PRINCIPLES

OF

MAHOMEDAN LAW:

WITH

LEADING CASES FROM 1838 TO 1889.

BY

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To HIS HIGHNESS

NAWAB SADIQ MAHOMED KHAN,

BAHADUR, UBASEE, WALEE REASUT,

KNIGHT GRAND COMMANDER STAR OF INDIA,

NAWAB OF BAHAWALPUR,

This Volume is Dedicated,

BY KIND PERMISSION,

AS A SLIGHT TRIBUTE OF HIGH RESPECT

AND ADMIRATION

FOR HIS HIGHNESS'S NOBLE QUALITIES, HIS ENCOURAGEMENT OF EDUCATION, HIS SOLICITUDE FOR THE HAPPINESS, AND THE SOCIAL AND MORAL ELEVATION OF HIS PEOPLE,

BY HIS HIGHNESS'S

HUMBLE SERVANT AND WARM ADMIRER,

THE AUTHOR.

PREFACE.

SINCE the publication of my work on Hindu Law, calls came upon me from various quarters for a similar handy, and easily accessible work on Mahomedan Law. My onerous and grave duties hardly left me sufficient leisure, and I could not bring out a work dealing with abstruse questions of Mahomedan Law as early as I was asked. As a help to students and the legal profession, with a view to easy reference, it is hoped it may be useful. In enunciating the principles, I have taken care to support them by decisions of the Judicial Committee of the Privy Council and the High Courts from so far back as 1838 down to date, pointing out at the same time the difference that exists between the two schools, Suni and Shia.

A. C. M.

PURULYA, CHOTA NAGPORE,
August, 1889.

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MAHOMEDAN LAW.

Mahomedan law based upon Mahomedan religion

MAHOMEDAN LAW is based upon Mahomedan religion, for the text of the Koran, which is its primary authority, is believed to be of divine origin, and to have been communicated by the angel Gabriel (Zebriel) to Mahomed. The Sunna or Hadis, which are the sayings and doings of Mahomed, supply what is wanting in, and throw light on what is obscure in, the Koran or Mahomedan Jurisprudence, but there are among Mahomedans, as in every other people, different schools and thinkers who entertain different views from one another. The schism which followed Mahomed's death divided the followers of Islam into two hostile sects of Sunis and Shias. The Sunis accept the writings and futwas of four followers of the Prophet—Abu Hanifa, Abu Abdul Malik, Mahomed bin Idrs ash Shafi-i, and Ahmad ash Shaibbani, commonly known as Ibu Hanbal. They recognise these four as the immediate and trusted followers of the Prophet, but the Shias reject these, and look upon Ali, the son-in-law of Mahomed, as his sole lawful successor.

The school of Abu Hanifa is the principal and almost exclusive Suni law prevalent in India. Although there is no work directly come from Abu Hanifa, yet his doctrines—as embodied in the Digests, the Futawa-i-Kazee and the Futawa of Alumgir, compiled by order of Aurungzeb, and the most celebrated Hedaya—are universally received as authority throughout India.

The subject of inheritance is treated in the works entitled Sirajiya and Sharfiyah, translated by Sir William Jones so early as 1792.

Difference between the Shia and Suni Schools.

Of the Shia School of inheritance there are no doubt four or five schools on religious matters, but the chief difference between it and the Suni sect is, as already noticed, in the law of the Twelve Imams, who were, according to the Shias, Ali and his descendants, but in the basis both agree. The following passage in the Koran is as it were the starting point to both: "God hath thus commanded you concerning your children. A male shall have as much

as the share of two females; but if they be females only and above two in number, they shall have two-third part of what the deceased shall leave, and if there be but one, she shall have the half; and the parents of the deceased shall have each of them a sixth part of what he shall leave if he have a child; but if he have no child, and his parent be his heir, then his mother shall have the third part, and if he have brothers, his mother shall have a sixth part after the legacies which he shall bequeath, and his debts be paid. Ye know not whether your parents or your children be of greater use unto you. Moreover, you may claim half of what your wives shall leave if they have no issue, but if they have issue, then ye shall have the fourth part of what they shall leave after the legacies which they shall bequeath, and their debts be paid; they also shall have the fourth part of what ye shall leave in case ye have no issue; but if ye have issue, then they shall have the eighth part of what ye shall leave after the legacies which ye shall bequeath and your debts be paid.

"And if a man or woman's substance be inherited by a distant relation, and he or she have a brother or sister, each of these two shall have a sixth part of the estate; but if there be more than this number, they shall be equal sharers in the third part after payment of the legacies which shall be bequeathed and the debts without prejudice to the heirs.

"They will consult thee for thy decision in certain cases: Say unto them God giveth you these determinations concerning the more remote degrees of kindred. If a man die without issue and have a sister, she shall have the half of what he shall leave, and he shall be heir to her in case she have no issue; but if there be two sisters, they shall have between them two-thirds of what he shall leave; and if there be several, both brothers and sisters, a male shall have as much as the portion of two females."

In the distribution of the estate no distinction between real and personal or ancestral and acquired property is observed.

On these lines, succession among heirs is regulated by the Mahomedan law, but, in the distribution of the estate, no distinction is observed between real and personal and ancestral and acquired property. All the sons, whatever their number, inherit equally, the rule of primogeniture not being recognised by the Mahomedan law.

The daughter has half of the share of a son when they inherit, and other females—*viz.*, the widow, mother, daughter

and sister—are heirs and not excluded from inheriting. These succeed with full proprietary right to their respective shares, not being restricted at all in their dealings regarding them, and, after the death of the owners, descend to their own heirs and not those of the husband or the brother as the case might be. As a rule, the descendants exclude all other relations, and parents, children, widow and the widower are simultaneously called to inherit, the right of representation not being recognised, although inheritance may partly ascend lineally and partly descend lineally at the same time. Primogeniture not recognised by the Mahomedan law.

A deceased person's son shall not inherit his father's share if the father died before the grandfather, but the surviving sons of the grandfather, *viz.*, the paternal uncles of the son, will inherit. The exception to the general rule that a brother inherits double the share of a sister is in the case of brothers and sisters by the same mother only, but by different fathers.

Debts are payable before legacies, but after payment of the funeral charges. Legacies must not exceed one-third of the estate, and wills executed in favor of one son or one heir to the prejudice of the other sons or heirs are invalid. Wills executed in favor of one son to the prejudice of others are invalid.

INHERITANCE ACCORDING TO THE SUNI SCHOOL.

Heirs defined.

The order of succession according to this school lies principally between three classes of heirs, *viz.*, sharers, residuaries, and distant kindred.

The sharers are those to whom specific shares are assigned. Residuaries are those who are entitled to the residue or the surplus after the allotment of the shares. This surplus, in the absence of residuaries, reverts to the sharers, and is termed "the return." But this takes place only when the deceased leaves not a single individual connected with him. This, however, very rarely, if ever, happens, as the deceased generally leaves persons related to him, and are called distant kindred.

SHARERS.

Who are sharers.

There are twelve classes of persons who are entitled to shares, and these are—the father, true grandfather, half-brother by the mother, the daughter, son's daughter, the mother, the true grandmother, full-sisters, half-sisters by the father, half-sisters by the mother, husband, and the wife.

True grandfather includes all grandsons in the male line in which no mother enters, as the father's father, father's father's father. Similarly true grandmother is a female ancestor, as the mother's mother, mother's mother's mother, mother's father's mother, father's mother's mother, grandfather's mother's mother, and so on. Mother's father's father, mother's mother's father, father's mother's father are false grandfathers. False grandmothers are the mother's father's mother, father's mother's father's mother. Son's daughter includes a grandson, son's son's daughter, and so forth.

The husband and wife are entitled to shares for special cause, and the rights of the ten others are founded on nusub or kindred.

The shares assigned by the sacred text are six in number —a half, a fourth, an eighth, and two-thirds, one-third and

a sixth ; the half is had by the husband when the deceased has no child nor child of a son surviving him by a daughter of the loins ; by the son's daughter when there is no daughter of the loins ; by the full-sister and a half-sister on the father's side when there is no full-sister. These are the five persons who can have a half share, and the fourth becomes the share of a husband when there is a child or the child of a son of the deceased him surviving. The wife or wives have the fourth, if the deceased left no child nor child of a son. The eighth is the share of a wife or wives when the deceased has left a child or child of a son. Shares how distributed.

Four persons have right to two-thirds, *viz.*, two or more daughters of the loins, the same number of daughters of a son in case there be none of the loins, two full-sisters or more or two half-sisters by the father when there is no full-sister.

A third is had by the mother when the deceased died without issue, his own or that of a child of his, and without leaving two brothers or sisters. It is the share as well of two or more children of a mother whether they be male or female.

The sixth is the share of a father when the deceased has a child or child of a son surviving him, of a grandfather when there is no father, of a mother when the deceased has left a child or child of a son, or two brothers or sisters ; of a single grandmother, or of several grandmothers when there are others at the time of inheriting, of a son's daughter with a daughter of the loins to make up two-thirds, and the child of the mother be it male or female.

RESIDUARIES.

Persons for whom no shares are assigned, but who take the surplus after the sharers have had their shares, are called residuaries, and these are of three kinds :—(*1st*) Residuaries by themselves or in their own right ; (*2nd*) residuaries by another ; and (*3rd*) residuaries with another. Who are residuaries. Different kind of residuaries.

The *1st* class comprehends "every male into whose line of relation to the deceased no female enters." In it come the offspring-part of the deceased—the offspring of his father and the offspring of his grandfather. 1st class—in their own right.

The son is thus the nearest of the residuaries, the next is the son's son, then the father, then the grandfather, *i.e.*,

father's father, then the full-brother, then the half-brother by the father, then the son of the full-brother, then the son of the half-brother by the father, then the full-paternal uncle, then the half-paternal uncle, then the son of the half-paternal uncle by the father, then the full-paternal uncle of the father, then the half-paternal uncle of the father on the father's side, then the son of the father's paternal uncle, then the son of the father's half-paternal uncle on the father's side, then the paternal uncle of the grandfather, then his son how low soever.

Rule of division.

In case there be several residuaries in the same degree, division *per capita* is the rule, and never *per stirpes*. The son of one paternal uncle and the sons of another have each one-eleventh part of the property after its division into eleven parts. Likewise the son of one brother and ten sons of another have each at the same ratio.

and class—by another.

(*2nd.*)—The residuary by another is every female who becomes a residuary by right of certain coexistent male relations, such as a daughter by a son, a son's daughter by a son's son, a full-sister by her brother, a half-sister by the same father by her brother. The rest of the residuaries are males who inherit without the participation of females, and these are the paternal uncle and his son, the son of a brother, and the son of an emancipator. The rule that a male takes twice as much as a female equally applies to this line of succession.

3rd class—with another.

(*3rd.*)—The residuaries with another are females who become residuaries with another female, as full-sisters and half-sisters by the father with daughter or daughter's sons. Among all these the nearest are preferred to those that are not so closely allied to the deceased. Thus when the deceased leaves a daughter, a full-sister, and the son of a half-brother by the father, a half of the inheritance goes to the daughter, half to the sister, and nothing to the brother's son, because the daughter and the sister are nearer to the deceased than his brother's son. In like manner, full-blood is preferred to half-blood, and a brother accordingly excludes a nephew, a full brother excludes a half-brother, and a half-brother excludes a full-brother's son.

Emancipators are residuaries through special cause.

Residuaries through special cause are those who are called the emancipators.

DISTANT KINDRED.

Distant kindred are persons who are neither sharers nor residuaries to the deceased, but who, as his relatives, inherit his property when there are neither sharers nor residuaries. There are four classes of distant kindred: first the children of daughters and sons of daughters; the second are the false grandfathers and false grandmothers; the third are the daughters of full-brothers and of half-brothers by the father, the children of half-brothers by the mother, and the children of the sisters; the fourth are the paternal uncles by the mother, *viz.*, the half-brothers of the father by the same mother, and their children, paternal aunts and their children, maternal uncles and aunts and their children, and the daughters of full-paternal uncles and half-paternal uncles by the father. Succession among these too is regulated by the well-recognised rule of proximity to the deceased. The nearer is preferred to the more remote, and when there is equality in degree, the child of an heir, whether sharer or residuary, is preferred. If there be no child of any of the heirs, the property is equally divided among them. If there be males and females, the division is in the proportion of two parts for a male and one for a female. Of two relations equal in degree, if one be immediately related through a sharer and the other not so, the former is preferred to the latter.

Distant kindred comprehend four classes.

Rules of succession among these.

RULES OF DISTRIBUTION.

There are seven rules of distribution—three are the results of a comparison between the number of heirs and the number of shares, and four of a comparison of the number of each set of heirs and their respective shares.

Rules of distribution.

The first is called Mutamasil, which occurs when the number of heirs and the number of shares exactly agree, as in the case of a father, a mother and two daughters. The share of the parents is one-sixth each, and that of the daughters two-thirds.

(1.) Mutamasil.

The second is termed Matawafik or composite, and takes place on a comparison of the number of heirs and the number of shares, as in the case of a father, a mother and ten daughters.

(2.) Matawafik.

(3) Mutabayun.

The third is called Mutabayun, and it takes place when, on a comparison of the number of heirs and the number of shares, it is found that the heirs cannot get their shares without a fraction, as in the case of a father, a mother and five daughters. Each parent having a sixth, the remainder four is to be distributed among the five daughters, and this cannot be done without a fraction. And the rule is that (5) the number of heirs is to be multiplied into the number of division, *viz.*, 6. Thus $5 \times 6 = 30$, the parents take five each, and the daughters four each.

The fourth occurs when, on a comparison of the different sets of heirs, it appears that all are Mutamasil or equal, and certain sets cannot get their portions without a fraction, as in the case of six daughters, three grandmothers, and three paternal uncles. The division is to be by six, and a comparison is to be made between the several sets and their individual shares.

The fifth takes place when it is found that the heirs cannot have their shares without a fraction, and the sets are Mutadakhil or concordant, as in the case of four wives, three grandmothers and twelve paternal uncles; the share of the grandmothers is one-sixth, that of the four wives is one-fourth, and the division is to be made by twelve.

When, on a comparison of the different sets of heirs, it is found that some of the sets are Mutawafik or composite with each other, the sixth rule is to be adopted, *viz.*, the original division must be by twenty-four, as in the case of four wives, eighteen daughters, fifteen female ancestors and six paternal uncles.

The seventh, or the last, is to be applied when it appears on a comparison of the different sets of heirs that all are Mutabayun, and not one agrees with another, as in the case of two wives, six female ancestors, ten daughters, and seven paternal uncles. The division must be by twenty-four, and, as in every other instance, after a comparison between the several sets of heirs and their respective shares. In the main the principle on which "the mode of ascertaining the number of portions to which each set of heirs is entitled, is to multiply the portions originally assigned them by the same number by which the aggregate of the original portions was multiplied; and similarly to find the portion of each individual in the several sets of heirs, the plan is to ascertain how many times the

number of persons in each set may be multiplied into the number of shares ultimately assigned to each set."

EXCLUSION FROM INHERITANCE.

It has been observed that in the order of succession according to Mahomedan law, the nearer in the line of heirs are preferred to those who are not so closely allied to the deceased, in other words, the cognates, including even the daughter's son, are excluded by the agnates however distant. And this question of exclusion should here receive attention. Now it can be either entire or partial, but six persons, *viz.*, the father, the mother, the son, the daughter, and the husband and the wife can, under no circumstances, be excluded, and must have some share or other. Exclusion is entire in the case of persons who are slaves, homicide, infidels, and persons differing in religion. These being altogether excluded, cannot exclude other heirs either entirely or partially. It is partial when it takes place by reason of some intervening heir, as in the case of a man who dies leaving a father or mother and two sisters who are infidels.

Some persons are excluded.

Exclusion is either entire or partial except six persons who can never be excluded.

When partial.

The sisters, being infidels, are altogether excluded, and the father or mother, according to true calculation, would be entitled to two-thirds, but the share of each is a third; had the sisters not been infidels, the father or mother would only have been entitled to a sixth, but they being infidels are entirely excluded.

Infidels.

In illustration of the principle that the nearer exclude the more remote, the exclusion of full-brothers and sisters by a son, son's son, and a father, is in point. Half-brothers and sisters on the father's side are excluded by full-brothers and sisters, and half-brothers and sisters on the mother's side are excluded by a child, the child of a son, a father, and a grandfather. Grandmothers, whether maternal or paternal, are excluded by a mother, and paternal grandmothers are excluded by a father, and a grandfather is excluded by a father when anterior to him.

Remote heirs by nearer.

It is rendered more explicit if we suppose the case of a person who dies leaving a father, a father's mother, and the mother of a mother's mother. The father inherits the whole, because he excludes his mother, and the mother excludes the mother of the mother's mother, because she

is nearer to the deceased. Grandmothers, on the side of the mother, are not excluded by a father, so that if one should leave a father, a father's mother, and a mother's mother, the father's mother is excluded by the father. One grandmother only on the side of a mother can be an heir, for true grandmothers are only those in whose line of relationship a father does not come between two mothers. So that this single heir is the mother's mother, how high soever, and as the nearer excludes the more remote, only one grandmother can inherit. In respect of total exclusion on the ground of personal disqualification, slavery comes first in order, and there is no difference between an absolute and a qualified slave. The second is homicide, and to exclude one from inheritance it must be intentional, and such as would render expiation necessary. The third, difference of religion, means difference between Islam and infidelity.

Grounds of total exclusion.

Adopted and illegitimate sons do not inherit.

Adopted sons as well as illegitimate children, or those born of fornication or adultery, cannot inherit from their father, nor can one illegitimate brother succeed to the estate of another.

Khajeh Oheed Khan *v.* Collector of Shahabad.

Sir L. S. Jackson and Dwarka Nath Mittra, JJ., held, in Khajeh Oheed Khan *v.* The Collector of Shahabad (9 W. R., 502), that there is no authority from Mahomedan law or from decided cases showing that an adopted son may inherit among Mahomedans. They could not accept the dictum by one Judge of the late Sudder Court in the case of Mirza Aga Ali Hossein Khan *v.* Shoohamut Ali, decided in the year 1861, stating that the adopted son was entitled to a certificate, as binding authority upon the subject.

Mental derangement no impediment to inheritance.

In Mir Mahar Ali *v.* Amani (2 B. L. R., p. 312) Macpherson, J., held that mental derangement is no impediment to succession according to Mahomedan law—*Vide* Macnaghten's Precedents of Inheritance, case 10, p. 89.

Zina explained.

In Mirza Himmut Bahadur *v.* Mussamut Sahabzadee Begum (14 W. R., 125) the High Court of Calcutta observed: "Under the Shia as well as the Suni law any connection between the sexes, which is not sanctioned by some relation founded upon contract or upon slavery, is denounced as "zina" or fornication. Both the schools, Suni and Shia, prohibit sexual intercourse between a Mooslinah, *i.e.*, a Mahomedan woman and a man who is not of her religion. The right to inheritance

is founded on 'Nassab' or consanguinity, and on 'Subub' or special connection. Under Nassab are comprised three classes or series of persons: (*first*) the parents and the children: how low soever; (*second*) the brethren and their children how low soever, and the grand parents how high soever; and (*third*) the maternal and paternal uncles and aunts. Subub is of two kinds—'Zarjeeut' or the relation between husband and wife, and 'Wulla' or dominion, of which there are three kinds: the wulla of circumspection, the wulla of responsibility for offences, and the wulla of Imamut or headship of the Mussulman community. The plaintiff comes under the second class of parties, claiming under the right of Nassab, *viz.*, the brethren. Is there then any "Nassab" between the plaintiff and his deceased illegitimate brother; for, unless this be established, the plaintiff's suit must necessarily fail."

Nassab—Three kinds.

Subub—Two kinds.

Now we find on the Shara-ul-Islam that "the Waladoo-zina has no Nassab." The following passage from a work called Jamia-i-Abbasi has been quoted: "That the child of fornication does not inherit from his father, nor does his father or his relations inherit from him, but his son and wife and the Imam inherit from him, and, in various traditions, it has been handed down that his mother, his maternal brethren and his maternal relations do inherit from him." We may observe that, at page 630 of this very work, we find a passage altogether opposed to the passage quoted. It is to this effect: "The estate of a Waladoo-zina or child of fornication is inherited by his children and his wife, as also by his father and his mother, but not by any near relation of his; but if he have no children or wife, the Imam succeeds." Here the brother is not mentioned as "entitled to succeed." Then, as regards the right of illegitimate sons to claim relationship with their father's family, the case of Boodhun *v.* Jan Khan (13 W. R., 265) is conclusive.

Shara-ul-Islam on the point.

THE INCREASE.

The rules of distribution already considered lead us on to the subject of the Increase and Return. This chapter will be devoted to the treatment of the circumstances under which increase takes place. It takes place when it is found, on a distribution of the shares, that they are less than the shares of the property, and all

Increase, how does it arise.

the claimants cannot have what they are justly entitled to. In this event the shares of the property are raised to the number of the shares of the sharers, and the deficiency is distributed over all the sharers in proportion to their shares. For instance, "a woman leaves a husband, a daughter, and both parents." Here the property should be made into twelve parts, of which, after the husband has taken his fourth and the parents have taken their two-sixths or four, there remain only five shares for the daughter instead of six, or the moiety to which by law she is entitled. In this case the number twelve, into which it was necessary to make the estate, must be increased to thirteen, with a view of enabling the daughter to realise six shares of the property.

THE RETURN.

The Return.

The next subject for consideration is the Return. It is, as shewn in the chapters on inheritance, the shares of residuaries after allotment of shares to the legal sharers, and, consequently when there are no residuaries, it turns out to be a surplus and reverts to the sharers. These are the mother, the grandmother, the daughter, son's daughter, full-sister, half-sister of the father, and half-brother or sister by the mother. It does not come to the husband and wife. This, however, was controverted by the Privy Council in Mussamut Harmutul-nissa Begum *v.* Allahdiah Khan (17 W. R., 108). Their Lordships remarked: "The proposition which assumes that if there are no residuaries the three-fourths of the property would necessarily go to the Crown may be contestable. As a general rule, a widow takes no share in the return; but some authorities seem to hold that if there are no heirs by blood alive, the widow would take the whole estate to the exclusion of the fisc. Following this dictum, the High Court of Calcutta, in Mahomed Arshad Chowdry *v.* Safida Banno (I. L R., 3 Calc., 702) observed: "Now these observations, although they had no bearing upon the ultimate decision of the case, seem to us rather in favor of the plaintiff than of the defendant." Then, with reference to the quotations from Baillie's and Macnaghten's Mahomedan Law, and from the Futawa Alumgiri, there can be no doubt that the more ancient authorities did hold that the widow and the husband were not entitled to the "rudd" or return under the Mahomedan law; but more modern authorities

Who are entitled to it.

Decision of Privy Council.

Subsequent decision in Bengal.

have held the other way, and have ruled that, in the absence of the "bait-ul-mal," the widow and husband are entitled to the return. In Koonari Bibi *v.* Dalim Bibi (I. L. R., 11 Calc., 14) Macpherson, J., followed the view of the Privy Council, that if there be no heirs by blood alive, the widow would take the whole estate. "It is contended," he observed, "on the authority of the cases reported in 1 Select Reports, 346, and I. L. R., 3 Calc., 702, that the widow is entitled to the 'return,' and it is ingeniously argued that, as those who share in the return take in preference to 'distant kindred,' so the widow's claim must be preferred to that of the distant kindred. But we think that neither the cases cited nor the authorities go to this extent. What the cases decided was that in the absence of other heirs (and 'distant kindred' are heirs), the widow is entitled to the return as against the bait-ul-mal or public treasury." Originally it would seem the widow was not entitled to share in the 'return' at all, and an exception was only made in her favor as against the public treasury. But she has no claim as against any of the heirs.

Widow entitled to the return as against the public treasury in the absence of any heirs.

The return is the reverse of the increase, and means proportionate increase, whereas the so-called increase means proportionate reduction; but the principle of distribution is the same in both cases, with this difference that in the case of return the share of the husband or wife is deducted, and the remainder is distributed among the sharers in proportion to the fractions of their original shares.

The four events on which it takes effect are described by Sir William Macnaghten:—

(*Firstly*)—Where there is only one class of sharers unassociated with those not entitled to claim the return, as in the instance of two daughters or two sisters, in which case the surplus must be made into as many shares as there are sharers, and distributed among them equally.

(*Secondly*)—When there are two or more classes of sharers unassociated with those not entitled to claim the return, as in the instance of a mother and two daughters. The mother's share being one-sixth, and the two daughters' share two-thirds, the surplus must be made into six, of which the mother will take two and the daughters four.

(*Thirdly*)—When there is only one class of sharers associated with those not entitled to return, as in the case of

three daughters and a husband, in which case the whole estate must be divided into the smallest number of shares, of which it is susceptible, consistently with giving the person excluded from the return his share of the inheritance (which is in this case four), and the husband will take one as his legal share or a fourth, the remaining three going to the daughters as their legal shares and as the return. Where it cannot be so distributed without a fraction, as in the case of a husband and six daughters (three not being capable of division among six), the proportion must be ascertained between the shares and sharers.

(*Fourthly*)—Where there are two or more classes of sharers associated with those not entitled to claim the return, as in the instance of a widow, four paternal grandmothers and six sisters by the same mother only, in which case the whole estate must be divided into the smallest number of shares of which it was susceptible, consistently with giving the person excluded from the return her share of the inheritance (which is in this case four).

VESTED INTERESTS.

When vested interests arise.

Vested interests in the inheritance arise in the event of some of the heirs dying prior to any distribution of the estate, and the surviving ones inherit the shares of the deceased. Thus, when the heirs are sons and daughters, and one of either dies, he or she has no other heirs than the surviving brothers and sisters, the property is divided among the survivors in the proportion of two shares to a male and one to a female. Here the survivors are said to have vested interests in the inheritance, and the rule is, as stated, that the property of the first deceased is apportioned among the general heirs living at the time of the death of the last heir. In the case of the death of the next or second deceased, the difference in the rule is that the proportion is ascertained between the number of shares to which he was entitled at the first distribution, and the number into which it was necessary to distribute his property to satisfy all the heirs. The rules of division, as Sir William Macnaghten has laid them down, are, firstly, if the proportion should appear to be prime, the aggregate and individual shares of the preceding distribution must be multiplied by the whole number of shares into which it was necessary to make the estate at the subsequent distribution, and the individual shares at the subsequent distribution

must be multiplied by the number of shares to which the deceased was entitled at the preceding one.

If the proportion should be concordant or composite, the rule is that the aggregate and individual shares of the preceding distribution must be multiplied by measure of the number of shares into which it is necessary to make the estate at the subsequent distribution, and the individual shares at the subsequent distribution must be multiplied by the measure of number of shares to which the deceased was entitled at the preceding distribution.

Rules to ascertain the shares.

These rules enable us to ascertain the shares which the several heirs can have, but it might happen that the assets of the estate might not be sufficient to meet the claims of each of the heirs, and in such case the rule is to find the number of shares into which the estate should be divided, as also the number of shares to which each set of heirs is entitled, and then to compare the former number with the number of assets. "If these numbers appear to be prime to each other, the rule is that the share of each set of heirs must be multiplied into the number of assets, and the result divided by the number of shares into which it was found necessary to make the estate. If the numbers are composite, the rule is that the share of each set of heirs must be multiplied into the measure of the number of assets, and the result divided by the measure of the number of shares into which it was found necessary to make the estate. To ascertain the number of shares of the assets to which each individual heir is entitled, the same process must be resorted to, with this difference that the number of assets must be compared with the share originally allotted to each individual heir, and the multiplication and division proceeded on as above. In a distribution of assets among creditors, the rule is that the aggregate sum of their debts must be the number into which it is necessary to make the estate, and the sum of each creditor's claim must be considered as his share. For instance, supposing the debt of one creditor to amount to 16 rupees, of another to 5, and of another to 3, and the debtor to have left property to the amount of 21 rupees. By observing the process laid down, it will be found that the creditor, to whom the debt of sixteen rupees was due, is entitled to 14 rupees; the creditor of five rupees to 4 rupees 6 annas; and the creditor of three rupees to 2 rupees 10 annas."

OF PARTITION.

Partition can be claimed of an estate which has devolved on persons by inheritance, and one heir alone can claim when it can take place without detriment to the utility of the estate, as well as when the estate consists of various articles, otherwise the consent of all the co-heirs is requisite. Among co-heirs there may be missing persons, and persons who have died leaving their wives pregnant. In these events the distribution will take place so far as the other heirs are concerned, and the property of the missing person should be in abeyance for ninety years. In the case of a person dying leaving his wife pregnant, the share of one son is to be reserved, which would go to the son if one were born. But in partitioning between sons no distribution will take place if the deceased died leaving his wife pregnant, but no living sons surviving him, or, in other words, the deceased died leaving no sons but relatives who would inherit if he left no issue. An exception is made in the case of such relatives, who would at all events have a share whether the child were born or not. The partition would take place, giving, for instance, the mother a sixth, to which she is legally entitled. If the child be not born alive, her share is increased to one-third. In illustration of the point that the property of a missing person is held in abeyance for ninety years, or until his death is proved, the judgments of Spankie and Pearson, JJ., in Hasan Ali *v.* Maherban (I. L. R., 2 All., 625) are conclusive. It was a case in which plaintiff sued the daughter of a missing person, Farzand Ali, for possession of his share of the property. According to the Mahomedan Law of Inheritance, Spankie, J., observed : " A missing person is considered as living in regard to his own estate, so that no one can inherit from him, and dead in regard to the estate of another, so that he does not inherit from any one, and his estate is reserved until his death can be ascertained, or the term for a presumption of it has passed over." I find a summary of the law quoted from well-known authorities and cited in Macnaghten's Mahomedan Law : " Thus if he (the missing person) had an estate when he disappeared, or if at that time he was entitled to a share in a joint property, such property cannot be inherited before his death be proved, or until he would have been ninety years of age,

How partition is effected.

Missing person's property held in abeyance for ninety years.

but must remain in trust until that time, when it will devolve upon those of his heirs who are in existence at that time. On the death of any of the relatives of a missing person to whom he is an heir, he is so far considered to be alive that his share is set aside, but such share is not reserved in trust for him and his heirs, but delivered to the other heirs who would have taken if he had been dead; if he returns after this, he will be entitled to his share, but if he does not return, it devolves on the heirs who came into possession at the former distribution, but not to the heirs of the missing person." Again, "If a missing person be a co-heir with others, the estate will be distributed as far as the others are concerned, provided they would take at all events whether the missing person were living or dead. Thus in the case of a person dying, leaving two daughters, a missing son, and a son and daughter of such missing son, the daughters will take half the estate immediately as that must be their share at all events; but the grand-children will not take any thing, as they are precluded on the supposition of their father being alive."

Farzand Ali became lost during the lifetime of his parents, and his daughter, according to the view of the law expressed above, could not, under the circumstances, inherit. Pearson, J., concurring in this opinion, observed: "The property in suit did not belong to Farzand Ali, the missing man, but would have been more or less inherited by him had he survived his parents. The plaintiffs are his sisters and a cousin, who married one of them; the defendant is his daughter, and if she be not entitled to the property, they are. Her contention is that her father is still alive, and if the contention be true, it is apparent from the rules of Mahomedan Law, cited by my learned colleague Spankie, J., that she is not entitled to hold the property either as heir or trustee, although Farzand Ali may be entitled to it should he return. The plaintiffs do not assert that he is dead, but nothing has been heard of him since he disappeared in 1857, and the strong probability is that he died in the lifetime of his parents, in which case his daughter could not inherit through him any part of their estate." In Hussainee Khanun *v.* Tijan Lall (14 W. R., 273) the High Court of Calcutta expressed the same opinion. It was observed that there was a difference of opinion as to the time to

wait before the property of a missing person could be inherited by his heirs. The Court concluded as follows: "It appears that, according to Abu Hanifa, Mahomed and Abu Yusuf, there is some difference of opinion as to whether 100, 105 or 110 years is the proper time to wait before the property of a missing person can be said to be inherited by his heirs, and, therefore, alienable by them; and looking to this difference, it is laid down that 90 years is the least period which must elapse before the estate of a missing person can be alienated by his heirs."

The usual modes of partition of property where it does not consist of money are by distributing it into several distinct shares, and by the usufruct of property, that is, by allowing the heirs to enjoy the properties or use the property by turns. In case of one heir demanding a separation, and another a division of the usufruct, the former is to be preferred whenever it is practicable. Actual partition, *i.e.*, by metes and bounds, is not necessary to the separation or cessation of a co-parcenary. In Degamber Misser *v.* Ram Lall Roy (I. L. R., 14 Calc., p. 767) Tottenham and Norris, JJ., after full and careful consideration, were of opinion that no partition by metes and bounds was necessary. Reference was made to the dictum of Lord Westbury in Appovier *v.* Rama Subba Arzan (11 Moore's I. A., 75) as follows: "When the members of an undivided family agree among themselves with regard to particular property that it shall thenceforth be the subject of ownership in certain defined shares, then the character of undivided property and joint enjoyment is taken away from the subject-matter so agreed to be dealt with; and in the estate each member has thenceforth a definite and certain share which he may claim the right to receive and enjoy in severalty although the property itself has not been actually severed and divided." * * * * * * * Then if there be a conversion of the joint tenancy of an undivided family into a tenancy in common of the members of that undivided family, the undivided family becomes a divided family with reference to the property that is the subject of that agreement, and that is a separation in interest and right, although not immediately followed by a *de facto* actual division of the subject-matter. This may, at any time, be claimed by virtue of the separate right."

Actual partition not necessary to separation of a co-parcenary.

In Gopal Saha *v.* Ojoodhea Pershad (2 W. R., 47) it was held that a private partition, though not sanctioned by official authority, if full and final as among the parties to it, will have the same effect as the most formal partition on the right of pre-emption. We think these two cases establish the view we hold.

INHERITANCE UNDER THE IMAMYA OR SHIA SCHOOL.

This school has the Koran, as the Sunis have, for their guide, and the same rules in regard to the allotment and distribution of the legal shares among the various claimants, According to the Shias, the eldest son, if worthy, is entitled over and above his legal share to his father's sword, his Koran, his wearing apparel, and his ring. The difference between the two sects is that in the number of shares of the property no increase takes place, as in the case of the Sunis, when it is insufficient to satisfy the claims of all the heirs. In the case of a husband, a daughter, and parents, the property is divided into twelve; the husband receives three shares or a fourth, the parents two-sixths or four, and the daughter half; but the daughter, according to this division, does not get half, *viz.*, six, but five only. And, according to the Suni doctrine, the property would be divided into thirteen parts to enable the daughter to have her six shares. The Imamya tenets would not sanction this division, and the daughter must be content with the residue, *viz.*, the five shares. The great principle of the Shia School is that a deduction is only to be made from the share of such heir who may, under certain circumstances, be deprived of a legal share, or whose share would admit of diminution. For, as in the case put, had there been a son, the daughter would not have been entitled to any specific share, and she would have become a residuary; whereas the husband or parents can never, under any circumstances, be deprived of legal shares.

Among Shias no increase in the number of shares takes place.

The surplus, after the distribution of assets, reverts to the heirs, and, if there be no heirs, it reverts to the sharers in proportion to their shares.

Wife not entitled to share in the return.

The husband is entitled to share in the return, but not the wife. If there be brethren, the mother is not entitled to share in the return else she inherits, and where there is an individual claiming a double relation, he holds the surplus exclusively.

The Shias make no distinction on the ground of agnates or cognates in the distribution of the estate. According to the Sunis agnate kinsmen are preferred, but the Shias prefer the nearest kin without reference to sex. A daughter, according to the Shia School, excludes a son's son, and a maternal uncle excludes a paternal grand-uncle; by the Suni doctrine the daughter would have half, and the maternal uncle would be wholly excluded by the paternal uncle of the father.

Shias prefer the nearest kin as heir, and make no distinction between agnates and cognates.

The husband takes the whole estate of his wife in failure of heirs, but the wife inherits her legal share, *viz.*, one-fourth only, and the residue goes to the Crown. In case there be no children, the share of a husband is half; of the wife a fourth; and, when there are children, the husband has a fourth and the wife an eighth. There are three degrees of heirs—the first are by virtue of consanguinity; the second, by virtue of marriage; and, the third, by virtue of Willa. Willa is that sort of inheritance which accrues from mutual agreement between two persons who engage each to be heir to the other, and that which is derived from freedom granted, and the emancipator acquires a right of inheritance. The former are excluded by the latter, who, however, are restricted under section 3, Act V of 1843, which enacts "that no person who may have acquired property by inheritance shall be dispossessed or prevented from taking possession thereof on the ground that the person from whom the property may have been derived was a slave. The Privy Council in appeal, in Syud Mir Ujmudden Khan *v.* Zia-ul-nissa Begum (I. L. R., 3 Bom., 422), from the judgment of the High Court, gave effect to it. In its judgment it observed that it was contended that to apply the section to this case would be to give a retrospective effect to the Act in violation of well known rules of construction. "Their Lordships cannot accede to that argument. The Act was in force at the time of the death of Amir-ul-nissa; and the question, who is entitled to succeed to her property, is determinable by the law as it stood when the succession opened. Their Lordships cannot recognise any vested interest said to have been acquired, previous to the passing of the Act, by the unascertained persons who might at his death be the then residuary heirs of her husband; or admit that her husband, by the act of emancipation, acquired a vested right which the statute could not except by express and retros-

pective words take away. One of his residuary heirs died before the widow, and it is not contended that any interest vested in him. The whole right, if any, which can be asserted under the Willa rule of law, is treated as having been in Moinuddun when Amir-ul-nissa died. If he too had died in her lifetime, the right could not have been asserted by his sister and heiress, the plaintiff in the suits. It would have been in some more distant male relative of the Nawab.

It was further contended that the respondents could not claim the benefit of the statute, inasmuch as they are not persons "who may have acquired property by inheritance," and that the words are to be construed by the Mahomedan law which gives the property to a preferable class of heirs, *viz.*, the heirs of the husband, the emancipator. This argument seems to their Lordships to reduce the clause to a nullity. They conceive that the words must be taken to include any persons who would have acquired a title to property by right of inheritance, but for some obstacle arising out of the status of slavery. It was argued by Mr. Doyne that, in all probability, the legislature had not its mind directed to this somewhat obscure branch of Mahomedan law, and that the section must be taken to apply only to cases in which the person from whom the property is inherited was, at the time of his death, a slave; but if the third section were to be taken subject to the old Mahomedan law, the master in such a case would be entitled to take the property of the slave, and the son of the slave, or the other natural heirs of the slave, could not be said to be persons "who may have acquired property by inheritance." The clause, upon this construction of it, would have no meaning or operation.

Their Lordships cannot accede to the general proposition of Mr. Doyne that the operation of the statute, or of this particular section in it, is to be confined to the property of persons, who, at the time of their death, are slaves. They are of opinion that, in construing this remedial statute, they ought to give to it the widest operation which its language will permit. They have only to see that the particular case is within the mischief to be remedied, and falls within the langnage of the enactment. They find it impossible to say that this is not the case in the present instance.

They have already intimated their opinion that the general scope and object of the statute was to remove all the disabilities arising out of the status of slavery.

The rule of Willa, whereby the natural heirs of the emancipated were excluded by the heirs of the emancipator, was not less such a disability than the rule of law whereby the natural heirs of an unemancipated slave were excluded by his master or his heirs. As to the language of the Act, the question which arises upon the first words of the section has been already dealt with, but a further argument has been founded upon the words "that the person from whom the property may be derived was a slave." The words are not "was a slave at the time of his or her death," and the terms may well be taken to apply to "any person who had at any time been a slave."

It is to be remembered that so long as there is any heir of the first degree, even if she be a female, none of the second degree can inherit, and so long as there is any one of the second degree, none of the third can inherit; and the principle that individuals of the whole-blood exclude those of the half-blood is given effect to in the case of collaterals just as individuals of the whole-blood in the main line exclude those of the half-blood *of the same rank*. For instance, "a brother or sister of the whole-blood excludes a brother or sister of the half-blood; a son of the brother of the whole-blood however does not exclude a brother of the half-blood, because they belong to different ranks, but he would exclude a son of the half-blood who is of the same rank; so also an uncle of the whole-blood does not exclude a brother of the half-blood, though he does an uncle of the half-blood." Similarly, among collaterals, a nephew or niece, whose father was of the whole-blood, does not exclude his or her uncle or aunt of the half-blood, except in the case of there being a son of a paternal uncle of the whole-blood and a paternal uncle of the half-blood by the same father only, the latter of whom is excluded by the former.

Individuals of the whole-blood exclude those of the half-blood of the same rank.

This principle of exclusion does not extend to uncles and aunts who are of different sides of relation to the deceased —a paternal uncle or aunt of the whole-blood does not exclude a maternal uncle or aunt of the half-blood, but a paternal uncle or aunt of the whole-blood excludes a paternal uncle or aunt of the half-blood; and so, likewise, a maternal uncle or aunt of the whole-blood excludes a maternal uncle or aunt of the half-blood."

The paternal uncle of the half-blood will have two-thirds by reason of his claiming through the father, and a maternal aunt of the whole-blood one-third, as she prefers a claim through the mother. If a man leave a whole sister and a sister by the same mother only, the former will take half the estate and the latter one-sixth, the remainder reverting to the whole-sister ; and if there be more than one sister by the same mother only, they will take one-third and the remaining two-thirds will go to the whole-sister.

In the case of individuals who have got a legal share, the rule that those related by the same father and mother exclude those who are related by the same mother only does not apply. As has been seen, there are three classes of heirs: In the first, come the parents, the children and grand-children how low soever. The children exclude the grand-children ; the grand-children the great-grand-children, without reference to sex ; but grand-children do not take their share according to the sex of their root; children of sons take the portion of sons, and children of daughters take the portion of daughters. The second class comprises two divisions: (*1st*) the grandfather and the grandmother and other ancestors; (*2nd*) the brothers and sisters and their descendants how low soever. The one division does not exclude the other how distant soever, but the nearest in degree in each division exclude the more distant. The third class comprises the paternal and maternal uncles and their descendants, the nearest of whom exclude the more distant. Those of the whole-blood exclude those of the half-blood in the same degree, and the son of a paternal uncle of the whole-blood excludes a paternal uncle of the half-blood.

Wife married to a sick man, who dies without having the marriage consummated, does not inherit his property.

In the case of a wife married to a sick man who dies without having the marriage consummated, she does not inherit his estate, nor does the husband, if his wife die before him, under the same circumstances. But if a sick woman marry and her husband die before her, she shall inherit of him, although the marriage was never consummated, and she never recovered from her illness ; she inherits as well when her husband on his deathbed divorces her and dies within one year from the date of divorce ; but if he lived for upwards of a year, she does not inherit. Although the husband and wife are heirs of each other, there is no representation

in the matter of succession, and the rights of a husband or a wife do not descend to the heirs of the husband or the wife in the event of the death of either prior to that of the other—*Vide* Eken Bebee *v.* Ashruff Ali (1 W. R., 152). Under the Mahomedan system, either according to the Suni or the Shia sect, after the dissolution of a marriage contract by death or otherwise, the parties or their heirs bear no more relation to one another than the heirs of quondam partners in the same mercantile house. And as laid down in Mahar Ali *v.* Amani (2 B. L. R., A. C., 306) and Noro Narain Roy *v.* Nemai Chand Neogy (6 W. R., 303), neither mental derangement nor want of chastity in a daughter before or after the death of her father, whether before or after her marriage, is an impediment to inheritance.

Difference of allegiance and homicide, whether justifiable or accidental, do not exclude from inheritance, as they do amongst Sunis. Homicide, to be a bar to inheritance, must be due to *malice prepense.*

Mother is entitled to the custody of her infant children.

The mother, according to this school, is entitled to the custody of her infant children, unless she be guilty of some act of impropriety, as ruled by Cunningham, J., in the matter of Hossennee Begum (I. L. R., 7 Calc., 437). The Mahomedan law, according to both the Shia and Suni Schools, looks upon the mother as entitled to the custody of a male child under seven years, and of a female who has not attained her puberty in preference to her father as held in Nur Kadir *v.* Zulukha Bibi (I. L. R., 11 Calc., 649); Bhoocha *v.* Elahi Bux (I. L. R., 11 Calc., 574); Budhin Bibi *v.* Fankolah (20 W. R., 411); *In re* Amirunnissa (11 W. R., 297); and Ray Begum *v.* Reja Hossein (2 W. R., 76).

A Shia widow, having no child alive by her deceased husband, inherits nothing of his real property.

In Mussamut Asloo *v.* Mussamut Umdatoonnissa (20 W. R., 297), it was held by the High Court of Calcutta that, under the Mahomedan law which governs members of the Shia sect, a widow, having no child alive by her deceased husband, inherits nothing of the land which he has left. The following passage in Shurayaool Islam was relied upon:—

"If there be a child to the wife by the deceased, she inherits out of all he has left, and if there be no child she inherits nothing of the land, but her share of the value of goods and buildings will be given to her. It has, however, been said that she will not be debarred from

anything except houses and buildings; while Moortaza (may God be gracious to him) has expressed a third opinion, which is, that the land should be valued, and her share of the value assigned to her. The first opinion is the best known."

SALE.

Sale defined.

Sale is the transfer of property to another for a consideration which is either property or price. It takes place by mutual consent or by reciprocal delivery, and is of four kinds, *viz.*, absolute, conditional, imperfect or void. Absolute sale takes place immediately the price is paid to the seller, and the property to the purchaser, that is, when there is no contingency, and on the happening of which it is to be perfected. Conditional sale is that which depends upon the consent of the owner, as in the case of a minor, who, although competent to contract, yet the consent of his guardian must be obtained to render the sale operative. Imperfect sale is that where there has been a reciprocal agreement between the seller and the buyer regarding some specific property, but possession has not been given up; it takes effect on seizin. A void sale is that which can never take effect, as when a property, which has no legal value, is sold, such as wine and pork, which are forbidden to Moslems.

Subject-matter must be in actual existence.

The subject-matter of sale must be determinate, and must be in actual existence at the period of making the contract, and be susceptible of delivery either immediately or at some future period. The price must be ascertained so as to prevent dispute in future. When the thing to be sold is specific and the price paid, there should be no delay in delivery or the payment, but if both the thing and the price be indeterminate, the delay is not illegal. Deferred payments must not, however, be contingent on events, the occurrence of which, in respect of time, is uncertain, such as the fall of rain, the blowing of wind, or the season for reaping the corn. The parties must know the obligation they contract. A minor with the consent of his guardian and a lunatic in his lucid intervals can enter into contracts, and the option to annul a contract either by the seller or the purchaser must be exercised within three days. Purchasers are at liberty to return things to sellers on the discovery of defects which were not known at the time of purchase, but, if in the hands

Option to annul a contract must be exercised within three days.

of the purchaser, the thing sold is further injured, he can only have compensation, but he is bound to pay the full price agreed upon when it is damaged during the period it was in his possession for his final approval. The condition of option does not continue, if, during the time agreed upon, the purchaser exercises acts of ownership. The purchaser can claim refund of the price of articles sold when they are found, on examination, to be faulty, even if they have been injured in the act of trial; but if he derived any benefit from the things, or made any use of them, he is only entitled to compensation. All these conditions apply to the seller's vendor as well—when the defect is of an inherent nature. The purchaser has no remedy, when, after becoming aware of the blemish in the thing purchased, he uses it or tries to remove the defect, unless there be some special agreement about it, as his acts implied acquiescence. If, after sale, it is found that a part of the property is defective, or part of it belongs to a third person, the purchaser must either keep the whole, and claim compensation for the part that is defective, or he must restore the whole and claim complete restitution of the price. If the defective part could be separated without injury, it must be returned. A purchaser cannot sell personal property which he has merely bargained for, and of which he has not had possession. Sales of property for the consideration of a debt due from the seller or a third party are not legal. Every act in connection with sale, *viz.*, negotiating, bargaining for, and entering into agreements, on Friday, after the hour of prayer, is prohibited, though not altogether invalid.

PRE-EMPTION.

Pre-emption explained.

Pre-emption is a right to possession of lands and other immoveable property which have been sold by paying the price that was paid by the purchaser. It could be exercised in respect of properties sold or transferred by means equivalent to a sale. It does not arise in respect of properties of which there has been a gift, or bequest, or obtained by will or by inheritance. In cases, however, of gifts made for a consideration, the right arises: the sale must be complete, that is to say, the interest of the seller must have ceased, previous to any claims that could be preferred in regard to the property. Such claims could be advanced—*firstly*, by a partner in the property

Parties who can advance the claim.

sold; *secondly*, a partner in its rights; and, *thirdly*, a neighbour. These may be persons of all descriptions without reference to difference of religion. In this connection the Full Bench ruling of the Calcutta High Court in Kudrutullah *v.* Mohini Mohun Shaha (4 B. L. R., 134, and 13 W. R., 21), and of the Allahabad High Court in Gobind Doyal *v.* Inayatullah (I. L. R., 7 All., 775) are important. The Calcutta High Court (the majority, Peacock, C.J., Kemp and Mitter, JJ.), *held*, in substance, that a Hindu purchaser is not bound by the Mahomedan law of pre-emption. Macpherson, J., was of opinion that where a Mahomedan co-sharer or neighbour has a right of pre-emption, and a property is sold by his neighbour or co-sharer also a Mussulman, his right is not defeated by the mere fact that the purchaser is a Hindu. The Full Bench of the Allahabad High Court, in the case cited above, coincided with Macpherson, J., and *held* that in a case of pre-emption, where the pre-emptor and the vendor are Mahomedans, and the vendee a non-Mahomedan, the Mahomedan law is to be applied to the matter. It would not be equitable that persons, who were not Mahomedans, but who had dealt with Mahomedans in respect of property, knowing the conditions and obligations under which the property was held, should merely, by reason that they were not themselves subject to the Mahomedan law, be permitted to evade those conditions and obligations. One of the chief reasons why the Calcutta High Court held that the law of pre-emption did not apply to Hindu purchasers is that the Mahomedan law admitted of all kinds of devices for the purposes of frustrating its own law. And these devices are sanctioned by the great Mahomedan lawyer. Abu Yousuff, the great disciple of Hanifa, who is considered the great oracle of Mahomedan Jurisprudence—Abu Yousuff, who was selected for his learning by the great Haroun Alraschid to be the great Kazi-ul-Kuzot, or Supreme Civil Magistrate,—*held* "that such devices are not abominable." Peacock, C.J., observed: "If we are to administer the Mahomedan law, and not the law which we administer in these Courts, we shall be precluded from entering into the question whether there were a device or not to get rid of a contract. It strikes me that we should not, by so doing, be administering equity, justice, or good conscience." The Allahabad High Court fully reviewed the arguments of

Decisions of the Calcutta and Allahabad High Courts.

the learned Judges of the Calcutta Bench, and observed : "In all cases of pre-emption there are three parties,—the pre-emptor, the vendor, and the purchaser. And so far as the question now under consideration is concerned, different cases may be imagined by supposing all or one or two of these three parties to be Hindus or Mahomedans. The simplest and ordinary case is where all the three parties concerned are Mahomedans, and in such circumstances it is obvious, as was remarked by Mitter, J., and the learned Judges who agreed with him, in the case of Kudrutullah *v.* Mohini Mohun Shaha (4 B. L. R., 134, and 13 W. R., 21), that the Mahomedan law would apply—a proposition which, as a matter of law, though not of logic, necessarily implies a negative answer where all the parties to a pre-emption suit are Hindus. Nor can there be any difficulty in holding that, for similar reasons, the same negative answer must be given in a case in which the pre-emptor being a Mahomedan, both the vendor and the vendee are Hindus ; or conversely where the pre-emptor being a Hindu, both the vendor and vendee are Mahomedans. And to carry the reasoning further, the same negative answer must be given where both the pre-emptor and the vendor being Hindus, the only party who is Mahomedan is the vendee. Nor would any one maintain that the Mahomedan law would govern a pre-emptive suit in which the pre-emptor and the vendee are both Hindus, and only the vendor is a Mahomedan. Indeed I am not aware of a single case in which the Mahomedan law as such has been held applicable in any of such circumstances. The reason of the negative answer is that, although the Mahomedan law of pre-emption makes no distinction of race or creed, that law, from being the common law of the land, applicable alike to Hindus and Mahomedans, has been reduced to the status of being a personal law of the latter who alone can enforce the rights or incur the obligations exacted by that personal law. Rights derived from members of that community, whether by Hindus or by other non-Mahomedans, would, of course, be governed by the Mahomedan law, because, as I have already explained, the inception of the right, and not the array of the parties to the suit, must be the turning point of the decision within the meaning of section 24 of the Civil Courts Act. But because a Hindu is not, under that section, subject to the Mahomedan law of pre-emption

he cannot avail himself of any pre-emptive right which that law creates only in favor of those who are subject to its behests. And the reason is simple. The rights and obligations created by that law, as indeed by every other system with which I am acquainted, must necessarily be reciprocal. Then, if a Hindu cannot, as a pre-emptor, avail himself of the Mahomedan law of pre-emption in a case where the vendor is a Mahomedan and the purchaser is a Hindu, what reason is there for holding that a Mahomedan pre-emptor can enforce the pre-emptive right where the vendor is a Hindu and the purchaser a Mahomedan? The question was discussed by this Court in the Full Bench case of Chundo *v.* Hakeem Alim-ooddeen (N.-W. P. H. C. Rep., 1874, p. 2), and the majority of the Court gave an affirmative answer upon a reasoning which must necessarily lead to the conclusion that an affirmative answer should also be given to the proposition, which, as I have just stated, can only be answered in the negative. Indeed the untenability of the proposition, as already pointed out, was long afterwards enunciated by the majority of the Full Bench of this Court in Dwarka Dass *v.* Hosain Bux (I. L. R., 1 All., 564), which furnishes an answer in the negative perfectly consistent with my own view—an answer which gives sure effect to an important portion of the reasoning adopted by Mitter, J., in Kudrutullah *v.* Mohini Mohun Shaha (4 B. L. R., 134, and 13 W. R., 21), though it controverts the conclusion at which the learned Judge arrived. He says (page 147): "If we decided this case against the Hindu purchaser and thereby deprive him of a property which has already become his by the law of his country, we must bear in mind that we have already decided that so far as he is concerned he will never be able to enforce any right of pre-emption even though a Mahomedan should choose to purchase a part of his family house from one of his co-parceners. So long as this country was under the Mahomedan Government, the right of pre-emption was granted to all classes of persons without any distinction of creed, color or birth, inasmuch as no such distinction was recognised in that respect by the Mahomedan law, which was in fact the law of the land. Now that the Mahomedan law has ceased to be the law of the country, it seems to me to be manifestly unjust and inequitable that we should enforce the Mahomedan law of pre-emption against a Hindu, without giving him the benefit of that

law, in other cases in which he would like to stand in the position of a pre-emptor." I have said enough to show that with a great deal of the reasoning upon which this passage proceeds I entirely concur. But I reject the conclusion, because the necessary steps leading to it are based upon, what I may respectfully call, fallacies as to the Mahomedan rules of pre-emption. These I shall presently discuss at some length; but I may here make some observations with reference to the illustration given in the passage, namely, the case of a Hindu co-parcener selling his share in his family house to a Mahomedan. I should unhesitatingly say in such a case that the sale was subject to the incidents of the Hindu law which governed the rights of the vendor, that if that law provided a rule of pre-emption, the rule should be enforced against the Mahomedan purchaser whether his law recognised it or not. In such a case there can be no question of the Mahomedan being deprived of a property which has already become his by the laws of his country." He bought it subject to the rules which governed it in the hands of his vendor, from which he has derived his title, and the circumstance, that he is not a Hindu, will not save him from the incidents of the Hindu law. Indeed, in the case supposed, as the law stands, the Mahomedan purchaser would, no doubt, be free from a pre-emptive claim at the instance of his Hindu vendor's co-parceners. But he would be free only because the Hindu law provides no pre-emptive right.

He would, however, be liable to something "worse" by reason of that law which governed the property in the hands of his vendor. The sale might be avoided at the instance of the Hindu co-parcener if the subject of the sale was a share in joint property. And if it can be shown that property in the hands of a Mahomedan is in principle as much subject to the pre-emptive claim of his Mahomedan co-parcener or neighbour as the invested estate in the hands of a Hindu widow, or the share of a member of a Hindu joint family, is subject to its own restrictions or qualifications as to sale, it seems to me that the enforcement of the Mahomedan rule of preemption against the Hindu purchaser from a Mahomedan would be any thing but "manifestly unjust and inequitable." And once this proposition is established, it will be obvious that all the exigencies of Mr. Justice Mitter's reasoning

contained in the passage cited are satisfied by the *ratio decedendi* in Dwarka Das *v.* Hosain Bux (I. L. R., 1 All., 564), wherein the majority of the Full Bench of this Court declined to enforce the Mahomedan rule of pre-emption in a case in which the vendor was a Hindu, although the pre-emptor and the purchaser were both Mahomedans. For if the *ratio decedendi* of that ruling is correct, the matter stands thus—property in the hands of a Mahomedan is subject to the pre-emptive claim of his Mahomedan co-parcener or neighbour; property in the hands of a Hindu is not so subject to the Mahomedan rule of pre-emption. The Mahomedan can claim the benefit of the law of pre-emption. The Hindu cannot claim the benefit of that law. These propositions, which seem to me to be intelligible, consistent, and equitable, would meet all the objections which Mitter, J., contemplated ; and, if they are correct, there can be no question of either the Hindu or the Mahomedan being "deprived" of his right by reason of the law of the other. The pre-emptive rights and objections between Mahomedan co-parceners and neighbours being mutual, the principle of the maxim *qui senti commodium sentre debit et onus* applies, but it would not apply in the case of a Hindu where no such reciprocity exists. And if the Hindu purchaser would not be affected by the Mahomedan's pre-emptive claim, it would be on the principle of a cognate maxim that law passes with its burdens—*terra transit cum overe*—and there would be no violation of the notions of justice, equity, and good conscience.

This, however, begs the whole question ; and having already supported the various cases in which it would arise on account of the difference in religion of the partners in a pre-emptive case, the only case which remains to be conceived is one in which the pre-emptor and the vendor are both Mahomedans, and the only non-Mahomedan among the parties is the vendee. This is the case now before us, and to the question, whether the Mahomedan law of pre-emption is applicable to such a case, my answer is in the affirmative. But because the authority of Sir Barnes Peacock and Mr. Justice Dwarka Nath Mitter demands the highest respect from me, as from every one else connected with the administration of justice in British India, I feel myself bound, in differing with them, to explain my reasons fully by reference to original texts

of the Mahomedan law of pre-emption, which, I cannot help feeling, would have led those eminent Judges to a different conclusion had the texts been accessible in the English language. I make this observation, because Sir Barnes Peacock, at the beginning of his judgment, in the celebrated case of Shaik Kudrutullah *v.* Mohini Mohun Shaha (4 B. L. R., 134, and 13 W. R., 21) used expressions which leave no doubt that, even after the case had been argued before him in the Full Bench, His Lordship was induced to form an opinion similar to that which I have formed in this case, and that he adopted the opposite view in consequence of the opinion which had been "so forcibly and clearly expressed by Mr. Justice Mitter." And, because, the judgment of that learned Judge, in the most exhaustive and powerful manner, presents the opposite view to that which I hold in this case, the best way in which I can justify my own opinion is to examine the reasoning leading to the conclusions which he and the majority of the Court adopted in that case.

Dealing thus with the question now before us, I may remark, in the first place, that I entirely agree with Mr. Justice Dwarika Nath Mitter, in holding that the answer to the question depends upon the nature of the right of pre-emption under the Mahomedan law. I also concur generally in the following remarks (p. 140): "If that right is founded on an antecedent defect in the title of the vendor, that is to say, on a legal disability on his part to sell his property to a stranger without giving an opportunity to his co-parceners and neighbours to purchase in the first instance, those co-parceners and neighbours are fully entitled to ask the Hindu purchaser to surrender the property; for although as a Hindu he is not necessarily bound by the Mahomedan law, he was at any rate bound by the rule of justice, equity, and good conscience to inquire into the title of his vendor; and that very rule also requires that we should not permit him to retain a property which his vendor had no power to sell. If, on the contrary, it can be shewn that there was no such defect in the title of the vendor, or, in other words, that he was under no such disability, even under the Mahomedan law itself, it would follow, as a matter of course, that there was no defect in the title of the purchaser at the time of its creation. Further on he says: "Now, so far as I can judge of the Mahomedan law of pre-emption from

the materials within my reach, it appears to me perfectly clear that a right of pre-emption is nothing more than a mere right of repurchase, not from the vendor, but from the vendee who is treated for all intents and purposes as the full legal owner of the property which is the subject-matter of that right." In this passage, Mitter, J., referred to the materials upon which he based his conclusion, and he proceeds to quote passages from those materials. On this point I have to say that those materials appear to me to be in several respects inadequate. They are to be found in the Hedaya, or rather in the translation of the Hedaya made by Mr. Hamilton about a century ago under the orders of the Governor-General, Warren Hastings. It was not, however, a translation of the original Arabic text, but of a Persian translation. For that work gratitude is due to Mr. Hamilton, but, at the same time, I am afraid it has been sometimes the source of mistakes by our Courts in the administration of the Mahomedan law. Mitter, J., says : That he is satisfied, by certain passages in this work, that the conclusions at which he arrived were consistent with the Mahomedan law of pre-emption. I need not quote any more passages from the learned judgment, as I purpose to analyse all the main arguments adopted by the majority of the Judges. The first proposition which those learned Judges laid down was that the right of pre-emption, under the Mahomedan law, "was a mere right of repurchase, not from the vendor, but from the vendee, which could not be enforced by a Mahomedan pre-emptor against a Hindu vendee, because the property, even in the hands of the Mahomedan vendor, not being subject to the pre-emptive right at the time when the title of the Hindu vendee was created by the sale, the right could not run with the land nor follow it in the hands of a stranger not subject to the Mahomedan law." These are the main conclusions at which the learned Judges arrived, and the rest of their reasoning seeks to support those conclusions by the argument that, under the Mahomedan law, the right of pre-emption is a right "feeble" and "defective," because, according to the rules of that law, it can be easily defeated by devices which Mitter, J., designated as "tricks and artifices."

I believe in giving this analysis I have exhausted all the arguments which the learned Judges employed in arriving at the view to which I am opposed. But if it can be

shewn from the original texts of the Mahomedan law itself, that the main proposition upon which the whole argument proceeds are in themselves erroneous, I think I shall have justified my view. First, then, as to the nature of this right. I remember the salutary warning of the Roman Jurist Javolenus (whom Creasy, C.J., has quoted in his work on International Law) that the task of laying down definitions is not only "the most laborious, but also the most perilous." The exigencies of this case, however, require that I should endeavour to define the right of pre-emption as prescribed by the Mahomedan law; and I think I am strictly within the authorities of that law when I say that pre-emption is a right which the owner of certain immoveable property possesses as such for the quiet enjoyment of that immoveable property to obtain in substitution for the buyer proprietary possession of certain other immoveable property not his own on such terms as those on which such latter immoveable property is sold to another person. I could easily support every word of this definition by original Arabic texts of the Mahomedan law itself, but I will confine myself only to such texts as bear immediately upon the main propositions involved in this case. I may, however, observe that the nature of the right, as appears from the definition which I have given, partakes strongly of the nature of an easement—the "dominant tenement" and the "servient tenement" of the law of easement being terms extremely analogous to what I may respectively call the "pre-emptive tenement" and "pre-emptional tenement" of the Mahomedan law of pre-emption. Indeed the analogy goes further; for I shall presently shew that the right of pre-emption, like an easement, exists before the injury to that right can give birth to a cause of action for a suit,—sale in the one case corresponding to the invasion of the easement in the other. In short I maintain that under the Mahomedan law, the rule of pre-emption proceeding upon a principle analogous to the maxim—*sic utere tuo ut alienum non lædas* —creates what I may call a legal servitude running with the land, and the fact that that law has ceased to become the general law of the land cannot alter the nature of the servitude, but only renders its enforcement dependent upon the religion of the party who claims the servitude, and of the party who owns the property subject to that servitude.

Now the main authority upon which the learned Judges relied for the view that the right of pre-emption does not

exist before sale is a passage in Hamilton's Hedaya to be found at p. 568, vol. iii, of his translation. The translation is at its best a very loose one when compared with the original Arabic text, which I shall literally translate here : "Pre-emption becomes obligatory (*i.e.*, enforceable) by a contract of sale, which means after the sale. Not that sale is the cause (of pre-emption) for the cause is conjunction (of the properties) as we have already mentioned. And the reason in the matter is that pre-emption becomes obligatory when the seller has turned away (*i.e.*, wishes to get rid of) the ownership of his house, and the sale makes this apparent. Hence, proof of sale is sufficient as against him even to the extent of the pre-emptor taking it (the house) when the seller acknowledges the sale, although the buyer contradicts him." The meaning to be evolved from the passage is obviously different from the interpretation which can be placed upon Mr. Hamilton's translation, which indeed seems to me to have misled Mitter, J., and the other learned Judges who agreed with him. The Arabic word *tajibo*, which occurs in this and other passages and which Mr. Hamilton translated as "established," really means "becomes obligatory, necessary, or enforceable," as a term of law, and I cannot help feeling that, if the passage had been accurately translated by Mr. Hamilton, the majority of the Full Bench in Shaik Kudrutullah's case might possibly have arrived at a very different conclusion. It is unnecessary to quote any more passages from the original Arabic text of the Hedaya, which distinctly go to shew that the cause or foundation of the right of pre-emption is the conjunction of the pre-emptive tenement with the pre-emptional tenement ; that its object is to obviate the inconvenience or disturbance which would arise by the introduction of strangers, and the right exists antecedently to sale; and that sale is a condition precedent not to the existence of the right but only to its enforceability. Mr. Hamilton's translation is sufficiently accurate to indicate these conclusions, and I shall, therefore, pass on to other books as high in authority as the Hedaya itself. Here is a short text from the Dorrul Mukhtar : "The cause of pre-emption is the contiguousness of the pre-emptor's property with the purchased property whether by co-parcenership or vicinage." Again a more explicit passage is to be found in Aini, a commentary upon the Kanz. "The author (of the Kanz) says 'by sale' which must be referred to his

Object of pre-emption is to prevent inconvenience by the introduction of strangers.

expression, pre-emption becomes obligatory." This would indicate that the cause of the obligatoriness of pre-emption is sale, that is, the sale of the pre-emptional house, and some have held this very opinion. The correct opinion, however, that the cause of pre-emption is the conjunction of the properties in a necessary manner and sale is a condition (of pre-emption). From this it follows that pre-emption becomes enforceable by sale, that is, after its coming into existence. All the different views on the subject entertained by Mahomedan Jurists, who were only too fond of the mediæval schoolmen's method of arguing such questions, are to be found in Berjandi, a well-known Commentary on the Mahomedan law: "Be it known that the language of the author implies that the cause of the obligatoriness of pre-emption is the conjunction of the pre-emptor's property with the subject of the sale in some way or other," and this is the opinion adopted by the moshaibs (elders) in general. Khassaf says: "That pre-emption becomes enforceable by sale, then by demand, and, therefore, both become the cause, but, as to this, it may be said that, when pre-emption is established by sale, there is no meaning in establishing it a second time by demand." Sheik Abubakr Rezi used to maintain that "pre-emption becomes enforceable by sale, the right of taking possession is established by demand, and ownership (of the pre-emptor) is established either by decree or by mutual consent." Sheikh-ul-Islam held that "co-parcenership together with sale constitutes the reason of the enforceability of pre-emption, and it is emphasized by demand, and ownership is established either by decree or by mutual consent, and so it is laid down in the Zakhira." These texts leave no doubt in my mind that the "cause" or foundation of pre-emption is "conjunction" of the pre-emptor's property with that of the vendor, and, inasmuch as such conjunction existed before the sale, it follows that the pre-emptive right originates antecedently to the sale in respect of which it may be exercised. For example, when two Mahomedans own shares in a house, the share of each may in turn be regarded as dominant or servient to the other for purposes of pre-emption, because the conjunction of the properties of the two owners being a circumstance common to both, alternately entitles the other to claim pre-emption when the proper occasion arises, that is, when either transfers his share by sale. The analogy of a non-

Cause of pre-emption is propinquity of the pre-emptor's property to that of the vendor.

apparent easement suggests itself. It is true, as Mitter, J., says, that neither can prevent the other from selling his share to whomsoever he pleases, because the Mahomedan law nowhere recognises any right of veto in the pre-emptor, nor does it impose any "positive legal disability" on the vendor in this respect. This no doubt at first sight suggests a distinction in principle between pre-emption and non-apparent easement, such as a right annexed to *A's* house to prevent *B* from building on his own land. But the distinction, so far as the question of the origin of right is concerned, is in reality not one of principle but of detail arising from the difference in the nature of the occasion demanding the exercise of the right. In the one case that occasion is sale, in the other it is building. Now it is true that in the one case the pre-emptor cannot prevent his co-parcener from selling his property to a stranger, whilst, in the case supposed, *A* could prevent *B* from building on his land. But the reason of the distinction is not that the right of the one did not exist before the sale and the right of the other did exist before the building. The reason is this: The object of the non-apparent easement possessed by *A* is the beneficial enjoyment of his own property, and definite infringement of that right is ascertained when *B* takes any definite action to build up in his land—a state of things which would be sufficient to afford a cause of action in favor of *A* seeking preventive relief or other assertion of his right of easement. But in the case of pre-emption the object of the right is to prevent the intrusion not of all purchasers in general but only of such as are objectionable from the pre-emptor's point of view. Again the right (unlike the right of veto possessed by members of a joint Hindu family with respect to the sale of his share by any of them) is not free from definite qualifications, among which the most important is that the pre-emptor complaining of the intrusion of the purchaser should place himself absolutely in the position of the purchaser with reference to the terms of the contract of sale, such as the amount and payment of the price, &c., &c. It is obvious then that before a pre-emptor can make up his mind to assert his pre-emptive right, he must, *ex necessitate rei*, know definitely who the purchaser is, and under what terms he has purchased the property, because it may well be that, on the one hand, he may have no objection to such purchaser, and, on the other hand, even

if he does object, he may not be in a position to pay the price which the purchaser has paid. No such considerations exist in the case of the right of easement which I have supposed by way of illustration. And it follows that before a sale is actually completed, the pre-emptor is not, *ex necessitate rei*, in a position to have definite information as to whether the proper occasion has arisen for the exercise of his existing pre-emptive right. This is the reason why the law gives him no right of vetoing the sale. But the reason falls far short of showing that his right of pre-emption was wholly non-existent at the time of sale when the title of the purchaser was created. From what I have already said, it is perfectly clear to me that any action on the part of the pre-emptor before the sale would be premature, whether such action consisted of vetoing or consenting to a sale which has not yet been effected, and of which the terms and the purchaser have not yet been ascertained in the sense of creating the legal rights and obligations which render a sale an accomplished fact in law. I have already said that, unlike the veto possessed by a member of a joint Hindu family, the right of pre-emption does not prohibit sale in general, regardless of the purchaser, of the amount of price and other terms of the contract of sale; and because the right is in its very nature incapable of being asserted or exercised till these matters are definitely ascertained, it follows that a sale, irrespective of the pre-emptor's consent, is not void in law. The pre-emptive right may or may not be asserted or enforced, and it would be absurd to say that that which is only possible should, by a retrospective effect, vitiate that which is certain, namely, the sale. This is the manner in which the Jurists of the Mahomedan law have dealt with this point of the rule of pre-emption, and it is upon very similar grounds that they hold the pre-emptor incapable of relinquishing his pre-emptive right in respect of a sale which has not yet taken place. They would say (and there is ample authority for this statement) that the identity of the purchaser, the amount of the price and other terms of the sale, the certainty of which is essential not to the existence but the exercise of the pre-emptive right—being still undefined by a legal relation between the vendor and the vendee, the pre-emptor had no means of knowing for certain whether he should or should not give

up an ascertained legal right, and, therefore, the relinquishment of pre-emption before sale is void. Whatever the merits of this reasoning from a jurisprudential point of view may be, I confess I fail to see how it supports the view that the right of pre-emption does not exist as a restriction or qualification of the right of sale possessed by the owner of property subject to pre-emption. It is indeed not an absolutely unqualified disability, for it does not absolutely prohibit sale without the consent of the pre-emptor. But that it amounts to a qualified disability distinctly operating in derogation of the vendor's absolute right to sell the property and thus affects his title, which would otherwise amount to absolute dominion, cannot, in my opinion, be doubted. That the results of such restrictions or qualifications are dependent for their enforcement upon the occurrence of the actual sale is a circumstance which, in my opinion, does not affect the question relating to the inception of the right of pre-emption.

But in opposition to this view Mitter, J., and, the learned Judges who concurred with him, relied upon the argument that there is nothing whatever in the Mahomedan law which imposes upon any one the obligation of making the first offer to his neighbour, nor is there anything to shew that the right of pre-emption is based upon any such obligation, the non-fulfilment of which would prevent the stranger from acquiring a complete and valid title to the property by virtue of his purchase. In dealing with this argument I must, in the first place, observe that one of the greatest difficulties in the administration of the Mahomedan law, as indeed of all ancient systems, lies in distinguishing moral from legal obligations. The Mahomedan law having been evolved from the Koran, and the sayings of the prophet naturally presents such difficulties, and the question, whether the vendor is bound to offer the property to his co-parcener before selling it to a stranger, is an illustration of what I mean—a difficulty which was felt at an early stage by the Mahomedan Jurists themselves. The following is a text from Ainí, a Commentary upon the Kanz, a well-known book in Mahomedan Jurisprudence: "A co-parcener is one whose share has not been divided in the property sold." This is universally agreed upon, because it has been related by Jahir that the Prophet decreed pre-emption in respect of every joint undivided property, whether a grove or a

Co-parceners defined.

house, saying: "It is not lawful for any one to sell till he has informed his co-parcener who may take or leave it as he wishes; and if he has sold without such information, the co-parcener has a preferential right to the share." This tradition has been related by Muslim, Abu David, and Aukissai. Two other traditions to the same effect are also to be found in Muslim, which is one of the books of acknowledged authority on Hadis or traditions. I will, however, quote only one of them, as it brings into prominence the difficulty with which I am now dealing. It is related by Jahir that the Prophet said: "Pre-emption exists in all joint properties whether land, or house, or grove. It is not proper for him (the owner) to sell till he has offered it to his co-parcener, who may take it or reject it; and if the vendor fails to do this, his co-parcener has the preferential right to it until he is informed." Both these traditions have much the same effect; but in the first of them, the Arabic word *loyahillo* occurs, which I have rendered by "not lawful;" whilst, in the second, the phrase employed is *loyasliho*, which I have translated as meaning "not proper." The importance which the Mahomedan Jurists, in laying down legal principles, attached to the exact words in the sayings of the Prophet at once gave rise to the question, whether the injunction as to the vendor's giving notice to the pre-emptor, and offering to him the property for purchase, was a mere moral behest or created a legal obligation. I have already shewn how Mahomedan Jurists dealt with the right of pre-emption, and the method of arguing which they adopted had no doubt considerable influence in the interpretation of these two traditions. The difference of phraseology, which I have already indicated, enabled them to put such an interpretation as would render the traditions consistent with the rule that the absence of the pre-emptor's consent does not vitiate the sale—the rule which had been unanimously adopted by the Jurists. This is best shewn by Nawawi, a celebrated commentary on Muslim, in which these traditions occur. The author explains the traditions in the following manner: The saying of the Prophet to the effect that it is not for him (the vendor) to sell until he has apprised his co-parcener is, in the opinion of our doctors, taken to refer to the moral propriety of giving notice and to the objectionableness of sale before such notice—an objectionableness which arises from impro-

Owner of property bound to offer it for sale to co-parcener in the first instance.

priety. It does not, however, mean that such sale is absolutely prohibited, and this is the manner in which they have interpreted the Hadis (saying of the Prophet) "because it may be rightly affirmed of that which is morally objectionable that it is not lawful, and thus the expression 'lawful' comes to mean permissible, which implies that both sides (positive and negative) are on an equal footing, whilst that which is 'morally objectionable' cannot be said to be permissible, both sides of which are equal, but on the contrary the 'morally objectionable' is that the rejection of which prevails (over its adoption)." It is not necessary to pursue any further the syllogistic manner in which such questions were dealt with by Mahomedan Jurists. I may, however, say that the ultimate reason which prevented their interpreting these traditions in the sense of creating a legal obligation imposed upon the vendor was that the language of the tradition being capable of two interpretations they adopted the more lenient one, acting upon the presumption that a legal obligation does not exist till expressly provided, and that all contracts are lawful unless expressly prohibited by law. The law, therefore, as it stands, does not oblige the vendor to give notice of the projected sale to the pre-emptor, nor does it vitiate a sale executed without his permission. I am not at liberty to interpret the saying of the Prophet in a sense other than that adopted by the recognised authorities on Mahomedan Jurisprudence. But it is perfectly clear from these traditions that the very conception of pre-emption in Mahomedan law necessarily involves the existence of the right before the sale in respect of which it may be exercised. All that the interpretation of the Mahomedan Jurists goes to shew is, that the sale is not vitiated by the absence of the pre-emptor's consent—an interpretation which, while it is perfectly consistent with the rest of their method of reasoning in dealing with pre-emption, again falls short of establishing the proposition that the right is not antecedent in existence to the sale complained of by the pre-emptor.

I have now to deal with the argument that the right of pre-emption under the Mahomedan law is "a mere right of repurchase, not from the vendor but from the vendee." I trust what I have already said goes far to shew that this conclusion cannot be right. If by the expression "repurchase" is meant the institution of

a new contract of sale other than that entered into by the vendor and the vendee, the hypothesis becomes obviously erroneous, because the entire argument that the vendor of a pre-emptioned tenement conveys an absolute ownership to the vendee, unhampered by any defect of title arising out of pre-emption, applies as much to a Mahomedan as to a Hindu vendee. And if the right of pre-emption is only a right of repurchase, and if the right is to be enforced not as a rule of law but only by reason of the rule of justice, equity, and good conscience, I fail to see, even in a case where all the parties are Mahomedans, where the equity lies in forcing a man to sell that which is absolutely his own to a man who had no right in connection with it at the time when the title of the vendee was created. Equity is higher than the consideration of race and creed, nor will it allow parties to impose upon each other rules not sanctioned by the law. And if its rules prohibit a Hindu purchaser from being deprived of property of which he is the absolute owner, the same rule should, by ordinary legal analogy, benefit also a Mahomedan purchaser of property whose title is, ex-hypothesi, as absolute and as free from defect as that of the Hindu vendee. Further, if pre-emption is only a right of "repurchase" from the vendee who, ex-hypothesi, has, under the sale, derived an absolute title, unhampered by the pre-emptive right, there is no reason which would prevent the vendee from insisting that the terms of the new sale should be other than those under which he himself purchased. That this would be the necessary consequence of the hypothesis seems to me to be as clear as the proposition that every absolute owner is at full liberty to sell or not to sell his property, and that if he chooses to sell it, he can make his own terms as to the bargain of sale. That such a result is not only not warranted by the Mahomedan law of pre-emption, but would positively strike at the very root of the right itself, seems to me to be too obvious to require any explanation. But the Mahomedan law of pre-emption involves no such anomalous inconsistencies of reasoning, because the right of pre-emption is not a right of repurchase either from the vendor or the vendee involving any new contract of sale; but it is simply a right of substitution entitling the pre-emptor, by reason of a legal incident to which the sale itself was subject, to stand in the shoes of the vendee

Right of pre-emption is not a right of repurchase from the vendor or the vendee, but a right of substitution of that of the vendee.

in respect of all the rights and obligations arising from the sale under which he has derived his title. It is in effect as if in a deed of sale the vendee's name was rubbed out and the pre-emptor's name inserted in its place. Otherwise, because every sale of a pre-emptional tenement renders the right of pre-emption enforceable in respect thereto, every successful pre-emptor obtaining possession of the property by the so-called "repurchase from the vendee" would be subject to another pre-emptive claim dating not from the original sale but from such "repurchase—" a state of things most easily conceivable where the new claimant is a pre-emptor of a higher degree than the pre-emptor who has already succeeded. The result would be that pre-emptive litigation could never end. I could go on at much greater length to shew that the hypothesis that pre-emption is only a "right of repurchase from the vendee" would involve even greater anomalies inconsistent with the fundamental rules of the right of pre-emption. But I need not pursue the argument any further, because it seems to me that the general principles of jurisprudence suggest the same conclusions as those at which I have arrived. I take it as a fundamental principle that no state of things can give rise to cause of action such as can be sued upon in a court of justice, unless there is a right and an infringement of that right, the right being necessarily antecedent to the injury. My conceptions of jurisprudence prevent me from conceiving any kind of right, of which both the inception and the infringement depend upon one and the same incident. And it would be absurd to conceive a right of which the infringement takes place before the inception of the right itself. And if I am right so far, how would the right of pre-emption stand these tests if it be not taken not to exist before the sale in respect of which it is to be exercised? The injury to the right is the intrusion of a stranger, under a sale, and the whole object of the right is to prevent such intrusion. And how could such intrusion be legally prevented if the right did not exist before the intrusion? Similar difficulties will arise if it be assumed that the point of the inception of the pre-emptive right is not sale but "tolab," that is, demand of pre-emption by the pre-emptor. There can be no legal demand of a right which does not exist, nor could refusal by the vendee to surrender the pre-

emptional property constitute any injury where no legal right existed.

But apart from the reasoning suggested by the analogy of jurisprudential conceptions, it seems to me that if it is once conceded that the sole object of the pre-emptive right is to prevent the intrusion of strangers objectionable to the pre-emptor, it follows, I should say as a matter of "common sense," that if a Mahomedan pre-emptor can, by the exercise of his pre-emptive right, prevent the intrusion of another Mahomedan, he should, *á fortiori*, be able to do so in the case of a purchaser who belongs to a different race and creed; for *cæteris paribus* it may be taken that a non-Mahomedan purchaser under such conditions would be more objectionable to the Mahomedan pre-emptor, and would demand a more strenuous exercise of the pre-emptive right.

Besides these arguments there is much on the subject of conflict of laws in the judgment delivered by Macpherson, J., in Kudrutullah *v.* Mohini Mohun Shaha (4 B. L. R., 134, and 13 W. R., 21), which I might adopt in support of my view. But it is unnecessary to repeat the arguments which these learned Judges have aleady expressed with such force and lucidity. It however remains for me to deal with the reasoning adopted by Mitter, J., as to pre-emption being a right "feeble and defective," because, on the one hand, it is lost, if not immediately asserted; and, on the other hand, it can be defeated by "tricks and artifices." If "feeble and defective" only means that the right of pre-emptor is transitory in the sense of requiring immediate assertion, I can understand the phrase. But I do not understand how the transitory character of the right can affect the question, whether or not it should be enforced against a Mahomedan vendee and not against a non-Mahomedan. So far as this particular point is concerned, it seems enough to say that, if the right is legally enforceable against the one, it should be enforceable against the other. On the other hand, in one sense full ownership itself may be called transitory, because if *A* being the owner of *X*, *B* to sell it to *C*, *A* being present at the time of the sale, his omission to assert his title to *X* would, in effect, by the doctrine of estoppel, defeat his right in *X*. Pre-emption is feeble in a sense not dissimilar in principle to the illustration which I have given. The object of

Rule of pre-emption is based upon the doctrine of notice.

the Mahomedan law in rendering the immediate demand of pre-emption, a condition precedent to the exercise of the right, is to render it obligatory upon the pre-emptor to give the earliest possible notice to the vendee not to rely upon his purchase for making improvements, &c., in, or otherwise dealing with, the purchased property. The rule is a very salutory restriction of right, which might otherwise be very capriciously enforced under a system of law which recognised no rule as to the limitation period for enforcing claims. Indeed the rule rests much upon the same considerations as the doctrine of "notice" and the principle of acquiescence amounting to estoppel in equity jurisprudence. But such restrictions do not derogate from the right of pre-emption any more than another equitable rule of the same right, that the pre-emptor, in enforcing his right, cannot break up the bargain of sale by pre-empting only a portion of the property sold to one purchaser. The law of pre-emption is full of equitable considerations of this nature, but it is scarcely necessary to pursue the argument any further. This brings me to the last point. Considerable parts of the judgment in Kudrutullah's case are devoted to showing that the right of pre-emption can be defeated by what Mitter, J., calls "tricks and artifices," which Peacock, C.J., held are recognised and allowed by Mahomedan law, and from this it is inferred (though I I confess, with due respect, I am not able to follow the reasoning) that the right is not enforceable against a Hindu purchaser though enforceable against a Mahomedan. If any question of the "tricks and artifices" referred to were involved in this case, I should have a good deal to say on the subject, but here I need only say once more that in dealing with questions of Mahomedan law the distinction between moral behests and legal duties on the one hand, and between rules of substantive law and procedure on the other, must always be borne in mind. And I think I may safely say that most, if not all, the notions about the efficacy of these tricks and devices arise from overlooking these distinctions. Peacock, C.J., says (p. 173): "The Mahomedan law, as has been already shown by Mr. Justice Kemp and Mr. Justice Mitter, admits of all kinds of devices for the purpose of frustrating its own law. If there is a *bonâ fide* sale between a Mahomedan vendor and a Hindu purchaser,

and they come forward and declare that which is not true, and say that it was not a sale intended to operate, but was a fictitious device, their words must be accepted according to the Mahomedan law, and the truth of the assertion cannot be disputed. They would be bound by the untruth which the vendor and the purchaser declare for the purpose of evading the right of pre-emption. Can we say that if they will state an untruth, the Hindu shall remain in possession of the property which he has purchased, but if they will not declare that which is untrue, there is an equity to take the property away from the purchaser." The argument is consistent with certain passages in the text books which his Lordship went on to cite. But without attempting to explain the real reasons upon which those passages proceed, the argument may be fully answered by saying that, in the case supposed, the question, whether there has been a *bonâ fide* sale or not, is not a question of substantive law, but a mere question of fact to be ascertained by the rules of that department of procedure which consists of the rules of evidence; and that we are no more bound to follow the Mahomedan Law of Evidence in a pre-emptive suit than in a suit involving questions of succession or inheritance. The Mahomedan Law of Evidence, like other old systems, contains numerous rules which arose either from imperfect notions as to the distinction between the weight and admissibility of evidence or from the rules of procedure or from the political exigencies of the Mahomedan people when those rules were formulated. The rule whether upon any particular point in a pre-emptive suit, the statement of the pre-emptor, the vendor or vendee is to be believed, is an illustration of the former part of the proposition, and the latter part may be exemplified by the disability imposed upon non-Mahomedans to give evidence against a Mahomedan in a court of justice, the reason being stated to be "that they have no power over the Moslems, and are suspected of inventing falsehoods against them." But the Mahomedan Law of Evidence is not the law of British India, and whatever force the argument of Peacock, C.J., might have had in 1869, when his judgment was delivered, it can have no application now. For if it was intended as an enunciation of the Mahomedan Law of Evidence, since that time a Code of Evidence has been passed providing its own rules for ascertaining facts, and section 2

of the enactment (Act I of 1872) has abolished all other rules of evidence. Similarly it will be found upon close examination of the other devices to defeat pre-emption referred to in the Hedaya and in Baillie's Digest, on which the learned Judges of the Calcutta High Court relied that they owe their origin to extremely technical rules of the Mahomedan Law of Contract, Procedure or Evidence, in none of which departments of law are we bound by these technicalities. The Mahomedan Substantive Law in matters governed by it cannot, of course, be administered without ascertaining the facts to which it is to be applied. But how those facts are to be ascertained is a matter relating to the remedy *ad lites ordinationem* for which the Courts in British India have their own rules. And there is in principle no more reason for saying that in a pre-emptive suit, the questions whether a valid *bonâ fide* sale has taken place or not, and, if so, for what price, governed by the Mahomedan law, than there would be for saying that when a decree is passed under the Mahomedan law for dower or inheritance, the process for executing the decree is to be regulated by the rules of procedure provided by that law. And speaking generally I may say that if it is once conceded that the technicalities of the Mahomedan Law of Contract, Procedure or Evidence are not binding upon us it will be found that no "tricks and artifices" can defeat the pre-emptive right in our Courts. Such devices are held to be "abominable," even where the technicalities of Mahomedan adjective law might give them some plausible effect; and this is the prevalent doctrine, notwithstanding the opinion of Kazi Abu Yusuf, to be found in the passage from the Hedaya, to which Kemp, J., has referred. The opinion of Imam Mahomed, given in that same passage, condemns all devices. * * * Moreover the right, though it no doubt operates as a restriction of the principle of free sale, and thus tends to diminish the market value of property, must have enough to recommend itself; for even in some of the most civilized parts of Germany, a similar right (*retractrecht*) is still maintained either as a custom or as a rule of law. And if such is the case in a country where distinctions of race, caste or creed do not prevail, it seems to me that the right must not be lightly dealt with in a country like India, where the population presents quite the opposite state of things,

and where the intrusion of a stranger as a co-sharer must not only give rise to inconvenience, but disturb domestic comfort, if not, as in some cases, lead to breach of the public peace."

Mahomedan owner bound to offer to sell, firstly, to partner in the property; next, to partner in the appendages; and, then, to the neighbour.

Petheram, C.J., in concurring, observed that the Mahomedan law imposes an obligation upon a Mahomedan owner of property, in the neighbourhood of which other Mahomedans have property, or in respect of which other Mahomedans have a share, to offer it to his neighbours or partners before he can sell it to a stranger. This is an incident of his property, and is founded on the precept of the Prophet, who has said: "A partner in the thing itself has superior right to one who is only a partner in the appendages, and a partner in the appendage of the property precedes a neighbour. The superiority of right in every instance depends on the strength of the cause or fundamental principle. A partner in the thing itself has superior right to one who is only a partner in its appendages; and a partner in the appendage of the property precedes a neighbour." The reason is that greater regard is due to the partner than to the stranger who may have made the purchase, since the vexation that would ensue to the partner from forcing him to abandon a place which from long residence may have acquired his affections would doubtless be greater than that to which the stranger is subjected, for though he may thus be dispossessed, contrary to his inclination, of a property to which he has acquired a right by purchase, yet still is the grievance but inconsiderable, since he is not dispossessed without receiving a due consideration, and as all these reasons equally hold on behalf of a neighbour he is entitled to the privilege of *shafie* as well as a partner.

A partner in the appendages comes next to the partner in the property itself, because he participates merely in the immunities of the property, and as the neighbour does not even do this, he is the next in order. In Khuman Sing *v.* Hardai (I. L. R., 11 All., 41) the order of precedence to pre-empt is discussed and settled. The pre-emptive clause in the Wajib-ul-Arz of a village gave a right of pre-emption in cases of sale by shareholders first to "Bhai-Hakiki" (own brothers), next to "Karibi" near, and next to co-sharers in the same *thoke* as the vendor. The word "Karibi" is to be read in connection with the preceding word "Bhai," the words "Bhai-Karibi"

could not reasonably be confined to cousins, but must be construed as meaning "Bhai-bund," or "Bhai-log," so as to include all near relations, both male and female. It was held that a vendor's father's brother's widow, holding a share in the village absolutely and as heir of her deceased husband, was entitled to pre-emption in preference to the vendees who were only sharers in the same *thoke* as the vendor. If own brothers and cousins were the only persons that were to be allowed to pre-empt, the words "Bhai-Karibi" would not have been used. Bhai-Hakiki would have been sufficient to include brothers; and to bring in cousins, the words "Bhai Chachera," "Phupera," "Mamera," "Mausera" would have been used according to the intentions of the shareholders. Bhai-Karibi, having been used, meant Bhai-bund or Bhai-log, both male and female.

Pre-emption does not arise where the vendor is a Hindu. It does, if the purchaser be a Hindu.

Having treated of pre-emption, its nature and incidents, and the circumstances under which it could be exercised, it is here worthy of note that it does not arise where the vendor is a Hindu. It has been shewn that it does not affect if the purchaser be a Hindu, but the case is otherwise if the vendor be a Hindu. Another Full Bench decision of the Allahabad High Court in Dwarka Dass *v.* Hasan Baksh (I. L. R., 1 All., 565) has settled this point. Oldfield, J., concurring in the judgment in Poorno Sing *v.* Hurry Churn Sorma (10 B. L. R., 11) observes: The Mahomedan law recognises the right of pre-emption on the ground of avoiding the inconvenience to a neighbour which might arise by the sale of adjoining property to a stranger. The right can be claimed by all description of persons without reference to difference of religion. We find in the Hedaya that the privilege of *shaffa* is established after sale, and the right of the *shafie* is not established until after demand be regularly made. These and similar passages imply only that a complete title to claim the right of pre-emption accrues only on completion of sale when the owner's interest in the property has ceased, but the right itself would seem to spring out of a rule of Mahomedan law enacted in the interests of neighbours, and which would seem to be binding only on all those owners being vendors of property who are subject to Mahomedan law, and who necessarily hold their property subject to this rule of law which will affect them and the property

whenever a sale takes place. Another essential to the exercise of this right is that the person claiming pre-emption should declare his intention of becoming the purchaser immediately on hearing of the sale, and that he should, with the least practicable delay, make affirmation by witness, if such be his intention, either in the presence of the seller or of the purchaser, or on the premises. There is difference of opinion on this head. Abu Yusuf is of opinion that if the claimant needlessly neglect to advance his claim for a period exceeding one month, such delay shall amount to a defeasance of his right, but, according to Abu Hanifa, there is no limitation as to time. In Jarfan Khan *v.* Jabbar Meah (I. L. R., 10 Calc., 358) the High Court of Calcutta (Field and O'Kinealy, JJ.), relying upon a passage in page 489 of Baillie's Digest of Mahomedan Law, held that the provisions of the Mahomedan law were not carried out inasmuch as he made a delay, went into the house, got the money, and then called the witnesses. The passage is: "By talab-i-mowa-shebat is meant that when a person who is entitled to pre-emption has heard of a sale, he ought to claim his right immediately on the instant (whether there is any one by him or not), and when he remains silent without claiming the right, it is lost." If he be reading a letter in which the information as to the sale is contained, and if he wait till he finish the whole letter without making the talab-i-mowa-shebat, the right of pre-emption is lost." "The talab-i-mowa-shebat, or immediate demand, is first necessary, then the talab-i-shad, or demand with invocation, if at the time of making the former there was no opportunity of invoking witnesses, as for instance, when the pre-emptor at the time of hearing of the sale was absent from the seller, the purchaser, and the premises. But if he heard it in the presence of any of these, and had called on witnesses to attest the immediate demand, it would suffice for both demands, and there would be no necessity for the other." The High Court of Allahabad in a very recent ruling in Mahomed Wilayet Ali Khan *v.* Abdul Rub (I. L. R., 11 All., 108) has set the matter at rest. They observe in the Wajib-ul-Arz of a village, it was provided that a co-sharer wishing to sell his share must give notice to the other co-sharers, and that first a nearer co-sharer and next a more distant co-sharer should have the

Essentials to the exercise of the right explained.

right of pre-emption. Such notice having been given, sale took place in October 1884, the pre-emptor did not give notice that he claimed to exercise his right of pre-emption before July 1885, it was held, that notice on the part of the pre-emptor if at all given was too late, and was not a prompt demand in accordance with the Mahomedan law, and the pre-emptor could not take advantage. The disqualification in respect of a part would disentitle the pre-emptor to prefer a claim in respect of the whole property. A suit which does not include the whole of a pre-emptional property is unmaintainable—*Vide* Durga Prosad *v.* Munshi (I. L. R., 6 All., 423) and Hulasi *v.* Sheo Prosad (I. L. R., 6 All., 455). Where properties are distinct, and have no concern with another, a suit to claim pre-emption lies—*Vide* Rowshun *v.* Ram Dihal Roy (13 C. L. R., 45).

Pre-emptor must claim the whole of the property in suit.

The right is said to be exercised when the ceremony of talaba-ishtihad is performed before witnesses in the presence of the purchaser upon the lands which are the subject-matter of the claim. It is not necessary that the purchaser should be in possession (*vide* 5 C. L. R., p. 370) ; and the formality of "ishtihad" or invocation of witnesses is not necessary to be observed when the opposite parties are Hindus, and it was never recognised by them as one of the incidents of custom prevalent amongst them. In such cases what the custom is and what conditions it renders incumbent on the pre-emptor to fulfil are to be seen as laid down by Macdonell, J., in Abdul Adood *v.* Mahomed Makmil (10 I. L. R., 563), in Zamir Hasan *v.* Doulat Ram (I. L. R., 5 All., 110), distinguishing Dwarka Dass *v.* Hasain Bux (I. L. R., 1 All., 564) and Kudrutullah *v.* Mohini Mohan Shaha (4 B. L. R., F. B., 134), and following Chowdree Brij Lall *v.* Goor Sahai, and Jai Kuar *v.* Heera Lal (I. L. R., 7, N.-W. P., 1), and Fakir Rowat *v.* Emam Baxsh (Sup. Vol., B. L. R., 35), and Bhodo Mahomed *v.* Radha Churn Bolia (13 W. R., 332). The current of decisions in respect of pre-emption on the score of vicinage has been that it applies to houses and parcels of land and not to large estates—*Vide* Chowdry Jugul Kissore Sing *v.* Poocha Sing (8 W. R., 413), and Abdul Azim *v.* Khond Kar Hamed Ali (10 W. R., 358). When two persons have by vicinage an equal right of pre-emption, the property—per Khan Koran *v.* Seeta Ram (2 N.-W. P., 257) and Nundo Thakur *v.* Gopal

Pre-emption on account of vicinage applies to houses and parcels of land and not large estates.

Thakur (I. L. R., 10 Calc., 1008)—is to be decreed to them by halves on payment of their respective moieties of the purchase money. Should any improvements have been made to the property by the purchaser, the pre-emptor must pay its value, but if there have been deterioration through the act of the purchaser, he could claim a proportional reduction of the price ; but where it has taken place without the instrumentality of the purchaser, the pre-emptor is bound to pay the whole price or abandon his claim. If it should turn out that the property neither belonged to the vendor nor the purchaser, the pre-emptor could receive the price from the seller, or from the purchaser if he had possession, and could remove the improvements he made to the property.

GIFTS.

A gift is the conferring of property without anything in return for it, and, to make it complete, acceptance and possession on the part of the donee, and relinquishment on the part of the donor, are necessary. It should be accompanied by delivery of possession, and cannot be made of a thing not in existence at the time of the grant. It must not be dependent on anything contingent—*vide* Yusuf Ali *v.* Collector of Tipperah (I. L. R., 9 Bom., 138), nor referred to a future time. The terms, "After my death you will be owner of my property," were construed to be gifts *in futuro*, and so held invalid. Gifts in these terms "I will give you my house to-morrow" as well, are not legal. A valid gift takes place on the delivery of a thing with some such words as these—"I have given this thing to thee," or "I have invested thee with the property of it." In short a gift must establish a right of property in the donee, and be free of conditions, such as—"This mansion is for thy life, and when thou art dead it reverts to me." Here the gift is lawful, but the condition is void. There may, however, be loans, and these are to be distinguished by the terms used. When the words have reference to the thing itself it is a gift, and when they refer to the profits, it is a loan. Thus when a man says, "My house is given to you, you will live in it," "this food is yours, you shall eat it," gift is intended. Where a man having another's property—say, money—in his possession, is told, "Expend them for your necessities," it is a loan. If he had wheat in his possession and the owner said "Eat it," that

Gifts cannot be of things not in existence.

Loans distinguished from gifts.

would be a gift. Mere saying "This house is yours" would constitute a gift, and the addition of words "and after you of your posterity" is a mere surplusage. The principle that formal delivery and seizin are necessary in cases of gifts is enunciated by the Bombay High Court (Sir Charles Sargent, C.J., and Nanabhai Haridas, J.) in Meher Ali *v.* Tajudeen and others (I. L. R., 13 Bom., 156). In Mohinudin *v.* Mancher Shah (I. L. R., 6 Bom., 650) the question arose whether a gift by a person not in possession is null and void, and it was decided that it was. In accordance with the view, Sir Charles Sargent observed: "In the Hedaya, vol. III, p. 291, we find it laid down, Gifts are rendered valid by the tender, acceptance and seizin." The Prophet has said "A gift is not valid without seizin." So also if the thing be pawned to or usurped by a stranger. We think this statement of the law of gifts is not consistent with any other conclusion than that delivery and seizin are of the essence of a gift, and that, therefore, no right of any description passes without them as must be the case when the donor is not himself in possession. In Rahim Baksh *v.* Mahommad Hosan (I. L. R., 11 All., p. 3) these points, *viz.*, tender and acceptance and possession of the donor were fully considered. The Prophet has said, "A gift is not valid without seizin," meaning that the right of property is not established in a gift until after seizin. Tender and acceptance are necessary, because a gift is a contract; and tender and acceptance are requisite in the formation of all contracts, and seizin is necessary in order to establish a right of property in the gift, because a right of property according to our doctors is not established in the thing given merely by means of the contract without seizin (Hedaya, vol. III, p. 291). The same is the effect of the Futawa Alumgiri as represented in Mr. Baillie's Digest. "The legal effect of gift is not complete until possession is taken of the thing given, and in this respect a stranger and the child of the donor are on the same footing when the child is adult." (Baillie's Digest, p. 520). It has indeed never been doubted that, under the Mahomedan law of the Hanifa School actual delivery of possession of the gift (of property) is a condition precedent to the validity of the transfer of ownership to the donee, and indeed it is in consequence of the stringent requirements of that law on this point that gifts of property held in joint co-parcener-

Delivery and seizin are of the essence of a gift.

ship (musha) have been held to be invalid, because perfect and exclusive possession of joint undivided shares cannot be given to the donee (*vide* Note No. 4, p. 520, Baillie's Digest).

Such then being the rules of the Mahomedan law as to the indispensability of possession by the donee, it follows *à fortiori* that property of which the donor himself is not in possession, and never acquired possession thereof, so as to deliver it to the donee, cannot be made the subject of a valid gift.

Possession is a condition precedent to the validity of a gift.

Even property susceptible of possession, but in the possession of a trespasser, is no exception from the rule as to possession being a condition precedent to the validity of a gift. Gift of a thing not in the possession of the donor during his lifetime is null and void, and the deed containing such gift is of no effect, because in cases of gift seizin is a condition. Gift is rendered valid by tender, acceptance and seizin. Seizin is necessary and absolutely indispensable to the establishment of proprietary right. The Prophet has said: "A gift is not valid without seizin, so also if the thing given be pawned to or usurped by a stranger." So also in the Surhi Viquya, "A gift is perfected by complete seizin." As the gift is, therefore, null, the claim of the donee is inadmissible, and the deed is invalid as regards the lands of which the donor was never possessed." In Mohinuddin *v.* Mancher Shah (I. L. R., 6 Bom., 650) the donor made a gift of his right of ownership to a property which was not in his own possession, but which he had mortgaged, and the gift was held invalid under the Mahomedan law for want of possession. Distinction was drawn by Garth, C.J., in Mullick Abdool Guffor *v.* Mulika (I. L. R., 10 Calc., 1112), after elaborate arguments as to possession being a condition precedent to the validity of a gift. He observed: "We have been referred to several authorities, and amongst others to Durul Mokhtar (Book on Gift), p. 635, which lays down that no gift can be valid unless the subject of it is in the possession of the donor at the time when the gift is made. Thus when land is in the possession of a usurper (or wrong-doer), or if a lessee or mortgagee, it cannot be given away; because in these cases the donor has not possession of the thing which he purports to give. But we think that this rule, which is undoubtedly laid down in several

Garth, C.J. draws a distinction between a gift of a right of ownership and of the property itself.

works of more or less authority, must, so far as it relates to land, have relation to cases where the donor professes to give away the possessory interest in the land itself, and not merely a reversionary right in it. Of course an actual seizin or possession cannot be transferred except by him who has it for the time being. It is possible too that these texts may be explained by what we are informed was the law in Bagdad in early times with reference to land let on lease; we are told that an izara-lease, which in this country means generally a farming lease of ryoti holdings, meant, according to the law of Bagdad, a lease of the land itself or its usufruct, and that the owner of land having made such a lease could not by law transfer his reversionary interest so as to give the transferee a right to receive the rent from the ijaradar—see Futawa Alumgiri, vol. III, Book on Gifts, p. 521.

Whether this is the real meaning of the authorities may be doubtful; but it is certain that such a state of the law in this country would render the transfer by gift of a zemindari and other landlord's interest simply impossible: lands here are almost always let out on leases of some kind, and there are often four or five different grades of tenants between the zemindar and the occupying ryot. What is usually called possession in this country is not actual or khas possession, but the receipt of the rents and profits; and if lands let on lease could not be made the subject of a gift many thousands of gifts which would have been made over and over again of zemindari properties would be invalidated. If we were disposed to agree with this novel view of Mahomedan law (which we are not), we think we should be doing a great wrong to the Mahomedan community by placing them under disabilities with regard to the transfer of property which they have never hitherto experienced in this country. Such a view of the law is quite inconsistent with several cases decided by the Sudder Dewanny Adawlut under the advice of the Kazis), and also by this Court (see Select Reports, 5, 12 and 115, Note 1, Bombay High Court Reports, 157, 10 W. R., and 12 W. R., 498), and it is directly opposed to the case of Amirunnessa *v.* Abedoonissa (23 W. R., 208) decided by their Lordships of the Privy Council.

In that case a gift of large zemindaries was held to be valid, although it is clear that they consisted, as such

estates generally do, of tenures and interests of all kinds; no objection was then taken to the gift upon the ground that has been urged before us here, and, indeed, so far as it appears that point has now been taken for the first time. * * * * * * The second and third points contended for by the plaintiffs have reference to the doctrine of Musha under the Mahomedan law. It is urged (1) that a gift of an undivided share in any property is invalid, because of Musha, or confusion, on the part of the donor; and (2) that a gift of property to two donors without first separating and dividing their shares is bad, because of confusion on the part of the donees. But it must be borne in mind that this rule applies only to those subjects of gift which are capable of partition. See the Hedaya, vol. III, Book on Gift, p. 293, where the rule laid down is to the effect that "A gift is not valid of what admits of division unless separated and divided"—see also Baillie's Mahomedan Law, 2nd Edition, p. 520; Futawa Alumgiri, Book on Gift, p. 521; Macnaghten's Mahomedan Law, p. 201. The rule, therefore, applies only to gifts of such property as is capable of division; whereas reversionary interests or malikana or other choses in action are not capable of division. Musha defined.

It is said that one main reason for this rule, which applies only to gifts and not to sales, is to protect a man's heirs against gifts made in defeasance of their rights. We were referred to certain texts which apparently favoured that view, and it is also probable that another reason for the rule was to protect creditors against fraudulent gifts made by debtors, it being a well-known text of the *bona fides* of a gift whether possession of the thing given has passed to the donee."

The other exceptions to the rule that possession is essential to gifts are where a husband gives a property to his wife, or a father to his minor child—*Vide* Wajed Ali *v.* Abdool Ali (W. R., 1864, 127) and Munnoo Beebi *v.* Jehander Khan (1 Agra, 250). When a trustee has the charge of the property given formal delivery and seizin are not necessary as was held in Ibrahim *v.* Suleman (I. L. R., 9 Bom., 146) and Khajurinnissa *v.* Rowshan Jehan (2 C. L. R., 195), and in the case of a gift to a minor the possession of the guardian is sufficient. The principle involved in these questions was clearly enunciated by the Madras High Court in Azmunnissa Begum *v.* Dale (6 Mad., 455). It Exceptions to the rule of possession.

was held that under Mahomedan law, in the instance of a wife who may give a house to her husband, the gift will be good, although she continue to occupy it along with her husband, and keep all her property therein, because the wife and her property are both in the legal possession of the husband. So also it has been held that if a father transfer his house to his minor son himself continuing to occupy it, and to keep his property therein, the gift is valid on the principle that the father in retaining possession is acting as agent for his son; according to this doctrine his possession is equivalent to that of his son. Reason requires that the same principle should be applied to the case of a gift by husband to wife. All this has reference to gifts of undefined shares of joint undefined property, and applies with greater force and reason where the shares are defined, and the property is capable of partition. The rulings in Jewan Bax *v.* Imtiaz Begam (I. L. R., 2 All., 93) and Golam Jafar *v.* Mashudin (I. L. R., 5 Bom., 238) are conclusive.

Gifts with indication that they are to certain persons of a house or immoveable property for their residence or use, and of their heirs, generation after generation, although there may be clauses of forfeiture are under the Mahomedan law, both according to the Shia and the Suni Schools, gifts to the donees absolutely—*Vide* Nasir Hasen *v.* Sughra Begum (I. L. R., 5 All., 505). Indeed a chief characteristic of Mahomedan law is that gifts made to a relation cannot be revoked. In Golam Hussain Saheb *v.* Agi Azam Tadallah Saib (4 Mad. H. C. R., 44) certain lands, choultries and moveable property had been, by instrument in writing, given to the brother of the donor and his heirs for the purpose, in perpetuity, of keeping in repair the choultries, and affording strangers the charities of shelter, and, if circumstances permitted, food also, as well as for supplying the wants of the donees with clauses restraining alienation by them. It was held that there was a complete transfer of property whether it be looked upon as trust or gift, and the power of revoking gifts could only be exercised where no relationship existed between the donor and the donee. The rules are equally positive where there has been a gift in return for something received, or where the property given away has been improved upon, as also when it has passed to a second donee or to the heirs of the first.

Gifts made on deathbed are regarded as legacies, and cannot be for more than a third of the property, and in favour of any of the heirs, as no heir can, under the Mahomedan law, take a legacy without the consent of the rest. The gift to be ineffectual must be shown to have been made at a time when the donor was dangerously ill, and was under the apprehension of immediate death. In Mahomed Gulshare Khan *v.* Maria Begum (I. L. R., 3 All., 731), Spankie, J., observed: "As to the law relating to 'Marz-ul-maut' or 'fatal disease,' we have only to follow the precedent of this Court—Labbi Bibi *v.* Bibbun Bibi (N.-W. P.), H. C. R., 1874, p. 159—which, up to the present time, has been our admitted authority in such cases. It is declared to be the law that persons labouring under a death sickness are incapable of making a valid gift, or of disposing of their property in charity. If however possession has been given of the subject of the gift it is valid to the extent of one-third of the sick man's estate. But it was pointed that if the law be unrestricted in its operation, it would deprive persons who are suffering from lingering diseases, but who at the same time are in full possession of their senses, and free from the influences which sometimes affect those who are labouring under mortal sickness, of all power of dealing with their property." The law, therefore, the learned Judges say, "provides that where the malady is of long continuance, and there is no immediate apprehension of death, a sick person may make a gift of the whole of his property." It also goes on to define what constitutes a malady of long continuance, and as is admitted by both parties to the suit when the sickness has lasted for a year, and there is no immediate danger of death, the incompetency to make a gift of the whole of the property is removed.

Gifts generally are of one-third of the donor's property.

Gifts made when the donor is dangerously ill are ineffectual.

Sick person not under the immediate apprehension of death may make a gift of whole of his property.

Besides the ordinary gifts there are two sorts of contracts, which come under the head of gifts, *viz*, Hiba-bashart-ul-Iwaz and Hiba-bil-Iwaz. The first is like a sale in the first stage before receipt of the consideration for which the gift is made, and the seizin of the grantor and grantee is a requisite condition. Hiba-bil-Iwaz is fully explained by the Allahabad High Court in Rahim Baksh *v.* Mohammad Hosan (I. L. R., 11 All., p. 3). The fundamental conception of a Hiba-bil-Iwaz in Mahomedan law is that it is a transaction made of two separate

Hiba-bashart-ul-Iwaz and Hiba-bil-Iwaz defined.

acts of donation, that is, it is a transaction made up of mutual or reciprocal gifts between two persons, each of whom is alternately the donor of one gift and the donee of the other. The Iwaz or exchange in gift is of two kinds—one subsequent to the contract, the other stipulated for in it (Baillie's Digest, 2nd edn., p. 541). "When the exchanging takes place subsequent to the gift, the Iwáz is, without any difference of opinion between our masters, a gift *ab initio*. So that it is valid where gift is valid, and void where gift is void, there being no difference between them except as to the dropping of the power of revocation in the case of the Iwaz, while it is established in that of the gift. And after possession has been taken of the Iwaz, the power to revoke drops also with respect to the gift. So that neither party can reclaim from his fellow what he has become possessed of, whether the Iwaz were given by the donee or by a stranger with or without his direction. All the conditions of gift are applicable to the Iwaz, and the transaction does not come within the meaning of a contract of mooawuzut, or mutual exchange, either in its inception or completion."

The law upon the subject is perfectly clear, for the very nature of gift under the Mahomedan law requires that the subject thereof must be a right of property in something specific without an exchange. The Hedaya defines gift in the same sense. "Hiba, in its literal sense, signifies the donation of a thing from which the donee may derive a benefit; in the language of the law, it means a transfer of property made immediately and without any exchange." It is, therefore, impossible to hold that natural affection, kindness, services and favours can be regarded as a Hiba-bil-Iwaz, or a gift for an exchange, as understood in the Mahomedan law. Hiba-bil-Iwaz means literally gift for an exchange; and it is of two kinds, according as the Iwaz, or exchange, is or is not stipulated for at the time of the gift. In both kinds there are two distinct acts: First, the original gift; and, second, the Iwaz or exchange. But in the Hiba-bil-Iwaz of India, there is only one act; the Iwaz, or exchange, being involved in a contract of gift as its direct consideration. And all are agreed that if a person should say, "I have given this to thee for so much" it would be a sale, for the definition of sale is an exchange of property for property, and the exchange

may be effected by the word "give" as well as by the word "sell."

The transaction which goes by the name of Hiba-bil-Iwaz in India is, therefore, not a proper Hiba-bil-Iwaz of either kind, but a sale; and has all the incidents of the latter contract. Accordingly possession is not required to complete the transfer of it, though absolutely necessary in gift, and what is of great importance in India, an undivided share in property capable of division may be lawfully transferred by it, though that cannot be done by either of the forms of the true Hiba-bil-Iwaz.

Delivery of possession to the donee is a condition precedent to the validity of a gift, for to use the language of the Hedaya, the Prophet has said, "A gift is not valid without seizin," meaning that "the right of property is not established in a gift until after seizin." Tender and acceptance are necessary, because a gift is a contract, and tender and acceptance are requisite in the formation of all contracts, and seizin is necessary in order to establish a right of property in the gift, "because a right of property," according to our doctors, "is not established in the thing given merely by means of the contract without seizin."

WILLS.

Essentials to a will.

The essentials to a will are, *firstly*, that the testator is competent to make a transfer of a property; *secondly*, there is a legatee competent to receive it; and, *thirdly*, the subject of the bequest is susceptible of being transferred after the testator's death. It does not signify if it were or were not in existence at the time of bequeathing it, or that it was effected by a written instrument, or merely by word of mouth. It may be of real as well as personal property, but not to a larger amount than one-third of the testator's estate. To exceed one-third and to be left at all to an heir, consent of the other heirs must be obtained. In regard to grants to persons not in existence at the time of the grant, it is worthy of note both the Mahomedan law and Hindu law are agreed. A recent ruling of the Bombay High Court in Abdul Cadir Haji Mahomed *v.* C. A. Turner (I. L. R., 9 Bom., 156) gives effect to this view. In Ponappa Pillai *v.* Pappa Vay Yangar (I. L. R., 4 Mad., 43), Turner, C.J., after a

Hindu and Mahomedan law are agreed that grants to persons not in existence are illegal.

full review of the opinions of eminent sages, as Narada and Vrihaspati, and the comments of Jagannatha and Sir William Jones, held that without assets the son and grandson of a Hindu are under a moral and religious obligation to pay the father's debts, but not under a civil obligation. Legally the son's obligation had no force independently of assets nor in excess of assets. This is so under the Mahomedan law as well.

Difference between Inheritance and Legacy.

Between property which is the subject of inheritance and property which is the subject of legacy, the difference is in the mode of acquisition. The former becomes the property of the heir in due course of law; and the other does not become so until the consent of the legatee has been obtained. In cases of wills reduced to writing, consent of the heir may be proved if he affixed his signature to it without undue influence having been exercised on him. Where the will is nuncupative, evidence of some act done at the time of its execution, or some act done subsequently amounting to a ratification of it, is necessary. The rulings in Khajurinnissa *v.* Rowshan Jehan (I. L. R., 2 Calc., 184), where a will purporting to give one-third of the testator's property to one of his sons as his executor, to be expended at the son's discretion in undefined pious uses, and conferring on such son a beneficial interest in the surplus of such third share, and in Baboo Jan *v.* Mahomed Norooll Huq (10 W. R., 375) where a large part of the estate was under a will said to have been endowed for charitable purposes, and the rest divided among the heirs, clearly illustrate the principle of the Mahomedan law, that a testator cannot leave a legacy to one of his heirs without the consent of the rest, nor can he give away more than one-third of his estate.

In Fatema Bibee *v.* Ariff Ismailjee Bham (9 C. L. R., 66) the case was as follows: A Mahomedan by his will bequeathed the rents of a certain house in trust for his children, and directed that, after the death of the last surviving child, such rents should be paid to the Committee of the District Charitable Society. It was held that as the gift to the children was a gift to the heirs of the testator, and there was no assent on the part of the heirs, it was invalid, and, being so as regards the heirs, it also failed as regards the District Charitable Society. Consent to be valid must be given after the testator's death—*vide* Chera Chowrittel Ayrsha Kuth Umah *v.* Kallu Pudiakel Biathu

Umah (2 Mad., 350); the payment of the legacies should precede the satisfaction of claims of inheritance, but after the debts of the testator had been liquidated. Debts acknowledged to be due by the testator on his deathbed to an heir follow the rule in respect of gifts, *viz.*, that they are good to the amount of a third of his estate. As in Hindu so in Mahomedan law wills executed are not altogether null and void by there being illegal provisions, which might be eliminated and the legal clauses given effect to. But where they altogether divest property from the next heirs, they are invalid as ruled in Jumunooddeen Ahmed *v.* Hossein Ali (2 W. R., Mis., 49).

Debts should be paid before legacies.

In Oomutoonnissa Bibee *v.* Ooreefoonissa Bibee (4 W. R., 66) a Mahomedan lady made a will disinheriting her nearest relation and leaving her whole estate to her nephew—"Nuslu-bod-nuslum, bottun-bad-botthun" (from generation to generation). It was held that the devise to the nephew was absolute to him and for his lifetime, but it would not go to his sons and must revert to the relatives of the testator. Similarly, a bequest by a man who is in debt to the full amount of his property is invalid, unless all the creditors agree to release the property.

Bequest by a man of all his property when it is wholly encumbered is invalid.

A legacy of a property having been made in favour of a person is made a second time in favour of another, the first legacy is cancelled on the principle of retraction. Revocation is made manifest by words and acts indicating it, *viz.*, if one should bequeath a slave and then pledge him, it is a revocation.

If he bequeath a piece of iron and then turn it into a sword, it is a revocation. If it were a mansion that was bequeathed, and the grantor altered its exterior so greatly by bedaubing it with mud as not easily to be made out, it is a revocation. If it were land, and the grantor sowed vegetables on it, it is not a revocation, but if he makes a vineyard of it, or plants trees on it, the bequest is revoked. If it is to the same individual in the second instance it being greater than that made in the first instance, the second will take effect.

Revocation explained.

It does not affect whether the quantity is greater or smaller; the one made last will take effect. When there are two legatees, and one die before the legacy is payable, the survivor has the whole; but if there had been an apportionment, the survivor would have half, and the remaining half would go to the heirs of the deceased executors; execu-

tors of a Mahomedan should not be persons of a different persuasion, although it is not prohibitory by the Mahomedan law, but if an application be made to remove the infidel executor, and to appoint a proper person in his stead, the application might be granted—*Vide* Jehan Khan *v.* Mandy (10 W. R.. 185). Executors, when there are more than one, should act jointly, but in cases of necessity, and when benefit to the estate is expected, one can act. A person not being an heir at the time of the execution of the will, but becoming one previous to the death of the testator, cannot take the legacy left to him by such will; but a person being an heir at the time of the execution, and becoming excluded previously to the testator's death, can take the legacy left to him by such will. A legacy to a child in the womb being born within six months from the date of the bequest is valid. When a slave is given away, but not the child of which she is pregnant, the bequest of the slave and the exception of the child are both valid. The child to be entitled to the bequest must be born alive, but if it die a short time after its birth, the legacy is legal to the extent of a third of the testator's property. If two children be born and one die, the legacy is divided into moieties,—one for the living child and the other for the heirs of the deceased.

Executors and what can be subjects of legacy and will.

Besides bequests of real property, the services of a slave, the use of a mansion, and the produce of lands and gardens can be legally granted either for a time or in perpetuity. Temporary legacies are enjoyed in the same manner as persons in whose favour a wukf has been made hold property. The owner holds the property whilst its usufruct is enjoyed by the legatee. In the case of a slave, his services are to be at the disposal of the legatee for a limited time, for instance, for three or five years. If, however, a specific period be stated, and it expired before the death of the testator, the bequest is void. If no time be specifically mentioned, the legatee is to have the use—if it be a house or a garden—as long as he lives, and in the case of a slave, he is entitled to his earnings during the period of his own life, although the earnings might exceed a third of the property. In the case of a bequest of the fruits of a garden, if it transpires that there is no fruit in the garden on the day of the testator's death, the bequest is, strictly speaking, void, but a favourable view of the testator's intention in such cases is to be

taken, and it should be held that it should take effect on the produce and fruits that may grow subsequent to the death of the testator and till the time of the death of the legatee. The exception is in the case of bequests in respect of wool of the testator's flocks, or their progeny, or milk in their teats. Even if it be said in the will that the legatee is to have the wool or the milk "for ever," he is entitled only to the wool that may then be on the backs of the sheep or the milk that could then be had.

Legatee can partition his share with the heirs.

A legatee can effect a partition of his one-third share with the heirs, and the purchasers of their shares can stand as partners with the legatee of his share, *viz.*, the one third. When there is a bequest of the produce of a land and there be no trees at all on the land, it is to be let, and a third of the income arising out of the land or the rent is to be given to the legatee. Legacies of the produce of a mansion or the earnings of a slave, to the poor generally, is legal, but not of the occupancy of a house or the services of a slave. If the persons, however, be specifically mentioned, the legacies are valid.

Legacies to the poor and those by an alien of the whole of his property are valid.

Those by a Mooslim to an alien are illegal.

Legacies by an alien to a Mooslim are valid even if they are of the whole of his property. The rule of invalidity, because of being more than one-third, does not apply unless disallowed by the heirs of the alien. Should he have no heir, it is valid, although it is of the whole of his property, but those made by a Mooslim to an alien, a non-Mahomedan and an apostate are always illegal. The slayer of a person can never inherit him. According to Abu Hanifa bequests made by a Mooslim having renounced the Mahomedan, faith, which would be valid if made as a Mooslim, would remain in abeyance until he returns to the faith or dies, and those which would not be valid even if made when he was a Mooslim are void, but the opinions of Abu Yusuf and Moohumnud are in the other way. They hold that whatever is valid to the sect to which the renegade goes over is valid to him.

MARRIAGE.

Marriage explained.

Marriage among Mahomedans is known as shadee, which means joy or festivity, and is usually celebrated with gaiety and a good deal of pomp and ceremony. It is a contract which has for its object the conferring of status on the children that issue from it. Indeed it is the basis upon which the framework of civilized society is

built. Lord Penzance in his remarks in Mordaunt *v.* Mordaunt (L. R., 2 Probate and Divorce, p. 126) said: "In England and other Christian countries marriage creates a special status, and it lies at the very root of civilized society. Marriage is an institution, and not only confers a status on the parties to it, but upon the children that issue from it. Though entered into by individuals, it has a public character, and as such is subject in all countries to general laws which dictate and control its obligations and incidents independently of the volition of those who enter upon it." Without it the intercourse of man with a woman is prohibited absolutely, and, if perpetrated, it is zina, as held in Himmut Bahader *v.* Sahebzadi Begum (14 W. R., 125, and 4 B. L. R., A. C., 103), and subjects them to hudd, which, in the case of a freeman, is stoning to death; and scourging with a hundred stripes if the offender be a slave. Thus it is sanctioned and lawful in extreme old age, and even in the last or death illness. It is one of the prime necessities of man and is instituted for the solace of life. As in all other contracts, proposal and acceptance are first requisites in a marriage, and understanding, puberty and freedom in the contracting parties are the next essentials. Marriage cannot be contracted by an insane person or a boy; nor can it be by boys of understanding without the consent of his guardian; nor by a slave without the consent of his master. In the woman there should be no legal incapacity, and she as well as her suitor should understand each other. There must be witnesses, as the Prophet has said: "There is no marriage without witnesses." Sahadut, or the presence of witnesses, is a condition peculiar to marriage, and can on no account be dispensed with. All the learned are agreed it is requisite to the legality of marriage, and the witnesses must be men of discretion, puberty, enjoying freedom and professing the Musalman faith. There must be more than one, and all need not be males. It is sufficient if one be a man and two females, or two males and one female, but not merely women. The parties as well as the witnesses should hear what is said at the time, and not that some should hear and repeat to the others. The words should be to the effect, "Bear witness that I have married this woman;" and the woman should answer, "I have accepted." The woman shall place herself so, so as to be easily identified by the witnesses; if other women be there

Essentials to marriage.

Witnesses to marriage indispensably necessary.

the proper course for the woman is to uncover her face that the witnesses may see her, and mention her name and those of her father and grandfather. The husband and wife shall both be identified, and there should be no ambiguity or confusion in respect of parties. For instance, "a man having two daughters—the eldest of whom is named Ayesha and the younger Fatemah—and, intending to marry the elder, contracts her in the name of Fatemah, the marriage takes effect as to the younger, while if he had said: "I have married my elder daughter Fatemah, there would be no contract as to either." Contracts made while parties are walking or riding, or when both parties being present one should rise or occasion a change of the meeting, are not legal, but in a passing boat it is valid. Consent of the woman is another stringent condition, and must be expressed on arriving at puberty. It does not signify whether she be a virgin or *suyyeb*, that is, one who has had intercourse with a man. According to the Sunis, marriages are voidable when dissent is declared by the girl as soon as puberty is developed. By the law of the Shia sect the matter is to be propounded to her, so that she may advisedly give or withhold her assent. In Newab Mulka Jehan Sahiba *v.* Mahomed Ushkurree Khan (26 W. R., p. 26) the Lords of the Privy Council observed: "Authorities were cited to shew that the two Great Mahomedan sects differ on the point upon which the case hinges. It is said that the Sunis hold marriages like the present to be voidable only, *i.e.*, complete, unless avoided by dissent; the Shias, on the other hand, that they are *fazoolee* only and incomplete until ratified by assent. And there certainly seems to be ground for the opinion that this distinction exists and that the latter is the doctrine of the Shias. The evidence of the high priests of Lucknow, given in the suit, appears to be clear on the point and upon the rights of the parties in cases like the present. They declare the law to be that the marriage of a minor, contracted by the father or grandfather, is binding and irrevocable, they having the legal right to contract for the minor; but that this irrevocable power of contract does not belong to guardians of a lower degree, as the mother or grandmother, who can only contract a *fazoolee* marriage, that is, one incomplete for want of sufficient authority. They declare that, according to the Shia doc-

Rules observed by the Sunis and Shias.

Opinion of the Privy Council on marriage.

trine, a *fazoolee* marriage requires the assent of the minor, after attaining puberty and mature understanding to perfect it, and that in the event of death intervening before such assent is given, the marriage remains incomplete.

It was proved that, in accordance with the law thus laid down, the ceremony of the marriage in this case was in the *fazoolee* form.

In Wilson's Glossary the word " Fazuli " is thus defined : " In Mahomedan Law an unaccredited agent is one who acts for another without authority and whose transactions are invalid unless confirmed by the principal." The word appears also from the glossary to be used as an adjective, to denote contracts requiring such confirmation. Their Lordships see no reason to disparage the learning or fairness of the high priests who were examined upon the law, and they have observed with regret the strong animadversions made by the Officiating Judicial Commissioner upon their evidence, which, in so far as it states the law, appears to be in accordance with the written authorities. Part II of Mr. Baillie's Digest of Mahomedan Law (as stated by the author in the introduction) is intended to exhibit the doctrine of the Shia sect and to be composed entirely of translations from the " Sharaya-ool-Islam," a work, he says, of the highest authority in that sect. The following are extracts from chapter 1, section 2, page 9 : "The contract of marriage may, according to the most approved doctrine, remain in suspense as already mentioned for the sanction of the person having authority in the matter ; and if a young girl is contracted in marriage by any other person than her father or paternal grandfather, whether the person be nearly or remotely related to her, the contract cannot pass or be operative unless subsequently allowed or approved by herself, even though the person were her brother or paternal uncle. In the case of a virgin, this permission or assent may be inferred from her silence when the matter is propounded to her ; but a woman who is not a virgin, must be put to the trouble of giving expression by actual speech to her permission or assent."

When the fathers of two young children have contracted them to each other in marriage, the contract is binding on them both ; and if one of them should happen to die, the other would be entitled to share in the deceased's inheritance. If any other than the fathers of the children

should contract them in marriage, and one of them should happen to die before arriving at puberty, the contract would be void, and both dower and the right of inheritance would fail." Another passage states the law still more distinctly (Chap. 4, p. 294): "When a girl under puberty has been married by her father or paternal grandfather; her husband inherits from her and she from him, so also if two young children are married to each other by their fathers or paternal grandfathers, they have mutual rights of inheritance. But if they should be contracted in marriage by any other than their fathers or paternal grandfathers, the contract remains in suspense till assented to by the spouses themselves, after arriving at puberty and discretion: and if one of them should die before such assent has been given, the contract would be void, and there would be no right of inheritance. And the same would be the result, though one of them should attain to puberty and assent to the marriage, if the other should die before puberty." The extracts cited in the judgment below, from the works of Macnaghten and Baillie relate, as their Lordships understand, to the doctrine of the Sunis. These—and still more distinctly some passages in the Hedaya—certainly seem to indicate that by that law a marriage between minors of the kind now in question requires dissent to annul it, and that, in the event of one of the minors dying, the marriage remains in force, and the incidents of inheritance and of dower attach as upon a marriage between persons of full age. (Hedaya, Book 2, c. 2, vol. 1, pp. 102-6). It is not, however, necessary to decide what would be the rights of the parties according to the Suni Law; but their Lordships are led by the evidence of the high priests and the authorities above cited to the conclusion that, by the law of the Shia School, the present marriage, unless the assent of the girl after attaining puberty can be shown was imperfect, and could, if she died before such assent, create no rights or obligations. It must, therefore, be ascertained whether such assent had been shown or ought to be presumed. It seems to be clear, according to the Shia doctrine, that the girl must have arrived at puberty, and also be of mature understanding when her assent is given. There is no evidence of the state of Ara Begum's undersanding, but assuming her to have been by age and understanding capable of assenting, their Lordships

Contracts entered into by fathers or paternal grandfathers are complete and not when made by others.

According to the Sunis, dissent must be express. By the Shia law the matter is to be propounded to the girl who may advisedly give or withhold her assent.

think there is not sufficient evidence of the fact of her assent to satisfy the requirement of the law. The law of the Sunis appears to adopt a very stringent rule, requesting the option of dissent to be declared by the girl as soon as puberty is developed. But the doctrine of the Shias seems to be that the matter ought to be propounded to her, so that she may advisedly give or withhold her assent.

This is a rational provision of law, for assent ought to be the expression of the mind and will of the girl upon the marriage when it is brought to her notice and is present to her understanding. It appears by the extracts from Baillie (Part II, before cited) that the girl's assent, if a virgin, may be inferred from her silence when the matter is propounded to her; but a woman who is not, must be put to the trouble of giving expression by actual speech to her assent. The mention of this distinction (which involves a concession to the modesty of a virgin) strongly indicates the view of the Shia School that assent must be evidenced in such a way as to leave no doubt that it is the act of the mind and will. Their Lordships, however, do not mean to hold that it must in all cases be shewn that the question of the marriage was distinctly propounded to the girl. They have no doubt that assent may in some cases be presumed from the conduct and demeanour of the parties after they have attained puberty and mature understanding. Circumstances may obviously exist which would properly lead to the inference that the marriage had been recognized and ratified, although no distinct assent could be proved. But in this case there is neither evidence of express assent nor of facts, from which it may be presumed the girl was taken to Arabia far from her betrothed husband, and there is no proof that the marriage was ever brought to her attention, or that she by word or conduct in any way recognized or ratified it. An attempt was made to prove an usage in the royal and noble families of Oude, that a girl married as a minor could not reject the marriage, although her guardians who had assented to it might be of a lower degree than her father or grandfather; but the evidence entirely failed to prove an usage having the force of law. The utmost that the Mahomedan gentlemen who were examined proved was that it would be unusual and unbecoming for a girl to reject such a marriage. But

the question is not what Sooltan Ara Begum would have done as a matter of propriety, if she had lived, and the question had been propounded to her, but what by law she had the power to do, if she chose to exercise it. All these witnesses acknowledged that they must be governed by the law as expounded by the high priests; and their evidence almost involved the assumption that the girl would have had a right by law to disaffirm the marriage, but that it would be unbecoming in her to avail herself of it. For these reasons their Lordships, guided by what they conceive to be the doctrine of the Shia School, are of opinion that the evidence fails to shew that the *fazoolee* marriage had become perfect before Ara Begum's death, and, consequently, that the claim of Ushkurree Khan to inherit as her husband, has not been established.

Parents and guardians have power to set aside marriages merely on the ground of inequality between the parties to the marriage, if it had taken place without their consent. The Prophet has said that "Women are not to be married except to equals." It thus follows that husbands should be the equals of their wives, that is, not inferior to them, and not that the wives should be the equals of their husbands. Equality is regarded, *firstly*, in descent or lineage; *secondly*, in the Islam of paternal ancestors. If one who himself has turned a convert to Mahomedanism, and his father was not a Mooslim, he is not regarded as the equal of a person who has had one paternal ancestor a Mooslim; similarly, he who has had more paternal ancestors Mooslim is superior to him who has had less; and, *thirdly*, in the status of the person: a slave, whoever he may be, is not the equal of a free woman, nor is he, whose father is emancipated, the equal of a woman free by origin. *Fourthly*, it is observed in respect of property, that is to say, the man should have enough to pay the dower and find the maintenance of his wife. So long as he has enough for these purposes, he is considered her equal in respect of property, no matter how rich the wife might be. *Fifthly*, it is to be in respect of piety and virtue. A profligate is not the equal of a good girl, who, on attaining to puberty, might express her dissatisfaction at the marriage. If the father, under the impression that he was marrying his daughter to a virtuous man and not a drinker of wine, afterwards finds him to be an inveterate drunkard, the marriage is void. *Sixthly*, it is to be in res-

Husband should be the equal of their wives.

How equality is ascertained.

pect of trade or business. Professors of low trades, such as horse dealers, cuppers, shavers, weavers, sweepers and tanners are not the equals of perfumers, drapers and bankers. These are the cases of unequal alliances to which parents and guardians can object. Their right exists till the woman gives birth to a child, but not after the woman has actually borne a child to her husband. The objection must be preferred before a Judge, and without his order the marriage between the parties is not annulled. The order may be either for a separation or repudiation. If the husband has consummated with the wife, he is liable for the whole of the dower specified for maintenance during the iddut or period of probation.

Having dwelt upon the requisites essential to a marriage, reference should here be made to marriage itself, and the legal effects it produces on the parties. It has been shown that consent of the bride must be obtained to the proposal. It is indicated by a smile or laugh, unless made jestingly, when the lady is consulted or informed that she has been contracted. Mere silence is no assent, but when she has entrusted the matter entirely to her guardian, and he mentions to her several names of persons, and she says "I am content with whatever you do, or marry me to whomsoever you like," is expressing consent. Silence is consent in cases when the father or guardian mention the name of the husband and the dower, and the daughter remains silent. It is not consent when only one is mentioned. Consent on the part of the girl in one or other shape stated is necessary, but it must be express on the part of a Suyyib. The proposal may be made by means of agency or by letter, but there must be witnesses to the receipt of the message or letter, and to the consent on the part of the person to whom it is addressed. But letters or even writing when the parties are present are not sanctioned; and consent of minors on arriving at puberty is not required when the marriage is performed by their father or grandfather. It is contracted by words which are of two kinds—sureeh or plain—which apply exclusively to nikah and tazweez. The other sort is *kinayat* or ambiguous. It is contracted as well by hiba or gift, tumleek or transfer, and sadkut or alms, and shera or purchase. If, for instance, a man says to a woman "I have purchased thee for so much, and she answers "yes," it is a marriage. Likewise if a man, after he

has repudiated his wife irrevocably, that is, three times, says, "I have recalled thee on so much," and the woman agrees in the presence of witnesses, it is a legal marriage. Marriage would be presumed where the parties have been in continual cohabitation, and the legitimacy of the issue of such union as well, although there might be no evidence of the celebration of marriage. The fact of a woman having constantly lived as a wife of a man, who, according to Mahomedan law, is not prohibited from marrying her, is as laid down by the Privy Council in Mahomed Bauker Hossein Khan *v.* Shurfoonissa Begum (8 Moore's I. A., 136), and Ashruffinnissa *v.* Aziemun Bosoda Kooery (1 W. R., 17), and Shams-oon-nissa Khanum *v.* Rai Jan Khanum (6 W. R., P. C., 52), and Hidayutoollah *v.* Rai Jan Khanum (3 Moore's I. A., 295), sufficient to raise the presumption of marriage and the legitimacy of the children.

Marriage would be presumed where the parties have been in continual cohabitation.

In Mulka Jehan Sahiba *v.* Mahomed Ushkurree Khan (L. R., I. A., Sup. Vol., 192, and 26 W.R., 31) the Lords of the Privy Council laid down the following doctrine in respect of presumption of marriage and legitimacy of children :—

"It appears to be clear Mahomedan law that if a man has a child by his own slave, the child without marriage is deemed to be lawfully begotten and is entitled to inherit as a co-sharer with children born in marriage; the mother in such case becoming oomi-walad, and entitled to emancipation on the death of her master. These consequences, however, according to some authorities, occur only in the case of a mother having a child by his own slave, for it is said to be unlawful for a man to have connexion with the slave of another, especially with his mother's slave, and that the parentage of a child born of such connexion, although begotten in error, cannot be established to belong to him,—Hedaya, Vol. II, p. 20 & 384, Macnaghten's Precedents, Vol. II, p. 322, and Mulka Jehan Sahiba *v.* Mahomed Ushkurree Khan (26 W. R., p. 31).

Child by a slave is deemed to be lawful and entitled to inherit as a co-sharer with children born in marriage.

The legal effects of marriage, as contained in the Futawa Alumgeri, are that it "legalises the enjoyment of either of them (husband and wife) with the other in the manner which in this matter is permitted by the law; and it subjects the wife to the power of restraint, that is, she becomes prohibited from going out and appearing in public; it renders her dower, maintenance and raiment obligatory on her husband; and establishes on both sides the prohibitions of affinity and the rights of inheritance, and the obligatori-

Legal effects of marriage defined.

ness of justness between the wives and their rights; and on her it imposes submission to him when summoned to the couch; and confers on him the power of correction when she is disobedient or rebellious, and enjoins upon him associating familarly with her with kindness and courtesy. It renders unlawful the conjunction of two sisters (as wives) and of those who fall under the same category."

Sisters cannot be wives of one and the same person.

It is is not legal for a free man to have more than four wives at one and the same time. For a slave to marry more than two is against law. Either of these may marry woman who may be slave or free. The marriage of five wives in succession might take place, but it is lawful so far as the first four are concerned, but unlawful as regards the fifth. If in one contract a marriage is effected of five, it is altogether null and void in respect of one and all. This rule applies equally to slaves who marry three or more than two. The leading trait in Mahomedan law, with regard to marriage, is that it is not lawful for a man to be married at the same time to any two women who stand in such a degree of relation to each other, as that if one of them had been a male, they would not have intermarried. It is not lawful to marry or even cohabit with two sisters whether they be sisters by consanguinity or fosterage. If a man marry two sisters by one contract, he must be separted from them both, and if they be married by separate contracts, the marriage of the last one is invalid. A Judge, if he be aware of the fact, is bound to make the separation. If a man desire to marry one of the two after separating from the other, he might do so, but he must separate before consummation. But if he does after consummation, he must wait for the marraige till the expiration of both their idduts or period of probation. Usually this iddut is four months and ten days when the woman is a free person, and two months and five days when she is a slave, and is incumbent on persons who have gone through a valid marriage. Pregnant women, be she a free person or a slave, need only observe till her delivery; and women who are barren and not likely to produce issue have to reckon three months. It is waiting, before marrying again, for the period stated, as it is incumbent, on women after dissolution of marriage. When a man has married a woman by a lawful contract, and has repudiated her after consummation, it is incumbent on her to observe an iddut on the principles that she ought to allow the man an

A free man can marry four and no more, and a slave no more than two.

Period of iddut.

opportunity to re-consider his hasty action and recall her.

In the event of the death of the husband, the woman is bound, out of respect to his memory, to observe an iddut. It is not necessary, where there has been no valid marriage, or where there has been a marriage under a *fazoolee* contract, that is, a contract entered into by an unauthorised agent. It need not be mentioned that it is not at all incumbent after a zina or illicit intercourse. Besides these, a married woman who has been repudiated before consummation, an alien who having left her husband has come into our-dar (under protection), two sisters married by one contract which has been cancelled, and more than four women connected together in one contract which has been annulled, are not liable to iddut. It is clear that these prohibitions are chiefly on account of the illegality of marriage. The prohibition, as contained in the Koran, is "Ye are forbidden to marry your mothers and your daughters and your sisters and your aunts, both on the father's and the mother's side, and your brother's daughters and your sister's daughters. The mothers include a man's own mother and his grandmothers by the father or mother's side, and how high so ever." Daughters are the daughters of his loins, his step-daughters and the daughters of his sons or daughters how low so ever. Sisters are the full-sisters and the half-sisters of the father or the mother and foster-sisters. The prohibition in regard to daughters equally extend to the daughters of the brother and sister how low so ever. Paternal aunts mean the full-paternal aunt, the half-paternal aunt of the father (that is, the father's half-sister by his father), and the half-paternal aunt by the mother (or the father's half-sister by his mother). And so also the paternal aunts of his father, the paternal aunts of his grandfather, and the paternal aunts of his mother and grandmothers. Maternal aunts are the full-maternal aunt, the half-maternal aunt by the father (that is, the mother's half-sister by her father), and the half-maternal aunt by the mother (or the mother's half-sister by her mother), and the maternal aunts of fathers or mothers.

Iddut is not necessary in cases of zina, *i. e.*, where there has been no valid marriage.

Persons with whom marriage is prohibited.

The prohibition is by principle of affinity equally strong as regards the mothers of wives, their grandmothers by the father's or mother's side, the daughters of a wife or of her children, how low so ever; the wife of a son or

Grounds of prohibition.

of a son's son, how low so ever; and the wives of fathers and of grandfathers on the father's and mother's sides how high so ever. Even if there be illicit intercourse, the prohibition by reason of affinity equally holds good. For instance, if a man has committed adultery with a woman, her mother and daughter, so far as these can go, are prohibited to him just as the father and grandfathers of the man are prohibited to him. If a man touch a woman, or kiss her, or look on her with desire, prohibition by affinity is established. Similarly so, if a woman should look on the nakedness of a man with desire, or touch or kiss him with desire, her mother and daughter would come within forbidden grounds so far as the man is concerned. Desire is necessary in all cases, and prohibition does not take place when the looking on or touching is not done with desire. In a man, desire is rendered manifest by the turgidity of the virile member, but if he be an old man or impotent, by the motion or beating of the heart. In a woman it is known by the desire in the heart and showing her delight at it.

If a man should say to his wife "I had connexion with your mother,"—or, being asked "What did you do with the mother of your wife?" and he says, "I had connexion with her—prohibition by affinity is established, and it would not at all signify even if the questioner and the answerer had both spoken without meaning what they said. Separation between married parties is the result when there has been a kissing by a man of his father's wife with desire, or by a father of his son's wife against her will. In a case of actual connexion, the offender is liable to the hudd, which being the severest punishment awardable, no pecuniary mulct is added to it. All these prohibitions do not apply where there has been marriage by an invalid contract as it is *ab initio* void, *e.g.*, marriage without witnesses, marriage with any one of the prohibited persons, or with the agent, who, having undertaken to contract a marriage for a woman, contracts her to himself, &c., &c. Marriage cannot be contracted with a person who is a slave of the party, although that of a free man with a slave, not being his property, with the consent of the master of the slave, is allowable, provided he be not already married to a free woman. Mahomedans can marry Christians, Jews, and believers in one God, but they cannot marry over and

above the prohibited persons already specified, their nurse, their foster-mother and their sisters by fosterage in accordance with the saying of the Prophet "What is unlawful to you by consanguinity is unlawful to you by fosterage." These prohibitions do not apply to the wives of adopted sons. The texts do not prohibit them to adopted fathers nor the foster-mother of a man's sister, his foster-son's sisters, nor his foster-brother's sister. In the absence of paternal guardians the maternal kindred may dispose of an infant in marriage, and, in default of maternal guardians, the Government may act for them. In Kuloo *v.* Goriboolah (13 B. L. R., 163 note; 10 W. R., 12) the nearest guardian being precluded from giving his consent to the marriage of the minor, the mother's consent was held valid. In the matter of Mohin Bibi, (13 B. L. R., 160) the father being an apostate, his consent to the marriage of his infant girl was not considered necessary; that of the *mother was* sufficient.

Prohibitions do not apply to the wives of adopted sons.

DOWER.

Having considered at some length how and between whom marriages can be contracted, we should direct our attention to its necessary concomitants. Dower is one such, and "is the property which is incumbent on a husband either by reason of its being named in the contract of marriage or by virtue of the contract itself as opposed to the usufruct of the wife's person." It may be verbal or expressed in writing called the Kabinamah, and becomes due on the consummation of marriages, or, its substitute, a valid retirement. When the parties meet together at a place where there is nothing to prevent their matrimonial intercourse, either in law, decency, or health, the retirement is valid. It must, in the first instance, be at a place not intruded upon by the presence of any other person. The presence of a little child who does not understand, or a person who has fallen into a swoon, or an insane person or lunatic does not affect, but if the child is able to understand, or if a deaf or dumb person be present, the retirement is not valid. Likewise, the presence of another wife of the husband and of a dog belonging to her breaks the retirement. The place must be a house, a mansion, or separate apartment, secure from observations of passers by. A field or a house not screened and protected from the view of lookers on, does not constitute a vald retirement. The

Dower explained.

Valid retirement defined.

parties must be free from disease which prevents or renders coition injurious. Dower is payable either immediately or after a time stipulated for, or on the death of either party, or divorce. The one which is immediately exigible is termed Mojjal or prompt, and the other which is not exigible till the happening of some one of the events specified is termed Mowajjal or deferred dower. Limitation in respect of dowers, which are prompt, runs from the date of demand at any time after the consummation of marriage. There must be a previous demand by the wife, who has the option to demand or not, as well as to elect her time for demanding, as held by the Judicial Committee of the Privy Council in Khajorannissa *v.* Saifoolla Khan (L. R., 2 I. A., 235; 15 B. L. R., 306; and 24 W. R., 163) and Mulleka *v.* Jumeela (L. R., I. A., Sup. Vol., 135; and 11 B. L. R., 375).

The heirs of the wife can, and are bound, to sue for their mother's Mojjal dower within 12 years of the mother's death. The very best kind of oral evidence is indispensably necessary to support a claim for dower where no kabinamah has been executed.—*Vide* Husana *v.* Husmutnoonnissa (7 W. R., 495) and Abdool Jubbar Chowdry *v.* Collector of Mymensing (11 W. R., 65). If a kabinamah be produced, it is sufficient, and it is not necessary to prove possession of a property, even if that were the condition laid down in the deed in lieu of dower.—*Vide* Nuseeboonnissa *v.* Danesh Ali (3 W. R., 133). The presumption, according to Mahomedan law, is where it is not expressed whether the payment of dower is to be prompt or deferred, that it is due on demand as held in Bedar Bukht Mohammed Ali *v.* Khurrum Bukht Yahya Ali Khan (19 W. R., 315) and Tadya Taufikun nissa *v.* Golam Kambor (I. L. R., 3 All., 506), and where there has been no kabinamah, the verbal contract, in the first place, must be proved by the most clear and satisfactory evidence; and, in the second place, custom of the women of the woman's family to receive, rather than of the men of the husband's family to pay, a certain dower must be proved, having due regard to the means and position of the bridegroom—*Vide* Nuzeemooddeen Ahmed *v.* Hosseinee (4 W. R., 110). Mowajjal or deferred dower, as already shown, becomes payable on the dissolution of marriage, either by divorce or by the death of either of the parties, but it is a money claim merely, and the wife has no lien on her

Where it is not expressed whether dower is prompt or deferred, it is due on demand.

husband's property. But where the widow has been in possession of a property of her husband under a claim of dower, she has a lien on it, and is entitled to possession.—*Vide* Woomatool Fatima Begum *v.* Meerunmunnissa Khanum (9 W. R., 318). She has equally a lien where a whole estate of a Mahomedan has been charged by a deed of dower but possession not given over to her. It was held by the Sadr Dewani Court, and confirmed by the Judicial Committee of the Privy Council on appeal, in Amir-oon-nissa *v.* Morad-oon-nissa (6 Moore's I. A., 211), that the widow had a lien upon her deceased husband's estate as being hypothecated for her dower, and that she could either retain property to the amount of her dower or alienate part of the estate in satisfaction of her claim. This principle was adopted in Wahedunnissa *v.* Shubrathan (6 B. L. R., 54; 14 W. R., 239) and Bachun *v.* Hamid Hossein (10 B. L. R., 45; 14 Moore's I. A., 377), it being held that, under the Mahomedan law, there is no hypothecation without seisin, but a creditor, whether widow or any other person, if in possession of the husband's property with the consent of the debtor, or his heirs, might hold over until the debt is paid. Without possession the widow's claim for dower is only a debt against the husband's estate, and may be recovered from the heirs to the extent of assets come to their hands. It does not give the widow a lien on any specific property of the deceased husband, so as to enable her to follow that property, as in the case of a mortgage into the hands of a *bonâ fide* purchaser for value. Possession is thus essential to entitle a widow to hold the entire estate of her husband until her dower is paid as against the other heirs, and this proposition has the sanction of the Lords of the Privy Council as laid down in Mulkah Do Alum Nawab Tajdor Bahoo *v.* Jehan Kadr (10 Moore's I. A., 252, and 2 W. R., P. C., 55), and Aziz-ullah Khan *v.* Ahmed Ali Khan (I. L. R., 7 All., 353), and Kurreem Baksh Khan *v.* Doolhin Khoord (15 W. R., 82).

Dower is a money claim, but when the widow is in possession of a property of her husband, she has a lien on it.

The position of the widow in possession is so strong that even if she be dispossessed by the heir of her husband, she, as held in Umed Ali *v.* Saffiham (3 B. L. R., A. C., 175), takes the estate subject to her lien for the amount of her dower. In Mir Mahar Ali *v.* Amani (2 B. L. R., 306), the question of dower of a widow in all its details and her position as regards the heirs of her husband, was so fully considered by Macpherson, J., that it is important to give

Macpherson, J., discusses the question of dower of a widow and her position as regards the heirs of her husband.

a part of it here : "The plaintiff's suit was instituted more than three, but less than six, years after the death of Hakimum ; and the question is whether when the heirs of a woman who dies in her husband's lifetime sue the husband for her dower which was mowajjal, their suit must not be brought within three years of the origin of their cause of action, *viz.*, the death of the woman. On the one hand it is contended that the right to deferred dower arises solely from the husband's contract to pay it, and that the suit is a simple suit for the breach of a contract within the meaning of clauses 9 and 10 of section 1 of Act XIV of 1859 ; on the other hand, it is argued that the suit is not merely for a breach of contract, but is against the husband who holds the dower in his hands as trustee for his wife who (and her heirs after her death) has a lien on his property to the extent of the unpaid dower ; and it is urged that the period of limitation is either twelve years under clause 12 of section 1 of Act XIV of 1859, or, at any rate, six years under clause 16. But the plaintiff's claim, as regards this dower, is simply for a money debt. I can find nothing in the Mahomedan law to warrant the idea that where there is a contract to pay deferred dower, that contract of itself gives the woman a lien on her husband's property. In the case of Woomatull Fatima Begum *v.* Merun Munrissa Khanum (9 W. R., 318) Seton Karr, J., is said to have held that a widow has a lien for her dower whether 'prompt' or 'deferred.' But the Court so held merely with reference to the special case before it, which was one in which the widow having got possession of her husband's estate held it in lieu of her dower for many years before the heirs of the husband turned her out. The learned Judge held : 'These texts and cases seems to us to establish the position that the widow of a Musalman in possession of her husband's estate upon a claim of dower has a lien upon it as against those entitled as heirs, and is entitled to possession of it as against them till the claim of dower is satisfied.' The authorities show that one who has a claim for dower is exactly on the same footing as any other creditor, and ranks *pari passu* with ordinary creditors, having no special charge on the estate or preference of any sort, though dower like every other debt must be paid before the heirs are entitled to take anything. In Macnaughten's Precedents 'of Debts and Securities,' case 10, page 356, the question is put : 'A man

dies being indebted to his wife for her dower. Has she a lien on the personal property left by her husband in satisfaction of such dower in preference to the other heirs?' The answer is, that, if the other heirs pay her dower, she has no claim on her husband's property, except for her share as one of his heirs; but that if they do not pay her dower, she has a 'prior claim' against the estate, but this contains no indication of any opinion that the wife has a lien for her dower; it merely shows that as to which there is no doubt, *viz.*, that the dower, like any other debt, must be paid before the estate divisible among the heirs can be ascertained."

In case 32 of the Precedents of 'Marriage dower,' &c., 282, the question is asked: 'Is there any fixed period according to the Mahomedan law beyond which a claim of debt cannot be preferred?' And is a debt of dower considered in the same light as other debts; or are there any peculiarities attending it?' The reply is as follows: 'There is no fixed period beyond which payment of dower cannot be claimed, and a claim of dower is considered in the same light as other claims, which cannot be defeated without satisfaction by the debtor or relinquishment by the creditor as is laid down in the Kyfiah. A debt of dower is viewed in the same light as any other debt which has been contracted by a stranger, and the claim of payment cannot be defeated until the debtor liquidate it, or the creditor relinquish his claim. So also in the Fajuli Imadeyar: Payment of a wife's dower is incumbent on the husband in like manner as the payment of his other debts, and, until satisfaction is made, the estate cannot be distributed among his heirs."

"In case 23, page 274, it is expressly said in one of the answers to a question put: 'The law makes no distinction between a claim of dower and other debt; no preference is given to one description of claim over another, and a *pro rata* distribution must be made with respect to all."

"In case 24, p. 275, the question being whether the whole of the property, real and personal, of the husband being absorbed by the debt (dower), the property belonged of right to the widow, or was to be distributed among the heirs generally; the answer is: 'It has been proved by the testimony of three competent witnesses, that the debt due

to the defendant from her deceased husband on account of dower, amounted to ten thousand gold mohurs, and twenty-five thousand rupees, and a debt legally proved cannot be satisfied, but by compromise or liquidation. So long as the debtor lives, he is responsible in person, and, on his death, his property is answerable; but there is this distinction between money and other property in cases of dower, namely, that the widow is at liberty to take the former description of property over which she has absolute power; but as to other property, she is entitled to a lien on it as security for the debt, and it does not become her property absolutely without the consent of the heirs of a judicial decree. Where the debt is large and the estate small, the former necessarily absorbs the latter in spite of any objection urged by the heirs, who, until they pay the debt, have no legal claim against the creditor in possession to deliver up the estate. Here, no doubt, there is the expression she has a lien.' But it is evident that the word is used merely with reference to questions as to the distribution of the estate, and that it is not mentioned in any degree to lay down that a woman has a lien on her husband's estate in the ordinary and legal sense of the term lien. It is not intended to say anything more than that the widow has a right to be paid her dower before the heir takes anything for himself."

"In the case of Shahzadi Mahomed Faiz *v.* Shahzadi Oomdali Begum (6 W. R, 111), it is said in general terms that a 'Mahomedan wife's dower, even though it is in the hands of her husband, is considered to be her estate held by him, in trust for his wife, and, on her death becomes divisible among her heirs. The Limitation law applicable to a suit by those heirs is not that relating to suits on contracts, but that relating to suits to recover inheritance. The suit is not founded on the contract but in the withholding of the widow's estate from the heirs. In that case the Lower Court (whose judgment was upheld) was of opinion that as the suit was a suit to recover by right of inheritance the estate of the deceased wife, it could not be deemed a suit founded on contract. What the precise facts were does not clearly appear; nor does the meagre report, with which we are furnished, give any indication of the matter having been argued or discussed, and the decision is, therefore, of little value as a precedent. But it is wholly unnecessary for me to con-

sider what is the law of limitation applicable to a case in which the wife's dower is in the hands of the husband, because, in the present instance, the whole dower being deferred, and not having become due until the wife's death, there is no ground for saying that it is 'in the hands of her husband, and that, therefore, he is to be deemed a trustee any more than there is ground for saying that every debt, which is not paid on due date, remains in the hands of the debtor, who therefore is a trustee for his creditor.' The case of the widow, who, after her hushand's death, claims her dower as against the husband's heirs is very different from that of the heirs of the wife, who claim her mowajjal dower as against the surviving husband."

"On the whole, I have no doubt whatever that, according to Mahomedan law, when the heirs of a Mahomedan woman claim from her husband dower which was mowajjal or deferred, and not due or payable until her death, their claim is a simple money claim, founded solely upon the contract entered into by the husband, and that the rule of limitation applicable is that contained in clauses 9 and 10 of section 1, Act XIV of 1859. And I think that the present suit not having been instituted till more than three years had elapsed from the death of the wife is barred so far as the claim for dower is concerned."

Three years are the period of limitation in respect of deferred dowers from the death of the wife or dissolution of marriage.

Thus the period of limitation, in respect of deferred dowers, is three years from the time of the death of the wife or dissolution of marriage. Macpherson, J., it will be seen, draws a distinction between a claim by the wife and a claim by the heirs of the wife in respect of deferred dowers. The limitation in respect of prompt dowers, it has already been stated, is 12 years—*vide* Hossein-oodden Chowdry *v.* Tozennissa Khatoon (W.R., 1864, p. 199); and the Privy Council, in Ameroonnissa *v.* Morad-oonnissa (6 Moore's I. A., 211), has, by its authority, settled the point. There having been a clause in the deed of dower that it would be due 'on being demanded by my wedded wife,' it was contended that 12 years had expired in 1830, during the lifetime of the husband, and no demand was made, and the case is barred. Lord Justice Knight Bruce observed: "Upon this point a very great difficulty arises. It was never pleaded in the orginal proceedings of the plaintiff before the Sudder Ameen, the objection was only taken in the Sadr Dewani Court; and considering that it is an objection by the plaintiff against the defendant, that might perhaps

be a ground for refusing to entertain it. Now section 14 of the Regulation in question prohibits the Civil Courts from hearing or determining any suit whatever, 'if the cause of action shall have arisen twelve years before any suit shall have been commenced on account of it; unless the complainant can show by clear and positive proof that he had demanded the money or matter in question, and that the defendant had admitted the truth of the demand or promised to pay the money; or that he directly preferred his claim within the period for the matters in dispute to a Court of competent jurisdiction to try the demand, and shall assign satisfactory reasons to the Court why he should not proceed in the suit; or shall prove, that either from minority, or other good and sufficient cause, he had been prevented from obtaining redress.' This may probably be a case fit to be dealt with under the concluding part of this Regulation; there may be such 'good and sufficient cause,' but their Lordships do not desire to put their decision on that point. The terms of the deed are 'When demanded by my wedded wife.' In this country various cases have arisen with regard to obligations payable on demand, a promissory note not payable on demand is payable immediately. It is important, however, in some cases of negotiable securities, that the demand be made within a reasonable time; in other cases that the demand should be made immediately, and some without any demand at all. Carter *v.* Ring (3 Camp., 459), Gibbs *v.* Southson (5 Bary, Ap., 917), Simpson *v.* Routh (2 Bary., C. R., 682). In the latter case, Mr. Justice Littledale lays it down that in the case of a bond with a penalty to pay a certain sum on demand an express demand must be made before the action can be maintained. So in an action on a promise to pay a collateral sum on request. These authorities show that there may be cases where an action would not lie, except where a request or demand is made, and others where such demand is not necessary. It is quite unnecessary that there should be any demand here. The deed of dower or settlement was by the husband in favour of his wife, and the intention of the parties was that the wife was to have as a dowry the sum of Rs. 46,000; and it is important to consider how inconvenient it would be if a married woman was obliged to bring an action against her husband upon such an instrument; it would be full of danger to the happiness of married life, and we

think upon the true construction of this settlement she had a right of suit without a previous demand, and that she was not obliged to sue her husband immediately or in his lifetime. Their Lordships are of opinion that the Regulation does not apply as a bar to her claim, and that such defence altogether fails."

As regards the dower itself, the lowest figure it can be fixed at, is ten dirms, equal to six shillings and eight pence, but there is no limit to its maximum. In Sugra Bibi *v.* Masuma Bibi, (I. L. R., 3 All., 573) it was held, that a Mahomedan widow was entitled to the whole of her dower which her deceased husband had on marriage agreed to give her whatever it might amount to, and whether or not her husband had not the means to pay it when he married, or had not left assets sufficient to pay the dower debt. Stuart, C.J., in a very elaborate and learned judgment dissented from the rest of the Court. He observed: This is one of those extraordinary and embarrassing cases which the Mahomedan law offers as puzzles to the European mind. The plaintiff appellant, is a pauper, and as such she sues to recover no less a sum than Rs. 51,000 from the estate of her deceased husband, although that estate it was well known when the suit was brought amounted only to something between rupees two and three thousand. Now, in any system of law, appealing to one's sense of justice, and claiming in that respect, I do not say respectful, but intelligible acceptance among rational beings, one would suppose that, as regards the two sums I have named, a Court of law might be permitted to exercise a discretion by means of which the widow's claims might be reduced to the possibilities of the case. But it would appear that we are not so to escape from a hopeless and helpless dilemma; for we are told that we must either give this pauper plaintiff Rs. 51,000, or Fatema's portion of 10 dirms amounting to Rs. 107. There is, it seems, no middle course, we are not even to substitute for her Rs. 51,000, the whole of the husband's estate of two to three thousand rupees, much less to apportion her such a sum as, under such circumstances, European widows are obliged to be content with. Such a case appears to be beyond the reach of intellectual apprehension, the suggested law is visionary, and the facts are of a somewhat intangible character.

There is no limit to the maximum of a dower.

Stuart, C.J., expresses his opinion.

But as to the facts they appear to be these: The parties and their families were, and are, Shias. The plaintiff

was married to her husband, Tasaduck Hosain, on the 7th May 1843, and the marriage subsisted until the 26th July 1874, when Tasaduck Hosain died. At the time of his marriage with the plaintiff he settled upon her—according, it is said, to the custom of the family—a dower of Rs. 51,000, although at the time he possessed no independent means of his own, and had even then not been admitted as a pleader, although he afterwards appears to have practised in that professional position with some little success. What was the exact extent and value of the property he left at his death does not very clearly appear. One witness states that his profits were between four or five hundred rupees a year, and it is not unlikely that by means of professional savings and property inherited from his father, who, it is stated, practised as a mooktear, Tasaduck Hosain may have left behind him some two or three thousand rupees. It is, however, unnecessary to consider these and other figures of a similar kind, for the rule of the Mahomedan law, which we are asked to recognise and administer in this case, is one that puts the case quite beyond the limits of arithmetic in any aspect. Here is a case in which a woman, herself a pauper, seeks to recover dower to the extent of Rs. 51,000, although when this settlement of dower was supposed to be made, the husband, the settler, had not a rupee in the world to call his own. Nevertheless, the claim is stated to be justified by the Mahomedan law among the Shias, which, it is said, places no limit to the maximum of dower; no matter what the extent of the husband's estate may or may not be, or whether he had any estate at all. Now even if such were really and undoubtedly Mahomedan law among Shias, I trust I may be pardoned if I hesitate to admit that it would be reasonable to expect the Judges of a High Court to administer such a law. But although it was strongly urged at the hearing that such was unquestionably sound Mahomedan law, I have not for myself been able to discover any rule of the kind so absolutely laid down in any recognised authority, whether Shia or Sunni. In Baillie's well-known Digest of Mahomedan law, published in 1865, dower is said to be 'incumbent' on a husband; but how can it be incumbent on him, that is, imposed on him as a duty and obligation, if the thing to be done is an impossibility, and that it relates to money and property which have no existence, a state of things

which, by the way, that author himself recognises when he expounds that 'when something is mentioned as dower, which is not in existence at the time—as, for instance, the future produce of certain trees, or of certain land, or the gains of a slave—the assignment is bad, and the woman is entitled to her proper dower; this 'proper dower' being explained to be dower appropriate to the wife's family and social position." But it is further stated in the same work that 'dower is unlimited in amount,' but it is not said that it is unlimited irrespective of the actual extent and value of the husband's property. On the other hand, I find it laid down in a judgment of the Calcutta Sadr Dewani Adalat, Vol. 1, page 277, that anything possessing a legal value may be given in dower, that is, of course, a legal value at the time of marriage and settlement. Did the Rs. 51,000, in the present case, possess at that time, or did it ever possess, and does it possess now a legal value? Then, in another ruling of the same Court, page 267 of the same volume, it is laid down that the amount of dower is recoverable from the real and personal property left by the husband in preference to the claims of heirs, a ruling which appears to me to disparage and discredit such a dower claim as this. Again in the Tagore Law Lectures, 1873, page 348, it is asserted that property assigned as dower must be specified and in the husband's possession at the time of the assignment, which would otherwise be invalid; a proposition which does not appear to be intended to apply otherwise than to dower generally, whether prompt or deferred. Then, in regard to the Shias we are told by Mr. Baillie in his work on this system, published in 1869, page 68, that 'among them there are no bounds to the quantity or value of the dower which is left entirely to the will of the husband and wife, so long as it is capable of appreciation that is not totally destitute of value, like a single grain of wheat for example.' But this also is a text which fails to determine the question under consideration within appreciable or intelligible limits. I could understand the doctrine laid down, if it meant or could be understood to mean quantity or value of dower as a recoverable charge on the husband's estate. Then as to 'the will of the husband and wife,' such language is surely the idlest verbiage, unless it can be shown that there was something on which the husband and wife's will could be exercised upon. The

expression, however, that the dower must be 'capable of appreciation, *i. e.*, not totally destitute of value, like a single grain of wheat,' seems to bring the rule within one's powers of apprehension, although there appears to me to be no reason why the appreciation should not be equally applied to visionary or impossible dower, to the case, for example, of the husband not having himself a single grain of wheat, but yet settling a dower of Rs. 51,000 on his wife. The result in short of the authorities appears to be that, while some texts might possibly suggest the broad principle contended for in this appeal, it is nowhere laid down absolutely and expressly by any authotity on the Mahomedan law that dower, limited or unlimited, is to be regarded without regard to the husband's estate, and that unlimited dower may mean and be accepted, as dower of the value, it may be of ten times the value of that estate, so that her husband, at the time of his marriage, although not possessed of a single pice, might yet settle as dower upon his wife lakhs and crores of rupees! Now this is not too extravagant an ideal of the principle of Mahomedan law in question, for, as a proposition, it must to that full extent be maintained, supported and affirmed as Mahomedan law before the plaintiff-appellant can succeed in this case.

As to the custom on this subject among Shia families, I am not satisfied that such a custom has been satisfactorily proved in this case, but even if it were undoubtedly the practice among Shia ladies, I should hesitate to allow such practice to determine so serious a question. Nor can I recognise, as a sufficient reason, for such a practice that among the Shias a childless widow is precluded from taking any share in the estate of her deceased husband, for surely that is a difficulty that could be met by an express settlement, which would give the wife, at the time of the marriage, a reasonable share of, or, if you please, the whole of her husband's property. This doctrine in short contended for of unlimited dower infinitely transcends the necessity of the case as stated. But again in excuse of this alleged singular and anomalous rule as dower, it is suggested that it is intended to protect Mahomedan wives against the facility for divorce, which can be capriciously used against them by their husbands, seeing that dower takes effect from the wife's divorce or the husband's death. But this explanation I am altogether unable

to appreciate, for the consequences of dower might be fully guarded against by allowing the wife her proper dower or even such dower as may comprise the whole of the husband's then available estate. Again it has been said that the amount of the husband's estate, out of which the dower might have to be paid, could not be known at the time of the contract. But that does not appear to me to get rid of the difficulty, or, I had rather said, the preposterous and visionary absurdity of the alleged rule which has no foundation in any rational hope or expectation, but is solely referable to an idle and nebulous fiction, which, in the case of parties like those in appeal, could never be imagined to descend to the earth in the shape of actual cash or property. But it has also been urged that to allow a wife in the name of dower to carry off the whole of the husband's available estate, instead of a fixed sum, however large, might have the effect of defeating the rights of the heirs, or, in other words, might finally determine the inheritance of his property. My answer to this, however, that such a result entirely depends upon the extent of the husband's property, for, as in the present case, a dower might be named so large as hopelessly to absorb the whole property, leaving the heirs nothing, but the mere name of heirs. Altogether I must decline to accept such a view of Mahomedan law, and unless compelled by the supreme ruling of Her Majesty's Privy Council, I must decline to administer or apply it in any case.

There has as yet been no ruling by the Judicial Committee of the Privy Council, nor by any of the other High Courts, approving and following the opinion of the Full Bench of the Allahabad Court. But as regards the payment of prompt dower, the current of rulings—until the Full Bench decision of the Allahabad High Court in Abdul Kadir *v.* Solima (I. L. R., 8 All., 149)—was that, if a husband sued to recover his wife—it did not signify if one was a Shia and the other a Sunni—or for the restitution of conjugal rights, even after both have already cohabited with consent since their marriage, and the wife refused to cohabit with him until her dower was paid, that such a suit was not maintainable.—*Vide* Edan *v.* Mazhar Hassain (I. L. R., 1 All., 483), and Nusrat Hassain *v.* Hamidan (I. L. R., 4 All., 205), and Willyat Hassain *v.* Allah Rakhi (I. L. R., 2 All., 831). The Full Bench fully reviewed these decisions and the authorities upon which

they were based, and arrived at the conclusion adopted and followed by the Madras High Court in Kunhi *v.* Moidin (I. L. R., 11 Mad., 327), that the payment of dower could not be constituted a condition precedent to the restitution of conjugal rights, or to the recovery of a wife by her husband. As the doctrines laid down by the Full Bench in the case of Abdul Kadir *v.* Salima (I. L. R., 8 All., 149) are of considerable importance, the judgment is here quoted. The question raised, by this reference is one not free from difficulty, arising partly from the manner in which the subject has been dealt with in the text books of Mahomedan law, and partly from the *ratio decedendi* adopted on some of the reported cases which I shall presently refer to and discuss.

Payment of dower is not a condition precedent to restitution of conjugal rights.

The plaintiff has preferred this second appeal impugning the view of the Mahomedan law taken by the Lower Appellate Court, and the question raised by the contention of the parties is one the decision of which will affect the domestic family life of the Mahomedan community. It therefore falls essentially within the purview of section 24 of the Bengal Civil Courts Act (VI of 1871), which binds us to adhere to the rules of Mahomedan law in determining such questions. The clause is a reproduction of section 15, Bengal Regulation IV of 1793; referring to that clause the Lords of the Privy Council in Moonshee Buzloor Raheem *v.* Shumsoon-Nissa Begum (11 Moore's I. A., 551), which was a suit for restitution of conjugal rights by a Mahomedan against his wife, made certain observations which furnish the guiding principle upon which such cases should be determined. After quoting certain passages from the judgment of the learned Judges of the Calcutta High Court, their Lordships went on to say: "The passages just quoted, is understood in their literal sense, imply that cases of this kind are to be decided without reference to the Mahomedan law, but according to what is termed 'equity and good conscience,' *i.e.*, according to that which the Judge may think, the principles of natural justice require to be done in the particular case. Their Lordships most emphatically dissent from that conclusion. It is in their opinion opposed to the whole policy of the law in British India, and they can conceive nothing more likely to give just alarm to the Mahomedan community than to learn by a judicial decision that their law, the application of which has been thus secured to them, is to be overridden upon a question which so materially con-

Privy Council holds Mahomedan law to govern cases between Mahomedans when not in plain conflict with the general municipal law.

cerns their domestic relations. The Judges were not dealing with a case, in which the Mahomedan law was in plain conflict with the general municipal law, or with the requirements of a more advanced and civilized society, as, for instance, if a Musalman had insisted on the right to slay his wife taken in adultery. In the reports of our Ecclesiastical Courts, there is no lack of cases in which a humane man, judging according to his own senses of what is just and fair without reference to positive law, would let the wife go free; and yet the proof falling short of legal cruelty, the Judge has felt constrained to order her to return to her husband."—Pp. 614-615.

I have quoted the passage at such length, because it has come within my notice that vague and variable notions of the rule of 'justice, equity, and good conscience' are sometimes regarded as affecting the administration of native laws in such matters to a degree not justified or necessitated by the general municipal law applicable to all persons, irrespective of their race or religion, and, applying the observations of the Lords of the Privy Council to the present case, I have no doubt that this case must be decided according to the rules of Mahomedan law, the order of the Court, whatever it may be, being, of course, subject to such rules as the exigencies of the general municipal law may require.

In this view of the case, the reference cannot, in my opinion, be satisfactorily answered without considering: *first*, the exact nature and effect of marriage under the Mahomedan law upon the contracting parties; *secondly*, the exact nature of the liabilities of the husband to pay the dower; *thirdly*, the matrimonial rights of the parties as to conjugal cohabitation; and, *fourthly*, the rules of the general law as to the decree of Court in such cases. But as preliminary to the consideration of these various points, I may observe that a suit for restitution of conjugal rights is a suit 'of a civil nature,' within the meaning of section 11 of the Civil Procedure Code, and this view is supported by the terms of Articles 34 and 35, Schedule II, Limitation Act (XV of 1877), and the provisions of section 260 of the Code itself. To quote the language of the Privy Council in the case already referred to "upon authority, then as well as principle, their Lordships have no doubt that the Musalman husband may institute a suit in the Civil Courts of India for a declaration of his right to the possession

A suit for restitution of conjugal rights is a suit 'of a civil nature.' —*Vide* section 11, C.P.C.

of his wife and for a sentence that she return to cohabitation ; and that that suit must be determined according to the principles of the Mahomedan law."

What then are the rules of the Mamomedan law upon the first three points which I have already enumerated? I will deal with each of those points separately, and, in doing so, will refer to the important rulings which constitutes the case law upon the subject.

Marriage is a civil contract explained.

In dealing with the first point, I adopt the language employed in the Tagore Law Lectures (1873) in saying that "marriage, among Mahomedans, is not a sacrament, but purely a civil contract, and though it is solemnised generally with recitation of certain verses from the Koran, yet the Mahomedan law does not positively prescribe any service peculiar to the occasion, That it is a civil contract is manifest from the various ways and circumstances in and under which marriages are contracted or presumed to have been contracted. And though a civil contract, it is not positively prescribed to be reduced to writing, but the validity and operation of the whole are made to depend upon the declaration or proposal of the one, and the acceptance or consent of the other of the contracting parties, or of their natural and legal guardians before competent and sufficient witnesses; as also upon the restrictions imposed, and certain of the conditions required to be abided by according to the peculiarity of the case."—(p. 291). That this is an accurate summary of the Mahomedan law is shown by the best authorities, and Mr. Baillee, at page 4 of his Digest, relying upon the texts of the Kanz, the Kifyah, and the Inayah, has well summarized the law: "Marriage is a contract which has for its design or object the right of enjoyment and the procreation of children. But it was also instituted for the solace of life, and is one of the prime or original necessities of man. It is therefore lawful in extreme old age, after hope of offspring has ceased, and in the last or death illness. The pillars of marriage as of other contracts are Ejab-o-Kabool or declaration and acceptance. The first speech, from whichever side it may proceed, is the declaration, and the other the acceptance." The Hedaya lays down the same rule as to the constitution of the marriage contract, and Mr. Hamilton has rightly translated the original text: "Marriage is contracted, that is to say, is effected and legally confirmed—by means

of declaration and consent both expressed in the preterite." These authorities leave no doubt as to what constitutes marriage in law, and it follows that the moment the legal contract is established, consequences flow from it naturally and imperatively as provided by the Mahomedan law. I have said enough as to the nature of the contract of marriage, and, in describing its necessary legal effects, I cannot do better than resort to the original text of the Futawa Alumgeri which Mr. Baillee has translated in the form of paraphrase at page 13 of his Digest, but which I shall translate here literally, adopting Mr. Baillee's phraseology as far as possible: "The legal effects of marriage are that it legalizes the enjoyment of either of them (husband and wife) with the other in the manner, which in this matter, is permitted by that law," and it subjects the wife to the power of restraint, that is, she becomes prohibited from going out and appearing in public; it renders her dower, maintenance, and raiment obligatory on him; and establishes on both sides the prohibitions of affinity and the rights of inheritance, and the obligatoriness of justness between the wives of their rights, and on her it imposses submission to him when summoned to the couch; and confers on him the power of correction when she is disobedient or rebellious, and enjoins upon him associating familiarly with her with kindness and courtesy. It renders unlawful the conjunction of two sisters (as wives), and of those who fall under the same category with reference to prohibitions of the marriage law.

Legal effects of marriage.

That this conception of the mutual rights and oligations arising from marriage between the husband and wife bears in all main features close similarity to the Roman law, and other European systems which are derived from that law, cannot, in my opinion, be doubted; and even regarding the power of correction, the English law seems to resemble the Mahomedan, for even under the former "the old authorities say the husband may beat his wife;" and if, in modern times, the rigour of the law has been mitigated, it is because in England, as in this country, the criminal law has happily stepped in to give to the wife personal security which the matrimonial law does not. To use the language of the laws of the Privy Council in the case already cited: "The Mahomedan law, on a question of what is legal cruelty between man and wife,

would probably not differ materially from our own," of which one of the most recent expositions is the following: "There must be actual violence of such a character as to endanger personal health or safety, or there must be a reasonable apprehension of it." "The Court," as Lord Stowel said, in Evans *v.* Evans, "has never been driven off this ground."

Now the legal effects of marrriage, as enumerated in the Fatawa-i-Alumgeri, come into operation as soon as the contract of marriage is completed by proposal and acceptance; their initiation is simultaneous, and there is no authority in the Mahomedan law for the proposition that any or all of them are dependent upon any condition precedent as to the payment of dower by the husband to the wife. This leads me to the consideration of the second point upon which the greatest stress has been laid in the argument at the bar. It was contended by the learned pleader for the respondent that, under the Mahomedan law, the wife's dower is regarded as nothing more or less than the price for connubial intercourse, and that the right of cohabitation does not, therefore, accrue to the husband till he has paid the dower to the wife. The argument so urged renders it convenient to deal with the third point along with the second.

I have already shown that, under the Mahomedan law, the right of cohabitation comes into existence at the same time and by reason of the same incident of law as the right of dower. That the latter right may modify and affect the former cannot be doubted; how it effects and modifies it is the main subject of this reference. Dower, under the Mahomedan law, is a sum of money or other property promised by the husband to be paid or delivered to the wife in consideration of the marriage, and, even where no dower is expressly fixed or mentioned at the marriage ceremony, the law confers the right of dower upon the wife as a necessary effect of marriage. To use the language of the Hedaya, "the payment of dower is enjoined by the law merely as a token of respect for its object (the woman), wherefore the mention of it is not absolutely essential to the validity of a marriage, and for the same reason a marriage is also valid, although the man were to engage in the contract on the special condition that there should be no dower"—(Hamilton's Hedaya by Gradv. p. 44). Even after the marriage the amount of

Dower explained.

dower may be increased by the husband during coverture —(Baillee's Digest, p. 111); and indeed in this, as in some other respects, the dower of the Mahomedan law bears a strong resemblance to the *donatio propter nuptias* of the Romans which has subsisted in the English law under the name of marriage settlement. In this sense and in no other can dower, under the Mahomedan law, be regarded as the consideration for the connubial intercourse, and if the authors of the Arabic text books of Mahomedan law have compared it to price in the contract of sale, it is simply because marriage is a civil contract under that law and sale is the typical contract which Mahomedan jurists are accustomed to refer to in illustrating the incidents of other contracts by analogy. Such being the nature of the dower, the rules which regulate its payment are necessarily affected by the position of a married woman under the Mahomedan law. Under that law marriage does not make her property the property of her husband, nor does coverture impose any disability upon her as to freedom of contract. The marriage contract is easily dissoluble, and the freedom of divorce and the rule of polygamy place a power in the hand of the husband, which the lawgiver intended to restrain by rendering the rules as to payments of dower stringent upon the husband. No limit as to the amount of dower has been imposed, and it may either be prompt, that is, immediately payable upon demand, or deferred, that is, payable upon the dissolution of marriage, whether by death or divorce. The dower may also be partly prompt and partly deferred; but when, at the time of the marriage ceremony, no specification in this respect is made, the whole dower is presumed to be prompt and due on demand—See Mirja Bedar Bukht Mahomed Ali Bahadoor *v.* Mirja Khassum Bukht Yaha Ali Khan Bahador (2 Suth.'s P. C. J., 823). The question when such dower becomes payable, was discussed by the Lords of the Privy Council in Muleka *v.* Jumeela (L. R., Sup. Vol., I. A., 135; 11 B. L. R., 375), and in Ranee Khajooroonnissa *v.* Ranee Rysoonnissa, (L. R., 2 I. A., 255, and 5 B. L. R., 84), and in the former of these cases their Lordships approved the rule laid down by the Sadr Dewani Adalut of these Provinces in Nawab Bahadoor Jung Khan *v.* Uzeez Begum (N.-W. P., S. D. A. Ref., 1843-46, p. 180), wherein the Court considered "the nature of the exigible dower to be that of a debt payable generally on demand

When there is no specification, dower is prompt and due on demand.

after the date of the contract which forms the basis of obligations, and payable at any period during the life of the husband, in which that demand shall be actually made, and, therefore, until the demand be actually made and refused, the ground of an action at law cannot properly be sued to have arisen." These rulings leave no doubt that, although prompt dower may he demanded at any time after the marriage, the wife is under no obligation to make such demand at any specified time during coverture, and that it is only upon making such demand that it becomes payable in the sense of performance being rendered in fulfilment of an obligation.

The right of dower confers another right upon the Mahomedan wife, and the nature of this second right is described in the Hedya in a passage on which the learned pleader for the respondent has relied for his contention. The passage is to be found in Grady's edition of Hamilton's Hedaya, at page 54, but as the translation is not sufficiently close, and is moreover interpolated with paraphrases, I translate the original text here literally, since much depends upon the exact meaning of the passage: "It is the wife's right that she may deny herself to her husband until she receive the dower, and she may prevent him from taking her away (that is, travelling with her), so that her right in the return may be fixed in the same manner as that of the husband in the object of the return and become like sale. And it is not for the husband that he may prevent her travelling or going out of his house and visiting her friends until he has paid the whole exigible dower, because the right of restraint is for securing the fulfilment of his right to the rightful person, and he has not the right to securing fulfilment before rendering fulfilment himself, and if the whole dower is deferred, it is not for her to deny herself, because of her having dropped her right by deferring it as in sale." And in this matter Abu Uusuf holds the contrary opinion. And if the husband has retired with her, the same would be the answer according to Abu Hanifa, but the two disciples have said she has not the right to deny herself, and the difference of opinion subsists where there is retirement with her consent; but if she was forced, or an infant or insane, her right of denying herself does not drop according to the unanimous opinion of our doctors.

Another passage to be found in the Dorrul Muktar has also been cited by the learned pleader for the respondents, and I translate it here before considering the exact effect of those authorities upon the present case: It is the wife's right to prevent the husband from connubial intercourse, and that which is implied therein, and from journeying with her even though after connubial intercourse and retirement to which she has consented because all connubial intercourse has been contracted with her, and, the rendering of some does not imperatively require the rendering of the rest. This right is for the purpose of obtaining what has been stated as prompt dower, whether wholly or partly.

Relying upon these passages, the learned pleader for the respondents contends that the right of cohabitation does not accrue to the husband at all, until he has paid the prompt dower, and that inasmuch as the plaintiff in the present case had not paid the dower to his wife, defendant No. 2, her refusal to cohabit with him did not afford a cause of action for a suit for restitution of conjugal rights. In support of this contention, certain reported cases have been cited, which I wish to notice here: In Sheikh Abdool Shukoar *v.* Roheemoon-nissa (N.-W. P., H. C. Rep., 1874, p. 94), it was held that a suit will not lie by a Mahomedan to enforce the return of his wife to his house, even after consummation with consent, until her prompt dower has been paid. The rule was followed to its fullest extent in Wilyyat Husain *v.* Allah Rakhi (I. L. R., 2 All., 831), and in Nasrat Husain *v.* Hamidan (I. L. R., 3 All., 205), and in the former of these cases, it was held that a Mahomedan cannot maintain a suit against his wife for restitution of conjugal rights even after such consummation with consent as is proved by cohabitation for five years, where the wife's dower is prompt, and has not been paid. In Eidian *v.* Mazhar Hosain (I. L. R., 1 All., 483), where the plaintiff prayed for restitution of conjugal rights, and the defendant, in her written statement, having claimed dower, the Lower Appellate Court, setting aside the decree of the first Court, decreed the claims conditional upon payment of prompt dower. This Court upheld the decree by a judgment which is silent upon the specific question, whether the dower not having been paid before suit, the plaintiff had the right to come into Court with such a prayer. In Nazir

Khan *v.* Umrao, (Weekly Notes, 1882, p. 96), a Division Bench of this Court upheld the decree of the Lower Appellate Court, which had dismissed the suit *in toto*, reversing the decree of the Court of first instance which had passed a decree in favour of the plaintiff (husband) conditional upon his paying the prompt dower. The ruling is in full accord with the *ratio decedendi* adopted in the case of Sheikh Abdool Shukoar *v.* Roheemoonnissa (N.-W. P., H. C. R., 1874, p. 94), which appears to be the leading case upon the point under consideration, so far as this Court is concerned. No ruling of any other High Court was cited at the hearing in support of the respondent's contention, except the case of Jaun Bibee *v.* Sheikh Munshee Beparee (3 W. R. C. P., 98), which does not appear to me to be decisive on either side of the contentions raised in the case. The ruling of this Court, in Sheikh Abdool Shukoar *v.* Rokheemoonnissa, (N.-W. P., H. C. R., 1874, p. 94), is therefore the only leading case upon the subject, but with due deference I am unable to agree in the rule thus laid down.

The texts cited by the learned pleader for the respondents undoubtedly show what is a well-recognised rule of the Mahomedan law of marriage, that the marriage contract having been completed, and its legal effects having been established, the right of claiming prompt dower comes into existence in favour of the wife, and that she can use such a claim as a means of obtaining payment of the dower, and as a defence for resisting a claim for cohabitation on the part of the husband against her consent; and when I say this, I put the case in favour of the respondents in its strongest possible light, for even upon this question, in cases where cohabitation has taken place, the conflict of authority is too great to render it an undoubted proposition of the Mahomedan law. The learned Judges, in the case to which I have just referred, seem to have appreciated this difficulty, but preferred to adopt the view of Imam Abu Hanifa in preference to the concurrent opinions of his two eminent disciples—Kazi Abu Yusuf and Imam Mahomed—notwithstanding the fact that a passage was cited to them from the Dorrul Mokhtar in support of the view that where, in such a point, there is a difference between Abu Hanifa and his disciples, the opinion of the latter should prevail." Both Imam Abu Hanifa and Imam

Mahomed were purely speculative jurisconsults who spent their lives in extracting legal principles from the traditional sayings of the Prophet; but Kazi Abu Yusuf, whilst equally versed in traditional lore, had, in his position as Chief Justice of the Empire of the Khalifa Haroun-ul-Rashed, the advantage of applying legal principles to the actual conditions of human life, and his dicta (especially in temporal matters) command such high respect in the interpretation of Mahomedan law, that whenever either Imam Abu Hanifa or Imam Mahomed agrees with him, his opinion is accepted by a well-understood rule of construction. But before proceeding any further, I wish to quote a passage from the celebrated Futwa Qazi Khan, a text book as high in authority as the Durrul Muktar :—

"A wife, having surrendered herself to her husband before the fulfilment (*i.e.*, payment) of dower, subsequently denies herself (to him) for securing fulfilment of the dower, she has this right in the opinion of Abu Hanifa, but Abu Yusuf and Imam Mahomed maintain that she has not the right of prohibiting him from connubial intercourse, and doubts have arisen in regard to their opinions as to the power of preventing her from journeying. And, according to the opinion of Abul Qasim Assaffar, it is her right that she may prevent him from taking her on a journey." But the best summary to the law is to be found in the latest authoritative work on the Mahomedan law.—The Fatawa Alumgiri—in a passage which Mr. Baillie has translated somewhat briefly at pages 124-25 of his celebrated Digest. The passage being the most complete exposition of the law upon the subject, I translate it here myself as closely as possible from the original text itself :—

"In all places, when the husband has had connubial intercourse with her, or validly retired with her, the whole dower is confirmed. If she intends to deny herself to him for securing fulfilment (*i.e.*, payment) of her exigible dower, it is her right to do so according to Imam Abu Hanifa; but this is opposed to the opinions of his two disciples (Kazi Abu Yusuf and Imam Mahomed), and in like manner the husband cannot prevent her from going out or travelling, or going on a voluntary pilgrimage according to Abu Hanifa, except when she goes out in an indecent manner." As to her right to all this, before

Dower is confirmed after husband's valid retirement or connubial intercourse with his wife.

she has surrendered herself (consummation), there is unanimity of opinion as there is in the rule, *viz.*, when the husband has had connubial intercourse with her whilst she is a minor, or has been forted or insane, her father might refuse to surrender her until the payment of her prompt dower. So in the Itabuyyah: And if the husband has had connubial intercourse with her, or retired with her with her consent, it is her right to refuse herself to go on a journey until payment of her whole dower, according to the written engagement, or the prompt part of it, according to the custom of our country. This view is according to Abu Hanifa, but his two disciples maintain that she has no such right, and the Shaik-ul-Imam, the jurisconsult, and the pious Abul Qasim Assaffar, were accustomed to decide according to Abu Hanifa, so far as going on a journey is concerned; but in the matter of refusing herself he used to decide according to the opinions of the two disciples, and several of our learned doctors have approved of this distinction.

Having cited these various passages from text-books of the highest authority upon the Mahomedan law, I proceed to consider the exact effect they have upon the present case. And here I have to point out that, in this case, the Court of first instance found that no demand for dower had been made by the wife (defendant No. 2) before the institution of the suit, and that she had already cohabited with her husband, the plantiff; and there is no question that she had attained majority when she was married. These matters were not dealt with by the Lower Appellate Court, which decided the case upon the preliminary point, and they may be taken to be so for the purposes of this reference.

Right of dower and right of cohabitation arise simultaneously.

I have already said enough to show that the right of dower does not precede the right of cohabitation, which the contract of marriage necessarily involves, but that the two rights come into existence simultaneously and by reason of the same incident of law. The right of the wife to claim maintenance from her husband, arises in the same manner as one of the legal effects of marriage, and to say that any of those effects are not simultaneously created by the contract of marriage amounts, in my opinion, to a violation of the fundamental notions of jurisprudence regarding correlative rights and obligations arising from one and the same perfected legal relation.

Indeed, so far as the question now under consideration is concerned, the rules of Mahomedan law leave no doubt when that system of law is consulted as a whole, and not upon isolated points. The fact of the marriage gives birth to the right of cohabitation not only in favour of the husband but also in favour of the wife, and to say that the payment of dower is a condition precedent to the vesture of the right, is to hold that a relationship of which the rights and obligations are essentially correlative, may come into existence at one time for one party, and another time for the other party. If the payment of dower were a condition precedent to the initiation of the right of cohabitation, a Mahomedan wife having quarrelled with her husband could not sue him for cohabitation till she had in a previous litigation sued, and, obtaining a decree, realized her dower, because, *ex-hypothesi*, her right of cohabitation with her husband would be dependent for its coming into existence upon the payment of her dower. Yet such is the logical result of the argument pressed upon us on behalf of the respondents. Such, however, is not the rule of the Mahomedan law, and even the passages, which have been cited on behalf of the respondents, do not support any such proposition. The passage in the Hedaya, which I have closely translated from the original text, no doubt entitles the wife to resist the claim of the husband for cohabitation with her by pleading the non-payment of her prompt dower, but it proceeds essentially upon the assumption that his right, to put forward such a claim, is antecedent to the plea. In the passage itself he is called "the rightful person," and the impediment to the enforcement of his right of cohabitation with his wife is stated to be the non-payment of her prompt dower, a rule which, having been borrowed from the Mahomedan Law of Sale, is based simply upon the analogy of the lien which the vendor posseses upon the goods for payment of the price before delivery. The rule is simply analogical, and, giving to it its fullest scope, it falls far short of maintaining the proposition upon which the argument for the respondents rests. The passage from the Dorral Muktar, following the analogy of sale, even further expressly lays down that the right of the wife to resist the husband's claim for cohabitation is intended to be for the purpose of realising her prompt dower. The same is the effect of the passage which I have cited from the Fatawa Kazi Khan and

Payment of dower is not condition precedent to right of cohabitation.

the Fatawa Alumgeri, and the rule, as stated by the Mahomedan jurists, bears in the eye of jurisprudence the strongest possible analogy to the ordinary rule of the law of sale which has been best stated in section 95 of the Indian Contract Act (IX of 1872), namely, that "unless a contrary intention appears by the contract, a seller has a lien on sold goods as long as they remain in his possession, and the price or any part of it remains unpaid." The same is the principle upon which, in the law of sale, the right of stoppage *in transitu* is based, and the lien which the vendor has amounts to nothing more or less than the definition given by Grose, J., in Hammonds *v.* Barclay (2 East, 227,) that it is "a right in one man to retain that which is in his possession belonging to another till certain demands of him (the person in possession) are satisfied." But this lien essentially presumes the right of ownership in the vendee, and terminates as soon as delivery has taken place. I have followed up the analogy of sale so far, because nearly the whole argument of the learned pleader for the respondents proceeded upon the circumstance that, in the passages which he cited, marriage has been compared to sale, dower to the price, and surrender of the wife to the husband to delivery of goods in the law of sale.

But to return to the passages which I have quoted from the Fatawa Kazi Khan and the Fatawa Alumgeri, it is apparent that the sole object of the rule, which entitles the wife to resist cohabitation, is to enable her to secure payment of her prompt dower. And it is equally apparent from those passages that the opinion of Imam Abu Hanifa is contradicted not only by his two eminent disciples Kazi Abu Yusuf and Imam Mahommed, but also by Shaik Assaffar, so far as the question of cohabitation is concerned. Imam Abu Hanifa and his two disciples are known in the Hanifa School of Mahomedan law as "the three Masters," and I take it as a general rule of interpreting that law, that whenever there is a difference of opinion, the opinion of the two will prevail against the opinion of the three. Now bearing this in mind, it is clear that the two disciples of Imam Abu Hanifa, regarding the surrender of the wife to her husband as bearing analogy to delivery of goods on sale, held that the lien of the wife for her dower, as a plea for resisting cohabitation, ceased to exist after consummation. According to the ordinary rule of interpreting Mahomedan

law, I adopt the opinion of the two disciples as representing the majority of "the three Masters," and hold that, after consummation of marriage, non-payment of dower, even though exigible, cannot be pleaded in defence of an action for restitution of conjugal rights; the rule so laid down having, of course, no effect upon the right of the wife to claim her dower in a separate action.

After consummation of marriage non-payment of dower cannot be pleaded as a defence to an action for restitution of conjugal rights.

But the rule enunciated by me need not be applied in its fullest extent to the present case, because here, in the first place, it has not been found that the wife ever demanded her dower before the suit was filed, or that she declined to cohabit with her husband, the plaintiff, upon the ground that her dower had not been paid. She relied upon the allegations of divorce and cruelty, both of which were found by the Court of first instance to be untrue, and upon these findings I hold that she had no defence to the action. The plaintiff, as I have already shown, acquired, by the very fact of the marriage, the right of cohabitation; he was not bound to pay the dower before it was demanded, and upon the findings of the first Court the first intimation which he had of such demand was the written defence of his wife (defendant No. 2) in the course of this unfortunate litigation. And upon intimation of such a demand, he actually brought the money into Court and deposited it for payment to his wife, the defendant No. 2, as her dower. Under such circumstances, the view of the District Judge, which follows the rulings to which he has referred, simply amounts to saying that the plaintiff must institute another suit like the present for enforcing the same remedy. I have already said that the present suit, bearing in mind the conjugal rights created by the Mahomedan law, was not premature, and the view of the learned District Judge can only have the effect of circuity of action in contravention of the maxim that it is to the benefit of the public that there should be an end to litigation.

This leads me to the consideration of the fourth point formulated by me at the outset, namely, the general law, as to decrees in such cases. The question involves mixed considerations of substantive law and procedure, and the answer to it is fully furnished by the dicta of the Lords of the Privy Council in the case of Munshee Buzloor Rahim *v.* Shams-oon-nissa Begum (11 M. I. A., 551), to which reference has already been made. After giving a brief

sketch of the matrimonial contract, their Lordships went on to say: "The Mahomedan wife, as has been shown above, has rights which the Christian—or at least the English—wife has not against her husband. An Indian Court might well admit defences founded on the violation of those rights and either refuse its assistance to the husband altogether or grant it only upon terms of his securing the wife in the enjoyment of her personal safety and her other legal rights; or it might, on a sufficient case, exercise that jurisdiction which is attributed to the Kazi: ..... Enough has been said to show that, in their Lordships' opinion, the determination of any suit of this kind requires careful consideration of the Mahomedan law, as well as strict proof of the facts to which it is to be applied. (p. 612).

Abiding by this dictum, I have carefully considered the Mahomedan law as I have already stated, whilst the facts of the case must, for the purposes of this reference, be taken to be those found by the Court of first instance. And upon this state of things I am of opinion that the decree passed by the Court of first instance was right and proper. The question as to the form of decree in such cases, and the manner in which it may be executed, was discussed in a very learned judgment by Markby, J., in Gatha Ram Mistree *v.* Moohita Kochin Atteah Domoonee (14 B. L. R., 298), in which that learned Judge, after briefly reviewing the laws of other civilized countries, came to the conclusion that the Ecclesiastical Law of England was the only system which justified the view that a Court could enforce the continuous performance of conjugal duties by unlimited fine and imprisonment;" but the learned Judge declined to follow that law in Indian cases, and held that the provisions of section 200 of the old Civil Procedure Code (Act VIII of 1859) were not applicable to decrees for restitution of conjugal rights. The Legislature has, however, stepped in to remove doubts upon this point, and sections 259 and 260 leave no doubt as to the manner in which a decree for recovery of a wife or for restitution of conjugal rights can be enforced under the present Code. The case before Mr. Justice Markby was, however, one between Hindus; and all that he said in that case would not necessarily apply to a case between Mahomedans. Nor need the English law upon the subject

Markby, J., held Ecclesiastical Law of England did not apply to Indian cases.

be consulted, though I may observe that, judging by the ruling (Mr. Justice Coleridge) *in re* Cochrane (8 Dowling's P. C. 630), 4 Jur., 534, the rule of English law as to the husband's general power over the wife's personal liberty goes as far as any civilized law can go in the direction of subjecting the wife to the control of the husband. An account of that case is given by Mr. McQueen in his Treatise on the Rights and Liabilities of Husband and Wife, and it appears that the order of the Court in that case was peremptory: "Let her be restored to her husband." The rules of our law, however, necessitate no such course, and in passing decrees in suit for restitution of conjugal rights among Mahomedans, the *dictum* of Privy Council, already quoted, furnishes the guiding principle. Courts of Justice in India, in the exercise of their mixed jurisdiction as Courts of equity and law, are at full liberty to pass conditional decrees to suit the exigencies of each particular case, upon the principles which have been so well stated by Mr. Justice Story in his celebrated work on Equity Jurisprudence, 11th edition, sections 27 and 28. So I understand the principle upon which the observations of the Lords of the Privy Council, in the case to which I have so often referred, were based, and I may with advantage cite another passage from that judgment: "It seems to them clear that if cruelty in a degree rendering it unsafe for the wife to return to her husband's dominion were established, the Court might refuse to send her back. It may be, too, that gross failure by the husband of the performance of the obligations which the marriage contract imposes on him for the benefit of the wife might, if properly proved, afford good grounds for refusing the assistance of the Court. And as their Lordships have already intimated, there may be cases in which the Court would qualify its interference by imposing terms on her husband. But all these are questions to be carefully considered, and considered with some reference to Mahomedan law." (pp. 615, 616.)

In the case in which their Lordships made these various observations, the question of non-payment of dower, as a defence to the action, did not arise, nor do the facts of the case, as found in this report, show whether the dower was prompt or deferred, whether it had been demanded or not before institution of the suit, and, of course there was nothing in the way of deposit by the husband of the amount

of dower during the course of the trial in the Court of first instance. These are the distinguishing features of this case ; and if the distinction has any tendency to alter the principle, such tendency is entirely in favor of the plaintiff-appellant's case.

To return once more to the case of Sheikh Abdool Shakkoor *v.* Roheem-oon-Nissa (N.-W. P , H. C., R., 1874, p. 94), which is the leading case upon the subject, I have to observe with profound deference that the *ratio decedendi* adopted in that case seems to me to proceed upon a misconception of the rule of Mahomedan law as to the exact time when the right of mutual cohabitation vests in the married parties, and also as to the exact nature of the husband's liability to payment of dower, and the exact scope of the right which a Mahomedan wife possesses to plead non-payment of dower in defence of a suit by her husband for restitution of conjugal rights. It is one thing to say that such a defence may be set up under certain conditions ; it is a totally different thing to say that until the dower was paid, no cause of action could accrue to the plaintiff."

Suit for restitution of conjugal rights won lie on the refusal either of the wife or the husband to cohabit.

The payment of dower not being a condition precedent to the vesting of the right of cohabitation, a suit for restitution of conjugal rights, whether by the husband or the wife, would be maintainable upon refusal by the other to cohabit with him or her ; and in the case of a suit by the husband, the defence of payment of dower could, at its best, operate in modification of the decree for restitution of conjugal rights by rendering the enforcement of it conditional upon payment of so much of the dower as may be regarded to be prompt. Such was actually the form of the decree, which was upheld by this Court in Eidan *v.* Mazhor Hosain (I.L. R., All., 48), and a decree to the opposite effect was approved by another Bench of this Court in Nazir Khan *v.* Umrao (Weekly Notes, 1882, p. 96). Defences, which do not go to the root of the action, but only operate in modification of the decree, are well-known to our Courts, and the principles upon which they are based are recognised by Courts of Equity, both in England and in America, under the general category of compensation or lien when pleaded by the defendant in resistance or modification of the plaintiff's claim. I have already said enough with reference to the argument of the learned pleader for the respondents to introduce an analogical comparison between the contract of sale and the

contract of marriage under the Mahomedan law, and between the claim of a Mahomedan wife for her dower and a lien as understood in the law of sale. "A lien is not in strictness, either a *jus in re* or a *jus ad rem*, but it is simply a right to possess and retain property until some charge attaching to it is paid or discharged. It is often created and sustained in equity, where it is unknown at law, as in cases of the sale of lands where a lien exists for the unpaid purchase money." —(Story's Equity's Jurisprudence, 11th edition, section 506.) So that pushing the analogy of the law of sale to its fullest extent, the right of a Mahomedan wife to her dower is at best a lien upon his right to claim cohabitation, and I am unaware of any rule of Mahomedan law which would render such lien capable of being pleaded, so as to defeat altogether the suit for restitution of conjugal rights.

Dower by analogy of the law of sale is a mere lien of the wife to claim cohabitation.

There is one more consideration which I wish to add to the reasons which I have already given at such length in support of my view. The Mahomedan law of marriage recognises nothing except right in its legal sense as the basis of legal relations and of those consequences which flow from them. And if the husband did not, before payment of dower, possess the right of cohabitation with his wife, it would follow, as a necessary consequence in Mahomedan jurisprudence, that when the dower is prompt, and cohabitation has taken place before the payment of such dower, the issue of such cohabitation would be illegitimate. It would be easy to show that such would be the logical consequence in Mahomedan law of the reasoning pressed on behalf of the respondents, but I need not go further in considering this matter, as I have referred to it only because, in the course of the argument, it was said that, before payment of prompt dower, the cohabitation of a Mahomedan wife with her husband was simply a matter of concession and not of right as understood in that law."

This elaborate discussion clearly settles that payment of dower could not be urged as a condition precedent by the wife on her husband seeking restitution of conjugal rights, and in reality of every other point connected with dower. We should now direct our attention to the other incidents in marriage, *viz.*, Divorce and Maintenance.

DIVORCE AND MAINTENANCE.

Divorce explained,—Talak and Khoola.

There are two forms of divorce according to the Mahomedan law—talak and khoola. A divorce by talak is the act of the husband without any assigned reasons or grounds for so doing. It is arbitrary on the part of the husband, but does not become irreversible unless it is repeated three times, and between each time the period of one month must intervene. In the interval, he may take her back. But when there has been an irreversible divorce, that is, duly brought about by three repetitions, the husband cannot again cohabit with his wife—*Vide* Mozuffer Ali *v.* Kammeerunnissa Bibee (W. R., 1864, 33). To entitle the husband to do so, the wife should be married to some other individual, and separated from him either by death or divorce; in the latter event it is not necessary that it should be repeated three times.

A divorce by khoola takes place with the consent of the wife, and on her giving or agreeing to give a consideration to the husband for her release from the marriage tie. The non-fulfilment of the agreement on the part of the wife does not invalidate the divorce. The difference between the two forms lies in the fact that by talak it is not complete and irrevocable by a single declaration of the husband, but a divorce by khoola is so from the moment when the husband repudiates the wife and the separation takes place. Lord Kingsdown in delivering judgment of the Privy Council in Bazul-ul-Roheem *v.* Luteefut-oon-Nissa (8 Moore's I. A., 379) observed: It appears that, by the Mahomedan law, divorce may be made in either of two forms: talak or khoola. A divorce by talak is the mere arbitrary act of the husband who may repudiate his wife at his own pleasure with or without cause. But if he adopts that course, he is liable to re-pay her dower or dyn-mohr, and to give up any jewels or paraphernalia belonging to her.

Difference between Talak and Khoola.

A divorce by khoola 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 matter 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. It

seems that, according to existing usage, a divorce by talak is not complete and irrevocable by a single declaration of the husband ; but a divorce by khoola or cancellation of the marriage is at once complete and irrevocable from the moment when the husband repudiates the wife and the separation takes place. In these particulars, the two modes of divorce differ.

But there is one condition which attends every divorce in whichever way it takes place, namely, that the wife is to remain in seclusion for a period of some months after the divorce, in order that it may be seen whether she is pregnant by her husband, and she is entitled to a sum of money from her husband during her iddut, or period of probation (four months and ten days) for her maintenance during this period.

As to the divorce itself, the husband's word that he has divorced his wife is taken as sufficient to establish that fact, as the Mahomedan law does not lay down any particular sort of evidence to prove a divorce. The Privy Council, however, expressed their opinion in Gouhor Ali *v.* Ahmed Khan (29 W. R., 215), that it is true that writing is not necessary to the legal validity of a divorce under the law, but where a divorce takes place between persons of rank and property, and where valuable rights depend upon the marriage and are affected by the divorce, one would certainly expect that the parties for their own security would have had some document which should afford satisfactory evidence of what they had done.

Divorce must be clearly expressed.

But the mere circumstance of a Mahomedan, who was duly married, having taken another woman to live with him in the house, and his wife leaving it in consequence, or from the fact of the husband stating in a will that he had no wife, is not enough. There must be clear repudiation or pronunciation of talak in some such words as these: "Thou art repudiated," or "I have repudiated thee," repeated three times. Repudiation might be in ambiguous terms, and in such cases the intention is to be gathered, and when a Mahomedan said to his wife when she insisted on leaving his house to go to her father's, that if she went, she was his paternal uncle's daughter, meaning thereby, that he would not look upon her any longer as his wife ; it was clearly used with intention, and constituted, according to Mahomedan law, a divorce. This divorce becomes absolute, if not revoked, within the time

Divorce if not revoked before iddut (4 months and 10 days) becomes absolute.

allowed by the law, that is, before the expiration of the wife's "iddut"—*Vide* Hamed Ali *v.* Imtuazan (I. L. R., 2 All., 71.)

A wife can as well sue for divorce if there be an agreement between her and her husband, that, on the husband marrying a second time during her life, and without her consent, she could divorce him. This question was fully considered in Badorannissa Bibi *v.* Mafiatola (15 B. L. R, 442.) In the original Courts it was held that there were numerous modes, according to the Mahomedan law, by which a husband can divorce his wife whenever he pleases; but it does not give equal facility to the wife to divorce her husband.

The High Court of Calcutta set aside this decision, and referred to the Hedaya, Book IV, Chapter III, and Baillie's Mahomedan Law, Chapter II, page 218, section 2. In the Hedaya it is laid down: "If a husband say to his wife, 'divorce yourself when you please,' she is at liberty to divorce herself, either upon the spot, or at any future period, because the word 'when' extends to all times; and hence it is the same as if he were to say 'divorce yourself at whatever time you like." If this is the correct law, the husband can certainly enter into an agreement with his wife, that, if he enter into a second marriage during her lifetime without her consent, she can divorce herself.

Repudiation explained.

Baillie, in chapter II, page 218, says: "Repudiation is said to be referred to a time when its effect is postponed from the time of speaking to some future time specified without any condition. And repudiation is said to be suspended on or attached to a condition when it is combined with a condition and made contingent on its occurrence. In the former case, repudiation takes effect immediately on the arrival of the time to which it has been referred; in the latter, it takes effect on the occurring of the event on which it has been made to depend. And revocable as well as irrevocable repudiations are susceptible of being referred to a time or made subject to a condition." The two kinds, izafat or reference to a future time with or without a a condition, prove that the Mahomaden allows private agreements between husband and wife in respect of divorce. The discretion to repudiate when attached to a condition might be unlimited as regards time, and the wife might exercise her option to avail herself of the breach of condition when there is nothing in the contract

between the parties to oblige the wife to exercise it directly.—*Vide* Ashruff Ali *v.* Ashad Ali (16 W. R., 260.) In Hamedoola *v.* Faizunnessa (I. L. R., 8 Calc., p. 237), this very question came up for consideration, and the Calcutta High Court decided it according to the previous cases. The learned Judge, Prinsep, J., who delivered judgment, observed: The Mahomedan law, on the question which has been laid before us, provides for the delegation of the power of divorce by the husband to the wife on certain occasions by word of mouth, but in no way, so far as it has been laid before us, limits the exercise of that power to those occasions. It would seem rather that, by providing how the wife should act, it recognises her power to divorce her husband if he should give her the power to do so. All the occasions specially provided for are what I may term casual. We are aware of no reason why an agreement entered into before marriage between parties able to contract under which the wife consented to marry on condition that, under certain specified contingencies, all of a reasonable nature, her future husband should permit her to divorce herself under the form prescribed by Mahomedan law, should not be carried out. We may observe, too, that the conditions under which it is stipulated that this power should be exercised by the wife, are certainly not opposed to the Mahomedan law on the subject. In all the cases on this point, no authority for the contention—that the delegation of power by the husband to the wife is contrary to Mahomedan law—could be produced."

Prinsep, J., holds delegation of power of divorce by the husband to the wife is allowed by Mahomedan law.

Thus a wife can, with the consent of her husband, free herself from the ties of marriage. She can as well urge the impotency of the husband as a ground for separation from him. The usual course in such cases is for the woman to bring her husband before the Judge, who is to ask him if he has had intercourse with her or not. If the husband should deny the charge and assert that he has had intercourse with her and she is an enjoyed woman, his word on oath is to to be taken in spite of the wife's protestations. If, however, the wife allege she is a virgin, an inspection is to be ordered. The inspection is generally by two women, and, if they should declare her to be an enjoyed woman, the word of her husband is to be taken with his oath and the wife's right would be declared void. If the women declare the wife to be a virgin, her word

What course the wife is to adopt when the husband is impotent.

without oath is to be accepted, and the case is to be adjourned for a year. At the expiration of the year, the wife should again appear before the Judge and allege that her husband has not had connection with her. The same process, as on the previous occasion, isto be gone through again by examination by two women, and, if after examination, the women declare her to be an enjoyed woman, the husband's word is to be relied on, and the wife's claim to separation refused. If the women declare her to be a virgin, the Judge is to give her an option to separate, and if she choose a separation, the Judge is to order the husband to repudiate her irrevocably, or pronounce the separation himself. The separation is an irrevocable repudiation, and the woman is entitled to her full dower. She is not bound to keep iddut, nor is she entitled to maintenance. Her case is very much like that of a Mutta wife.

Among Shias there is a marriage called the Mutta or a contract for a specific period, which may be for fifty years or four months, or any other specified period at the choice of the parties. In disposing of the petition in the matter of Luddun Saheba (I. L. R., 8 Calc., 736) Macdonell and Field, JJ., held that, according to the Shia law, a Mutta wife is not entitled to maintenance, and the husband can give up the remaining portion of the period for which the contract of Mutta marriage was made. For the defendant it was contended that the effect of giving up the rest of the period was to put an end to the relationship of husband and wife. The Court held that there was no authority for this contention, and, according to the Shia law, the Mutta form of marriage did not admit of repudiation. The question, however, of iddut was elaborately treated by the Allahabad High Court in the matter of the petition of Din Mahomed (I. L. R., 5 All., 231). "Upon this point," the High Court observes, "there is a note (under section 488) in Mr. Justice Prinsep's edition of the new Criminal Procedure Code (Act X of 1882), and also in the edition by Messrs. Agnew and Henderson, which refers to the Madras High Court proceedings dated 2nd December 1879, laying down that a divorced Mahomedan wife is entitled to maintenance during the iddut, or period of probation, but an order for maintenance for a period subsequent to the expiration of the iddut is illegal. If she be pregnant, she will be entitled to maintenance during gestation." I have unfortunately not

Mutta marriage, *i.e.*, for a specific period, explained.

had access to those proceedings, but as the note stands, the latter sentence must be regarded as only explanatory of the former, as in the case contemplated the period of gestation and iddut is identical. In connection with the exercise of the powers conferred under section 536, Criminal Procedure Code, I am of opinion that the rule of the Madras High Court is a salutary one and consistent with the principles of the Mahomedan Law. Iddut is defined in the Hedaya to be "the term of probation incumbent upon a woman in consequence of the dissolution of marriage after carnal connexion; the most approved definition of iddut is the term by the completion of which a new marriage is rendered lawful. Moreover an ordinary divorce under the Mahomedan Law is revocable within the period of iddut, and to use the words of the Hedaya a marriage is accounted still to subsist during the iddut with respect to various of its effects, such as, the obligation of alimony, residence, and so forth; and hence it may lawfully be accounted to continue in force with respect to the woman's inheritance, but as soon as the iddut is accomplished, a further procrastination is impossible, because the marriage does not then continue in any shape whatever." As a general rule, therefore, it may be laid down that the disseverance of the conjugal tie caused by divorce does not become absolute till the termination of the period of the iddut, the length whereof, in the case of a divorced woman not pregnant, extends over a period of three months reckoned from the divorce, and not three months and thirteen days as the Magistrate seems to think.

Disseverance of conjugal tie becomes absolute after Iddut.

The rule of Mahomedan Law in regard to maintenance of a divorced woman during her iddut is clearly stated in the Hedaya: "Where a man divorces his wife, her subsistence and lodging are incumbent upon him during the term of her iddut, whether the divorce be of the reversible or irreversible kind. The argument of our doctors is that maintenance is a return for custody, and custody still continues on account of that which is the chief end of marriage, namely, offspring (as the intent of iddut is to ascertain whether the woman be pregnant or not), wherefore subsistence is due to her as well as lodging, which last is admitted by all to be her right."

Therefore whilst I am of opinion that an order for maintenance of a wife, passed under chapter XLI of the

Criminal Procedure Code, becomes inoperative in the case of a Mahomedan by reason of his lawfully divorcing his wife, and thus putting an end to the conjugal relation, I hold that that relation does not cease to exist so absolutely as to render the wife free to marry again, or to look to any other means of support during her iddut. The High Court further took occasion to remark—with reference to the order of the Assistant Magistrate, on the answer made by Din Mahomed to the petition of his wife, that he had divorced his wife according to the Mahomedan Law, and that he was no longer bound to make a monthly allowance to her—that "a divorce made with a view to getting of an order of maintenance is invalid," and that "until a Musalman husband pays his wife's dower, his liability to maintain her in accordance with the marriage continues." The "Assistant Magistrate" the High Court observed, "was entirely wrong in holding that a Magisterial order for maintenance could in any manner operate as an impediment in the way of a Mahomedan to exercise the power conferred on him by his personal law to divorce his wife. He is also in error in thinking that the payment of dower is a condition precedent to the completion of a divorce, or that a Magistrate would be justified in passing any order of maintenance from the time of divorce till the time when the question of dower has been settled." Such is not the rule of the Mahomedan Law. Under that law, divorce is in no way dependent upon the payment of dower, though the ordinary form of dower debt becomes payable on the cessation of the conjugal relation, whether such cessation takes place by divorce or death. But these are matters which are entirely beyond the scope of chapter XLI, and with which Magistrates, in exercising their powers as to maintenance, are in no way concerned. All that the Magistrate has to determine in a case of this kind is whether the woman claiming maintenance is still the wife of the person against whom she advances such a claim. If the question is determined in the affirmative, the order of maintenance must continue to be operative; on the other hand, if it is found that by the effect of some rule of the personal law of the parties concerned, the conjugal relation has absolutely ceased to exist, the order of maintenance, *ipso facto*, becomes *functus officio*, and can no longer be enforced. The Cal-

Divorce is in no way dependent upon the payment of dower.

cutta and Bombay High Courts expressed similar opinions. In the case of Abdur Rahman (I. L R., 5 Calc., 558) a like interpretation was placed upon section 235 of the Presidency Magistrate's Act (IV of 1877), the words of which are *ipsisma verba* with the wording of section 537 of the Criminal Procedure Code. The learned Judges (Macdonell and Ainslie, JJ.) held that it is "as essential to the continued operation as to the original making of an order of maintenance that the recipient of the allowance should be a wife at the time for which maintenance is claimed, and, consequently, . . . a Magistrate must, when a question of divorce arises, determine on such evidence as may be before him, whether there has or has not been a legally valid divorce. If he finds that there has been a valid dissolution of the marriage tie, he should refrain from taking any steps to enforce the order of maintenance from the date of such dissolution." Sir Michael Westropp, C.J., concurred in this view of the law of the Calcutta High Court in the case of Kasam Perbhai (8 Bom., H. C. R., Cr. ca., 95). He observed, with reference to the order of maintenance and to the subsequent divorce: "That was a proper order at the time it was made, but we think the ground-work of that order has now been removed, and we cannot consider it any longer a continuing binding order upon the applicant. The enactment under which that order was made does not relate more especially to Mahomedans than to Hindus, Buddhists, Indo-Britons, Europeans, or any other branch of the general community, and the Legislature could never have intended by it to interfere with or restrict the Mahomedan Law of Divorce. We do not think that the Magistrate ought to issue an attachment or otherwise, to execute the order, it being in fact *functus officio*."

Macdonell and Ainslie, JJ., held that Magistrates before ordering maintenance fund whether there has been a valid dissolution of marriage.

Another mode of separation is by the husband's making oath accompanied by an imprecation as to his wife's fidelity, although a mere charge of adultery against the wife would not operate as a divorce as held by Campbell and Pundit, JJ., in Jaun Beebee *v.* Moonshee Beparce (3 W. R., p. 93).

Mere charge of adultery is not sufficient to effect a divorce.

The husband's vow of abstinence maintained inviolate for a period of four months, or, in other words, his refusal to take his wife back before the expiration of the iddut, operates as a divorce—*Vide* Mozuffer Ali *v.* Kumurenissa Bibee (W. R., 1864, 32) and Ibrahim *v.* Syed Bibi, (I. L. R., 12

Mad., 63). If he should deny the parentage of a child with which the wife was then pregnant, it will be bastardized and the wife divorced. The Mahomedan Law, however, is very scrupulous in bastardizing the issue of any connexion not casual, but where there has been cohabitation and acknowledgment of paternity. In Khajooroonnissa *v.* Rowshun Jehan (I. L. R., 2 Calc., 184) it was contended by the learned Counsel (Mr. Cowie, Q. C.), that the plaintiff's claim in right of her grandmother Beebee Loodhun, must fail, if Bibi Loodhun was not herself entitled to any share of Deedar Hossein's estate. She was not shown to have stood in any different position from that of the other three female servants mentioned in the schedule to the will, to whom a monthly allowance of Rs. 75 is to be given. If a wife at all, she appears, as held by the lower Court, to have been only a temporary wife, who, under the Shia law, would not inherit—Baillie's Digest, Imamea, pp. 44, 344."

Sir R. P. Collier, in delivering judgment of the Privy Council, observed: It is indeed alleged that she was what is called a temporary wife, and among the Shia sect there appears to be a power of taking a mere temporary wife. But it is to be observed that there is no evidence of hers being, what is called, a temporary marriage, and indeed the witnesses who seek to impugn the marriage on the part of defendant, speak of Bibi Loodhun not as a temporary wife, but as a mere servant. The question, therefore, seems to be not whether she was a temporary wife, in the sense attached to that term in Mahomedan treatises, but whether she was a wife or whether she was a mere servant. The evidence preponderates that she was a wife, and not as a mere servant, though no doubt a wife of an inferior order. It is an undisputed fact, that the plaintiff (Nuzeeroodeen), the son of Bibi Loodhun, was treated by his father and all the members of the family as a legitimate son. It is not that he was on any particular occasion recognised by his father, but that he always appears to have been treated on the same footing as the other legitimate sons. This of itself appears to their Lordships to raise some presumption that his mother was his father's wife. That such a presumption arises under such circumstances appears to have been laid down in a case which has been referred to, *viz.*, Khajah Hidayut-oollah *v.* Rai Jan Khanum (3 M. I. A., 318), in which Dr. Lushington, who delivered the judgment

Mahomedan Law sanctions the presumption of marriage where there has not been a mere casual concubinage, but a more permanent connection.

of the Board, makes this observation: "The effect of that appears to be that where a child has been born to a father, of a mother where there has not been a mere casual concubinage, but a more permanent connection, and where there is no insurmountable obstacle to such a marriage, then, according to the Mahomedan Law, the presumption is in favour of such marriage having taken place." In this case there is no evidence that Beebee Loodhun was a woman of bad character, or that her connexion was merely casual.

The same doctrine was laid down rather more strongly in a recent case which came before this Board on the 20th March 1873. In the case of Newab Mulka Jehan Sahiba *v.* Mahomed Ushkkurree Khan (8 Madras Jur., 306),—a case from Oudh, and a Shia case—their Lordships say: "This treatment of the daughter by the appellants, that is to say," the treatment of the daughter as a member of the family "affords a strong presumption in favour of the right of her mother to inherit from her." The question there was whether the mother, who was said to be a slave girl, inherited from her daughter whom she survived, the same question which would have arisen in this case if Bibi Loodhun had survived her son Nuzurooddeen. Their Lordships go on to say, after noticing various acts of acknowledgment of the legitimacy of the child: "After these acknowledgments, Malka Jehan and the appellants who act with her ought in their Lordships' view to have been prepared with strong and conclusive evidence to rebut the presumption raised by their own acts and conduct; and, in the absence of such evidence, they think the presumption must prevail." The conclusion deducible from these rulings is that where there has not been a mere casual concubinage, but a more permanent connection, the issue of such union, when treated as other sons are, is entitled to inherit along with them. The case of Sadakat Hossien *v.* Mahomed Yusuf establishes the principle that the issue of an adulterous intercourse, that is, when a woman having been previously married to a person then and still living has connection with another either by a marriage ceremony or not, could not inherit or acquire the status of a son by recognition. In this respect the principle of Hindu Law as regards the sons of unmarried concubines, who have had continuous intercourse with a man, as

Hindu and Mahomedan Laws agree in holding that sons of unmarried concubine who have had continuous intercourse with a man can inherit.

held by Sir Michael Westropp in Rahi *v.* Govind (I. L. R., 1 Bom., 110), are in unison with those of Mahomedan Law.

Legitimate children are all who are born six months after marriage as well as those who are born within two years after divorce or the death of the husband. Divorce of wife by her husband on his deathbed does not prevent her inheriting, if he die before the expiration of the iddut (four months and ten days). The maintenance during iddut must be sufficient, and is to be determined in each case by consideration of the rank and antecedents of the women. It comprehends food, raiment, and lodging, but it does not become due until it is decreed or ordered by a Court. In the absence of an agreement it could not be decreed retrospectively as held in Abdool Futteh Moulvie *v.* Zabirunnissa Khatun (I. L. R., 6 Calc., 631). There the Court (Garth, C.J., and Pontifex, J.) in appeal from the decision of Wilson, J., who passed an order for past maintenance, observed that the law is stated thus in Baillie's Digest, p. 443: "When a woman sues her husband for maintenance for a time antecedent to any order of the Judge or mutual agreement of the parties, the Judge is not to decree maintenance for the past." And the same rule is laid down in much the same terms in the Hedaya, Vol. 1, p. 398, and quoted in the Tagore Law Lectures for 1873, p. 453. We think therefore that, as in this case, no decree or agreement for maintenance was made before this suit, the maintenance should have been made payable only from date of decree. We think it also quite clear that maintenance can only be payable during the continuance of the marriage. A Nashizah or rebellious woman, that is, one who leaves her husband's house and denies herself to him, cannot claim maintenance. She can, on her return to her husband's house; but a wife who has apostatized, should she return to the faith, while her iddut is still subsisting, cannot, nor can she, who is imprisoned on account of any right against her during the iddut. The right to maintenance in the two last cases drops. A widow, too, has no right to maintenance whether she be pregnant or not, because the iddut of widowhood is a religious observance and not required by the law.

Maintenance to be regulated having regard to the rank and antecedents of the woman.

Maintenance not allowed retrospectively unless specially agreed to.

DEBTS AND SECURITIES.

The estate of a deceased person is liable to four distinct uses: 1*stly*, the payment of his funeral expenses; 2*ndly*, his debts; 3*rdly*, his legacies and the claims of his heirs.

Debts specified.

Debts are of two sorts, *viz.*, those contracted during health, and those during illness. Both are alike and one is not entitled to preference to the other; but debts acknowledged on a death-bed do not fall due before the liquidation of those contracted in health. Debts acknowledged on a death-bed as due to an heir are not of any validity at all, unless the other heirs admit them. The rule in respect of joint-debtors applies to joint-sureties. If two persons jointly contract a debt and one of them die, the survivor is liable for a moiety of the debt; so where two persons are joint securities for the payment of a debt, if one of them die, the survivor is responsible for his share. The cases of Sita Nath Das *v.* Roy Luchmiput Sing (11 C. L. R., 268) and Assamathunnissa Bibi *v.* Roy Luchmiput Sing (I. L. R., 4 Calc., 142; 2 C. L. R., 223), lay down that, under Mahomedan Law, a decree against one heir of a deceased debtor cannot bind the other heirs; nor can the creditor of a deceased Mahomedan follow his estate into the hands of a *bonâ fide* purchaser for value to whom it has been alienated by the heir-at-law, whether by sale or by mortgage—*vide* Bazayet Hossein *v.* Dooli Chand (I. L. R., 4 Calc., 402) and Mahomed Wajid *v.* Tayabon (L. R., 5 I. A., 211) and The Land Mortgage Bank *v.* Roy Luchmiput Sing (8 C. L. R., 447). But where the alienation is made during the pendency of a suit, in which the creditor obtains a decree for the payment of his debt out of the assets of the estate which have come into the hands of the heir-at-law, the alienee takes with notice, and is affected by the doctrine of *lis pendens*. It is worthy of note that the decree should direct payment out of the assets which have come into the hands of the heir, for it is a well-known principle of the Mahomedan Law that heirs are answerable for the debts of their ancestors as far as there are assets. Acting upon this principle the cases of Norsingh Das *v.* Nazmoddin (I. L. R., 8 Calc., 20 & 370) and Muttyjan *v.* Ahmed Ally, (10 C. L. R., 225 & 346) respectively were decided.

Heirs are answerable for the debts of their ancestors as far as there are assets.

A decree against one heir does of affect another.

As regards a decree against one heir not having effect against the other heirs, the case of Hendry *v.* Mutty Loll Dhur (I. L. R., 2 Calc., 397) is clear beyond a doubt. The facts are stated in the judgment of Garth, C. J., who observed as follows: In this case the plaintiff claims a three-sixteenth share in a dwelling-house at Sealdah, one-half of which is admitted to have belonged to the late Buzloor Rahim, who died in 1871.

Buzloor Rahim, in his lifetime, had employed Anderson Wallace & Co., in Calcutta, to do some repairs to the house; after his death, his daughter Sarferunnissa Begum, who was entitled to five-sixteenths of the whole property, employed them to do further repairs. The price of these repairs not having been paid, Anderson Wallace & Co. brought an action against Sarferunnissa Begum, as representing her father's estate, to recover the sum due to them; and, having obtained a decree, the house was sold in execution under the decree, and was purchased by the defendants Hendry and Hubbard. Meanwhile a sister of Buzloor Rahim, Sadorunnissa Bibi, who had been for sometime past on a pilgrimage to Mecca and who was entitled to a three-sixteenth share of the property, returned, and she sold her interest to the plaintiff who brings this suit to establish his right, insisting that the three-sixteenths which he purchased could not legally be sold, and were not in fact sold to Hendry and Hubbard under the decree.

The defendants contend that Sarferunnissa Begum represented the whole estate of Buzloor Rahim, and that, therefore, his sister's share was liable for the repairs and was properly sold under the execution. The learned Judge in the Court below has found that Sarferunnissa Begum was not legally authorized to represent the whole estate of her father, and that, consequently, the decree and the execution sale, which took place under it, only affected her five-sixteenths of the property.

Under these circumstances the three-sixteenths share which belonged to Sadorunnissa Bibi, being duly conveyed to the plaintiff, became his property, and the learned Judge in the Court below was, in our opinion, perfectly right in making a decree in his favour."

The Allahabad High Court in the case of Pirthipal Sing *v.* Husanie Jan (I. L. R., 4 All., 361) affirmed this principle. It was a case where the heirs to a deceased Mahomedan divided his estate among themselves according to their

shares under the Mahomedan Law of Inheritance, a small debt being due from the estate at the time of division. Two of the heirs were subsequently sued for the whole of such debt. It was held that inasmuch as such heirs had not, by sharing in the estate, rendered themselves liable for the whole of such debt, the Mahomedan Law allowing the heirs of a deceased person to divide his estate, notwithstanding a small debt is due therefrom, and as a decree against such heirs would not bind the other heirs, a decree should not be passed against such heirs for the whole of such debt, but a decree should be passed against them for a share of such debt proportionate to the share of the estate they had taken—*vide* Hamir Sing *v.* Zakir (I. L. R., 1 All., 57).

Debts contracted by minors are not valid.

In respect of debts contracted by minors, the Mahomedan Law is positive that they are not valid. The general direction is that a minor is not competent, *sui juris*, to contract marriage, to pass a divorce, to manumit a slave, to make a loan, or contract a debt or to engage in any other transaction of a nature not manifestly for his benefit without the consent of his guardian. Guardians are of two kinds, the lenial and the testamentary. The powers of the former, who are paternal relations of the minor, are limited to the education and marriage, and those of the latter, who are maternal relations of the minor, extend to the care of his person and property. These can exercise powers in respect to the education and marriage of the minors in the absence of the paternal kindred and mother. Debts contracted by any guardian for necessary purposes, such as the support or education of the minor, are payable by him on his coming of age, but as regards the guardian's power to sell the immoveable property of his ward, Sir William MacNaghten says, it can only be exercised under seven circumstances, *viz.*, 1*stly.*, where he can obtain double its value; 2*ndly.*, where the minor has no other property and the sale of it is absolutely necessary to his maintenance; 3*rdly.*, where the late incumbent died in debt which cannot be liquidated but by the sale of such property; 4*thly.*, where there are some general provisions in the will which cannot be carried into effect without such sale; 5*thly.*, where the produce of the property is not sufficient to defray the expenses of keeping it; 6*thly.*, where the property may be in danger of being destroyed; and 7*thly.*, where it has been usurped and the guar-

Guardians are of two kinds, lenial and testamentary.

Circumstances under which guardian can sell immoveable property.

dian has reason to fear that there is no chance of fair restitution. The case of Hosain Begum *v.* Zialul Nisa Begum, (I. L. R., 6 Bom., 467) illustrates the 3rd ground. The evidence in the case showed that the indebtedness of the deceased proprietor and the distressed condition of his heirs existed in a sufficient degree to justify the guardian to sell the whole property of the heirs. In illustration of the 1st and 2nd grounds, the case of Hosain Ali *v.* Mehdi Hosain (I. L. R., 1 All., 533) is an instance, where the guardian being in possession of certain real property on her own account and on account of her nephew and neice, minors, sold the property in good faith and for valuable consideration, in order to liquidate ancestral debts and for other necessary purposes and wants of herself and the minors. It is to be noted that the evidence regarding the necessity of sale must be sufficient. In Bhuthnath Dey *v.* Ahmed Hosain, (I. L. R., 11 Calc., 417,) where there was a mortgage by certain co-heirs of a property which had descended to them along with others (minors) to pay off arrears of rent of a putni talook, the evidence did not shew that there were other necessary expenses connected with the deceased's estate which had to be met, nor whether the arrears of rent could or could not have been paid without having recourse to the mortgage, it was accordingly held that the shares of the minors were not bound by the mortgage.

Interest disallowed by the Mahomedan Law.

Debts cannot receive accession as by the Mahomedan Law interest is prohibited (*vide* Hedaya, Vol. II, 489 Book XVI, Chapter 8), but it was held by Phear and Markby, J.J., in Meeah Khan and Manoo Khan *v.* Beebee Beebeejan and Beebee Annoojan, (14 W. R. 309), on a reference by the Calcutta Small Cause Court that Act XXVIII of 1855 repealed the Mahomedan Law relating to usury. In Ram Lall Mukerjie *v.* Haran Chunder Dutt (3 B. L. R., 130 and 12 W. R., p. 9) Peacock, C.J. and Macpherson, J., held that Act XXVIII of 1855 merely repealed the various Regulations and Acts which the English Government of India passed on the subject of usury. Phear, J., observed: "I have given my best consideration to the opinion which the late Chief Justice is reported to have expressed in Ram Lall Mukerjie *v.* Haran Chunder Dutt" (3 B. L. R., O. C., p. 130).

Sir Barnes Peacock said: "I do not think that Act XXVIII of 1855 was ever intended to repeal the

Hindu or Mahomedan Law as to interest." He then quoted the title of the Act, the preamble and the first section, and he added: "That act did no more than repeal the various Regulations and Acts, which the English Government has passed on the subject of usury." With the greatest deference for the opinion of Sir Barnes Peacock, I feel it most difficult to take this limited view of the operation of the Act. I see nothing to indicate that the words "the laws now in force relating to usury" of the preamble and "all laws in force in any part of the said territories relating to usury" of the first section are to be limited in their meaning to Regulations and Acts passed by the English Government of India. If the Legislature had so intended, surely it would have used "Regulations and Acts" in the place of "laws" instead of the several parts of Regulations mentioned in the schedule hereto annexed and all laws in force in any part of "such territories relating to usury are hereby repealed." We should have had "the several parts of regulations, &c., &c., and all other Regulations and Acts in force in any part, &c. &c."

Phear, J., argues that Act XXVIII of 1855 affects the rate of interest, and not the right to take interest.

Neither was the mischief at which Act XXVIII was directed, so far as I comprehend it, such as should induce us to suppose that it would be sufficient for the purposes of the Legislature that the Regulations and Acts of the English Government alone should be repealed. If this were so, probably we should be bound, if possible, to a construction upon the words of the Legislature which would limit their operation to the bringing about this result; but upon considering the regulations which are specifically repealed by this Act, I find that their general effect was to place a restriction of universal operation upon the rate of interest which should be recoverable by law under the terms of any contract of loan; and having regard to Act XXVIII of 1855 as a whole, I can conclude that the Legislature, at the time of passing it, was of opinion that restraint of this sort was mischievous. It appears to me, indeed, that the sole object of the Act was to leave the parties in any transaction entirely free to make their own terms with regard to the rate of interest, and if so, this object could only be attained by the removal of all prohibitions upon their freedom in this respect, whether imposed by English authority or by that of the recognised ancient law givers. This view is, I think, not a

little strengthened by the fact that Act XXVIII of 1855 followed immediately upon the repeal of the usury law in England and was, in appearance at any rate, an extension of that measure to India. Throughout the Act there is no trace to be found of reference or allusion to any still existing laws of prohibition or any indication that the Legislature entertained that such laws might remain in existence, notwithstanding the Act. On the contrary every clause of the Act seems to me to negative any thing of the kind. By the second section it is enacted that "any suit" (without a shadow of qualification) "in which interest is recoverable, the amount shall be adjudged or decreed by the Court at the rate (if any) agreed upon by the parties." And the application of all the other sections is equally general. The contingencies upon which they severally take effect are designated by, "whenever in any case" and so on.

It seems to me, then, something more than difficult to escape the conclusion that the repeal of "all laws relating to usury" which is effected by Act XXVIII of 1855 must extend to Mahomedan Laws. I will add that in my judgment the Legislature, by the use of the words "laws relating to usury", in this Act, intended to speak only of laws effecting the rate of interest which might legally be stipulated for. The rate of interest is the sole subject of the Act from the beginning to the end. There may be, however, laws which in strictness relate to usury, yet do not meddle directly with the rate of interest, such as a law limiting the period within which an action for arrears of interest, must be brought by reference to the amount so recovered. For instance Manu, sec. 151, Chapter 8, says: "Interest on money received at once not month by month or day by day as it ought, must never be more than enough to double the debt, that is, more than the amount of the principal paid at the same time. This in substance is a law for the limitation of suits, and as such does not, I think, fall within the scope of Act XXVIII of 1855. The Bombay High Court pointed out the true character of Manu's rule in the case which is reported in Vol. I, Bombay High Court Reports, p. 47; and by two diagrams given in Vol. III of the same Reports, p. 25, A. C. I. That Court also held that the rule does not fall within the repealing operation of the Act of 1855.* I do not in any degree dissent from these decisions.

Unfortunately we have not been aided by the argument of counsel in the case and therefore, having regard to the opposite opinion of Sir Barnes Peacock, I cannot do otherwise than greatly distrust my own judgment upon the question which has been proposed to us. It is consequently with considerable satisfaction that I find myself able to determine the matter of the reference, which is before us, without making that question the turning point of my decision. * * * * The learned First Judge appears to be of opinion that if the Act of 1855 be put upon one side, the law which the Civil Courts of this Country are bound to administer between Mahomedan suitors "does not allow a Mahomedan to charge another Mahomedan any interest whatever."

It seems to me that this view is erroneous. No doubt the passage in the Hedaya, to which the learned First Judge refers, and other passages in the Koran do (as they are commonly understood) forbid the taking of interest; and certainly, as far as I have the means of judging, I should suppose that a very considerable number of religiously-inclined persons of the Mahomedan Faith consider themselves bound to observe these precepts and conscientiously keep themselves out of all transactions which appear to infringe them. But on the other hand it is notorious that there are in India Mahomedan dealers in money and traders of unquestionable respectability, and that it has been the practice among this class for a very long period to take interest even from their co-religionists in the way of their business. Mr. Harrington, in his Analysis, Vol. I, p. 182, after remarking that the Mahomedan Law forbids the taking of interest for the use of money upon loans from one Musalman to another, and that the Hindu Law permits interest to be taken at prescribed rates only, goes on to say:—"The Hindu legislators have expressly sanctioned and the Musalman Government of India appear to have tolerated directly or indirectly, the customary interest of the country which in the plan for the administration of justice, proposed by the Committee of Circuit in 1772, is stated to have amounted to the most exorbitant usury." I cannot learn that our courts have in any case which is of authority refused to decree interest to a Mahomedan on the ground that he was disentitled by Mahomedan Law to recover it. On the whole it seems to me that, for a considerable period of

time past, the prohibition of the Koran and the Hedaya against the taking of interest, has not been treated by the executive and by the persons charged with the administration of justice in this part of India, as forming part of the active Municipal Law of the country. As a moral precept it will no doubt always be influential with those who acknowledge its authority ; but I think that as a part of the Municipal law, if it ever had existence as such, it has long been obsolete."

Markby, J., concurs in the opinion of Phear, J.

Markby, J., in concurring in the opinion of Phear, J., observed :—Looking to the very strict construction which has been put on the prohibitions contained in the Mahomedan Law with respect to profit in transactions in the nature of a loan or an exchange of commodities, I doubt whether any passage in the Hedaya (certainly I think not that to which the learned Judge of the Small Cause Court refers) would render invalid an agreement of a loan at interest unless the loan was made and repaid in coin of the same description. Possibly there may have at one time been a general feeling amongst Mahomedans against the propriety of taking interest, and that feeling may still exist to some extent. Possibly also, the Court administering Mahomedan Law, may at some distant period have refused to enforce the payment of interest but it seems to me unnecessary to consider this. Ever since our Courts have been established, and apparently long before the custom of taking interest as between Mahomedans has been recognised and enforced. And until this case was tried in the Court of Small Causes, I cannot discover the slightest trace of the validity of the custom having been questioned. I have not the least doubt that by the law we are bound to administer—a Mahomedan may claim the right to take interest as any other person."

Priority in point of time and strength of title confer superiority of right.

In the Mahomedan Law priority in point of time and the strength of title confer superiority of right, as for instance a claim founded on purchase is entitled to preference to a claim based on gift. Claims could be advanced without regard to time, as according to Mahomedan Law there is no rule of limitation. As observed in previous chapters, contracts are not dissolved by the death of one of the contracting parties, but they are liable as far as there are assets, except when the subject of the contract is of a personal nature. In the examination of the witnesses, oaths are not admi-

Limitation not recognised by Mahomedan Law.

nistered, and the evidence of slaves, minors, and of a father or grandfather in favour of his son or his grandson, and *vice versa*, of a husband in favour of his wife and *vice versa*, and of a servant in favour of his master and *vice versa* is not admissible. The evidence of two men or one man and two women is all that is required by law, and any more does not improve a case. The rules of procedure in Mahomedan Courts of justice since the reign of the Emperor Arungzebe Alumgir are, as Mr. Baillie has in his work, as follow: The parties appear in person before the Judge and the plaintiff states his case orally. This must be done in such terms as sufficiently to indicate the subject of claim, the cause of liability, and, if the cause be complicated, the conditions which are necessary to its validity. If the statement is satisfactory on these points, the claim is pronounced to be valid and the defendant must answer by yea or nay. If it is not valid, he is not obliged to answer. If the defendant denies the claim, the Judge then says to the plaintiff: Have you any proofs? If he says "no" he is told that he is entitled to the oath of the defendant, and if he require it, the defendant is called upon to confirm his denial by his oath, with the alternative of judgment being pronounced against him if he refuse. If the plaintiff has witnesses he produces them, and requests that they may be examined. Whereupon the Judge directs their evidence to be taken down on separate slips of paper. After which the depositions are read to the witnesses by an officer termed the Sahib Mujlis or Associate of the Judge, and they are required to repeat the words of testimony verbatim after the Judge himself. When this has been done, the proceedings are reduced to writing. After this, if the Judge is satisfied that the witnesses are just or righteous persons, he accepts their testimony and then gives the defendant an opportunity of offering any plea he may have in avoidance of the claim, such as satisfaction or release. If he has none, judgment is pronounced against him; and the whole proceedings are recorded in what is termed a Sijil.

Rules of evidence according to Mahomedan Law.

When the defendant has a plea in avoidance, the same course is to be followed. The parties now as it were change places and the defendant is termed the claimant and the plaintiff the defendant in avoidance. The plea must be consistent with the denial, or it will be rejected. If admitted the plaintiff may answer by yea or nay; and if

the answer is in the negative, the defendant must prove his plea; or in default of proof, he may call the plaintiff to confirm his denial by his oath under the penalty of judgment being given against him if he refuse. If the defendant denies on oath, he is absolved from liability. The proceedings are reduced to writing as before in the form of a Muhzer and Sijil in avoidance in the same way as on the original claim. The case does not always stop here; for the plaintiff may reply, and then the same course is to be followed as in the original claim and avoidance. Proof is on the claimant and the oath on the denier according to the saying of the Prophet. When the suit is for property, the defendant may, instead of merely denying the right of the claimant, set up a right of his own. Here there are two distinct issues and two claimants to the same thing, and evidence of title is adduced by each party. The rule is to prefer the evidence of the party out of possession, when the same cause of right is assigned by both the parties, and, as being derived from the same source, the evidence of the possessor is preferred; but when the sources are different, the evidence of the person out of possession is preferred. Priority in time in respect of the origin of right and sale and pledge with possession have precedence over the evidence of gift and possession, when it is alleged the same person is the grantee and vendor. When marriage is the subject of dispute between two parties, the evidence of the woman is conclusive, but if different dates be stated, preference is regulated by priority.

Possession and right by sale and pledge have precedence over gift and possession.

Evidence must be positive and relevant to the point at issue but hearsay evidence is admissible to establish birth, death, marriage and cohabitations. In cases affecting women, female evidence alone is admissible.

In cases of women, female evidence alone is allowed. Hearsay evidence is admissible in respect of birth, death, marriage, &c.

The general rule is that when both parties have evidence, the plaintiff or the party whose claim is greater is entitled to preference. When both parties swear, the oath of the party against whom the claim is made is entitled to preference, or, in other words, the evidence of a party in respect of his individual interest is entitled to preference. As for instance, in a dispute between the lessor and the lessee, the evidence of the lessor is received as to the amount of the rent, and that of the lessee regarding the duration of the lease. Decisions of arbitrators should be unanimous.

Legacies are payable after debts and to the extent of one-third of the legatee's property, and this principle is as applicable to slaves as it is to other sorts of property. Now slaves, as Sir William MacNaghten has described them, are infidels made captive during war and their descendants, and it is doubtful whether a man can sell himself when hard pressed, but it is admitted that a person can hire himself for any time, even for life. They are as much the property of heirs as any other property, and can only be emancipated to the extent of one-third of the value of their persons. When the master leaves no other property, to the extent of the other two-thirds, they must perform emancipating labor, and when the master dies insolvent they do not become free until they have by their labor earned for the deceased's creditor property to the full amount of their value. Now slaves are either qualified or entire. Qualified slaves are of three descriptions—the Makatib, the Mudabir, and the Umi-Walad.

Who are slaves?

Slaves are qualified or entire.

A Makatib slave is he who, by an agreement with his master, can obtain his freedom by paying a ransom either immediately or at some future time or by instalments. A Mudabir slave is he, whose freedom is contigent on the death of his master whenever that may happen.

An Umi-Walad is a female slave who has borne a child or children to her master who should acknowledge the first born to establish their parentage. Her freedom is unconditional on the death of her master. Besides their disability to give evidence in Courts of Justice, slaves cannot marry without the consent of their masters, nor can they hold any office in the state or be executors, securities, or guardians to minor children. They cannot make a gift or sale nor inherit or bequeath property. But they are not liable to be sued (except in the presence of their master) nor are they subject to the payment of taxes and liable to imprisonment for debt.

Entire or unqualified slaves are those who may be sold to find maintenance for and to pay dower to their wives.

A slave cannot marry his mistress nor a freeman marry his slave girl or even a female slave so long as he has a free wife. The issue by the male slave of one person and the female slave of another are not allowed to claim any rights of their putative father, nor has the latter a legal claim to the children so begotten.

ENDOWMENTS OR WUKF.

Wukf explained.

An endowment of property is its appropriation to the service of God, divesting the appropriator of his right to it and transferring from himself the profits of the property to the benefit of mankind. It is thus a property no longer subject to sale, gift, or inheritance. The right of the appropriator ceases as soon as the property, the subject of Wukf, is delivered to the Superintendent or Mutwalee. It is notnecessary that a formal deed should be executed as, according to Mahomedan Law, a valid endowment may be verbally constituted, but when it is made in extremes, that is, when the appropriator is on his death bed, it is valid to the extent of a third of his property. The reason is, that it is necessary to see if there is any other property, or the heirs will allow the appropriation and if there be no other property and the heirs do not allow the appropriation, one-third is set apart for the Wukf, and two-thirds for the heirs. The chief elements of Wukf are special words declaratory of the appropriation, such as "I have given this my land or bequeathed it as a perpetual Sadukah or charity." To constitute a valid Wukf there must be a dedication of the property solely to the worship of God or to religious or charitable purposes. Appropriations of property on a man and his descendants can be regarded as valid Wukf only, when the true Sadukah is used and then it must be shown that the man to whom it is appropriated is in a state of hopeless poverty. The salutary rule is that there must be a dedication of the property solely to the worship of God or to religious and charitable purposes, *vide* Abdul Ganne Kasam *v.* Hossein Megu Rahemutula, (I. L. R., 10 Bom., 7) and Mahomed Homedulla Khan *v.* Lotful Huq (I. L. R., 6 Calc., 744, and 8 C. L. R., 164). In Jagat Mani Chowdrani *v.* Romjani Bibi, (I. L. R., 10 Calc., 536), which came on appeal before McDonell and Field, JJ., the learned Judge McDonell, J., who delivered judgment of the Court observed as follows:—"The essentials of a valid Wukf are, in the first place, the appropriator must destine its ultimate application to objects not liable to become extinct; secondly it

Essentials to Wukf.

is a condition that the appropriation be at once complete; thirdly that there be no stipulation in the Wukf for a sale of the property and expenditure of the price on the appropriator's necessities; and fourthly, perpetuity is a necessary condition."

According to the doctrine of the Shias a Wukf to be valid, the grant must be absolute and unconditional, and possession must be given of the thing granted.

Should a person by a deed convey absolutely and unconditionally a property on trust for religious purposes, but reserve to himself for life two-thirds of the income arising from the said property, the deed by the Mahomedan Law is invalid with respect to the reservation, but as to the rest the deed operates as a good and valid grant.

Sir R. West in Phate Saheb Beebee *v.* Domudar Premji (I. L. R., 3 Bom., 88), expressed doubt whether a Wukf could be created for the purpose merely of conferring a perpetual and an inalienable estate on a particular family without any ultimate express limitation to the use of the poor or some other inextinguishable class of beneficiaries. It is a question of some nicety as to one element at least, of which the Mahomedan doctors have differed.

It is also necessary that the thing appropriated should be the appropriator's property at the time. He must have possession of it, and there should be no option in case of a purchase to the seller, as Wukf under these circumstances would not be valid. If a donee of land should make an appropriation of it before taking possession and should then take possession, the Wukf would not be valid. It is further necessary that the appropriator should be a man of understanding and a freeman and the property certain and specific. The appropriation must be complete, and not depend upon any contingency, as if one should say: "If my son arrives my mansion is a charity appropriated to the poor," and the son should arrive the mansion does not become Wukf. But if one were to say: "If this mansion be my property it is appropriated as charity." The appropriation is valid if the mansion actually be his property at the time of speaking, for the condition is fulfilled and there is no contingency. The income of a Wukf is in the first place to be devoted to the repairs of the building, and then to providing a Professor for a Mudrassah or an imam for a musjid or place of worship. Sadukah is that settlement by which appropria-

Wukf to be valid must be of a property certain and specific, and not depend upon any contingency.

tion is made in favour of the poor and indigent, as when a man says : " My land is appropriated to the poor after me," or " My land is settled on such an one and after him upon me." When it is said the settlement is for my child, it is for the child of his loins, and includes both males and females and a child of a son when he has none. A person is said to be poor who has only a dwelling-house and servant. Neighbours are those who assemble together with the appropriator and come to the musjid. Without a clear indication in the settlement that the children of the appropriator are to have the produce or the lands appropriated when reduced to want and poverty, they are to have nothing, but should there be, it is to be expended in the first place on the poor of his kindred. The nearest in kindred are first to be supplied and then the more remote, that is the child of the loins has priority and after him the child of a child, and then according to nearness in relationship to the appropriator.

Qualifications of a Mutwalee.

To conduct the property and carry out the instructions of the appropriator in regard to it, a Mutwalee or Superintendent is appointed. This person may be a Shia or a Suni, but should be one who does not seek for the office, and who is known to be a good and pious man. Females too are eligible for the appointment, but she is not competent to perform duties which are not of a secular nature, *vide* Mozavor Ibrambith *v.* Mazavor Hossain Sheriff (I. L. R., 3 Mad., 95), and Wahed Ali *v.* Ashruff Hossain (I. L. R., 8 Calc., 732 ; 10 C. L. R., 529.)

A property having been endowed and delivered up to the Superintendent cannot be taken back by the appropriator at his pleasure unless on the creation he has reserved to himself the right to do so—*vide* Dyal Chunder Mullick *v.* Keramut Ali (16 W. R.. 116) nor can it be sold in satisfaction of a decree against a person who has endowed and delivered possession of it to his wife as Mutwalee, *vide* Fegredo *v.* Mahomed Mudessor, (15 W. R., 75), and as held in Asherooddeen *v.* Drobo Moyee, (25 W. R., 557), misappropriation of Wukf funds by or misconduct of the Manager might subject him to removal from office, but do not alter the essential nature of the Wukf.

In Luchmeeput Sing *v.* Amir Alum (I. L. R., 9 Calc., 179), all the essentials of a Wukf, were fully considered and settled. The learned Judge, Tottenham, J., who

delivered judgment observed : " There has always been a good deal of controversy in the Courts as to what is essential and as to what will invalidate a Wukf. On the one hand it has been contended that no Wukf is valid unless it is solely and wholly for pious and charitable purposes enduring throughout all times, and on the other hand there have been those who considered that what is practically a perpetual provision for the dedicator's family may be a valid Wukf.

The fact that the Subordinate Judge who tried this case is himself a Mahomedan gentleman of considerable attainments in Arabic learning, entitles his opinion to peculiar weight in a case of this nature, and he appears to have entertained no doubt whatever as to this Wukf being of a thoroughly legitimate character as to its constitution and objects. And singularly enough, the only matter which strikes us, as one in respect of which, with reference to the decisions of the Courts, makes the character of this alleged Wukf at all doubtful, is the very one which the lower Court has treated as one as to which there could be no despute as to its being a proper object of Wukf. For in the Wukfnama there is express provision for the maintenance of the dedicator's male descendants in addition to the strictly pious and religious objects for which the Wukf purports to have been made. But the Bombay High Court has by a Full Bench decided that to constitute a valid Wukf there must be a dedication of the property solely to the worship of God or to religious or charitable purposes; *see* Abdool Gunne Kasam *v.* Hussain Miya Rahimtula (H. C. R., 10 Bom., 13.) That view has been endorsed by a Division Bench of this Court in the case of Mahomed Hamidulla Khan *v.* Budrunnissa Khatun (8 C. L. R., 164.)

This definition might seem to exclude from judicial recognition a Wukf of which one object is a provision for the family of the creator of it. The lower Court, however, easily disposes of this question by the observation that " it is quite evident and there is no necessity to quote any authority on the subject that a Wukf for one's self and children is valid."

In the Bombay case the Judges, after considering all the available authorities on this question, held that the balance was in favour of the *dictum* to which they gave effect; and this too was what the Division Bench, of which

Tottenham J., holds a deed which provides very remotely for the poor, and is silent as regards the worship of God, or religious observances is not a Wukfnama.

one of us was a member, decided in the case of Mahomed Hamidulla Khan *v.* Budrunnissa Khatun (8 C. L. R., 164). In that case the alleged Wukf, which we declined to recognise, had for its object nothing connected with the worship of God or religious observances, and provided only in any remote contingency for the poor. It was simply a perpetuity for the benefit of the dedicator's daughter and her descendants so long as any should exist.

The Wukfnama now before us is of a very different character; and having regard to the passage in it reciting the fact of dedication, we think that, without saying whether or no, we are prepared on further consideration to adopt to the full the ruling above-mentioned, we can treat this Wukf as actually fulfilling the conditions described for the maker of the Wukf, after reciting the whole of his property of every kind, proceeds to declare that all has been endowed by him for the expenses of the musjid and the tombs of holy personages of his family, the servants of the asthana and for performing the urs and fateha at the tomb.

These are the objects of the Wukf and they are all distinctly religious. They also involve to some extent charity to the poor. We are disposed to hold this therefore to be a valid Wukf within the purview of the rulings quoted.

The subsequent direction that the manager shall maintain the future male descendants of the maker of the Wukf does not necessarily alter its character. Whether or not the provision or direction can be lawfully carried out, it is not necessary for us now to decide. But apart from this, we are of opinion that the Wukf was completed by the passage which we have quoted, and we accordingly decide this point against the appellant.

As regards the third and last objection, we are of opinion that the Wukf being found to be a legal and valid one, it is really immaterial for the purposes of this suit, to enquire how the proceeds of the property have since been applied. For no amount of this appropriation or other misconduct on the part of the manager can alter the character of the Wukf or render it void. "The most that could be done, is, that the Mutwalee, when proved to have been guilty of waste or having misconducted himself, could be removed, *see* Golam Husain Saib *v.* Aji Ajam Tadallah Saib (4 Mad., 44) and Bharreck Chundra Sahoo *v.* Galam Sharrug (10 W. R., 458)."

In further illustration of the principle that a Mahomedan cannot settle his property in Wukf on his own descendants in perpetuity without making an express provision for its ultimate devolution to a charitable or religious object, the recent case of Nizamudin Gulam *v.* Abdul Gufur (I. L. R., 13 Bom., 265) is conclusive. All the authorities are carefully collated and cases bearing on the subject fully considered in the judgment of Parsons, J.

He observed: The plaintiff's suit as Mutwalee and also as next of kin, of the deceased Karumudin, is to obtain possession of certain property which was purchased by the defendants in 1866 at a Court sale held in execution of a decree passed against Tahira, one of the daughters of Karumudin. The grounds of the claim are that the property in question is Wukf and that Tahira had only a life interest therein. Two points, therefore, arise for consideration: first, whether the property is Wukf, and secondly whether the estate of Tahira therein was only a life estate. The facts are these: In 1883, Karimudin, who was the owner of the property, executed what he called a Wukfnama. In it he says: "My private properties which are at this day under my management and in my enjoyment, I have made a Wukf on my wives and on my *aulad* and other persons." He then names his two wives and the two daughters of each (whom, apparently, he means whenever he speaks of his *aulad*) and he describes the property which he purports to settle as Wukf upon them. He then dedicates a certain other part of his property, consisting of two nafars, expressly in Wukf, for such purposes as the preparing of his own tomb, the saying of prayers, the holding of a fair, the recitation of the Koran, etc., etc., and he directs that his aforesaid two wives and their *aulad* and *aflad* (*i. e.*, his descendants generally) from generation to generation, shall deposit the produce of these two nafars with some honest man and make the necessary disbursements; that if this cannot be done, they should take their respective shares of the produce and make the disbursements; that should the produce of the two nafars prove insufficient for the purpose, his wives and their *aulad* and *aflad* shall contribute from the property settled on them; and that should the produce of the two nafars be more than is sufficient, they should expend the excess in charitable purposes. He then lays down certain rules for the management

and inheritance of the property he purports to settle in Wukf on his wives and his *aulad* then living and on their descendants that may be born thereafter, *viz.* (1) that if one of the *aulad* of either wife die, the share of that portion, shall go to the wife and the survivors of her *aulad*, that after the death of a wife, her share shall go to her surviving *aulad*; that if a wife and her *aulad* cease to exist, their share shall go to the other wife and her *aulad*; that on the failure of *aulad* and *aflad* of both wives, the next of kin of the settlor shall receive the property and he adds that in this manner, it is provided that the management is to proceed from generation to generation; (2) that neither of the said two wives nor any one of the *aulad* of the wives shall alienate either by sale or gift or mortgage either their shares of the above-mentioned property or any field or both or any part of the land. He then appoints himself the Mutwalee of the property for his own life time, and he appoints Mahomed Abdulla and Mahomed Husein to be the Mutwalees after his death until a male from amongst his *aulad* attains the age of discretion. In this way Karimudin assumed to make a settlement in Wukf of his whole property. A part he did indeed settle in Wukf that is to say he assigned it directly and expressly for certain religious purposes. That part is not in dispute now, the other part, a portion of which is in suit he assigned under the denomination of Wukf to himself and his descendants with the evident intention that it should remain in the possession of his family inalienable at any rate, until by failure of near descendants it might fall into the hands of his next-of-kin, if indeed the provisions against alienation were not intended to apply to them also. The settlement it is to be noted has been already discussed by this Court in a case in which it was described as a document " purporting to settle with certain exceptions, moieties of the settler's estate on his wives Amina and Ayesha, on the daughters of the former Fatesaheb Bibi and Unsa Bibi and on the daughters of the latter Tahira and Sora Bibi, and the descendants of these donees in each line, so long as it should subsist, with cross remainders on the extinction of either line to the representatives of the other, and a final remainder on the extinction of both lines to the heirs of the settler", *see* **Phate Saheb Bibi** *v.* **Damoder Premji (I. L. R., 3 Bom., 84.)**

The effect of the settlement was not in issue in that case, though West, J., observes: "Whether a Wukf could indeed be created for the purpose merely of conferring a perpetual and an inalienable estate on a particular family without an ultimate express limitation to the use of the poor or some other inextinguishable class of beneficiaries, appears to be a question of some nicety, as to one element at least of which the Mahomedan doctors have differed." This, however, is the point that we have now to determine, *viz.*, whether the settlement of the lands in question on the donor and his descendants is a valid Wukf settlement when the deed does not provide for any ultimate devolution of the lands to any charitable or religious object. It is true that it does provide that if the produce of the two nafars of land, expressly assigned for a religious object, falls short, the holders of the land in suit are to make up the deficiency out of the produce thereof; but we cannot hold this to be any appropriation of that land for that purpose, and it cannot, in our opinion, affect the decision of the general question as to the validity of the settlement irrespectively of any such direction. The first case to be noted on the subject is that of Abdul Ganne Kasam *v.* Hossein Miya Rahemtula (10 Bom., H. C. R., 7) in which it was held that it is not sufficient to use in the deed the mere term Wukf, but that, in order to constitute a valid Wukf, there must be a dedication of the property solely to the worship of God or to religious or charitable purposes. To the same effect is the ruling in the case of Mahomed Hamidulla Khan *v.* Loteful Huq (I. L. R., 6 Calc., 744). In Fatma Bibi *v.* The Advocate-General of Bombay (I. L. R., 6 Bom., 42) it was held that the intermediate settlement of property in the founder's children and their descendants would not invalidate a settlement of that property as Wukf if there was an ultimate dedication to a pious and unfailing purpose. In the same volume, at page 88, there is another case: Sayad Mahomed Ali *v.* Sayad Gahor Ali, in which it was held that a settlement in which no religious purpose at all was expressed was no valid Wukf settlement. In the case of Lachmiput Sing *v.* Amir Alum (I. L. R., 9 Calc., 176) a grant in Wukf was held valid as being a complete endowment of property for religious and charitable purposes when coupled only with a direction that the manager should maintain the future male

descendants of the donor. The latest case to which we have been referred is Amrutlol Kalidas *v.* Shaik Hossein (I. L. R., 11 Bom., 492) in which Farren, J., following the decision in Fatima Bibi *v.* The Advocate-General of Bombay, (I. L. R., 6 Bom., 42), held the grant to be valid—an ultimate charitable object should be clearly and expressly designated in the deed of grant. In the present case, however, there is no such condition expressed. The settlement is solely for the benefit of those descendants of the donor who may succeed to the property, and those who may take it as next of kin. It is true that the logical deductions from the arguments of Abu Yusaf, referred to in Amrut Lall *v.* Shaik Hossein (I. L. R., 11 Bom., 492), would favour the opinion that the settlement would be valid as Wukf even in such a case, since on failure of heirs "the rent or produce would revert to the poor which must be supposed to be the appropriator's design, though he should fail to mention it" (Baillie's Mahomedan Law, p. 553, as cited in Amrutlal Kalidas *v.* Shaik Hossein (I. L, R., 11 Bom., 503). We cannot, however, adopt such an opinion which is opposed to the opinions both of Hanifa and Mahomed, and has been more than once dissented from in our Courts. In Fatima Bibi *v.* The Advocate-General of Bombay (I. L. R., 6 Bom., 51) West, J., said: "Wukf must have a final object which cannot fail; and this object, it seems, must, according to the better opinion, be expressly set forth, and, again, "If the condition of an ultimate dedication to a pious and unfailing purpose be satisfied, a Wukf is not made invalid by an intermediate settlement on the founder's children and their descendants. The benefits 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 be clearly designated." And in Amrutlol Kalidas *v.* Shaik Hossein (I. L. R., 6 Bom., 51) Farren, J., said: "If I were at liberty to draw my own deduction from the sayings of Hanifa and the two disciples, and to decide in the light of modern jurisprudence between the conflicting opinions of the latter, I should, without doubt, give the preference to the view of Mahomed, and refuse to press the arguments of Abu Yusuf to their legitimate conclusion." Though thus expressing his own views, Mr. Justice Farren felt himself at liberty to follow the decision of Mr. Justice

In a valid Wukf an ultimate charitable object should be clearly stated.

West in Fatima Bibi *v.* The Advocate-General of Bombay (I. L. R., 1 Bom., 51) which goes far beyond the decisions in the cases summarized at page 499 of the report in Amrutlol's case' as to which Farren, J., said : "The conclusion which is properly deducible from the above cited cases is, I think, that where the primary and general object of the endowment is for the furtherance of religious or charitable purposes, or for the worship of God, such endowment is valid, although the Wukfnama may also provide for the support of the family and descendants of the founder; but that where the Wukfnama has for its real object nothing connected with the worship of God or religious observances and provides only in a very remote contingency for the poor, such remote provision does not validate a perpetuity for the benefit of the dedicator's children and their descendants so long as any such exist." Having regard to the opinions expressed by West and Farren, JJ., in the cases of Fatima Bibi and Amrutlol, we do not feel justified in extending the rulings in those cases to such a case as the present where there is no express provision at all for the ultimate dedication of the property to any religious or charitable object. The question of life estate was summarily disposed of as being inconsistent with the Mahomedan Law, *see* Mussamut Hameada *v.* Mussamut Budhun (17 W R., Civil Rule 525).

Where the Wukfnama does not provide for the poor, or the worship of God or religious observances, a provision in it regarding a perpetuity for the benefit of the dedicator's children is invalid.

In respect of mortgages existing over properties set apart as endowment, the general rule, *viz.*, that the endowment is subject to the mortgage applies. According to Hazra Begum *v.* Khaja Hossein Ali Khan (4 B. L. R., Ac. 86 ; 12 W. R., 498) the mortgagee may enforce the mortgage by sale of the land, and the endowment will be rendered void as against the purchaser under the mortgage, but not as against the endower or his heirs ; as against these, the surplus sale proceeds will be subject to the endowment. Sir Barnes Peacock, C.J., referred to the Fatwa Alumgir, p. 458. "If a man mortgages land and then makes an endowment of it previous to redemption of the mortgage the endowment shall be binding and this shall not cancel the mortgage" ; that is the endowment is binding, the mortgage remains and consequently the endowment is an endowment subject to the rights of the mortgagee. "If the land after remaining some years in the hands of the mortgagee, the mortgage be redeemed, it

Where there is a mortgage over the endowed property, the endowment is subject to the mortgage.

shall revert to the purpose to which it was appropriated; should he (that is the endower) die and leave sufficient assets with which to redeem the land, the redemption shall be effected and the endowment shall be rendered effectual." In the general principles of mortgage, the Hindu and Mahomedan Law agree, *viz.*, as Lord Westbury said in Phillips *v.*, Phillips, 4 De G. F. and Jo., 208, and 31L. J. C. L. (N. S.) 325: "The conveyance of property subject to a charge is an innocent conveyance, that is, it cannot prejudice an existing charge. In other words a purchaser for value takes only what the vendor had to convey and no more." Similarly a charge created or accepted by one of several joint owners cannot prejudice the rights of the other joint owners, as held in Bassunteeram Marwary *v.* Kamaludin Ahmed (I. L. R., 11 Calc., 421), and by Innes, J., in Gangulee *v.* Ancha Bapalie (4 I. L. R., Mad. p. 86). The person in whose favour the charge is created must take it subject to the rights of the co-sharers. The mortgage security is simply a charge created upon the right and interest of the debtor to secure the repayment of the loan, and the decree directs that this charge be raised by sale of the property, *i.e.*, the debtor's property. The property ordered to be sold, therefore, is not the *estate* which would include the property of persons other than the judgment-debtor, but the rights and interests of the debtor himself in the estate at the date of the mortgage. The plea of *bonâ-fide* purchase for valuable consideration is only valid, even in the case of a sale under a decree to the extent of the "interest of the coparcener against whom the decree may have been passed. In Bengal the presumption always is that the manager deals with the immovable property as manager for necessary family purposes or such as would be binding on the family. In other cases the inference would be, as he has the power to do so, that he charged it for his own purposes to the extent of his individual interest. In Madras the position of a manager of family is not recognised and the presumption that a coparcener in dealing with the immoveable family property dealt as manager does not arise and the other coparceners are not thereby affected.