* v. *Ahmad* (1885) 7 All. 353, *Mayadmian* v. *Bibisaheb* (1916) 40 Bom 34, 30 I C 870.

(*n*) *Ali Bakhsh* v. *Allahdad* (1910) 32 All 551, 561, 6 I. C. 376; *Amir Hasan* v. *Mohammad* ('32) A A. 345, 136 I.C 833; *Abdulla* v. *Shams-ul-Haq* (1921) 43 All. 127, 131, 58 I.C. 833, ('21) A. A 262; *Beeju Bee* v *Syed Moorthiya* (1920) 43 Mad 214, 237, 53 I C. 905; *Mayadmian* v. *Bibisaheb* (1916) 40 Bom. 34, 47-49, 30 I. C. 870; *Mussammat Bibi* v. *Mussammat Bibi* (1923) 2 Pat. 84, 70 I. C. 312, ('23) A. P. 33; *Musammat Sogia* v. *Musammat Kutaban* (1928) 7 Pat. 141, 107 I. C. 319, ('28) A. P. 224; *Sheikh Abdur Rahman* v. *Sheikh Wali* (1923) 2 Pat. 75, 68 I. C. 601, ('23) A.P. 72.

interest (*o*). In other cases it has been held that it can be so transferred (*p*). But a transfer merely of the dower debt does not pass to the transferee the right to hold possession (*q*). In *Maina Bibi* v. *Chaudhri Vakil* (*r*), the Privy Council expressed a doubt whether a widow can transfer either the dower debt or the right to hold possession. All that can now be said with certainty is that the right to hold possession is heritable. Though it cannot be said with certainty whether it is also transferable, the balance of authority in India is in favour of the view that it is also transferable. S. 225A

(2) Assuming that a widow can transfer her dower debt and her right to hold possession till that debt is paid, a deed executed by her, which fails to effect a transfer of the *ownership* with which it purports to deal, cannot operate to transfer the dower debt and the right to hold possession (*s*).

Illustrations.

[(a) A Mahomedan dies leaving a widow, a daughter, and his father. The widow is in lawful possession of her husband's property in lieu of her dower. The widow dies leaving the daughter as her only heir. The daughter is entitled to retain possession of the property. The father is not entitled to possession of his share until he pays his proportionate share of the dower debt. But if the widow herself has not obtained possession in her lifetime, the daughter as her heir is not entitled to go into possession (*t*).

(b) A Mahomedan dies leaving a widow and a brother. The widow is in lawful possession of her husband's property in lieu of her dower. The brother is not entitled to possession of his share until he pays his proportionate share of the dower debt [s. 226]. The dower debt remains unsatisfied, and the widow sells the whole property to satisfy the debt, and delivers possession thereof to the purchaser. The sale-deed does not purport or attempt to transfer the dower debt or the right to hold possession to the purchaser, assuming that they could be transferred. What is the effect of the sale? The sale passes to the purchaser only the widow's share and the right to the possession of that share [s. 225]. What is the effect of the delivery of possession to the purchaser? The effect is that the brother, who was not entitled, before delivery of possession, to possession of his share until he paid his share of the dower debt, becomes entitled to immediate possession of his share without paying his share of the debt [see s. 222A]. The purchaser is not entitled to retain possession of the brother's share until the brother pays his share of the dower debt; the reason is that the deed does not purport to transfer to him either the dower debt or the right to hold possession. Nor is the widow entitled to have the possession restored back to her, for by giving up possession, she lost her

(*o*) *Ali Bakhsh* v. *Allahdad* (1910) 32 All. 551, 557, 6 I. C. 376; *Amir Hasan* v. *Mohammad* ('32) A. A. 345, 136 I. C. 833; *Sheikh Abdur Rahman* v. *Sheikh Wali* (1923) 2 Pat. 75, 68 I. C. 601, ('23) A.P. 72.

(*p*) *Abdulla* v. *Shams-ul-Haq* (1921) 43 All. 127, 131, 58 I.C. 833, ('21) A.A. 262, *Mussammat Bibi* v. *Mussammat Bibi* (1923) 2 Pat. 84, 70 I. C. 312, ('23) A. P. 33, *Musammat Sogia* v *Musammat Kilaban* (1928) 7 Pat. 141, 107 I. C. 319, ('28) A. P. 224.

(*q*) *Amir Hasan* v *Mohammad* ('32) A. A. 345, 136 I. C. 833.

(*r*) (1925) 52 I. A. 145, 159, 47 All. 250, 262, 86 I.C. 579, ('25) A.PC. 63.

(*s*) *Maina Bibi* v. *Chaudhri Vakil* (1925) 52 I. A. 145, 47 All. 250, 86 I. C 579, ('25) A.PC. 63; *Musammat Sitaran* v. *Ganesh* (1927) 2 Luck. 553, 101 I. C. 714, ('28) A.O. 209.

(*t*) *Tahir-un-nissa* v. *Nawab Hasan* (1914) 36 All. 558, 24 I. C. 938.

Ss. 225A-226.

right to hold possession. The purchaser has his remedy for the price paid by him against the widow. Whether the widow is entitled to recover the dower debt out of the other properties of her husband, is an open question. Probably she is.]

225B. Suit for possession by widow who is dispossessed.— If a widow who is in possession of her husband's property under a claim for her dower, is wrongfully deprived of her possession, she may bring a suit for recovery of possession (*u*). If the property is immovable, the suit must be brought within six months from the date of dispossession (*v*) [Limitation Act, 1908, Sch. I, art. 3]. If it is movable, it must be brought within three years from the date on which she first learns in whose possession it is [*ibid.*, art. 48].

The widow's right to sue for possession has nothing to do with her right to hold possession. It is the ordinary right of a person who, though he has no title to the property (s. 224B), is entitled to sue for possession, if he is wrongfully dispossessed. In the case of immovable property, such right is given by the Specific Relief Act, 1877, s 9. In the case of movables, the right to sue is a common law right.

225C. Widow's possession no bar to a suit for dower.— (*1*) The fact that a widow is in possession of her husband's property under a claim for her dower, is no bar to a suit by her against the other heirs of her husband to recover the dower debt. But she must in such a suit offer to give up possession of the property (*w*). She cannot both retain possession and have a decree for her dower debt.

(*2*) If she sues for part only of the dower debt, she cannot afterwards sue for the balance of the debt (*x*). See Code of Civil Procedure, 1908, O. 2, r. 2.

It has been held in Calcutta (*y*) that if the widow is in possession of her husband's property under a claim for her dower, the proper course for her to follow is to bring an administration suit in which the property can be placed in the hands of the Court, an account be taken of the profits received by her and of the interest due to her on the dower debt, and appropriate directions given for the satisfaction of her claim by sale of the assets or otherwise.

226. Suit by heirs for their shares and res judicata.— Where in a suit against the widow by the other heirs of her husband for recovery of their shares a decree is passed for possession conditional upon their paying their proportionate amount of the dower debt within a specified time, and the

(*u*) *Majidmian* v. *Bibisaheb* (1916) 40 Bom. 34, 49-50, 30 I. C. 870 [suit by a widow and heirs of a deceased co-widow]; *Azizullah* v. *Ahmad* (1885) 7 All. 353 [suit by heirs of a deceased widow].

(*v*) *Mashal Singh* v. *Ahmad Husain* (1928) 50 All. 86, 103 I. C. 363, ('27) A. A. 534.

(*w*) *Ghulam Ali* v. *Sagir-ul-nissa* (1901) 23 All. 432.

(*x*) *Kaniz Fatima* v. *Ram Nandan* (1923) 45 All. 384, 73 I. C. 977, ('23) A. A. 331.

(*y*) *Mirza Mohammad* v. *Shazadi Wahida* (1914) 19 C.W.N. 502, 28 I. C. 191. See also *Davuthammal* v. *Pasari* ('25) A.M. 1064, 86 I.C. 367.

decree provides that if the plaintiffs fail to pay the decretal amount within that time the suit should be dismissed, and the suit is eventually dismissed for non-payment, the dismissal does not operate as *res judicata* so as to bar a subsequent suit by the same plaintiffs against the widow for possession of the same property based upon the ground that the dower debt has since been satisfied from the income of the property. The non-fulfilment of the condition attached to the decree extinguishes only the right to recover *immediate* possession. It does not extinguish the proprietary interest of the heirs or their right to recover possession when the dower debt is satisfied *at some future time* either by the plaintiffs or out of the profits of the property. The effect of dismissal is simply to relegate the parties to the position in which they were before the first suit was brought (*z*). Ss. 226, 226A

226A. Kharch-i-pandan.—Where the husband and wife are both minors at the date of marriage, and the husband's father agrees with the wife's father to pay to the wife in consideration of the marriage a specified sum every month for her betel-leaf expenses, and charges certain properties with the payment thereof, with power to the wife to enforce it, the wife, although no party to the agreement, is entitled as a beneficiary under the agreement to sue her husband's father to recover the amount (*a*).

(*z*) *Mania Bibi* v. *Chaudhri Vakil* (1925) 52 I A 145, 47 All. 250, 86 I C. 579, ('25) A. PC. 63. *Nawasi Begam* v *Dilafroz* (1926) 48 All. 803, 98 I. C. 978, ('27) A. A. 39.

(*a*) *Khwaja Muhammad* v *Husaini Begam* (1910) 37 I. A. 152, 32 All. 410, 7 I C. 237; *Muhammad Ali* v *Fatima* (1930) 11 Lah. 85, 119 I.C. 486, ('29) A.L. 660.

CHAPTER XVI.

DIVORCE.

A. Divorce by husband.

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227. Different forms of divorce.—The contract of marriage under the Mahomedan law may be dissolved in any one of the following ways: (1) by the husband at his will, without the intervention of a Court; (2) by mutual consent of the husband and wife, without the intervention of a Court; (3) by a judicial decree at the suit of the husband or wife. The wife cannot divorce herself from her husband without his consent, except under a contract whether made before or after marriage [sec. 233], but she may, in some cases, obtain a divorce by judicial decree [secs. 239-240].

When the divorce proceeds from the husband, it is called *talak* (secs. 228-234); when it is effected by mutual consent, it is called *khula* (sec. 235) or *mubaráat* (sec. 236) according to the terms of the contract between the parties.

228. Divorce by talak.—Any Mahomedan of sound mind, who has attained puberty, may divorce his wife whenever he desires without assigning any cause (*b*).

Macnaghten, p. 59; *Hedaya*, 75; Baillie, 208-209.

229. Talak may be oral or in writing.—A *talak* may be effected by writing, generally called *talaknama*, as well as by word of mouth. No particular form of words is prescribed. If the words used are "express" or well understood as implying divorce, such as "talak," no proof of intention is required. If the words used are ambiguous, the intention must be proved (*c*).

Hedaya, 76; Baillie, 213, 229, 233.

Words of divorce.—The words of divorce must indicate an intention to dissolve the marriage. If they are express (*saheeh*), *e.g.*, "Thou art *divorced*," "I have *divorced* thee," or "I divorce my wife for ever and render her *haram* for me" (*d*), they clearly indicate an intention to dissolve the marriage, and no proof of intention is necessary. But if they are ambiguous (*kinayat*), *e.g.*, "Thou art my cousin, the daughter of my

(*b*) *Ahmad Kasim* v. *Khatun Bibi* (1932) 59 Cal. 833.

(*c*) *Ma Mi* v. *Kallander Ammal* (1927) 54 I.A. 61, 5 Rang. 18, 100 I C. 1, ('27) A.PC. 15, affirming (1924) 2 Rang. 400, 84 I. C 175, ('24) A R. 363, *Rashid Ahmad* v. *Anisa Khatun* (1932) 59 I.A 21, 54 All.46, 135 I.C. 762, ('32) A. PC. 25, *Ibrahim* v. *Syed Bibi* (1888) 12 Mad 63; *Wahid Khan* v. *Zainab Bibi* (1914) 36 All. 458, 25 I.C. 387, *Asha Bibi* v. *Kadir* (1909) 33 Mad. 22, 3 I C. 730.

(*d*) *Rashid Ahmad* v. *Anisa Khatun* (1932) 59 I.A. 21, 54 All. 46, 135 I C. 762, ('32) A. PC. 25.

uncle, if thou goest" (*e*), or "I give up all relations and would have no connection of any sort with you" (*f*), the intention must be proved.

Proof of talaknama.—A *talaknama* (deed of divorce) must be proved, like any other evidence, by primary evidence. If it is lost, it may be proved by oral evidence of its contents by some person who has read it. Evidence that the witness saw the document and heard it read out is hearsay so far as the contents are concerned, and is inadmissible (*g*). See Evidence Act, 1872, s. 63, read with s. 60, para. 2.

Shia law.—A *talak* under the Shia law must be pronounced orally in the presence of two competent witnesses: Baillie, II, 117. A *talak* communicated in writing is not valid, unless the husband is physically incapable of pronouncing it orally: Baillie, II, 113-114.

229A. Talak pronounced in absence of wife.—It is not necessary for the validity of a *talak* that it should be pronounced in the presence of the wife or even addressed to her (*h*) [see note below]. But if it is pronounced in her absence, she must either be referred to by name (*i*), or the words of repudiation must clearly refer to her (*j*). Thus a *talak* may be addressed to the father of the wife, and the wife may be referred to as "your daughter," as when a Hanafi Mahomedan addressing his father-in-law says: "Oh, Naina Mahomed! This is the *talak* for your daughter. *Talak* once, *talak* twice, *talak* thrice. She has become my mother" (*k*). The *talak*, however, must be communicated to the wife, and the communication should be made within a reasonable time after it is pronounced (*l*). If the divorce is in writing, it will be deemed to have reached the wife if she evades receiving it (*m*), or where it is sent to her by registered post, it is returned endorsed by the postal authorities "refused," and the facts show that the refusal was made with intent not to receive it (*n*).

Talak in writing.—Since a *talak* may be pronounced in the absence of the wife, it is not necessary, if it is in writing, that the writing should be signed in the presence of the wife. It may be signed in the presence of a Kazi, or the wife's father (*o*), or any other person (*p*).

(*e*) *Hamid Ali* v. *Imtiazan* (1878) 2 All. 71 [intention held to be proved]

(*f*) *Wajid Ali* v. *Jafar Husain* ('32) A.O. 34, 136 I. C. 209 [intention held not proved].

(*g*) *Ma Mi* v. *Kallander Ammal* (1927) 54 I.A. 61, 5 Rang. 18, 100 I C. 1, ('27) A.PC. 15.

(*h*) *Ma Mi* v. *Kallander Ammal* (1927) 54 I.A. 61, 5 Rang. 18, 100 I C. 1, ('27) A PC. 15, *Rashid Ahmad* v *Anisa Khatun* (1932) 59 I.A. 21, 54 All. 46, 135 I. C 762, ('32) A. PC. 25; *Sarabai* v. *Rabnabai* (1905) 30 Bom 537, 544, *Asha Bibi* v. *Kadir* (1909) 33 Mad. 22, 3 I.C. 730, *Rajasaheb, In re*, (1920) 44 Bom. 44, 54 I C. 573, *Ful Chand* v. *Nazab Ali* (1909) 36 Cal 184, 1 I C 740, *Ahmad Kasim* v. *Khatun Bibi* (1929) 59 Cal. 833.

(*i*) *Furzund Hossein* v. *Janu Bibee* (1878) 4 Cal. 588, distinguished in *Rashid Ahmad* v. *Anisa Khatun* (1932) 59 I A. 21, 54 All. 46, 135 I. C. 762, ('32) A. PC. 25.

(*j*) *Asha Bibi* v. *Kadir* (1909) 33 Mad. 22, 3 I. C. 730.

(*k*) *Ibid.*

(*l*) *Rajasaheb, In re*, (1920) 44 Bom. 44, 54 I.C. 573.

(*m*) (1905) 30 Bom. 537, 546, *supra.*

(*n*) (1932) 59 Cal. 833, *supra.*

(*o*) *Waj Bibee* v. *Azmut Ali* (1868) 8 W R. 23

(*p*) *Rajasaheb, In re* (1920) 44 Bom. 44, 54 I C. 573; *Ahmad Kasim* v. *Khatun Bibi* (1932) 59 Cal. 833 842.

S. 230 **230. Different modes of talak.**—A *talak* may be effected in any of the following ways :—

(1) *Talak ahsan.*—This consists of a *single* pronouncement of divorce made during a *tuhr* (period between menstruations) followed by abstinence from sexual intercourse for the period of iddat (s. 199).

When the marriage has not been consummated, a *talak* in the *ahsan* form may be pronounced even if the wife is in her menstruation.

(2) *Talak hasan.*—This consists of *three* pronouncements made during *successive tuhrs*, no intercourse taking place during any of the three *tuhrs*.

The first pronouncement should be made during a *tuhr*, the second during the *next tuhr*, and the third during the *succeeding tuhr*.

(3) *Talak-ul-bidaat or talak-i-badai.*—This consists of—

(i) three pronouncements made during a *single tuhr* either in one sentence, *e.g.*, "I divorce thee *thrice*," or in separate sentences, *e.g.*, "I divorce thee, I divorce thee, I divorce thee" (*q*); or,

(ii) a *single* pronouncement made during a *tuhr* clearly indicating an intention *irrevocably* to dissolve the marriage (*r*), *e.g.*, "I divorce thee irrevocably."

Hedaya, 72, 73, 83; Baillie, 206, 207, 226.

Talak-us-sunnat and talak-ul-bidaat.—The Hanafis recognize two kinds of *talak*, namely, (1) *talak-us-sunnat*, that is, *talak* according to the rules laid down in the *sunnat* (traditions) of the Prophet; and (2) *talak-ul-bidaat*, that is, new or irregular *talak*. *Talak-ul-bidaat* was introduced by the Omeyyade monarchs in the second century of the Mahomedan era. *Talak-us-sunnat* is of two kinds, namely, (1) *ahsan*, that is, most proper, and (2) *hasan*, that is, proper. The *talak-ul-bidaat* or heretical divorce is good in law, though bad in theology, and it is the most common and prevalent mode of divorce in this country (*s*), including Oudh (*t*). In the case of *talak ahsan* and *talak hasan*, the husband has an opportunity of reconsidering his decision, for the *talak* in both these cases does not become absolute until a certain period has elapsed (s. 231), and the husband has the option to revoke it before then. But the *talak-ul-bidaat* becomes irrevocable immediately it is pronounced (s. 231). The essential feature of a *talak-ul-bidaat* is its irrevocability. One of the tests of irrevocability is the repetition *three times* of the formula of divorce *within one tuhr*. But the *triple* repetition is not a necessary condition of *talak-ul-bidaat*, and the intention to render a *talak* irrevocable may be expressed even by a *single* declaration. Thus if a man says: "I have divorced you by a *talak-ul-bain* (irrevocable divorce)," the *talak* is *talak-ul-bidaat* or *talak-i-badai*, and

(*q*) *In re Abdul Ali* (1883) 7 Bom. 180; *Amr-ud-din* v. *Khatun Bibi* (1917) 39 All. 371, 39 I.C. 513.

(*r*) *Sarabai* v *Rabiabai* (1905) 30 Bom. 537; *Sheikh Fazlur* v. *Musammat Aisha* (1929) 8 Pat. 690, 115 I.C. 546, ('29) A. P. 81.

(*s*) *Amr-ud-din* v. *Khatun Bibi* (1917) 39 All. 371, 375, 39 I.C. 513.

(*t*) *Sheikh Fazlur* v. *Musammat Aisha* (1929) 8 Pat. 690, 115 I. C. 546, ('29) A. P. 81.

it will take effect immediately it is pronounced, though it may be pronounced but once. Here the use of the expression "*bain* (irrevocable)" manifests of itself the intention to effect an irrevocable divorce.

Talak-ul-bidaat and tuhr.—The High Court of Patna has expressed the opinion, relying on a passage on p. 74 of the *Hedaya*, that a *talak-ul-bidaat* effected by a triple pronouncement is valid even if it is pronounced when the wife is in her menstruation (*u*).

Shia law.—The Shia lawyers do not recognize the validity of *talak-ul-bidaat*. Baillie, II, 118.

231. When talak becomes irrevocable.—(*1*) A *talak* in the *ahsan* mode [s. 230 (1)] becomes irrevocable and complete on the expiration of the period of *iddat* (s. 199).

(*2*) A *talak* in the *hasan* mode [s. 230 (2)] becomes irrevocable and complete on the third pronouncement, irrespective of the *iddat*.

(*3*) A *talak* in the *badai* mode [s. 230 (3)] becomes irrevocable and complete immediately it is pronounced, irrespective again of the *iddat* (*v*). As the talak becomes irrevocable *at once*, it is called *talak-i-bain*, that is, irreversible *talak*.

Hedaya, 72-73; Baillie, 206-207, 226.

Until a *talak* becomes irrevocable, the husband has the option to revoke it which may be done either expressly, or impliedly as by resuming sexual intercourse.

Hedaya, 103-104; Baillie, 287-288.

As to the right to contract another marriage after divorce, see s. 243 (1). As to remarriage of divorcées, see s. 243 (5).

232. When talak in writing becomes irrevocable.—In the absence of words showing a different intention, a divorce in writing operates as an irrevocable divorce (*talak-i-bain*), and takes effect immediately on its execution (*w*).

Baillie, 234.

In a Bombay case (*x*), a Hanafi Mahomedan appeared before the Kazi of Bombay and executed a *talaknama*, which ran as follows: "As on account of some disagreement between us there has arisen some ill-feeling. I, the declarant, appear personally before the Kazi of my free will, and divorce Sarabai, my wife by *nika*, by one *bain-talak* (irrevocable divorce), and renounce her from the state of being my wife." In the course of his judgment, Batchelor, J., said: "To my mind this *talaknama* is decisive; it describes the talak as *talak-ul-bain* and emphatically declares that all rights and liabilities

(*u*) *Sheikh Fazlur* v. *Musammat Aisha* (1929) 8 Pat. 690, 115 I.C. 546, ('29) A.P. 81.
(*v*) *Rashid Ahmad* v *Anisa Khatun* (1932) 59 I.A. 91, 97, 54 All. 48, 59, 135 I.C. 789, ('32) A. PC. 25.
(*w*) Baillie, 233; *Sarabai* v. *Rabiabai* (1905) 30 Bom. 537.
(*x*) (1905) 30 Bom. 537, supra.

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between Adam and plaintiff as husband and wife have ceased and determined. There is ample authority in the books for the view that such a writing, even though not communicated to the wife, effects an irrevocable (that is merely the English rendering of *bain*) divorce *as from the date of the document.*"

But the writing may show an intention to the contrary. Thus if the writing says, "when this my letter reaches thee, then thou art repudiated," the *talak* does not take effect until the actual receipt of the letter: Baillie, 234. Similarly, if the writing says, "I have divorced thee on the 15th September, 1913, and the period of the third divorce will expire on the 15th November 1913," the *talak* contemplated by the husband is a *talak hasan* [s. 230 (2)], and there is no divorce unless two more pronouncements are made (*y*).

233. Stipulation by wife for right of divorce.—An agreement made, whether before or after marriage, by which it is provided that the wife should be at liberty to divorce herself in specified contingencies is valid, if the conditions are of a reasonable nature and are not opposed to the policy of the Mahomedan law. When such an agreement is made, the wife may, at any time after the happening of any of the contingencies, repudiate herself in the exercise of the power, and a divorce will then take effect to the same extent as if a *talak* had been pronounced by the husband (*z*). The power so delegated to the wife is not revocable, and she may exercise it even after the institution of a suit against her for restitution of conjugal rights (*a*).

Baillie, 19.

[(a) *A* enters into an agreement before his marriage with *B*, by which it is provided that *A* should pay *B* Rs. 400 for her dower on demand, that he should not beat or ill-treat her, that he should allow *B* to be taken to her father's house four times a year, and that if he committed a breach of any of the conditions, *B* should have the power of divorcing herself from *A*. Some time after the marriage *B* divorces herself from *A*, alleging cruelty and non-payment of dower. *A* then sues *B* for restitution of conjugal rights. Here the conditions are all of a reasonable nature, and they are not opposed to the policy of the Mahomedan law. The divorce is therefore valid, and *A* is not entitled to restitution of conjugal rights: *Hamidoolla* v. *Faizunnissa* (1882) 8 Cal. 327.]

Talak by tafweez (delegation of power).—The agreement in the above case may be supported on the doctrine of *tafweez*, which is an essential part of the Mahomedan law of divorce. Under that law the husband may *in person* repudiate his wife, or he may *delegate* the power of repudiating her to a third party, or even to the *wife:* Baillie, 238; such a delegation of power is called *tafweez.* "When a man has said to his wife, 'Repudiate thyself,' she can repudiate herself at the meeting, and he cannot divest her of the power": Baillie, 254. "When a man has said to his wife, 'Choose thyself to-day,' or 'this month,' or 'month' or 'year,' she may exercise the option (of repudiation) *at any time* within the given period": Baillie, 242. The agreement in the case

(*y*) *Ghulam Mohy-ud-din* v. *Khizar Hussain* (1929) 10 Lah 470, 114 I. C. 74, ('29) A L. 6.

(*z*) *Hamidoolla* v. *Faizunnissa* (1882) 8 Cal. 327; *Ayatunnessa Beebee* v. *Karam Ali* (1909) 36 Cal. 23, *Maharam Ali* v. *Ayesa Khatum* (1915) 19 Cal W.N. 1226, 31 I.C. 562; *Sanuddin* v *Latifannessa Bibi* (1919) 46 Cal. 141, 48 I C. 609 [agreement *after* marriage].

(*a*) (1919) 46 Cal. 141, 48 I.C. 609, *supra*

cited in ill. (a) may be regarded as a case of repudiation by the wife under an authority from the husband, in other words, as a *talak* by *tafweez*. Such a divorce, though it is *in form* a divorce of the husband *by the wife*, operates *in law* as a *talak* of the wife *by the husband*.

[(b) An agreement between husband and wife by which the husband authorizes the wife to divorce herself from him in the event of his marrying a second wife without her consent is valid : *Maharam Ali* v. *Ayesa Khatum* (1915) 19 Cal. W.N. 1226, 31 I.C. 562 ; *Badarannissa* v. *Mafiattala* (1871) 7 Beng. L.R. 442.]

At any time after the happening of the contingency.—Thus where a power is given to a wife by the marriage contract to divorce herself on her husband marrying again, then if her husband does marry again, she is not bound to exercise her option at the very first moment she hears the news. The wrong done to her is a continuing one, and she has a continuing right to exercise the power (*b*).

234. Talak under compulsion.—If the words of divorce used by the husband are "express" (s. 229), the divorce is valid even if it was pronounced under compulsion (*c*), or in a state of voluntary intoxication, or to satisfy his father or some one else (*d*).

Hedaya, 75, 76 ; Baillie, 208-210.

Shia law.—A divorce pronounced in the circumstances stated in this section is invalid under the Shia law : Baillie, II, 108.

234A. Talak when marriage solemnized in England according to English law.—A civil marriage, solemnized at a Registrar's office in London between a Mahomedan domiciled in India and an English woman domiciled in England, cannot be dissolved by the husband handing to the wife a *talaknama* [writing of divorcement (s. 232)], although that would be an appropriate mode of effecting the dissolution of a Mahomedan marriage under Mahomedan law (*e*).

The reason is that such a marriage is a Christian marriage by which is meant the voluntary *union for life of one man and one woman* to the exclusion of all others ; it is not a marriage in the Mahomedan sense which can be dissolved in Mahomedan manner. A Mahomedan marriage, being a polygamous marriage, is, according to the English law, no marriage at all.

235. Khula and mubara'at.—(*1*) A marriage may be dissolved not only by *talak*, which is the arbitrary act of the husband, but also by agreement between the husband and wife. A dissolution of marriage by agreement may take the form of *khula* or *mubara'at*.

(*b*) *Ayatunnessa Beebee* v. *Karam Ali* (1909) 36 Cal. 28, 1 I.C. 513.

(*c*) *Ibrahim* v. *Enayetur* (1869) 4 Beng. L.R. A.C. 13.

(*d*) *Rashid Ahmad* v. *Anisa Khatun* (1932) 59 I A 21, 27, 54 All. 46, 52-53, 135 I C. 762, ('32) A. PC. 25.

(*e*) *Rex* v. *Hammersmith, Superintendent Registrar of Marriages* [1917] 1 K.B. 634.

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(2) "A divorce by *khula* is a divorce with the consent, and at the instance of the wife, in which she gives or agrees to give a consideration to the husband for her release from the marriage tie. In such a case the terms of the bargain are matters of arrangement between the husband and wife, and the wife may, as the consideration, release her dyn-mohr and other rights, or make any other agreement for the benefit of the husband" (*f*). Failure on the part of the wife to pay the consideration for the divorce does not invalidate the divorce (*g*), though the husband may sue the wife for it.

A *khula* divorce is effected by an offer from the wife to compensate the husband if he releases her from his marital rights and acceptance by the husband of the offer. Once the offer is accepted, it operates as a single irrevocable divorce (*talak-i-bain*) [ss. 230 (3), 231], and its operation is not postponed until execution of the *khulanama* (deed of *khula*) (*h*).

(3) A *mubara'at* divorce, like *khula*, is a dissolution of marriage by agreement, but there is a difference between the origin of the two. When the aversion is on the side of the wife, and she desires a separation, the transaction is called *khula*. When the aversion is mutual, and both the sides desire a separation, the transaction is called *mubara'at*. The offer in a *mubara'at* divorce may proceed from the wife, or it may proceed from the husband, but once it is accepted, the dissolution is complete, and it operates as a *talak-i-bain* as in the case of *khula*.

(4) As in *talak*, so in *khula* and *mubara'at*, the wife is bound to observe the *iddat*, as stated in sec. 199 above (*i*).

Hedaya, 112-116; Baillie, 305-308. "*Khoola* means to put off, as a man is said to *khoola* his garment when he puts it off. In law it is the laying down by a husband of his right and authority over his wife for an exchange." Baillie, 306; *Hedaya*, 112. *Mubara'at* means mutual release: Baillie, 306; *Hedaya*, 116.

236. Effect of khula and mubara'at divorce.—Unless it is otherwise provided by the contract, a divorce effected by *khula* or *mubara'at* operates as a release by the wife of her dower, but it does not affect the liability of the husband to maintain her during her *iddat*, or to maintain his children by her

Baillie, 306-307; *Hedaya*, 116.

(*f*) *Moonshee Buzul-ul-Raheem* v. *Luteefut-oon-Nissa* (1861) 8 M.I.A. 379, 395; *Saddan* v. *Fatz Bakhsh* (1920) 1 Lah. 402, 55 I.C. 184.

(*g*) (1861) 8 M.I.A., 379, 397-398, *supra*.

(*h*) (1861) 8 M.I.A 379, 396, *supra*.

(*i*) *Ibid*.

237. Apostasy from Islam.—Apostasy from Islam of either party to a marriage operates as a complete and immediate dissolution of the marriage (*j*).

A Mahomedan husband becomes a convert to Christianity. The wife then marries another man *before* the expiration of the period of *iddat* (sec. 199). Is she guilty of bigamy under sec. 494 of the Indian Penal Code? No, because apostasy operates as an *immediate* dissolution of marriage (*k*). As to conversion to Mahomedanism, see sec. 14 above.

Rights of inheritance not affected by apostasy.—Change of religion does not affect rights of inheritance or other rights · see Act 21 of 1850.

238. Agreement for future separation.—The High Court of Bombay has held that an agreement between a Mahomedan husband and wife which provides for *future* separation in the event of disagreement between them is void as being against public policy (*l*). See secs. 215A and 216 (3).

The Bombay decision was founded on sec. 23 of the Indian Contract Act, 1872, which says that an agreement against public policy is void. But this decision is of doubtful authority. If a Mahomedan wife can lawfully stipulate for a divorce as stated in sec. 233, there is no reason why she cannot stipulate for *future* separation, at all events if the separation is to be for a justifiable cause. Such a stipulation can hardly be said to be against the policy of the Mahomedan law.

B. Judicial divorce at suit of wife.

239. Impotence of husband.—The wife is entitled to sue for a divorce on the ground of her husband's impotence, provided that (1) the defect existed at the time of the marriage and had continued since then, and (2) she did not then know of it.

If these facts are established, the further hearing of the suit will be adjourned for a year in order that it may be ascertained whether the defect is removable. After the period has expired, the Court may, on the application of the wife, and on proof that there has been no sexual intercourse between the husband and wife during that period, pass a decree dissolving the marriage (*m*).

Hedaya, 126-128; Baillie, 347-349.

240. Li'an or imprecation.—(*1*) The wife is entitled to sue for a divorce on the ground that her husband has falsely

(*j*) *Amn Beg* v. *Saman* (1910) 33 All 90, 7 I C. 342.

(*k*) *Abdul Ghani* v *Azizul Huq* (1912) 39 Cal. 409, 14 I.C. 641.

(*l*) *Bai Fatma* v. *Ahmahomed* (1913) 37 Bom 280, 17 I.C. 946.

(*m*) *Muhammad Ibrahim* v. *Altafan* (1925) 47 All. 243, 83 I.C. 27, ('25) A.A. 24, *A.* v. *B.* (1896) 21 Bom. 77; *Vadake Vitil* v. *Odakel* (1881) 3 Mad. 347.

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charged her with adultery. If the charge is proved to be false, she is entitled to a decree, but not if it is proved to be true (*n*). No such suit will lie if the marriage was irregular [Baillie, 337].

(*2*) *No separation until decree.*—A charge of adultery does not of itself terminate the marriage. The marriage continues until the decree is passed (*o*).

(*3*) *Retractation of charge.*—The effect of the decisions, excluding what are merely *obiter dicta*, would appear to be that a retractation of the charge by the husband at or before the commencement of the hearing disentitles the wife to a decree (*p*), but she is entitled to a decree if the retractation is made after the close of the evidence (*q*), or of the trial (*r*). The High Court of Bombay has expressed the opinion that retractation "has no place in the procedure in British Courts" (*s*).

Baillie, 335-339; *Hedaya*, 123-124.

Li'an or imprecation.—*Li'an* is testimony confirmed by oath and accompanied with imprecation. Under the pure Mahomedan law, if a man charges his wife with adultery, he may be called upon, on the application of the wife, either to retract the charge or to confirm it by oath complied with an imprecation in these terms: "The curse of God be upon him if he was a liar when he cast at her the charge of adultery." The wife must then be called upon either to admit the truth of the imputation, or to deny it on oath complied with an imprecation in these terms: "The wrath of God be upon me if he be a true speaker in the charge of adultery which he has cast upon me." If she takes the oath, the Kazi must believe her, and pronounce a separation between the parties. These, however, are mere rules of evidence, and they have been superseded by the Indian Evidence Act, 1872. As to special oaths under the Indian Oaths Act, 1873, see secs. 8, 9 and 11 of the Act and the under-mentioned case (*t*).

Where wife has not attained majority.—A wife who has attained puberty is entitled to sue under this section without a guardian, though she may not have attained majority within the meaning of the Indian Majority Act, 1875 (*u*).

As to restitution of conjugal rights where a charge of adultery has been made, see sec. 216 (4).

241. No other ground of judicial divorce recognized.—The wife is not entitled to claim a judicial divorce on any other ground, such as conjugal infidelity on the husband's part, or inability to maintain her [Baillie, 443], or cruelty.

(*n*) *Zafar Husain* v. *Ummat-ur-Rahman* (1919) 41 All 278, 49 I C 256, *Khatiyabi* v. *Umarsaheb* (1928) 52 Bom. 295, 110 I.C. 131, ('28) A B. 285

(*o*) *Jaun Beebee* v. *Beparee* (1865) 3 W.R 93; *Khatiyabi* v. *Umarsaheb* (1928) 52 Bom. 295, 110 I C. 131, ('28) A B. 285.

(*p*) *Musammat Fakhre Jahan* v. *Muhammad* (1929) 4 Luck. 168, 114 I.C 314, ('29) A.O 16

(*q*) *Rahima Bibi* v. *Fazil* (1926) 48 All. 834, 98 I C 573, ('27) A A 56

(*r*) *Ahmed* v *Bai Fatma* (1931) 55 Bom. 160, 128 I C 909, ('31) A B 76, where the husband asked for an opportunity to withdraw the charge for the first time in first appeal c

(*s*) (1931) 55 Bom. 160, 162, 128 I. C. 909, ('31) A B. 76, *supra*

(*t*) *Khatiyabi* v. *Umarsaheb* (1928) 52 Bom. 295, 110 I C. 131, ('28) A.B. 285

(*u*) *Ahmed* v. *Bai Fatma* (1931) 55 Bom. 160, 128 I.C. 909, ('31) A B. 76.

"Under the Mahomedan law a wife has no absolute right to obtain a divorce. She has that right only under certain specific contingencies and conditions" (*v*). As to cruelty as an answer to the husband's suit for restitution of conjugal rights, see sec. 216 (2).

242. Wife's costs in proceedings for divorce.—The rule of English law which makes the husband in divorce proceedings liable *prima facie* for the wife's costs, except when she is possessed of sufficient separate property, does not apply to divorce proceedings between Mahomedans (*w*).

The English rule is founded upon the doctrine of the Common Law according to which the husband becomes entitled upon marriage to the whole of the wife's personal property and to the income of her real property. Under the Mahomedan law, however, the husband does not by marriage acquire any interest in the property of the wife and there is no reason, therefore, to apply the rule of English law to proceedings for dissolution of marriage between Mahomedans.

C. Effects of divorce.

243. Rights and obligations of parties on divorce.—The following rights and obligations arise on the completion of a divorce, whatever may be the mode of divorce :—

(1) *Right to contract another marriage.*—If the marriage was consummated, the wife may marry another husband after the completion of her *iddat;* if the marriage was not consummated, she is free to marry immediately.

If the marriage was consummated, and the husband had four wives at the date of divorce including the divorced wife, he may marry another wife after completion of the *iddat* of the divorced wife.

Hedaya, 128, 32; Baillie, 350-351, 34-35. As to *iddat*, see sec. 199 and notes. As to maintenance during *iddat*, see sec. 215. If the marriage was not consummated, there is no *iddat* of divorce (sec. 199).

(2) *Dower becomes immediately payable.*—If the marriage was consummated, the wife is entitled to immediate payment of the whole of the unpaid dower, both prompt and deferred.

If the marriage was not consummated, and the amount of dower was specified in the contract, she is entitled to half that amount. If no amount was specified all that she is entitled to is a present of three articles of dress.

Hedaya, 44-45; Baillie, 96-97.

(*v*) *Muhammad Ibrahim* v. *Altafan* (1925) 47 All. 243, 245, 83 I.C 27, ('25) A.A 24, 26.

(*w*) *A.* v. *B.* (1896) 21 Bom. 77.

S. 243 (3) *Mutual rights of inheritance cease.*—Either party is entitled to inherit from the other until the divorce becomes irrevocable (sec. 231).

Immediately the divorce becomes irrevocable, mutual rights of inheritance cease, except where the divorce was pronounced during the husband's death-illness (sec. 114), in which case the *wife*'s right to inherit continues until the expiry of her *iddat*, unless she was repudiated at her own request (*x*).

Baillie, 279, 280, 282; *Hedaya*, 99-100.

1. The point of time when the rights of inheritance cease is the point of time when the divorce becomes irrevocable. In a *talak* in the *ahsan* mode that point of time is the expiry of the *iddat* [sec. 231 (1)]. In a *talak* in the *hasan* mode, it is the third pronouncement [sec. 231 (2)]. In a *talak* in the *badai* mode, it is the moment when the *talak* is pronounced [sec. 231 (3)].

2. It is obvious from what has been stated above that in the case of a *talak* in the *hasan* mode and a *talak* in the *badai* mode (*y*), the rights of inheritance cease immediately the *talak* becomes irrevocable, though the death, whether of the husband or wife, may occur before the expiry of the *iddat*. To this, however, there is an exception in favour of the wife. It is this that if the repudiation was made during the husband's death-illness, and he dies before the expiry of the *iddat*, the *wife* is entitled to inherit from him, the reason given being that a repudiation by a man in his last illness is nothing but a device to defeat the wife's right of inheritance. But the husband is not entitled to inherit from his wife if *she* dies before the expiry of the *iddat*, for he, and not she, was responsible for "the rupture of conjugal rights." These observations do not apply to a *talak* in the *ahsan* mode, for the rights of inheritance in that case continue *until* the expiry of the *iddat*, and it makes no difference whether the repudiation was made in health or in death-illness.

3. There is no right of inheritance in any case *after* the expiry of the *iddat*.

(4) *Cohabitation becomes unlawful.*—Sexual intercourse between the divorced couple is unlawful after the divorce has become irrevocable. The offspring of such an intercourse is illegitimate [ill. (*a*) to sub-sec. (5)], and cannot be legitimated by acknowledgment (*z*) [sec. 247]. But the parties may remarry as stated in sub-sec. (5) below.

(5) *Remarriage of divorced couple.*—(*i*) Where the husband has repudiated his wife by *three* pronouncements [sec. 230 (2) and sec. 230 (3) (i)], it is not lawful for him to marry her again until she has married another man, and the latter has divorced

(*x*) See *Sarabai* v. *Rabiabai* (1905) 30 Bom. 537, 547-548.
(*y*) (1905) 30 Bom. 537, 556-557, *supra*.
(*z*) *Rashid Ahmad* v. *Anisa Khatun* (1932) 59 I A. 21, 27, 54 All. 46, 53, 135 I.C. 762, ('32) A. PC. 25.

her or died after actual consummation of the marriage. The presumption of marriage arising from an acknowledgment of legitimacy [sec. 206A] does not apply to a remarriage between divorced persons unless it is established that the bar to remarriage created by the divorce was removed by proving an intermediate marriage and a subsequent divorce after actual consummation (*a*) [ill. (a)]. Even if a remarriage between the divorced persons is proved, the marriage is not valid unless it is established that the bar to remarriage was removed; the mere fact that the parties have remarried does not raise any presumption as to the fulfilment of the above conditions (*b*) [ill. (b)]. A remarriage without fulfilment of the above conditions is irregular, not void [Baillie, 151]. S. 243

(*ii*) In all other cases, the divorced parties may remarry as if there had been no divorce either during the *iddat* or after its completion.

[(a) A Hanafi Mahomedan repudiates his wife by three pronouncements in the same breath in these terms: "I divorce you, I divorce you, I divorce you" [sec. 230 (3) (i)]. The parties afterwards live together, and five children are born to them, whom the father acknowledges as legitimate. After his death the children claim their share of his estate as his heirs. It is not proved that there was a remarriage between the parties but the Court is asked to presume it from the acknowledgment of legitimacy. An acknowledgment of legitimacy, no doubt, raises a presumption of marriage, but that is only when there is no legal bar to the marriage. There is such a bar in this case created by the divorce, and it can only be removed by proving that their mother had after the divorce married another man, and the latter had died or divorced her after actual consummation of the marriage. If these facts are not proved, remarriage cannot be presumed, and the children cannot be held to be legitimate, and their claim must fail: *Rashid Ahmad* v. *Anisa Khatun* (1932) 59 I.A. 21, 54 All. 46, 135 I.C. 762, ('32) A. PC. 25.

(b) A Hanafi Mahomedan repudiates his wife by three pronouncements made during successive *tuhrs* [sec. 230 (2)]. He then marries her again. It is not proved that there was any intermediate marriage, but the Court is asked to presume it from the fact of the remarriage. No such presumption, however, can be drawn from the mere fact of remarriage, and the remarriage is irregular. As to the consequences of an irregular marriage, see sec. 206 above].

Baillie, 292-293; *Hedaya*, 107-108.

A remarriage with a thrice repudiated wife without fulfilling the conditions mentioned above is irregular, and not void. The reason for it is that the obstacle to the marriage can be removed "by consummation with a second husband, and expiration of her *iddat*": Baillie, 151.

As to "actual" consummation, see note to sec. 199, "valid retirement."

(*a*) *Rashid Ahmad* v. *Anisa Khatun* (1932) 59 I.A. 21, 27, 28, 54 All. 46, 53-54, 135 I.C. 762, ('32) A PC. 25.

(*b*) *Akhtaroon-nissa* v. *Sharmtoollah* (1867) 7 W.R. 268.

CHAPTER XVII.

PARENTAGE—LEGITIMACY AND ACKNOWLEDGMENT.

A. Establishment of Parentage.

Ss. 244-244B

244. Paternity and maternity.—Parentage is the relation of parents to their children. Paternity is the legal relation between father and child. Maternity is the legal relation between mother and child. These legal relations give rise to certain rights and liabilities as regards inheritance, guardianship, and maintenance.

244A. Maternity how established.—The maternity of a child is established in the woman who gives birth to the child, irrespective of the lawfulness of her connection with the begetter.

Baillie, 391.

As regards maternity, it is immaterial whether the child is an offspring of marriage or an offspring of *zina*, that is, fornication or adultery. The maternity of the child in either case is established in the woman who actually gives birth to the child. But paternity is not established unless the child was the offspring of marriage. Thus if a man commits *zina* with a woman, and a child is born, it is considered to be the child of its mother only and inherits from her and her relations (s. 72). But the man is not considered to be the *father* of the child, for paternity is established only by marriage, nor is the child *in law* the child of the man; it is *illegitimate*, and not entitled to inherit from him.

244B. Paternity how established.—(*1*) The paternity of a child can only be established by marriage between its parents. The marriage may be valid (*sahīh*), or irregular (*fāsid*), but it must not be void (*bātil*).

Marriage may be established by direct proof. If there be no direct proof, it may be established by indirect proof, that is, by presumption drawn from certain facts. It may be presumed from prolonged cohabitation combined with other circumstances (s. 206A), or from an acknowledgment of legitimacy in favour of a child.

(*2*) When the paternity of a child is established, its legitimacy is also established.

Baillie, 391, 392, 400-402; Shama Churun Sirkar's Tagore Lectures, 1873, s. CCCXV.

Ss. 244B, 245

The main pivot in cases of paternity and legitimacy is marriage. It is so also in the case of an acknowledgment. This appears clearly from the following passage in the judgment of the Privy Council in *Habibur Rahman* v. *Altaf Ali* (*c*):—

"By the Mahomedan law a son to be legitimate must be the offspring of a man and his wife or of a man and his slave; 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 a marriage in any particular case may be an open question. Direct proof may be available, but if there is no such, indirect proof may suffice. *Now one of the ways of indirect proof is by an acknowledgment of legitimacy in favour of a son.*"

245. Legitimacy: when conclusively presumed.—The fact that any person was born during the continuance of a valid marriage between his mother and any man, or within two hundred and eighty days after its dissolution, the mother remaining unmarried, shall be conclusive proof that he is the legitimate son of that man, unless it can be shown that the parties to the marriage had no access to each other at any time when he could have been begotten.

This is sec. 112 of the Indian Evidence Act, 1872. The question whether sec. 112 of the Evidence Act supersedes the rules of Mahomedan law as to legitimacy was left open in an Allahabad case (*d*). The High Court of Allahabad has since held that that the section supersedes Mahomedan law, and that it applies to Mahomedans (*e*). The same view has been taken in Lahore (*f*). The Chief Court of Oudh has held that even if sec. 112 applied to Mahomedans, it cannot be applicable to an irregular (*fásid*) marriage, as such a marriage is not a "valid" marriage within the meaning of the section. "Valid," in the view of that Court, means "flawless" (*g*). The marriage in the Oudh case was an irregular marriage, being a marriage with the wife's sister (s. 204).

Presumption of legitimacy under the Mahomedan law.—The rules of Mahomedan law may now be stated [Baillie, 392-393, 396-397]. They are as follows:—

1. A child born within less than 6 months after marriage is illegitimate.

2. A child born after 6 months from the date of marriage is presumed to be legitimate, unless the putative father disclaims the child by *li'an* (s. 240).

3. A child born within 2 years after the termination of the marriage is presumed to be legitimate, unless disclaimed by *li'an* (s. 240). This is the rule of Hanafi law. According to the Shafei and Maliki law, the period is 4 years. According to the Shia law, it is 10 months.

Points of difference between the two systems:—

(1) *In contrast with rule* 1.—Under sec. 112 a child born even a day after marriage is legitimate, unless the parents had no access to each other at any time at which it could have been begotten.

(2) A child born after 6 months from the date of marriage, but within 280 days of the termination of the marriage is legitimate under either system, subject to *li'an* in the one case, and proof of non-access in the other.

(*c*) (1921) 48 I.A. 114, 120, 48 Cal. 856, 60 I.C. 837, (1922) A.PC. 159.
(*d*) *Muhammad Allahdad* v. *Muhammad Ismail* (1888) 10 All. 289, 339.
(*e*) *Sibt Muhammad* v *Muhammad* (1926) 48 All. 625, 96 I.C. 582, ('26) A.A. 589.
(*f*) *Mt. Rahim Bibi* v. *Chiragh Din* ('30) A L. 97, 120 I.C 495, *Ghulam Mohy-ud-Din* v. *Khizar* (1929) 10 Lah. 470, 114 I.C. 74, ('29) A. L. 6.
(*g*) *Musammat Kaniza* v *Hasan* (1926) 1 Luck. 71, 92 I.C. 82, ('26) A.O. 231.

Ss. 245-247

(3) A child born between 280 days and 2 years after the termination of the marriage is legitimate by the Hanafi law, subject to *li'an*. Under the Evidence Act, however, the case will be governed by sec. 114 which provides that "the Court may presume the existence of any fact which it thinks likely to have happened, *regard being had to the common course of natural events.*" In a Calcutta case (*h*), before the passing of the Evidence Act, the Court declined to follow this part of the rule of Mahomedan law in the case of a child born 19 months after the date of divorce, on the ground that to hold that such a child was legitimate "would be contrary to the course of nature and impossible."

246. Legitimacy presumed from presumptive marriage.—The legitimacy of a child may be presumed from circumstances from which a marriage itself between its parents may be presumed (s. 206A).

In *Mahomed Bauker* v. *Shurfoon Nissa* (*i*), the Privy Council said: "The legitimacy or legitimation of a child of Muhammadan parents may properly be presumed or inferred from circumstances without proof, or at least any direct proof, either of a marriage between the parents, or any formal act of legitimation." See to the same effect, Ameer Ali, 5th ed., Vol. II, 213 *sqq.*

B. Acknowledgment of paternity.

247. Acknowledgment of legitimacy.—(*1*) "Where the paternity of a child, that is, his legitimate descent from his father cannot be proved by establishing a marriage between his parents at the time of his conception or birth, the Muhammadan law recognizes 'acknowledgment' as a method whereby such marriage and legitimate descent can be established as a matter of substantive law for purposes of inheritance."

"The Muhammadan law of acknowledgment of parentage with its legitimating effect has no reference whatsoever to cases in which the illegitimacy of the child is proved and established, either by want of a lawful union between the parents of the child being impossible (as in the case of an incestuous intercourse or an adulterous connection), or by reason of marriage necessary to render the child legitimate being *disproved*. The doctrine relates only to cases where either the fact of the marriage itself or the exact time of its occurrence with reference to the legitimacy of the acknowledged child is *not proved* in the sense of the law as distinguished from *disproved*. In other words, the doctrine applies only to cases of uncertainty as to legitimacy, and in such cases acknowledgment has its effect, but that effect always proceeds upon the assumption

(*h*) *Ashruf Ali* v. *Ashad Ali* (1871) 16 W.R. 260. | (*i*) (1860) 8 M.I.A. 136, 159.

of a lawful union between the parents of the acknowledged child " (*j*). In short, the doctrine applies only to cases where either the fact or the exact time of the alleged marriage is a matter of uncertainty, that is, neither *proved* nor *disproved* (*k*). Stating it in another form, the doctrine is " limited to cases of *uncertainty of* legitimate descent, and proceeds entirely upon an assumption of legitimacy and the establishment of such legitimacy by the force of such acknowledgment " (*l*).

(*2*) The acknowledged child may be a son or a daughter (*m*).

Baillie, 406, *Hedaya*, 439 The doctrine of acknowledgment is not a mere rule of evidence, but is part of the substantive law of inheritance. Hence the conditions under which it will take effect must be determined with reference to Mahomedan Jurisprudence (*n*).

The leading case on the subject is *Muhammad Allahdad* v. *Muhammad Ismail* (1888) 10 All. 289, a case which has been followed by Courts throughout India and approved by the Privy Council. The passages cited in this section are from the judgment of Mahmood, J. The law was thus stated by the Privy Council in *Sadik Husain* v *Hashim Ali* (*o*): " No statement made by one man that *another proved to be illegitimate* is his son can make that other legitimate, but *where no proof of that kind has been given*, such a statement or acknowledgment is substantive evidence that the person so acknowledged is the legitimate son of the person who makes the statement, provided his legitimacy is possible " (s. 250).

248. Acknowledgment may be express or implied.—An acknowledgment need not be express. It may be presumed from the fact that one person has habitually and openly treated another as his child, that is, as a *legitimate* child (*p*).

In *Muhammad Azmat* v. *Lalli Begum* (*q*), their Lordships of the Privy Council said: " It has been decided in several cases that there need not be proof of an express acknowledgment, but that an acknowledgment of children by a Mahomedan as his sons may be inferred from his having openly treated them as such."

(*j*) *Muhammad Allahdad* v *Muhammad Ismail* (1888) 10 All. 289, 330, 334-335, *Musst Bibee Fazlatunnessa* v. *Musst. Bibee Kamarunnessa* (1905) 9 C.W.N. 352, *Habibur Rahman* v *Altaf Ali* (1921) 48 I.A 114, 48 Cal. 856, 60 I.C. 837, ('22) A.PC 159 [marriage disproved]; *Sadik Husain* v. *Hashim Ali* (1916) 43 I.A. 212, 38 All 627, 36 I.C. 104; *Ihsan* v *Panna Lal* (1928) 7 Pat. 6, 103 I.C 430, ('28) A.P. 19; *Muhammad Shafiq-ullah* v. *Nuh-ullah* (1926) 48 All. 58, 88 I.C. 951, ('26) A.A 48, *Agha Muhammad* v. *Zohra Begam* (1928) 3 Luck. 199, 105 I.C. 490, ('28) A.O. 562; *Firoz Din* v. *Nawab Khan* (1928) 9 Lah. 224, 109 I.C. 779, ('28) A.L. 224 [marriage disproved]; *Ibrahim* v. *Mubarak* (1920) 1 Lah. 229, 56 I.C. 923; *Usmanmiya* v. *Valli Mahomed* (1916) 40 Bom. 28, 30 I.C. 904.

(*k*) *Muhammad Allahdad* v. *Mahommad Ismail* (1888) 10 All. 289, 334.

(*l*) (1888) 10 All. 289, 337, *supra*.

(*m*) See *Dhan Bibi* v. *Lalon Bibi* (1900) 27 Cal. 801.

(*n*) (1888) 10 All. 289, *supra*.

(*o*) (1916) 43 I.A. 212, 234, 38 All. 627, 661, 36 I.C. 104.

(*p*) *Muhammad Azmat* v. *Lalli Begum* (1881) 9 I.A. 8, 18, 8 Cal. 422; *Khajah Hidayut* v. *Rai Jan Khanum* (1844) 3 M.I.A. 295, 323 [consecutive course of treatment], *Mahomed Bauker* v. *Shurfoon Nissa* (1860) 8 M.I.A. 136, 158-159; *Ashrufood Dowlah* v. *Hyder Hossein Khan* (1866) 11 M.I.A. 94, 116; *Sadakat Hossein* v. *Mahomed Yusuf* (1888) 10 Cal. 663, 11 I.A. 31; *Abdool Razack* v. *Aga Mahomed Jaffer* (1893) 21 Cal. 666, 21 I.A. 56; *Masut-un-nissa* v. *Pathani* (1904) 26 All. 295; *Musst Bibee Fazlatunnessa* v. *Musst Bibee Kamarunnessa* (1905) 9 C.W.N. 352

(*q*) (1881) 9 I.A. 8, 18, 8 Cal. 422.

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249. Conditions of valid acknowledgment.—In order to render an acknowledgment valid and effective the following conditions must be fulfilled :—

(1) " the acknowledgment must not be merely of sonship, but must be made in such a way that it shows that the acknowledger meant to accept the other not only as his son, but as his *legitimate* son " (*r*) [see note 2 below] ;

(2) the ages of the parties must be such as to admit of the acknowledger being the father of the acknowledgee (*s*) [see note 3 below] ;

(3) the acknowledgee must not be the offspring of *zina*, that is, adultery, incest or fornication (*t*), as he would be if his mother could not possibly have been the lawful wife of the acknowledger at any time when he could have been begotten, as where the mother was at that time the wife of another man (*u*), or was within prohibited degrees of the acknowledger (*v*). If the marriage is *disproved*, the issue would be the issue of fornication (*w*) [see note 4 below].

(4) the acknowledgee must not be known to be the child of another man (*x*) ;

(5) the acknowledgment must not have been repudiated by the acknowledgee (*y*) [see note 5 below].

The above conditions apply whether the acknowledged child is a son or a daughter [see sec. 247 (2)].

Hedaya, 439 , Baillie, 408. A synopsis of the above conditions will be found in the Privy Council case of *Habibur Rahman* v. *Altaf Ali* (*z*)

1. *Acknowledgment and burden of proof.*—As marriage among Mahomedans may be constituted without any ceremonial, direct proof of marriage is not always available. Where direct proof is not available, indirect proof may suffice. Now one of the ways of

(*r*) *Habibur Rahman* v. *Altaf Ali* (1921) 48 I A. 114, 120, 48 Cal. 856, 60 I C. 837, ('22) A PC. 159; *Abdool Razack* v *Aga Mahomed Jaffer* (1893) 21 Cal. 666, 21 I A. 56; *Sadakat Hossein* v. *Mahomed Yusuf* (1893) 10 Cal. 663, 11 I.A. 31.

(*s*) *Habibur Rahman* v. *Altaf Ali* (1921) 48 I.A. 114, 120-121, 48 Cal. 856, 60 I.C. 837, ('22) A.PC. 159.

(*t*) *Habibur Rahman* v. *Altaf Ali* (1921) 48 I.A. 114, 121, 48 Cal. 856, 60 I.C. 837, ('22) A.PC. 159 , *Sadik Husain* v *Hashim Ali* (1916) 43 I.A. 212, 234, 38 All. 627, 661, 36 I.C. 104; *Rashid Ahmad* v. *Anisa Khatun* (1932) 59 I.A. 21, 54 All. 46, 135 I.C. 762, ('32) A.PC. 25; *Muhammad Allahdad* v. *Muhammad Ismail* (1888) 10 All. 289, 334-337; *Mardansaheb* v. *Rajaksaheb* (1909) 34 Bom. 111, 4 I.C. 254.

(*u*) *Inayat Ali* v. *Karim-un-nissa* (1893) 15 All. 396 , *Mardansaheb* v. *Rajaksaheb* (1909) 34 Bom. 111, 4 I C 254 , *Agha Muhammad* v. *Zohra Begam* (1928) 3 Luck. 199, 105 I.C. 490, ('28) A.O 562; *Muhammad Shafiq-ullah* v. *Nuh-ullah* (1926) 48 All. 58, 88 I.C. 954, ('26) A A. 48.

(*v*) *Habibur Rahman* v. *Altaf Ali* (1921) 48 I A. 114, 121, 48 Cal 856, 60 I.C. 837, ('22) A PC. 159.

(*w*) *Dhan Bibi* v. *Lalon Bibi* (1900) 27 Cal. 861 ; *Firoz Din* v. *Nawab Khan* (1928) 9 Lah. 224, 109 I.C. 779, ('28) A.L. 432 ; *Habibur Rahman* v. *Altaf Ali* (1921) 48 I A. 114, 119, 121, 48 Cal. 856, 60 I.C. 837, ('22) A.PC. 159.

(*x*) *Usmanmiya* v. *Valli Mahomed* (1916) 40 Bom. 23, 30 I C. 904.

(*y*) *Habibur Rahman* v. *Altaf Ali* (1921) 48 I.A. 114, 121, 48 Cal. 856, 60 I C. 837, ('22) A.PC. 159.

(*z*) (1921) 48 I.A. 114, 120-121, 48 Cal. 856, 60 I.C. 837, ('22) A.PC. 159.

indirect proof is by an acknowledgment of legitimacy in favour of a son. This acknowledgment must be not merely of sonship, but of *legitimate* sonship. Further, it must not be impossible upon the face of it as stated in the present section. If the conditions stated in the section are satisfied, the acknowledgment has more than a mere evidentiary 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 de jure*, it is, like every other presumption of fact, capable of being set aside by contrary proof. The result is that a claimant son who has in his favour a good acknowledgment of legitimacy is in this position: the marriage will be held proved and his legitimacy established unless the marriage is *disproved*. Until the claimant established his acknowledgment the onus is on him to prove a marriage. Once he established an acknowledgment, the onus is on those who deny a marriage to negative it in fact" (*a*).

2. *Clause* (1): *intention to confer status of legitimacy.*—The acknowledgment must be not merely of sonship, but of *legitimate* sonship. It must not, however, be supposed that an acknowledgment merely of sonship has no evidentiary value. Acknowledgment as a son *prima facie* means acknowledgment as a legitimate son (*b*).

A *mere casual* acknowledgment of paternity, not intended to confer the status of legitimacy, will not have the effect of conferring that status. There must be an intention to confer that status (*c*).

3 *Clause* (2). *age*.—The acknowledger must be at least twelve and a half years older than the acknowledgee: Baillie, 411.

4. *Clause* (3): *offspring of fornication.*—The issue of adultery, incest or fornication, cannot be legitimated by acknowledgment. If the marriage is *disproved*, the issue would be the issue of fornication Similarly, the issue of a re-marriage between divorced persons, where the wife was repudiated by a triple divorce and no intermediate marriage is proved, would also be the issue of fornication on the footing that such re-marriage is *void* (*d*).

No presumption of marriage arises from long cohabitation if the woman was a prostitute when she was brought to the home of the man whose wife she claims to be (*e*). But if the man acknowledges his children by her as his legitimate children, marriage with her will be presumed, for marriage with a prostitute is not prohibited, and she could have been his lawful wife, when the children were begotten (*f*). But if it is definitely proved that there was *no* marriage at all between the parties when the children were begotten, in other words, if marriage is *disproved*, the issue would be the issue of fornication, and they could not possibly be legitimated by acknowledgment as laid down in the cases cited in foot-note (*e*).

5. *Clause* (5): *repudiation.*—The acknowledgee is entitled to repudiate the acknowledgment, if he has attained an age when he can understand the transaction.

250. Right of inheritance.—If an acknowledgment is of legitimate sonship, and that relationship is possible in fact and in law [sec. 249], it raises a presumption of marriage between the acknowledger and the mother of the acknowledgee, and, unless

(*a*) *Habibur Rahman* v. *Altaf Ali* (1921) 48 I.A. 114, 120-121, 60 I.C. 837, ('22) A.PC. 159.

(*b*) *Fuzeelun Bebee* v. *Omdah Bebee* (1868) 10 W.R. 469, cited with approval in *Sadik Husain* v. *Hashim Ali* (1916) 43 I.A. 212, 232, 38 All. 627, 659, 36 I.C. 104, *Usmaniya* v. *Valli Mahomed* (1916) 40 Bom. 28, 33, 30 I.C. 904.

(*c*) *Abdool Razack* v. *Aga Mahomed Jaffer* (1893) 21 I.A. 56, 70, 21 Cal. 666, 679

(*d*) *Rashid Ahmad* v. *Anisa Khatun* (1932) 59 I.A. 21, 54 All. 46, 135 I.C. 762, ('32) A. PC. 25.

(*e*) *Ghazanfar* v. *Kaniz Fatima* (1910) 37 I.A. 105, 32 All. 345, 6 I.C. 674.

(*f*) *Imambandi* v. *Mutsaddi* (1918) 45 I.A. 73, 81-82, 45 Cal. 878, 889-890, 47 I.C. 513.

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rebutted, gives the acknowledgee the right of inheritance to the acknowledger as his legitimate child (*g*), and a similar right also to the mother of the acknowledgee as the lawful wife of the acknowledger (*h*).

Clear and reliable evidence that a Mahomedan has acknowledged children as his legitimate issue raises a presumption of a valid marriage between him and the children's mother (*i*).

251. Acknowledgment of legitimacy irrevocable.—An acknowledgment once made cannot be revoked (*j*).

252. Adoption not recognized.—The Mahomedan law does not recognize adoption as a mode of filiation (*k*).

Where custom is given priority by legislation over general Mahomedan law, as in the Punjab, Oudh and some other places (see secs. 10, 10A, 11 and 12 above), a special family or tribal custom of adoption will, if proved, prevail over that law.

The Oudh Estates Act, 1869, sec. 29, permits a Mahomedan talukdar to adopt a son to him (*l*).

The retention by Hindu converts to Mahomedanism of Hindu usages of inheritance and succession does not carry with it the Hindu custom of adoption. The burden of proving that the custom of adoption has also been retained lies on those who assert it (*m*).

(*g*) *Habibur Rahman* v. *Altaf Ali* (1921) 48 I A. 114, 121, 48 Cal. 856, 60 I C 837, ('22) A.PC. 159, *Mahammad Azmat* v. *Lalli Begum* (1881) 8 Cal. 422, 9 I A 8; *Sadakat Hossein* v. *Mahomed Yusuf* (1883) 10 Cal. 663, 11 I.A. 31.

(*h*) *Khajah Hidayut* v. *Rai Jan Khanum* (1844) 3 M I.A. 295, 318; *Wise* v. *Sunduloonissa* (1867) 11 M.I.A. 178, 193; *Nowab Mulka Jehan* v. *Mahomed* (1873) Sup. Vol. I A. 192, *Khajooroonissa* v. *Rowshan Jehan* (1876) 2 Cal. 184, 199, 3 I.A. 291; *Mahatala* v. *Haleemoozooman* (1881) 10 C L.R. 293; *Imambandi* v *Mutsaddi* (1918) 45 I.A. 73, 82, 45 Cal. 878, 890, 47 I.C. 513; *Habibur Rahman* v. *Altaf Ali* (1921) 48 I A. 114, 121, 48 Cal. 856, 60 I.C 837, ('22) A PC 159.

(*i*) *Imambandi* v. *Mutsaddi* (1918) 45 I.A. 73, 81-82, 45 Cal. 878, 889, 890, 47 I.C. 513.

(*j*) *Ashrufood Dowlah* v. *Hyder Hossein* (1866) 11 M.I.A. 94, *Muhammad Allahdad* v. *Muhammad Ismail* (1888) 10 All 289, 317.

(*k*) *Muhammad Allahdad* v. *Muhammad Ismail* (1888) 10 All 289, 310, *Muhammad Umar* v. *Muhammad Niaz-ud-Din* (1912) 39 Cal. 418, 39 I.A. 19, 13 I C. 344.

(*l*) See *Abdul Halim Khan* v. *Saadat Ali Khan* (1932) 59 I A. 202, 7 Luck. 194, 136 I.C. 745, ('32) A PC. 137.

(*m*) *Bai Machhbai* v. *Bai Hirbai* (1911) 35 Bom. 264, 10 I.C. 816.

CHAPTER XVIII.

GUARDIANSHIP OF PERSON AND PROPERTY.

A. Appointment of Guardians.

253. Age of majority.—In this Chapter, "minor" means a person who shall not have completed the age of eighteen years. **Ss. 253-254**

See the Indian Majority Act IX of 1875, sec. 3, and the Guardians and Wards Act VIII of 1890, sec. 4, cl. (1).

Age of majority under the Mahomedan law.—According to the Islamic law, the minority of a male or female terminates when he or she attains puberty. Among the Hanafis and the Shias, puberty is presumed on the completion of the fifteenth year. Under the Indian Majority Act (s. 3), minority ceases on the completion of the eighteenth year, unless a guardian of the person or property or both of the minor has been or shall be appointed before the minor has attained the age of eighteen years, or the property of the minor is under the superintendence of a Court of Wards, in which case the age of minority is prolonged until the minor has completed the age of twenty-one years.

Under the Mahomedan law any person who has attained puberty is entitled to act in all matters affecting his or her status or his or her property. But that law has been materially altered by the Indian Majority Act, and the only matters in which a Mahomedan is now entitled to act on attaining the age of fifteen years are (1) marriage, (2) dower and (3) divorce. In all other matters his minority continues until the completion at least of eighteen years Until then the Court has power to appoint a guardian of his person or property or both under the Guardians and Wards Act. See notes to sec. 101 above.

253A. Application for appointment of guardian.—All applications for the appointment of a guardian of the person or property or both of a minor are to be made under the Guardians and Wards Act, 1890.

Any person who is entitled to be a guardian by the Mahomedan law may act as such without any previous order of the Court. But there is nothing to prevent him from applying to the Court under the Guardians and Wards Act, that he may be appointed or declared a guardian under the Act. He is not bound to wait until his legal title or fitness to act as guardian is disputed by another person. The application for the appointment of a guardian may be made not only by a person desirous of being, or claiming to be, the guardian of the minor, but also by any relative or friend of the minor, and in some cases by the Collector (s. 8 of the Act). It should be in the form prescribed by sec. 10 of the Act, and no order should be made unless notice of the application is given to persons interested in the minor (s. 11 of the Act).

254. Power of Court to make order as to guardianship.—When the Court is satisfied that it is for the welfare of a minor that an order should be made (1) appointing a guardian of his person or property, or both, or (2) declaring a person to be such guardian, the Court may make an order accordingly.

Guardians and Wards Act, 1890, sec. 7.

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255. Matters to be considered by Court in appointing guardian.—(*1*) In appointing or declaring the guardian of a minor, the Court shall, subject to the provisions of this section, be guided by what, *consistently with the law to which the minor is subject*, appears in the circumstances to be for the *welfare* of the minor.

(*2*) In considering what will be for the welfare of the minor, the Court shall have regard to the age, sex and religion of the minor, the character and capacity of the proposed guardian and his nearness of kin to the minor, the wishes, if any, of a deceased parent, and any existing or previous relations of the proposed guardian with the minor or his property.

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

Welfare of the minor.—The above section is a reproduction in terms of sec 17, cls. (1), (2) and (3), of the Guardians and Wards Act. It imposes a duty upon the Court in appointing a guardian to make the appointment *consistently with the law to which the minor is subject.* The central idea, no doubt, is the *welfare* of the minor, but the rules for determining what is for the welfare of the minor are the rules laid down by the law to which the minor is subject. In appointing, therefore, a guardian of a Mahomedan minor, the Court must proceed on the hypothesis that the rules of the Mahomedan law for the appointment of a guardian are rules designed for the welfare of minors. It has no power to substitute its own views as to what is for the welfare of a minor for the rules prescribed by that law. Any appointment inconsistent with those rules cannot be upheld under the section. These rules may now be stated.

B. Guardians of the Person of a Minor.

(*i*) *Custody of boys under seven and of girls under the age of puberty.*

256. Right of mother to custody of infant children.—The mother is entitled to the custody (*hizánat*) of her male child until he has completed the age of seven years and of her female child until she has attained puberty. The right continues though she is divorced by the father of the child (*n*), unless she marries a second husband in which case the custody belongs to the father (*o*).

Hedaya, 138; Baillie, 435.

Nature and extent of right of hizanat (custody).—In *Imambandi* v. *Mutsaddi* (*p*), their Lordships of the Privy Council said: "It is perfectly clear that under the Mahomedan law *the mother is entitled only to the custody of the person of her minor chil*

(*n*) Baillie, 435; *Zarabibi* v *Abdul Rezzak* (1910) 12 Bom. L R 891, 8 I.C. 618, *Emperor* v *Ayshabai* (1904) 6 Bom L R. 536.

(*o*) *Ulfat Bibi* v *Bafati* (1927) 49 All. 773, 102 I.C. 103, ('27) A.A. 581

(*p*) (1918) 45 I A 73, 83-84, 45 Cal 878, 47 I C 513, *Ulfat Bibi* v. *Bafati* (1927) 49 All 773, 102 I C. 103, ('27) A.A 581; *Mt Siddiq-un-nissa* v. *Nizam-uddin* (1932) 54 All. 128, 137 I C 219, ('32) A A. 215.

up to a certain age according to the sex of the child. But she is not the natural guardian; the father alone, or, if he be dead, his executor (under the Sunni law) is the legal guardian."

It would appear from the passage quoted above that the father is the primary and natural guardian of his minor children, and that the right of custody of the mother and the female relations mentioned in sec. 257 below is *subject to the supervision of the father* which he is entitled to exercise by virtue of his guardianship. If so, the right of *hizanat* does not carry with it all the powers which a guardian of the person of a minor has under the Guardians and Wards Act, 1890. See note to sec. 260, "Father as guardian of his minor children."

Shia law.—Under the Shia law, the mother is entitled to the custody of a male child until he attains the age of two years, and of a female child until she attains the age of seven years. After the child has attained the above-mentioned age, the custody belongs to the father (*q*). If the mother dies before the child has attained that age, the father is entitled to the custody (*r*). On the death of both the parents, the custody belongs to the father's father. It is doubtful to whom the custody belongs in the absence of the father's father: Baillie, II, 95.

257. Right of female relations in default of mother.—Failing the mother, the custody of a boy under the age of seven years, and of a girl who has not attained puberty, belongs to the following female relatives in the order given below:—

(1) mother's mother, how high soever;
(2) father's mother, how high soever;
(3) full sister;
(4) uterine sister;
(5) [consanguine sister];
(6) full sister's daughter;
(7) uterine sister's daughter;
(8) [consanguine sister's daughter];
(9) maternal aunt, in like order as sisters; and
(10) paternal aunt, also in like order as sisters.

Hedaya, 138; Baillie, 435-436. Neither the *consanguine* sister (No. 5) nor her daughter (No. 8) is expressly mentioned either in the *Hedaya* or the *Fatawa Alamgiri*; it almost seems as if the omission is accidental, for *paternal aunts* are expressly mentioned.

258. Females when disqualified for custody.—A female, including the mother, who is otherwise entitled to the custody of a child loses the right of custody—

(1) if she marries a person not related to the child within the prohibited degrees (ss. 201-202), *e.g.*, a stranger, but the right revives on the dissolution of the marriage by death or divorce (*s*); or,

(*q*) *Lardli* v. *Mahomed* (1887) 14 Cal. 615.
(*r*) *Salim-un-nissa* v. *Saadat* (1914) 36 All. 466, 24 I.C. 632.
(*s*) *Fuseehun* v. *Kajo* (1884) 10 Cal. 15; *Bhoocha* v. *Elahi Bux* (1885) 11 Cal. 574, *Ansar Ahmad* v. *Samidan* ('28) A.O. 220, 106 I. C 822.

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(2) if she goes and resides, during the subsistence of the marriage, at a distance from the father's place of residence ; or,

(3) if she is leading an immoral life, as where she is a prostitute (*t*) ; or,

(4) if she neglects to take proper care of the child.

Hedaya, 138-139 ; Baillie, 435-436.

The reason of the rule in cl. (1) is that if a woman marries a man not closely related to the child, the child may not be treated kindly. It is otherwise, however, where the mother, for instance, marries her child's paternal uncle or the maternal grandmother marries the paternal grandfather, because these men, being as parents, it is to be expected that they will treat the child kindly : *Hedaya*, 138.

Apostasy.—Apostasy is stated in the *Fatawa Alamgiri* as a ground of disqualification. The reason given is that a woman who relinquishes the Moslem faith has to be kept in prison till she returns to the Mahomedan faith : Baillie, 435. But this reason cannot apply in British India ; hence apostasy would not be a disqualification in British India : Baillie, 435, f. n. (3). See also Act XXI of 1850, and notes to sec. 208 above.

259. **Right of male paternal relations in default of female relations.**—In default of the mother and the female relations mentioned in sec. 257, the custody belongs to the following persons in the order given below :—

(1) the father ;

(2) nearest paternal grandfather ;

(3) full brother ;

(4) consanguine brother ;

(5) full brother's son ;

(6) consanguine brother's son ;

(7) full brother of the father ;

(8) consanguine brother of the father ;

(9) son of father's full brother ;

(10) son of father's consanguine brother :

Provided that no male is entitled to the custody of an unmarried girl, unless he stands within the prohibited degrees of relationship to her (ss. 201-202).

(*t*) *Abasi* v. *Dunne* (1878) 1 All. 598.

If there be none of these, it is for the Court to appoint a guardian of the person of a minor.

Hedaya, 138-139; Baillie, 437.

It is clear from the proviso to the section that though a *boy* may be given in the custody of his paternal uncle's son, a *girl* should not be entrusted to him, for he is not within the prohibited degrees: Baillie, 437.

Husband as guardian.—The Court has no power under the Guardians and Wards Act [s. 19 (1)] to appoint a guardian of the person of a minor, where the minor is a married woman, and her husband is not in the opinion of the Court *unfit* to be the guardian of her person. If it be a rule of the Mahomedan law that a husband is not entitled to the custody of his wife until she has attained puberty, it must be taken to rest on the hypothesis that he is *unfit* by that law for that custody. If so, the Court may hold under sec. 19 of the Guardians and Wards Act that a Mahomedan husband is "unfit" within the meaning of that section to be the guardian of the person of his wife until she has attained puberty, and may, consistently with the provisions of that section, appoint her mother as her guardian until she attains puberty.

259A. Custody of child-wife.—The mother of a girl who is married, but has not attained puberty, is entitled to the custody of the girl as against the husband of the girl (*u*).

See Guardians and Wards Act, 1890, s. 19.

(*u*) *Custody of boys over seven and of girls who have attained puberty.*

260. Right of father and paternal male relations to custody of boy over seven and of girl who has attained puberty.—The father is entitled to the custody of a boy over seven years of age (*v*), and of an unmarried girl who has attained puberty. Failing the father, the custody belongs to the paternal relations in the order given in sec. 259 above, and subject to the proviso to that section.

If there be none of these, it is for the Court to appoint a guardian of the person of the minor.

Hedaya, 129; Baillie, 438.

Father as guardian of his minor children.—The Court has no power under the Guardians and Wards Act [s. 19 (2)] to appoint a guardian of the person of a minor whose father is living, and is not in the opinion of the Court *unfit* to be guardian of the minor (*w*). A father is under the Mahomedan law entitled to the custody of his son after he has completed the age of seven years, and of his daughter after she has attained the age of puberty, but there is no rule of Mahomedan law that he is entitled to that custody even if he is unfit for it. The Court, therefore, has power to appoint the mother or any other person whom it thinks proper, guardian of the person of the minor, if the

(*u*) *Nur Kadir* v. *Zuleikha Bibi* (1885) 11 Cal 649, *Korban* v. *King Emperor* (1904) 32 Cal. 444.

(*v*) *Idu* v *Amiran* (1886) 8 All. 322

(*w*) *Besant* v. *Narayaniah* (1914) 41 I A. 314, 324, 38 Mad. 807, 822, 24 I.C. 290.

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father is, in its opinion, unfit to be such guardian. The Court is not bound, if the father is unfit, to appoint the person entitled next after him, namely, the father's father, guardian of the person of the minor, for the father's father has no legal right to the guardianship during the lifetime of the father. The paramount consideration in such a case should be the *welfare* of the minor. The fact that the father has married again does not render him unfit for the guardianship of his child (*x*).

Testamentary guardian of person.—The father may, it seems, entrust the custody of his minor children to the executor appointed by his will: Baillie, 676.

(*iii*) *Custody of illegitimate children.*

261. Custody of illegitimate children.—The custody of illegitimate children belongs to the mother and her relations [Macnaghten, 298].

C. Guardians of the Property of a Minor.

262. Legal guardians of property.—The following persons are entitled in the order mentioned below to be guardians of the property of a minor (*y*):—

(1) the father;

(2) the executor appointed by the father's will;

(3) the father's father;

(4) the executor appointed by the will of the father's father.

Baillie, 689; Macnaghten, 62, 304.

Mother, brother, uncle, etc., not legal guardians.—The four guardians mentioned in this section are hereinafter called *legal guardians*. The only *relations* who are *legal guardians of the property* of a minor are (1) the father, and (2) the father's father. No other *relation* is entitled to the guardianship of the property of a minor *as of right*, not even the mother, brother or uncle. But the father or the paternal grandfather of the minor may appoint the mother, brother, uncle, or any other person as his executor or executrix, in which case they become *legal guardians* and have all the powers of a *legal guardian* as defined in ss. 263 and 267. *The Court* also may appoint any one of them as guardian of the property of the minor, in which case they will have all the powers of a guardian appointed by the Court as stated in ss. 264 and 267A. See note 1 to s. 265 below.

The only persons that are entitled to appoint a guardian of the property of a minor *by will* are his father and father's father. Even the mother has no power to appoint by will a guardian of the property of her minor children. A mother's executor is *not a legal guardian*, nor is a brother's executor, nor an uncle's executor. In fact no executor, except the father's executor or the father's father's executor, can be a *legal guardian* of the property of the minor: Macnaghten, 304. As to the powers of a *legal guardian*, see ss. 263 and 267.

(*x*) *Sadiq-un-nisa* v *Nizam-uddin* (1982) 54 All. 128, 137 I. C. 219, ('32) A.A. 215.

(*y*) *Imambandi* v. *Mutsaddi* (1918) 45 I.A. 73, 83-84, 45 Cal. 878, 892-893, 47 I C. 513.

Testamentary guardian of property.—Any person appointed executor by the will of the father or paternal grandfather of the minor becomes by virtue of his office legal guardian of the property of the minor. But can the father or paternal grandfather appoint one person his executor and another person guardian of the property of the minor? It would appear that he can (*z*): Baillie, 682.

262A. Guardian of property appointed by Court.—In default of the legal guardians mentioned in sec. 262, the duty of appointing a guardian for the protection and preservation of the minor's property falls on the judge as representing the Sovereign (*a*).

Baillie, 689.

Appointment of guardian by Court—If there is no legal guardian (s. 262), the Court may appoint any other person guardian of the property of a minor. In so doing the Court should be guided by what appears in the circumstances to be for the *welfare* of the minor [s. 255 (1) and (2)]. Thus the Court may appoint the mother guardian of the property of her minor son in preference to his paternal uncle (*b*). The fact that the mother is a pardanashin lady is no objection to her appointment (*c*).

The Court is not bound to appoint paternal relations guardians of property in preference to maternal relations. If the *welfare* of the minor requires it, the Court may appoint a maternal relation. The Court must also have regard to the *wishes of the minor's father*. Both these grounds concurred in a case in which a brother of the father's first wife was appointed guardian of the property of the minor in preference to a step-brother of the father (*d*).

262B. De facto guardian.—A person may neither be a legal guardian (s. 262) nor a guardian appointed by the Court (s. 262A), but may have voluntarily placed himself in charge of the person and property of a minor. Such a person is called *de facto* guardian. A *de facto* guardian is merely a custodian of the person and property of the minor (*e*).

The expression "de facto guardian" is used in contradistinction to "de jure guardian." Legal guardians (s. 262) and guardians appointed by the Court (s. 262A) are *de jure* guardians. The mother, brother, uncle, and all relations other than the father and father's father are *de facto* guardians, unless they are appointed executors by the will of the father or father's father (s 262), or are appointed guardians by the Court (s. 262A).

263. Alienation of immovable property by legal guardian.—A *legal* guardian of the property of a minor [s. 262] has no power to sell the *immovable* property of the minor except in the following cases, namely, (1) where he can obtain double its

(*z*) *Mata Din* v *Ahmad Ali* (1912) 39 I A. 49, 55, 34 All 213, 13 I C 976
(*a*) *Imambandi* v. *Mutsaddi* (1918) 45 I A 73, 84, 45 Cal 878, 893, 47 I C 513
(*b*) *Alim-ullah* v. *Abadi* (1906) 29 All. 10
(*c*) *Jawanti* v. *Gajadhar* (1911) 38 Cal. 783, 785, 10 I C 334.
(*d*) *Mahomed Sayeed* v. *Ismail* ('31) A. R. 66, 131 I C 497.
(*e*) *Imambandi* v *Mutsaddi* (1918) 45 I A 73, 84, 45 Cal. 878, 894-895, 47 I C 513, *Mohammad Ejaz* v *Mohammad Iftikhar* (1932) 59 I. A. 92, 101, 7 Luck 1, 136 I. C 97, ('32) A. PC. 78.

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value; (2) where the minor has no other property and the sale is necessary for his maintenance; (3) where there are debts of the deceased, and no other means of paying them; (4) where there are legacies to be paid, and no other means of paying them; (5) where the expenses exceed the income of the property; (6) where the property is falling into decay; and (7) when the property has been usurped, and the guardian has reason to fear that there is no chance of fair restitution (*f*).

Baillie, 687-688; Macnaghten, p. 64, s. 14, pp. 305, 306.

Where minor's title to property is in dispute.—The prohibition against alienation referred to in this section applies to immovable property to which the minor has an undisputed title. It does not apply where the minor's title to the property is disputed. Thus where the father of a minor sold part of the immovable property inherited by the minor from his mother *the title to which was in dispute*, and the sale was made pursuant to a compromise which *put an end to pending litigation*, the sale was held to be binding on the minor as being one *for the minor's benefit* (*g*) As to the power of a legal guardian to dispose of *movable* property belonging to his ward, see sec. 267 below.

264. Alienation of immovable property by guardian appointed by Court.—A guardian of property appointed by the Court under the Guardians and Wards Act, 1890 [s. 262A] has no power *without the previous permission of the Court*, to mortgage or charge, or transfer by sale, gift, exchange, or otherwise, any part of the *immovable property* of his ward, or to 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. A disposal of *immovable property* by a guardian in contravention of the foregoing provisions is *voidable* at the instance of the minor or any other person affected thereby (*h*). Permission to the guardian to do any of the acts mentioned above must not be granted by the Court except in case of necessity or for an evident advantage to the ward [Guardians and Wards Act, 1890, ss. 29, 30, 31].

Reference to arbitration by guardian appointed by the Court.—There are dicta of the High Court of Allahabad to the effect that a guardian appointed by the Court may refer to arbitration *without* the permission of the Court disputes as to the distribution of *immovable* properties of the minor's father, but that it is an irregularity if the guardian makes a reference without the "opinion, advice or direction" of the Court under sec. 33

(*f*) *Imambandi* v *Mutsaddi* (1918) 45 I A 73, 91, 45 Cal 878, 47 I. C 513; *Hurbai* v. *Hirajı* (1896) 20 Bom 116, 121, *Kali Dutt* v *Abdul Ali* (1888) 16 Cal 627, 16 I.A 96, *Thottoli* v. *Kunhammed* (1910) 34 Mad. 527, 8 I C. 1093.

(*g*) *Kali Dutt* v. *Abdul Ali* (1888) 16 Cal. 627, 16 I A. 96.

(*h*) *Solema Bibi* v *Hafez Mahammad* (1927) 54 Cal 687, 104 I.C 833, ('27) A.C. 836.

of the Act. There is no indication in the judgment as to the consequences of such an irregularity (*i*).

As to the disposal of *movable* property by a guardian appointed by the Court, see sec. 267A below.

265. Alienation of immovable property by de facto guardian.—A *de facto* guardian [s. 262B] has no power to transfer any right or interest in the *immovable* property of the minor. Such a transfer is not merely voidable, but void (*j*).

1. *Mother, brother, uncle, etc., as de facto guardians.*—The mother, as has already been stated, is not the legal guardian of the property of her minor children (see note to sec. 262). She is merely a *de facto* guardian—a bare custodian of their property, and has no power to sell, mortgage, or otherwise deal with immovable property belonging to them. As stated by their Lordships of the Privy Council in *Imambandi* v. *Mutsaddi* (*k*), which is the leading case on the subject, "the mother has no larger powers to deal with her minor child's property than any outsider or non-relative who happens to have charge for the time being of the infant." A sale, mortgage, or any other transfer by the mother is wholly void (*l*). The same remarks apply to a brother, uncle, and other relations. An alienation by a brother (*m*), uncle (*n*), or any other relation of the minor's immovable property is wholly void. If the alienee is let into possession of the property, his possession, so far as regards the minor's share, is no better than that of a *trespasser* (*o*).

The next question to consider is whether a sale or mortgage made by a *de facto* guardian is binding on the minor, if it was made to satisfy a mortgage or other debts of his father or other person from whom he acquires the property. In *Mata Din* v. *Ahmad Ali* (*p*), a Mahomedan executed a mortgage of his immovable property. He then died leaving a will by which he bequeathed the property to his four grandsons, one of whom was a minor, in equal shares subject to equal obligations in respect of his debts. After his death the three elder grandsons sold the mortgaged property including the minor's share to the mortgagee to satisfy the mortgage debt and other debts of the deceased. It was held by the Privy Council that the sale, though made to satisfy the debts of the deceased, was not binding on the minor, and that he was entitled to redeem his one-fourth share of the mortgaged property. In a Lahore case (*q*), a Mahomedan executed a mortgage of his immovable property in favour of *A*. He then died leaving a widow and minor children. The widow borrowed Rs. 3,000 from *B*, out of which she paid Rs. 2,500 which was the amount due to *A* under his mortgage, and mortgaged the same property to *B*. The balance of Rs. 500 was applied by her towards the maintenance of the children. The mortgage was for a term of 60 years, and *B* was let into possession. *B* spent Rs. 400 in improving the property. The children afterwards brought a suit against *B* to recover possession of their share of the property. It was held that the mortgage of the children's share was void, but the mortgage was set aside

(*i*) *Said-un-nissa* v. *Ruqaiya Bibi* (1931) 53 All 428, 130 I C. 201, ('31) A A. 307.

(*j*) *Imambandi* v. *Mutsaddi* (1918) 45 I A. 73, 45 Cal 878, 47 I.C. 513; *Mata Din* v. *Ahmad Ali* (1912) 39 I A. 49, 34 All 213, 13 I C. 976, *Khushia* v. *Faiz* (1928) 9 Lah 33, 103 I C. 365, ('28) A.L. 115 [suit to set aside alienation by mother is governed by art. 44 of the Limitation Act 1908]. See also *Moulvi Abu Mahomed* v. *Amtal Karim* (1888) 15 I A. 220 [sale by mother—lapse of time—acquiescence].

(*k*) (1918) 45 I.A. 73, 83, 45 Cal. 878, 894, 47 I C 513.

(*l*) *Imambandi* v *Mutsaddi* (1918) 45 I.A. 73, 45 Cal 878, 47 I.C. 513, *Muhammad Shafi* v. *Mst. Kulsum Bibi* (1923) 4 Lah. 467, 79 I.C. 260, ('24) A.L. 200

(*m*) *Mata Din* v. *Ahmad Ali*, *supra*; *Fateh Din* v. *Gurmukh Singh* (1929) 10 Lah. 385, 113 I. C. 227, ('29) A. L 810.

(*n*) *Nizam-ud-din* v *Anandi* (1896) 18 All. 373.

(*o*) *Imambandi* v. *Mutsaddi* (1918) 45 I.A. 73, 92-93, 45 Cal. 878, 903-904, 47 I.C. 513

(*p*) (1912) 39 I A. 49, 34 All. 213, 13 I C 976.

(*q*) *Rang Ilahi* v. *Mahbub Ilahi* (1926) 7 Lah. 35, 94, I.C. 25, ('26) A.L. 170.

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conditionally upon the children paying to *B* the amount by which they had benefited, namely, Rs. 2,500+Rs. 500+Rs. 400=Rs. 3,400. This decision probably goes too far, and may require reconsideration.

2. *Limitation for suit to set aside transfer of property by de facto guardian.*—Art. 44 of Sch. I of the Limitation Act, 1908, prescribed a period of 3 years within which a ward who has attained majority may sue to set aside a transfer of his property made by his guardian, the time running from the date of the ward's majority. This article applies to a transfer by a lawful guardian, and not one by a *de facto* or unauthorized guardian. The article that applies to a transfer by a *de facto* guardian is art. 144 read with sec. 8 of the Act. Art. 144 deals with immovable property, and prescribes a period of 12 years from the time when the possession of the defendant becomes adverse to the plaintiff (*r*).

3. *Reference to arbitration by de facto guardian* —The principle of the Privy Council decision in *Imambandi* v. *Mutsaddi* referred to in note 1 above has been applied to a reference to arbitration by a *de facto* guardian. Such a guardian has no power to refer to arbitration disputes as to the distribution of immovable properties of the minor's father, and the minor is not bound by an award made on such a reference. Nor does the subsequent appointment of the *de facto* guardian as guardian of the minor under sec. 10 of the Guardians and Wards Act, 1890, make the award binding upon the minor in the absence of evidence that the Court approved of the reference (*s*).

4. *Continuance of partnership business.*—It has been held, following the principle of the ruling in the Privy case of *Imambandi* v. *Mutsaddi* referred to in note 1 above, that where the father of a minor was a member of a firm which owed a rice mill and carried on rice milling business, the mother has no power to enter into an agreement with the surviving partners on behalf of the minor to continue the partnership business. Such an agreement is void (*t*).

As to the powers of a *de facto* guardian to deal with the *movable* property of the minor, see sec. 268 below.

266. Agreement by guardian for purchase of immovable property for his ward.—Neither the guardian of a minor nor the manager of his estate is competent to bind the minor or his estate by an agreement for the *purchase* of immovable property. Such an agreement is *void* (*u*).

[*A*, the manager of the estate of a minor, *B*, agrees to purchase from *C* immovable property on behalf of *B*. The agreement is *void*, and neither *B* nor *C* can sue for specific performance of the contract.]

267. Power of legal guardian to dispose of movable property.—A legal guardian of the property of a minor [s. 262] has power to sell or pledge the goods and chattels of the minor for the minor's imperative necessities, such as food, clothing, or nursing (*v*).

(*r*) *Mata Din* v *Ahmad Ali* (1912) 39 I A 49, 34 All. 213, 13 I C. 976

(*s*) *Mohammad Ejaz* v *Mohammad Iftikhar* (1932) 59 I A. 92, 7 Luck 1, 136 I C. 97, ('32) A PC. 78 · *Mohiuddin* v *K. Ahmed* (1920) 47 Cal 713, 57 I.C 945

(*t*) *Khorasanji* v. *Acha* (1928) 6 Rang 198, 110 I C 349, ('28) A R. 160.

(*u*) *Mir Sarwarjan* v *Fakhruddin* (1912) 39 I A 1, 39 Cal 232, 13 I C 331

(*v*) *Imambandi* v. *Mutsaddi* (1918) 45 I A 73, 86-87, 45 Cal. 878, 895-896, 47 I C. 513.

267A. Power of guardian appointed by Court to dispose of movable property.—A guardian of the property of a minor *appointed by the Court* [s. 262A] is bound to deal with *movable property* belonging to the minor as carefully as a man of ordinary prudence would deal with it if it were his own [Guardians and Wards Act, 1890, s. 27].

268. Power of de facto guardian to dispose of movable property.—A *de facto* guardian [s. 262B] has the same power to sell and pledge the goods and chattels of the minor in his charge as a legal guardian of his property (*w*).

(*w*) *Imambandi* v. *Mutsaddi* (1918) 45 I A. 73, 86-87, 45 Cal 878, 895-896, 47 I.C 513

CHAPTER XIX.

MAINTENANCE OF RELATIVES.

Ss. 268A-269

268A. Maintenance defined.—"Maintenance" in this Chapter includes food, raiment and lodging.

Baillie, 441.

269. Maintenance of children and grandchildren.—(*1*) A father is bound to maintain his sons until they have attained the age of puberty. He is also bound to maintain his daughters until they are married. But he is not bound to maintain his *adult* sons unless they are disabled by infirmity or disease. The fact that the children are in the custody of their mother during their infancy (s. 256) does not relieve the father from the obligation of maintaining them (*x*). But the father is not bound to maintain a child who is capable of being maintained out of his or her own property.

(*2*) If the father is poor, and incapable of earning by his own labour, the mother, if she is in easy circumstances, is bound to maintain her children as the father would be.

(*3*) If the father is poor and infirm, and the mother also is poor, the obligation to maintain the children lies on the grandfather, provided he is in easy circumstances.

Hedaya, 148; Baillie, 459-462. A daughter when married passes into her husband's family, and there is no obligation on the members of her natural family to maintain her, not even if she is divorced (*y*).

Right to maintenance: how long it continues.—The effect of the Indian Majority Act, 1875, so far as Mahomedans are concerned, is to extend the minority of a person until he has completed the age of 18 years, except in matters of marriage, dower and divorce. In respect of these matters a Mahomedan is entitled to act when he attains the age of majority under the Mahomedan law. That age is reached when he attains puberty, that is, when he completes the age of 15 years. Sir Roland Wilson considers that since maintenance is not of one of the excepted subjects, the age of minority for the purpose also of maintenance must be deemed to have been extended until the age of 18 years [Anglo-Muhammadan Law, ss. 140, 142]. This view, it is submitted, is not correct. The effect of the Indian Majority Act is to extend the period of *incapacity* to act in matters other than the three mentioned above, *e.g.*, contracts, wills, gifts, wakfs, etc. It is not to enlarge the duration of a *right* or of the corresponding duty. The children, therefore, of a Mahomedan have no right to maintenance after they have attained the age of puberty, nor is there any obligation on the parents to maintain them after that age, except, as stated above, in the case of a son who is disabled by infirmity or disease.

(*x*) *Emperor* v *Ayshabai* (1904) 6 Bom L R 536; *Mahomed Jusab* v. *Haji Adam* (1913) 37 Bom. 71, 15 I C. 520 [a Cutchi Memon case].

(*y*) *Pakruchi* v *Kunhacha* (1913) 36 Mad. 385, 13 I C. 236.

270. Maintenance of parents.—(*1*) Children in easy circumstances are bound to maintain their poor parents, although the latter may be able to earn something for themselves.

(*2*) A son, though in straitened circumstances, is bound to maintain his mother, if the mother is poor, though she may not be infirm.

(*3*) A son who, though poor, is earning something, is bound to support his poor father who earns nothing.

Hedaya, 148; Baillie, 465, 466.

270A. Maintenance of grandparents.—A person is bound to maintain his paternal and maternal grandfathers and grandmothers if they are poor, but not otherwise, to the same extent as he is bound to maintain his poor father.

Baillie, 466.

271. Maintenance of other relations.—Persons who are not themselves poor are bound to maintain their poor relations within the prohibited degrees in proportion to the share which they would inherit from them on their death.

Baillie, 467.

272. Statutory obligation of father to maintain his children.—If a father, who has sufficient means, neglects or refuses to maintain his legitimate or illegitimate children who are unable to maintain themselves, he may be compelled, under the provisions of the Code of Criminal Procedure, 1908, to make a monthly allowance not exceeding one hundred rupees, for their maintenance.

See the Code of Criminal Procedure, 1898, s. 488 as amended by s. 131 of the Code of Criminal Procedure (Amendment) Act, 1923 (XVIII of 1923). If the children are illegitimate, the refusal of the mother to surrender them to the father is not a ground for refusing an order of maintenance (*z*): See s. 261 above.

273. Maintenance of wives.—See ss. 213 to 215 above.

(*z*) *Kariyadan* v *Kayat Beeran* (1895) 19 Mad. 401.

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